

Amicus Curiae

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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

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INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

In this issue, a number of the contributors examine various topics relating to judges and their responsibilities, and the nature and impact of judges' decision-making. In addition, there are contributions on the administrative processes involved in handling homeless applications, suggestions for reform to corporate governance in the interest of better controlling problems of corruption and money-laundering, an analysis of China's reformed foreign investment law regime, and consideration of the often overlooked influence of Harold Laski's legal philosophy on China's governance and development.

Judges generally serve with honour, and the contribution by Barrie Lawrence Nathan entitled "Ain't Misbehavin': Judicial Conduct and Misconduct" points to the usually high standards of conduct within the judiciary that have contributed to the warranted prestige of the courts in the United Kingdom. He reminds us that judges, however, are human beings who do not always conduct themselves in an exemplary fashion, and Nathan examines recent instances of inappropriate conduct and comments

made by judges, as well as the manner in which complaints alleging such misconduct and inappropriate behaviour have been managed. Judges are shown in his contribution to exhibit bias, to have subsequently refrained from recusal, to have reacted badly to negative comments in the media, to have made inappropriate comments in the sentencing process (in particular in the handling of sexual assault cases), and to have sometimes even indulged in inappropriate language when faced with difficult parties. Nathan suggests that greater transparency in the work of the Judicial Conduct Investigations Office would likely improve a situation in which it seems complaints about judicial misconduct are increasing, but with somewhat fewer complaints resulting in disciplinary action against judges and magistrates (*The Law Society Gazette*, 'Complaints about Judges Behaving Badly Increase 17% in a Year' (7 December 2018)).

In his Review Article entitled 'Lions in the Whirligig of Time—Stephen Sedley's *Lions Under the Throne: Essays on the History of English Public Law*, and *Law and*

the Whirligig of Time’, Professor Patrick Birkinshaw explores important aspects of the recent writings of Sir Stephen Sedley, the distinguished former Court of Appeal judge and subsequently Visiting Professor at the University of Oxford. Birkinshaw delves into the core ideas in the analytical history, key issues, and prognosis for the future of public law offered by Sedley in these two recent books, and suggests that one of the most important themes to emerge from this work is that the pursuit of justice and governmental accountability is never-ending. Birkinshaw adds the moving thought that hopefully there will continue to be judges of Sedley’s immense ability and intuition to carry on that pursuit. In *Lions* (that is, the carved lions beneath the coronation throne, their role being both to provide support for the monarchy and to stir themselves when necessary to ensure that the state operates within the law) and *Whirligig* (a collection of occasional publications which, by its very nature, makes no large thematic offerings, but does draw effectively on Sedley’s experience as a practitioner) many major issues of public law are considered. Birkinshaw’s review not only shows us their importance but also offers perceptive commentary and elaboration. Thus, for example, he encourages Sedley to see the limited conceptualization of ‘the state’ in public law as an issue that is

somewhat deceptive, making it easy to overlook, for example, its importance in the Official Secrets Act 1911 and the space it gave Clive Ponting to construct a successful defence against unauthorized disclosure in the ‘interests of the state’. Birkinshaw concludes that not only do the two books offer a fine collection, analysing important features and issues of public law, but they also encourage us to hope that in times of aggressive executive power, popular nationalism and receding international cooperation, there is a real need for our judicial guardians to be independent, resilient, uprighteous and wise in following the deep structures of the law.

In her contribution to ‘Visual Law’, Dr Amy Kellam discusses the diptych by Gerard David entitled *Judgement of Cambyses*. The oil-on-wood panels were inspired by the Greek historian Herodotus’ account of the judgment and punishment of a judge in early Persian history. The artwork differed from the devotional Christian diptychs common to the Middle Ages and Early Renaissance in that it depicted a secular subject with intent to convey political censure. It was commissioned in the late fifteenth century to remind the people of Bruges that a harsh response awaited if they renewed their recently failed rebellion protesting the oppressive rule of their Austrian governors. For political ends the

painting repurposed the original tale, in which a corrupt judge was skinned alive for taking a bribe and delivering an unjust verdict and his son then forced to succeed him in that judicial role, carrying out his judicial duties seated on a bench covered with the refashioned skin of his father. Dr Kellam's note shows how the meaning of the depicted tale broadened over time. From a condemnation of judicial corruption, it was transformed into a public work warning against political unorthodoxy and protest. She observes that in contemporary Russia and Ukraine, Gerard David's diptych has been re-presented yet again, becoming something of a symbol of public protest against injustice and poor governance by the authorities, including the courts.

Dr Alex Schwartz reports on a 'webinar' discussion hosted by the Centre for Comparative and Public Law (CCPL) in the Faculty of Law, University of Hong Kong on 2 June 2020, and which he chaired. This event, entitled 'New Empirical Studies on the Supreme Court of the United Kingdom: A Book Talk', focused on two recently published empirical studies of the UK Supreme Court: Rachel Cahill-O'Callaghan's *Values in the Supreme Court: Decisions, Division and Diversity* (Hart 2020) and Chris Hanretty's *A Court of Specialists: Judicial Behaviour on the UK Supreme Court* (Oxford University Press

2020). In the discussion, Cahill-O'Callaghan explained how her study *Values in the Supreme Court*, examines the value-orientations that in her view inform decision-making in the Supreme Court, with some judges preferring to follow values of traditionalism and conformity and other judges more disposed to favour values of universalism. Hanretty explained how his book, *A Court of Specialists*, shows the impact of legal specialization on the Supreme Court's decision-making process, while empirical findings indicate that political ideology also has an important influence on the court's decisions.

Dr Patricia Ng's contribution, 'Public and Private Realms of the Administrative Justice System: Homelessness Cases in England', analyses access to justice issues for homeless persons who apply for housing assistance from their local authority in the UK. Recent legislation, most notably the Homelessness Reduction Act 2017, places stronger burdens on local authorities to intervene at an earlier stage in preventing and addressing potential homelessness. Failed applicants may challenge negative decisions by means of processes of internal review, a judicial review-type inquiry by a judge (under the Housing Act 1996) and a complaint to the Local Government and Social Care Ombudsman. Litigation is only possible as a last

resort under the 1999 Access to Justice Act. Dr Ng maintains that homeless applicants, however, are often socially vulnerable and demoralized by both the pressures in daily life caused by their homelessness and the bureaucratic challenges made to the detailed materials that they are required to provide to the local authority. As a result, many homeless person applicants develop ‘applicant fatigue’, deciding that she or he has no choice but to accept a negative outcome or simply to ‘let go’ their application, and not take things any further. In addition, possibilities of legal advice and representation have declined over the years, and the author concludes that while the ‘ADR’-type processes used in the homelessness application system may have yielded some loosely spread cost benefits for the system as a whole, such processes are side-lining cases that in all probability should be dealt with by litigation and judicial decision-making.

The contribution from Dr Ejike Ekwueme, ‘Pushing Corruption and Money Laundering into Reverse Momentum: Echoes from the Corporate Governance Arena’, considers how corruption, money laundering and poor corporate governance are closely linked problems and difficult to reform. He argues that, in order to combat more effectively the difficulties of corruption and money laundering,

boards of directors need to strengthen their corporate governance mechanism(s), especially audit committees—which should include competent non-executive directors—and other corrective measures designed to deal better with these problems. Such responses might usefully also include encouragement of whistle-blowing and enhanced corporate ethics and their robust enforcement.

The contribution ‘China’s New Foreign Investment Law: An Open-and-Shut Case for Foreign Investors?’ made by Zhang Xiaoyang looks at China’s revised legal framework for governing foreign investment. The new Foreign Investment Law of the People’s Republic seeks to level the investment playing field so that foreign investors will have fewer of the privileges—intended to attract foreign investment—that have been unavailable to domestic firms and entrepreneurs. In addition, operating a relatively nondiscriminatory negative list policy, inflows of overseas capital are confined to specifically identified sensitive sectors. Professor Zhang argues that given the strength of the Chinese market, the new foreign investment regime and accompanying policies may not necessarily deter foreign investors.

Professor Xu Ting reports on the conference she hosted on ‘Harold Laski and His Chinese Disciples: A Workshop on the Legacy

of Laski's Legal Philosophy', held virtually on 2 July 2020 at the University of Essex. This workshop examined the often-overlooked influence of Laski on China's governance and development, arguing for greater appreciation of the significance and legacy of Laski's legal philosophy. Speakers included Professor Roger Cotterrell (Queen Mary University of London), Professor Ross Cranston (London School of Economics and Political Science [LSE]), Dr Peter Lamb (Staffordshire University), Professor Martin Loughlin (LSE), Professor Michael Palmer (SOAS & IALS,

University of London) and Professor Francis Snyder (Peking University School of Transnational Law). Participants in the workshop included academics, students and several public audiences.

Finally, two book reviews are offered: Professor Björn Ahl's examination of *Transparency Challenges Facing China* (Fu, Palmer & Zhang, 2019) and Dr Maria Federica Moscati's analysis of *Access to Justice for the Chinese Consumer: Handling Consumer Disputes in Contemporary China* (Ling Zhou, 2020).

‘AIN’T MISBEHAVIN’: JUDICIAL CONDUCT AND MISCONDUCT

BARRIE LAWRENCE NATHAN

SCHOOL OF LAW, SOAS, UNIVERSITY OF LONDON

Abstract

This article looks at recent cases of judicial misconduct and alleged judicial misconduct. These include examples of judicial bias, or the appearance thereof, in relation to parties and to lawyers and failure to recuse oneself, judicial reaction to press criticism, judges using their court computers to watch pornography, a judge responding to a defendant’s bad language by using bad language herself, a judge with outdated views about rape and whether another judge’s comments about rape in passing sentence were validly criticized. The way in which the Judicial Conduct Investigations Office and other judges have dealt with complaints of judicial misconduct is discussed and in some cases found wanting.

Keywords: judicial misconduct, judicial discipline, bias, recusal, pornography, rape

[A] INTRODUCTION

Judges in the UK have a high and well-deserved reputation for probity and integrity. Of course, there are some judges who are pompous and arrogant, some who occasionally display partiality and an overbearing manner and some who are less than competent. Judges corrupted by bribery, however, are almost unknown. That is one of the reasons why the Commercial Court is so popular with foreign litigants.

In recent years there have been some examples of traditional judicial misconduct, but there have also been some novel situations where judicial misconduct has been alleged or found; these have raised questions of what behaviour is expected of judges. This article examines some of these cases and the way in which allegations of misconduct have been handled.

In particular it raises questions about the effectiveness of the Judicial Conduct Investigations Office (JCIO).

[B] SIR PETER SMITH: MISBEHAVIN' WITH HONOURS

Peter Smith practised as a barrister on the Northern Circuit from 1979 to 2002 when he was appointed a High Court Judge. He was assigned to the Chancery Division and received a knighthood by virtue of his appointment.

The Da Vinci Code

Smith first came to public notice when he tried the case of *Baigent v Random House Group Ltd* (2006). The case involved a claim by two authors that their copyright had been infringed by the defendants, who were the publishers of the best-selling book, *The Da Vinci Code*. As its name indicates, much of the book's plot turns on a code. In writing his judgment Peter Smith J amused himself by inserting a coded message of his own into the judgment. The Court of Appeal were not amused. Although they upheld Smith's judgment for the defendant, they were heavily critical of its drafting.

There is nothing wrong in itself with a judge, in appropriate circumstances, inserting a little humour into his or her judgment. For example, in *Re Shaw* (1958), a dispute concerning the will of the famous author, playwright and critic, George Bernard Shaw, Harman J's judgment was a parody of Shaw's style. What is important is that the wit or whimsy should not detract from the clarity of the judgment. Smith's judgment was so confusing that Mummery LJ said:

On the appeal there was a dispute about what findings the judge had actually made. Each side argued that key findings of the judge on the allegations of copying were in their favour (*Baigent v Random House Group Ltd* 2007: 110).

While giving credit for the speed at which Smith turned out a lengthy judgment, Lloyd LJ refers to Smith's code and comments:

The judgment is not easy to read or to understand. It might have been preferable for [Peter Smith J.] to have allowed himself more time for the preparation, checking and revision of the judgment (*Baigent v Random House Group Ltd* 2007: 3).

Indeed, a not insubstantial part of the judgments in the Court of Appeal is taken up with analysing the meaning of sections of Smith's judgment. Mummery LJ said:

It is fair to say that, if the judgment [of Peter Smith J] had presented the findings, together with supporting reasoning, in better order and with greater clarity, the scope for the parties to engage in ... arguments [in the Court of Appeal] would have been reduced (*Baigent v Random House Group Ltd* 2007: 115).

The conclusion to the leading judgment of Lloyd LJ is basically a list of statements of what Smith's judgment meant.

Addleshaw Goddard

In November 2006 Smith entered into negotiations with Addleshaw Goddard (AG), a large firm of solicitors, to join the firm. Some details of those negotiations appear from the Court of Appeal decision in *Howell and Ors v Lees-Millais and Ors* (2007). The partner at AG dealing with the negotiations was a Mr Simon Twigden. On 25 May 2007 Twigden emailed Smith saying that for financial reasons AG could not take the matter any further. There then followed an exchange of emails in which Smith expressed his displeasure at AG's decision. His final email of 31 May 2007 included the following:

I found your first email insulting and your second one condescending. I do not think the response should have been from you by such emails. You really should have had the courtesy to speak to me.

He then again reverted to the financial position and said of the figures which had been referred to in AG's earlier email:

They are just artificial figures. It is galling that these are used to knock down a proposal that emanated from you, which was never discussed with me and I would never have agreed it with you if presented in this way. We all agreed it [*sic*] there ought to be substantial benefits if properly sold but at this stage they would be difficult to assess.

He then made some further observations on the figures and concluded:

I feel you have wasted my time for several months. I am extremely disappointed because contrary to your fine words you have allowed the bean counters to prevail. I am not very impressed with you or your firm at the moment and I do not think the tone of your emails enhances the position (*Howell and Ors v Lees-Millais and Ors* 2007: 11,12).

The case of *Howell* involved a Beddoe application. Such applications are usually non-contentious; they consist of trustees seeking directions from

the court about the conduct of litigation on behalf of the trust. The costs are usually borne by the trust fund rather than any of the parties. In *Howell*, however, the application was an acrimonious one and the defendants had made it clear that, if they won, they would seek an order for costs against the trustees.

Not only were AG acting as solicitors on behalf of the claimants; the first claimant, Mr Howell, was a partner in AG. The application was scheduled to begin on Friday 29 June 2007, less than a month after the final embittered email from Peter Smith J. On Wednesday 27 June 2007 AG learned that the application had been assigned to Smith. On Thursday 28 June 2007 Peter Crampin QC, lead counsel for the claimants, wrote to the judge asking him to recuse himself. The judge replied the same day refusing to recuse himself and saying that, if Mr Crampin wished to renew the recusal application, he should do so the next day and support the application with evidence.

Accordingly, Crampin did renew the application on the Friday and in support called Mr Twigden, the partner who had been dealing with Smith. Mr Howell had not been involved in that. Some of the exchanges between the judge and counsel are set out in a transcript in the Court of Appeal judgment, which, as Sir Anthony Clarke MR commented with heavy understatement, ‘does not make entirely happy reading’. A flavour of what went on may be gleaned from the following passage:

MR CRAMPIN: Having had an unsuccessful discussion or negotiation with Addleshaws, your lordship expressed yourself in strong — intemperate, almost — anguish.

MR JUSTICE PETER SMITH: Nonsense. I don’t know what part of the country you come from, Mr Crampin, but it’s about time you grew up. If you think that’s intemperate, then you are on another planet from me. If you thought it was intemperate, then you should have seen the correspondence which didn’t trouble Mr Twigden.

MR CRAMPIN: I’m endeavouring to make a submission, not to engage with your Lordship in badinage of that kind (*Howell and Ors v Lees-Millais and Ors* 2007: 22).

The Court of Appeal gave Smith J’s judgment short shrift. Sir Anthony Clarke MR characterized the judge’s behaviour in the court below as intemperate, and the court unanimously held that the recusal application was properly made and should have been granted. The main points were summarized in the judgment of Sir Igor Judge, then President of the Queen’s Bench Division:

It is the conduct of the hearing which underlines that the judge had become too personally involved in the decision he was being asked to

make to guarantee the necessary judicial objectivity which would be required in the trustee proceedings. I identify three particular features. First, the witness who supported the application was in effect cross-examined by the judge in something of the style of an advocate instructed to oppose the application. Second, the submission by counsel for the applicant that the judge had given evidence was in the circumstances unsurprising, and the concerns he expressed on this topic were validly made. Finally, the judge impugned the good faith of the application, a conclusion repeated in the strongest terms of his judgment when there is no shred of evidence to suggest some ulterior or improper motive behind the application (*Howell and Ors v Lees-Millais and Ors* 2007: 34).

The Court of Appeal decision was delivered on 4 July 2007. On 16 July 2007 it was announced that Lord Phillips LCJ had referred Smith's conduct to the JCIO (Wikipedia 2020). There was then a very long delay until 18 April 2008 when the JCIO announced:

Following investigation under the Judicial Discipline Regulations 2006, the Lord Chancellor and the Lord Chief Justice have carefully considered the Court of Appeal's comments on the conduct of Mr Justice Peter Smith in the case of *Howell and others v Lees-Millais and others* and have concluded that the conduct in question amounted to misconduct.

As a result, the Lord Chief Justice has issued a reprimand to the judge.

The Lord Chief Justice has said: 'I consider that a firm line has now been drawn under this matter. Both I and the Lord Chancellor value the services of Mr Justice Peter Smith and he has my full confidence' (Wikipedia 2020).¹

It is strange that Lord Phillips expressed full confidence in a judge whom he had just found guilty of misconduct, a rare finding for any judge, let alone a High Court judge. A reprimand was the most severe form of discipline under the Constitutional Reform Act 2005, section 108(3), short of removal from office on an address to Parliament. It is perhaps noteworthy that Lord Phillips said that *both he and the Lord Chancellor* valued the services of the judge, but only said that the judge has '*my*' full confidence, not '*our*' full confidence. That confidence was to prove misplaced.

In the AG affair it was plain to everyone, apart from Smith himself, that he harboured negative bias against AG because of the firm's ending of the negotiations. What is interesting is what would have been the position if he had held positive bias in favour of AG. The negotiations between him and AG were held in confidence. The defendants would have known

¹ It might be noted here that JCIO statements about sanctions below removal from office are deleted after one year.

nothing about them had they not been raised by AG. What would have been the position if he and AG had reached agreement, or even more important, if the negotiations had still been continuing?

It is not clear who started the negotiations. At one point in the hearing at first instance counsel for the claimants, Mr Peter Crampin, referred to the judge's job application. This drew an angry interruption from the judge: 'I made no job application. They invited me.' (*Howell and Ors v Lees-Millais and Ors* 2007: 20) Also, in an email from the judge to AG on 31 May 2007, Smith referred to 'a proposal that emanated from you' (*Howell and Ors v Lees-Millais and Ors* 2007: 12). Yet on 26 May 2007 Smith had complained in an email that the senior management of AG had not given a fair appraisal to 'my proposal' (*Howell and Ors v Lees-Millais and Ors* 2007: 11).

The whole transaction is strange, but it seems highly unlikely that a firm of solicitors would have approached a sitting judge with a proposal to join them for a fee unless, at the least, the judge had indicated his interest in such a scheme. Moreover, in his email of 26 May 2007 Smith had said that, if AG were not going ahead with the proposal, 'would Mr Twigden let [the judge] know and he would go elsewhere' (*Howell and Ors v Lees-Millais and Ors* 2007: 11) Thus, even if the proposal had not emanated from the judge, he was certainly prepared to initiate it with another firm or firms. On the balance of probabilities, it seems likely that it was Smith who approached AG and not *vice versa*.

In November 2006 when negotiations had started Smith had been a full-time High Court judge for just over 4.5 years. He was born on 1 May 1952. He would have the option to retire, if he wished, with a full judicial pension at age 65 (1 May 2017). Under the Judicial Pensions and Retirement Act 1993 he would have had to retire at the age of 70 (1 May 2022). Thus, he had a potential further 15.5 years of judicial service ahead. It is clear that he was not planning for his arrangement with AG to commence after he reached retirement age. On 21 May, Smith had emailed Twigden as follows:

I thought I might have heard further from you as you said. I am a little concerned over the time frame. There are some decisions that I have to make by the end of June which will be affected by our discussions so I do need to progress the matter as soon as possible so I can see where we are going (*Howell and Ors v Lees-Millais and Ors* 2007: 10).

Also, as a selling point, Smith in his email of 26 May 2007 had referred to the fact that a recent judgment of his had been 'a landmark decision

on corruption' and had had 'an impact on Banking and Corporate [sic]' (*Howell and Ors v Lees-Millais and Ors* 2007: 11). This would not be much of a selling point in 15 years' time.

It would seem, therefore, that Smith was contemplating retirement from the bench. It used to be and apparently still is the rule that judges do not return to private practice after retirement. At one time it was the convention that judges did not accept any other employment after their retirement. In 1970 Fisher J, the son of the Archbishop of Canterbury, created something of a sensation when he retired after only two years on the High Court bench and took up a job with merchant bankers. He did so because he found judicial work dull. He received both criticism and support from legal journals. In a debate in the House of Lords on the Courts Bill in November 1970 Viscount Dilhorne said that it was inexcusable for any judge to resign in order to pursue a career in business: 'Having embarked on a judicial career, one is under a moral obligation to do the job and not to give it up in favour of one that appears more attractive.' (Goldman 2013: 373)

At that time there was no fixed retirement age for judges. Lord Reid and Lord Denning both continued sitting into their eighties. The Judicial Pensions and Retirement Act 1993 now requires judges to retire at 70, or in exceptional circumstances 75. High Court judges are of high intellect. Many of them are still very active at the age of 70 and have no wish to retire. Furthermore, nearly all of them will have accepted a drop in income upon their appointment and are still capable of earning a high income. It has become quite common for judges on their retirement to take up posts as arbitrators, mediators or consultants.

There was nothing wrong in Peter Smith J's considering this. It is not known what remuneration he would have received. References have been made to a figure of £750,000, possibly including money for an assistant (Rozenberg 2007; Buckley 2016); the accuracy of these sources is not clear. It is reasonable to assume that the remuneration would have been substantial and higher than a High Court judge's salary. The fact that AG, a very large firm with 178 partners and 400 fee earners, decided that it could not afford the expense indicates that the reward would have been substantial.

In those circumstances what would have happened if negotiations had been continuing or an agreement had been concluded when the Beddoe application came on for hearing? There would surely have been a conflict between Smith's duty to be impartial and his interest in not upsetting AG. This was not merely a hearing of an application which might have gone

against a client or clients of AG. It was a hearing at which a partner of AG was a party, as one of the trustees. His honesty was not in question, but his conduct was, and the defendants would be seeking costs against him personally (*Howell and Ors v Lees-Millais and Ors* 2007: 14).

The partner, Mr Howell, had apparently not been involved in the negotiations with Smith. Nevertheless, an adverse finding against him might well have an adverse effect on the negotiations.

The Court of Appeal set out the law relating to recusal in some detail. Possibly the most important part which would have applied if the negotiations had reached a successful conclusion, or were continuing, is the Guide to Judicial Conduct issued by the Judges' Council, First Supplement, June 2006, paragraph 7.2.3, which provides:

A current or recent business association with a party will usually mean that a judge should not sit on a case.

The negotiations were confidential. The defendants did not know about them. The claimants would probably have felt bound not to reveal them. In those circumstances it is submitted that the judge would have been under a duty either to recuse himself without stating the reason, or to reveal the negotiations or agreement and ask the defendants whether they had any objection to his sitting. It is not known what Peter Smith J would have done in this hypothetical situation. His conduct at the claimants' application to recuse is not encouraging.

The Solicitors and the Expert Witness

The next occasion when Smith was in the spotlight was a case where he again had refused to recuse himself (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013). The case involved a dispute over jurisdiction concerning a contract in Ethiopia. The judgment of the Ethiopian court had gone against the claimants, but they later discovered evidence which, they alleged, proved that the judgment was wrong. They sued the defendants in the UK. The defendants argued that Ethiopia was the proper forum for the case and applied for a stay of proceedings.

The application was heard by Peter Smith J. During the hearing of the application the claimants called a *soi-disant* expert on Ethiopian law. The expert had never given expert evidence before, was completely unaware of his duties under the Civil Procedure Rules 1999, and was destroyed in cross-examination. Despite this, Smith thought that the expert was honest and stressed this in his judgment. He held that the blame rested

with the claimants' solicitors who had given the expert no training or explanation of his duties. In the Court of Appeal Arden LJ thought that Smith had expressed this view to forestall an application for a wasted costs order against the expert (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59(i)).

A wasted costs order is an order for someone other than a party to the proceedings to pay costs that have been wasted because of their negligence or incompetence. The application proceeds in two stages. The first is to decide whether there is a *prima facie* case to answer in support of the application. If there is a *prima facie* case, the second stage is to decide whether such an order should be made.

Smith found in favour of the defendants that Ethiopia was the proper forum for the case and ordered a stay of proceedings. The defendants then applied for a wasted costs order against the claimants' solicitors, Rylatt Chubb (RC), on the grounds that they were responsible for the time wasted by their reliance on the expert. During his judgment on the stay application Smith had strongly criticized RC. RC therefore asked the judge to recuse himself from hearing the wasted costs application. He refused to do so, heard the first stage of the application and gave an initial finding against RC.

RC appealed. It is very unusual for a judge who has heard an application or a trial to recuse himself from a wasted costs application. The reason is that the judge who has heard the case is in the best position to hear the wasted costs application. He has heard all the evidence and arguments. If another judge takes over the wasted costs application, he will have to familiarise himself with all of the details. The mere fact that a judge has made findings against a respondent does not disqualify the judge from hearing the wasted costs application. It is only in exceptional circumstances that recusal is appropriate. The Court of Appeal found that there were exceptional circumstances (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59).

During his judgment on the application for a stay, Smith had strongly criticized RC for failing to prepare the expert to give evidence in court and for numerous defects in the four reports he had prepared for the court. The criticism had been repeated six times. At least twice the judge had said that the fault for the expert's evidence lay entirely with the claimants' solicitors. The Court of Appeal held that criticism of the claimants' solicitors was not relevant to the issues before the judge on the stay application. He had to evaluate the evidence of the expert and either

accept or reject it. If the solicitors were at fault for defects in that evidence, that was a matter for costs, not for deciding whether to grant a stay or not.

The Court of Appeal further held that the criticisms were expressed in absolute terms. Arden LJ, giving the judgment of the court, said:

The judge's failure to leave the door open for the possibility of some explanation when he had not heard evidence or explanation from the [claimants'] solicitors gives rise to an impression of bias because it suggests that no explanation will be considered. The impression of bias is further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result (*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Ors* 2013: 59).

Arden LJ emphasized that the argument for recusal was fortified by the judge's repetitions of his criticisms. She held that the judge should certainly have recused himself (*Mengiste and Another v Endowment Fund for the Rehabilitation and Ors* 2013: 62). The stage 1 wasted costs order was set aside, although it was left open to the defendants' solicitors to renew the application before another judge.

British Airways and the Lost Luggage

The next affair involving Smith was another recusal application. In 2008 a party called Emerald Supplies Ltd and many other claimants brought proceedings against British Airways (BA). The proceedings were very complicated and were linked with at least one other action. The proceedings involved competition law, and there were allegations against BA in relation to the carriage of cargo. Peter Smith J came into the action in March 2014 and was appointed the nominated judge in November 2014. Thereafter he apparently dealt with numerous interlocutory applications (*Emerald Supplies Ltd and Ors v BA* 2015: 1-5).

On 30 April 2015 Smith booked a return flight to Florence on BA for himself and his wife. On 6 July they went to Florence and on 10 July they returned. For some reason not explained to the passengers none of the passengers' baggage was loaded on the return flight. Smith was understandably very annoyed at this and entered into email correspondence with BA. He signed his emails in his judicial capacity.

In his judgment on the recusal application, Smith accepted that in the absence of a satisfactory explanation BA's conduct in relation to his baggage might be something which was 'strikingly similar' to some of the

allegations in the case before him (*Emerald Supplies Ltd and Ors v BA* 2015: 12).

In those circumstances it is hardly surprising that on 22 July 2015 BA made an application for the judge to recuse himself. What is surprising was the judge's reaction to hearing the application. He viewed it as an opportunity to pursue his complaint about his delayed luggage. The argument on the application is not law-reported, but a full transcript has appeared online (Transcript 2015) and was referred to in *The Independent* (Green 2015). The following exchange, which took place very early on in the application, gives the flavour of the judge's attitude: Jon Turner QC was lead counsel for the applicants, BA.

MR JUSTICE PETER SMITH: Right, Mr Turner, here is a question for you. What happened to [the] luggage?

MR TURNER: My Lord, the position remains that set out in the letter from Slaughter and May of 15 July, that we are not dealing with that as parties in these proceedings.

MR JUSTICE PETER SMITH: I am asking you: what has happened to the luggage?

MR TURNER: My Lord, so far as the parties to these proceedings, including Slaughter and May as the representative of British Airways for these proceedings, are concerned, we have said, and we maintain, that we are not getting involved because we trust that that will be dealt with expeditiously, in the ordinary course of events.

MR JUSTICE PETER SMITH: In that case, do you want me to order your chief executive to appear before me today?

MR TURNER: I do not wish your Lordship to do that; and I would say, if your Lordship will permit me to develop my submissions, that that would be an inappropriate mixture of a personal dispute --

MR JUSTICE PETER SMITH: What is inappropriate is the continued failure of your clients to explain a simple question, namely, what happened to the luggage? It has been two weeks since that happened now.

Exactly what power the judge would have had to order the chief executive of BA to attend court is not clear. Smith persisted in demanding an explanation for what had happened to the luggage. He appeared to think that, if a satisfactory explanation had been forthcoming, it would have been perfectly proper for his continuing as the judge in the case.

His behaviour was quite extraordinary. *The Independent* reported the reaction of a journalist who was present:

Will Gant, a reporter for the specialist legal magazine PaRR, witnessed the judge’s outburst. ‘I’ve been a court journalist for several years, and must have seen thousands of hearings, but frankly I was absolutely blown away by the unprofessional attitude that Mr Justice Peter Smith displayed at this one,’ he told *The Independent*.

‘The room was packed with dozens of lawyers, and two or three reporters from specialist legal publications, and as this unfolded, we all silently exchanged looks of complete amazement. I’ve never seen a judge allow their personal life to affect their work like this, and it was sad to watch. It was an embarrassment to British justice’ (Green 2015).

Smith’s reaction seemed in part almost paranoid. He thought that BA had been waiting for an excuse to get rid of him (*Emerald Supplies Ltd and Ors v BA* 2015: 32). In his judgment he said:

I would remind the parties that even before the case was allocated to me, Mr Turner expressed a view in open court spontaneously that his clients did not think I was capable of dealing with the CMC in this case because it represented difficult issues of competition law, of which it was alleged I had no experience.

The judge then resorted to sarcasm:

BA’s major difficulty was that I had been an allocated judge for four years in the Competition Appeals Tribunal ...

So, it was wrong to say that the judge had no experience of competition law? He continued:

... although I had not actually sat on any cases.

Not so wrong then.

During the course of the legal argument Smith took the opportunity to justify his conduct in the Addleshaw Goddard case and to criticize the Court of Appeal’s decision.

In the event, Smith did recuse himself for once. He used his lengthy judgment to repeat his criticisms of BA and did not accept any of BA’s arguments about apparent bias. His reasoning for recusing himself is not easy to follow. He referred to an intimation by BA’s solicitors that, if he did not recuse himself, they would make an urgent appeal to the Court of Appeal. He commented: ‘This litigation is complex enough, without those distractions.’

He then went on:

It would not be appropriate for a recusal application to be acceded to as a result of an exchange of private correspondence.

This would lead to a waste of a lot of judicial resource time in addition to the parties [sic] it will also slow progress of the case which I have been attempting to progress. I am afraid BA are not in my view really interested in progressing the matter expeditiously for obvious reasons.

I however cannot allow my presence in the case and its difficulties to distract the parties from this case. And therefore, regretfully, I feel that I have no choice, whatever my feelings about it, but to recuse myself from the case, and that is what my decision is; not for the reasons put forward by BA, but for the reasons that I have said (*Emerald Supplies Ltd and Ors v BA* 2015: 39-41).

It appears therefore that Smith recused himself not because of his correspondence with the defendants or any actual or apparent bias, but because his presence was a distraction to the case.

The Letter (not of the Law)

By now it was fairly apparent that Smith J was unfit to hold judicial office. Legal journalist, Joshua Rozenberg, had called for his resignation as far back as 2007 (Rozenberg 2007). Lord Pannick, a very eminent member of the bar and a regular columnist for *The Times*, took up the cudgels in his column of 3 September 2015. The article was headed ‘A Case about Luggage that Carries a Great Deal of Judicial Baggage’ (Pannick 2015). Lord Pannick referred to the BA case and said that ‘it raises serious issues about judicial conduct that need urgent consideration by the Lord Chief Justice’.

He picked out three troubling features.

First, the transcript repeatedly confirms what the judge refused to acknowledge: that his personal irritation (perhaps justified) was affecting his judicial responsibilities and made it impossible for him fairly to hear the BA proceedings ...

Second, there is the inexcusably bullying manner and threats: ‘What has happened to the luggage? ... I will rise until 12.45 and you can find out ... Do I have to order you to do it, then? ... I shouldn’t make any preparations for lunch because you are going to be sitting through.’

Third, there are the judge’s arrogant comments concerning the decision of the Court of Appeal in 2007 to remove him from an earlier case in which he had been unable to recognise that his personal interests made it inappropriate for him to sit in judgment. Mr Turner, QC, referred to the case for the legal principles. Mr Justice Peter Smith responded that he had ‘no regret’ about his decision, but ‘plenty of regrets about the way in which the Court of Appeal went about their decision’, but he was ‘no longer surprised by what happens in the Court of Appeal ...’.

Lord Pannick concluded:

Litigants are entitled to a better service than this. The reputation of our legal system is damaged by such behaviour. The Lord Chief Justice should consider whether action to address Mr Justice Peter Smith’s injudicious conduct has, like his luggage, been delayed for too long. (*Harb v Prince Abdul Aziz* 2016: 52)

Unsurprisingly, Smith took great exception to this article. He contacted Mr Anthony Peto QC by phone. Peto was joint head of Blackstone Chambers, of which Lord Pannick was a member. This was apparently in about mid-November 2015. On 1 December the judge wrote an extraordinary letter to Peto. He said the ‘quite outrageous’ article had caused him great difficulties in challenging it. (What else he had done to challenge it since the article had been published three months earlier is not known.) He said that Pannick’s article was worthless because Pannick had never appeared before him. (Thus, when a judge’s behaviour is reported in a law report no barrister’s opinion of the judge has any value unless he or she has personally appeared before that judge.) He said that the article had been extremely damaging to Blackstone Chambers within the Chancery Division. (Why the article should have caused damage to Blackstone Chambers or even Lord Pannick is not explained.) Smith stated that he had strongly supported the chambers, especially in applications to take silk, and concluded as follows:

I will no longer support your Chambers please make that clear to members of your Chambers. I do not wish to be associated with Chambers that have people like Pannick in it (*Harb v Prince Abdul Aziz* 2016: 53).

It is now necessary to refer to the case of *Harb v Prince Abdul Aziz* (2016). The case was heard over several days before Smith J in July 2015 and centred in essence on whether an oral contract had been made between the claimant and the defendant, and if so, whether the defendant had been acting in a personal capacity or as an agent. The case turned on the credibility of the parties and their witnesses. At the trial the defendant had been represented by two barristers from Blackstone Chambers. The judge found against the defendant on every issue.

The defendant appealed to the Court of Appeal. There were five grounds of appeal. In essence the Court of Appeal held that the judge had failed to analyse the issues properly or to explain his findings on disputed evidence adequately. The defendant prince had filed witness statements but had not attended to be cross-examined. This clearly affected the weight of his evidence. Nevertheless, there were serious shortcomings in the evidence of the claimant and her main witness. The judge took a shortcut, basically

saying that wherever there was a conflict between the evidence for the claimant and the evidence for the defendant, he preferred the evidence of the claimant. He should have dealt with the criticisms of her evidence in each instance and explained why he preferred it. The result may have been the same, but a litigant is entitled to know why his or her criticisms have been rejected. Lord Dyson MR, delivering the judgment of the court, said:

Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases (*Harb v Prince Abdul Aziz* 2016: 39).

The Court of Appeal upheld the appeal on the first four grounds. The fifth ground was that there was an appearance of bias by the judge against the defendant's barristers, since they were from Blackstone Chambers, and consequently against the defendant himself. There had not been an application for the judge to recuse himself because he had not sent his letter about Blackstone Chambers until after the evidence and concluding submissions had finished.

The Court of Appeal said that its findings on the first four grounds made it unnecessary for them to determine the fifth ground. However, in view of the importance of the allegation, they thought it right to express their conclusions on it (*Harb v Prince Abdul Aziz* 2016: 49). They then proceeded to make possibly the most scathing criticisms of a High Court judge that had ever been made by the Court of Appeal, criticisms that were all the more trenchant in that the court had said expressly they were unnecessary to decide the appeal. Moreover, the criticisms were made despite the fact that the court rejected the ground that the judge was or appeared to be biased.

It was held, *inter alia*, that, although a litigant might perceive the judge to be biased against an advocate, it did not follow that he would be biased against a party, and although the judgment was delivered after

publication of the article, there was nothing to show that the judge had materially altered his judgment in reaction to the article.

Lord Dyson MR referred in detail to the BA recusal application and to Lord Pannick's article. Then he said:

In his letter to the claimant's solicitors dated 12th February 2016, the judge accepted that he should not have written the Letter. It is difficult to believe that any judge, still less a High Court Judge, could have done so. It was a shocking and, we regret to say, disgraceful letter to write. It shows a deeply worrying and fundamental lack of understanding of the proper role of a judge. What makes it worse is that it comes on the heels of the BAA baggage affair. In our view, the comments of Lord Pannick, far from being 'outrageous' as the judge said in the Letter, were justified. We greatly regret having to criticise a judge in these strong terms, but our duty requires us to do so. But it does not follow from the fact that he acted in this deplorable way that the allegation of apparent bias must succeed (*Harb v Prince Abdul Aziz* 2016: 68).

Discipline (lack of) and retirement

The only way to remove a High Court judge is by an address to the Queen by both Houses of Parliament. This has never been done. It is hard, however, to see how Peter Smith J could have continued sitting after the remarks of the Court of Appeal both in regard to the instant appeal and in justifying the remarks of Lord Pannick in his article. In fact, Smith's conduct in the BA case had been referred to the JCIO in July 2015 (Rozenberg 2017a). Apparently in May 2016 Smith had agreed to refrain from sitting (Rozenberg 2017b), and he never sat as a judge again. Indeed, it appears that even before that the listing office had been very careful about which cases were listed before him (Buckley 2016).

Lord Pannick in his article touched upon Smith's reputation:

On hearing about this latest episode, no one at the bar or on the bench would have said, 'What, Mr Justice Peter Smith? Surely not?' (*Harb v Prince Abdul Aziz* 2016: 52).

Nevertheless, in his letter to Peto, Smith had said:

I have letters of support from no less than 24 Silks, 4 High Court Judges and 1 Court of Appeal Judge all of whom appeared in front of me and do not share his views of my abilities and the way I perform in Court. Some of the letters have been extremely critical of Pannick's article. Others have commented adversely in terms I would not wish to print (*Harb v Prince Abdul Aziz* 2016: 53).

It is hard to believe that the judge would have made up such precise figures, yet it is also hard to believe that so many members of the bench and bar would have expressed such support and commented so adversely on an article which the Court of Appeal held to have been justified. On 5 August 2016 a Mr Michael Richards wrote to the JCIO requesting copies of all letters received by Mr Justice Peter Smith in the period from 3 September 2015 to 1 December 2015 which mention Lord Pannick, Lord Pannick's article or Blackstone Chambers. The request was refused under the Freedom of Information Act 2000 (Richards 2016).

With such serious allegations against a High Court Judge one would have expected the JCIO to carry out its investigation with dispatch. All the necessary evidence was readily available in the Court of Appeal decision and the transcript of the recusal application. If need be, presumably the tape-recording from which the transcript was prepared could also have been accessed. Yet the investigation dragged on and on. No reason was given for this. In an article in *The Times* on 2 August 2016, the paper's legal correspondent, Frances Gibb, said that Smith had been signed off sick and was mentally unfit to defend himself in a disciplinary hearing. The JCIO would neither deny nor confirm this. At that time a separate investigation into the *Harb* appeal had begun.

Eventually a hearing was fixed for March 2017, nearly two years after the investigation had begun. That date was then postponed for over six months until Monday 30 October 2017, over two years since the investigation had begun. No reason was given for this and the JCIO declined to give any details of what stage the investigation had reached. Joshua Rozenberg speculated that a deal had been reached between Smith and the JCIO. Smith would retire with a full pension when he reached the age of 65 on 1 May 2017 and the investigation would automatically come to an end (Rozenberg 2017a). May 1 came and went. Smith did not retire; he carried on drawing his full judicial salary. Then on Friday 28 October 2017, two days before the disciplinary hearing, Smith finally retired (Croft 2017).

If he had been mentally unfit to defend himself previously, it would have been of some importance to know when he had first suffered from mental illness and whether this could have affected any of his decisions. It would be reassuring to know that all instances of misconduct by Smith had been rectified. Unfortunately, not every litigant who suffers judicial misconduct has the money or the will to take their case to the Court of Appeal. Whatever the truth about Smith's mental state, it appears that he has recovered. At the time of writing this, Smith has returned to the bar and

become a member of Goldsmith Chambers in London and Fountain Chambers in Middlesborough.

On Fountain Chambers’ website he is listed as one of the barristers, Sir Peter Smith QC. It is normal to stop using the title QC after appointment to the High Court bench. On the Goldsmith Chambers’ website he is named simply as Sir Peter Smith and is listed with others as a Chambers Associate. The meaning of this is not explained. His CV on both websites is the same. It says that he sat exclusively in London until he retired in October 2017. In fact he did not sit in London or anywhere else after mid-2016. The CV also lists ‘Cases Decided on the Bench’, the last one of which is *Emerald Supplies v BA*. As has been seen above, he did not decide this case. The only decision he made was to reject an application to recuse himself, which was overruled by the Court of Appeal.

On both websites it is stated that ‘Peter has a reputation of being robust but fair’. Considering that he was twice overruled for refusing to recuse himself for bias, actual and apparent; that he received a judicial reprimand; that his behaviour has variously been categorized as intemperate, bullying, threatening, arrogant and that, in the *Harb* case, his judgment was expressly held to be unfair, it is not easy to see where his reputation for fairness comes from.

In the application to Smith in *Emerald Supplies* to recuse himself, counsel for BA objected at one point to the fact that Smith had signed a personal letter to BA making reference to his title as a judge. Smith replied as follows:

If I put Sir Peter Smith, I always get letters ‘Dear Sir Smith’ which doesn’t actually give confidence in the other party (Transcript).

Clients wishing to employ Sir Peter at Goldsmith Chambers might not get confidence from the fact that on the website the box they are invited to fill in is headed ‘Interested in instructing Sir Smith?’

[C] JUDGES AND PORNOGRAPHY

Judges at a lower level than the High Court do not have the same security of tenure. They can be dismissed by the Lord Chancellor and Lord Chief Justice jointly. On 17 March 2015 the JCIO issued a statement that three judges had been dismissed and a fourth had retired, but would have been dismissed had he not retired. The dismissals made headlines all over the world. It was unprecedented for three judges to be dismissed on the same day. The judges were District Judge Timothy Bowles, Immigration Judge

Warren Grant and Deputy District Judge and Recorder Peter Bullock. The fourth judge was Recorder Andrew Maw. The reason for the dismissals was that the judges had been watching pornography on their court computers. It was not explained how this had been discovered. It was plainly imprudent for the judges to have used their court computers, which can be monitored, for this purpose. It would be interesting to know whether their browsing had been discovered by monitoring or whether the judges had been so silly as to have been seen by court staff while watching pornography or whatever.

The JCIO said in a statement that Lord Thomas, the Lord Chief Justice, and Chris Grayling, the Lord Chancellor, had investigated allegations against the judges. They concluded that it was an ‘inexcusable’ use of court equipment and condemned the judges’ conduct as ‘wholly unacceptable’. Most people would probably agree that the judges’ behaviour was inappropriate and improper, but it is not so clear why it was inexcusable and unacceptable.

The statement raises more questions than it answers. It was stated that the pornography watched by the judges was not illegal. When did the judges watch the pornography – during a hearing, during court hours, outside court hours? Was it the use of court equipment that was so heinous? Would it have been alright if they had watched the pornography on their own laptops? Would they have faced the same result if they had been reading pornographic magazines? Would it have been acceptable if they had used court computers to do their shopping, book their holidays or just surf the internet? How often and for how long had they watched? Did it affect their ability to hear cases impartially and attentively?

Take the hypothetical case of a judge who has been sitting for 20 years, whose decisions have never been successfully appealed and who has a high reputation for fairness, courtesy and efficiency. Suppose it were found that on one occasion he had watched legal pornography on a court computer for ten minutes. Would that justify his dismissal? Something is known about the extent of use by two of the judges, but not from the JCIO. The Solicitors Regulation Authority took disciplinary proceedings against Mr Bullock and Mr Maw. In mitigation, Bullock said that the material had only been accessed in his private chambers, did not impinge on his judicial work and that he had only accessed the material on two occasions for a limited time (Taylor 2016). Mr Grant’s access to the material was on a different scale. He appealed his dismissal to the Employment Appeals Tribunal. At the hearing counsel for the Ministry of Justice said: ‘This wasn’t a case of watching pornography one or two

times, or even ten or 20 times, but was persistent – several times a day – over 14 months or so.’ (Reilly 2016)

Grant, the father of five children, said that he had been suffering severe and undiagnosed depression (BBC News 2015) resulting from marital problems and that his work had not been affected (Reilly 2016). The Ministry of Justice said that his misuse of the computer broke strict judicial guidelines (Connelly 2016; Reilly 2016). The guidelines would appear to be the Guide to Judicial Conduct, of which the 2013 edition applied at that time. Paragraph 5 provided that:

- (1) A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.
- (2) As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

Grant’s claim was dismissed (Connelly 2016).

There is little detail about whether the cases that the judges tried involved pornography. Two of the judges are known to have overseen cases in which the charges related to pornography or sex-offending. One of the four judges jailed a teacher for downloading child pornography and another sentenced a Peeping Tom for using a mobile phone to film women in swimming-pool changing rooms (Doughty & Ors 2015). It does not appear that the judges’ predilection for legal pornography affected their sentencing of illegal pornography.

Although the cases were unprecedented in England, they were not unprecedented in the common law world. In or about 2002 it was found that Robert Fisher, a High Court judge in New Zealand, had been watching pornography on a court computer. An investigation was carried out under the aegis of the Attorney-General, Margaret Wilson, to see whether he had done anything illegal. On 19 February 2002 Ms Wilson confirmed that Justice Fisher had done nothing unlawful in watching any of the internet sex sites. As in England, the only way a High Court judge in New Zealand could be removed was by a motion in Parliament; there were no grounds for that. It was handed back to the Chief Justice, Dame Sian Elias, for the judiciary to decide what to do. Dame Sian said that she did not believe Justice Fisher should resign and that his internet use was a ‘lapse’ in a distinguished career. Justice Fisher had looked at ‘adult movies’ on Department for Courts computers for about 90 minutes over two weeks 15 months previously. He had apologized and promised not to

do it again (Small 2002). It does not appear that any other form of discipline was considered.

There was considerable pressure on Fisher to resign.

The Prime Minister, Helen Clark, said it was a matter of public interest that people in judicial office be seen to uphold the highest standards. 'That is not to say that people have to be saints, but there are areas where people should not lightly tread if they wish to retain the highest public esteem and regard' (Small 2002).

The author has been unable to discover whether Fisher did in fact resign at that time. Since 2004 he has been in full-time practice as an arbitrator, mediator and South Pacific judge (New Zealand Dispute Resolution Centre).

In addition to Justice Fisher, in 2002 investigations into five New Zealand District Court judges who had also accessed internet sex sites cleared them of any wrongdoing. They had given their explanations to the Chief District Judge. In four of the cases, the access was work related. In the other case, the access was of extremely short duration and was accidental (Small 2002). Thus, there were apparently no grounds for disciplining them.

[D] JUDICIAL LANGUAGE²

Sometimes in the criminal courts a defendant swears at a judge. It is much more unusual for a judge to swear at a defendant. That is what happened in Chelmsford Crown Court in August 2016 when HH Judge Patricia Lynch sentenced John Hennigan, a man with a long criminal record, for breach of an ASBO (antisocial behaviour order). During the sentencing Hennigan interrupted her, saying: 'It's obvious, isn't it? Because you're a cunt and I'm not.' The judge then responded: 'Well, you're a bit of a cunt yourself. Being offensive to me doesn't make things better at all.' When Lynch confirmed the defendant's sentence, Hennigan, 50, said: 'Go fuck yourself'. Lynch retorted: 'You too. Take him down.' (Bowcott 2017)

The Guardian reported as follows on the aftermath:

After the hearing on 11 August, the Judicial Conduct Investigations Office (JCIO) received about 10 complaints about the judge's behaviour and her use of the word 'cunt'. Lynch told the investigators

² Readers of this section of the article are warned that reference is made to strong language used by a judge and that this may offend some readers. It has been quoted as in the original, nevertheless, in the interests of accuracy.

that she deeply regretted the incident and that her remarks were a momentary lapse of judgment that should have never happened. She apologised ‘unreservedly’ for her remarks, according to a JCIO statement sent to one of the complainants, Robert Hackett.

A report on the incident was referred to the Lord Chief Justice, Lord Thomas ... and the Lord Chancellor, ... Liz Truss. The JCIO statement said: ‘Although the Lord Chancellor and the Lord Chief Justice considered HHJ Lynch’s remarks to be inappropriate, they did not find that they amounted to misconduct or warranted any disciplinary sanction. [They] were of the view that the matter should be dealt with by informal advice.’

Lynch had now been advised to ‘ensure that she responded appropriately to parties in court at all times’.

Responding to the JCIO statement, one of the complainants, Robert Hackett, said: ‘I do feel this has taken an extraordinary amount of time and that the judge has been let off very lightly. Her behaviour was inexcusable’ (Bowcott 2017).

Mr Hackett’s complaint had presumably been made shortly after the incident on 11 August 2016; the JC10 statement was made on or about 9 January 2017.

Judge Lynch fared better than HH Judge Jinder Singh Boora. In January 2020 the Lord Chancellor and the Lord Chief Justice issued him with a formal warning for using inappropriate language. The JCIO statement does not specify what the inappropriate language was. It is unlikely to have been threatening or abusive; that might have exposed him to criminal charges. It may well have been swearing. The significant difference from Judge Lynch’s behaviour is that Judge Boora used the language ‘at an event attended in a private capacity’. It seems that the JCIO takes a more serious view of bad language in private than on the bench. The statement said that the Lord Chancellor and Lord Chief Justice concluded that Judge Boora’s conduct had the potential to undermine the reputation of the judiciary. From the complaints made about Judge Lynch’s conduct it appears that she had in fact undermined the reputation of the judiciary.

[E] JUDGES AND RAPE

Over the last 30 or 40 years there have been great changes in the attitudes of the courts towards rape. Until *R v R* (1992) the law was that a husband could not be guilty of raping his wife while the marriage subsisted. It is also well settled law that even if sexual intercourse begins consensually the man must withdraw once the woman withdraws her consent, or he

will be guilty of rape. However, it appears that some of the changes have not reached all of the judges. In August 2019 HH Judge Tolson, a family judge, heard a case in which a husband was seeking contact with his child. The wife resisted on the grounds, *inter alia*, that the husband had been violent towards her and had raped her while the child was present in the home. The judge found against the wife on this issue, holding that she had done nothing physically to resist the intercourse.

The wife appealed successfully to the High Court. The judge, Alison Russell J, stated that Tolson's judgment was so flawed as to require a retrial; his decision was unjust because of serious procedural irregularity and multiple errors of law (*JH v MF* 2020: 58). She gave a very detailed and critical judgment, in which she said:

This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent. This would place the responsibility for establishing consent or lack thereof firmly and solely with the complainant or potential victim the judge should have been fully aware that the issue of consent is one which has developed jurisprudentially, particularly within the criminal jurisdiction, over the past 15 years (*JH v MF* 2020: 37).

The judge in the instant case should have considered the likelihood that the Appellant had submitted to sexual intercourse [as opposed to consenting to it]; he singularly and comprehensively failed to do so instead employing obsolescent concepts concerning the issue of consent (*JH v MF* 2020: 54).

Russell J went on to recommend further training for family judges.³

An interesting rape case in which the female judge, HH Judge Lindsey Kushner, made comments during sentencing that proved controversial was the trial of Rodrigues Gomes in March 2017. Gomes was convicted and sentenced to six years' imprisonment. In order to ensure that the judge's remarks are seen in context it is necessary to set them out *in extenso*:

Kushner J told Manchester Crown Court that women should be free to do whatever they wanted without the risk of being attacked. But, she said, they should still be aware that some people are likely to see them as easier targets when they are drunk.

³ Russell J was herself no stranger to criticism. She had been criticised by the Court of Appeal in *LL v Lord Chancellor* (2017) in which she had sent a man to prison for breach of an order which she had never made. Longmore LJ categorized some of her errors collectively as gross and obvious irregularity.

‘We judges who see one sexual offence trial after another, have often been criticised for suggesting and putting more emphasis on what girls should and shouldn’t do than on the act and the blame to be apportioned to rapists,’ she said, while sentencing a man to six years for raping a girl who was drunk.

‘There is absolutely no excuse and a woman can do with her body what she wants and a man will have to adjust his behaviour accordingly. But, as a woman judge, I think it would be remiss of me if I didn’t mention one or two things.

‘I don’t think it’s wrong for a judge to beg women to take actions to protect themselves. That must not put responsibility on them rather than the perpetrator. How I see it is burglars are out there and nobody says burglars are OK but we do say: ‘Please don’t leave your back door open at night, take steps to protect yourselves’.

‘It should not be like that but it does happen and we see it time and time again.’

She added: ‘They are entitled to do what they like but please be aware there are men out there who gravitate towards a woman who might be more vulnerable than others. That’s my final line, in my final criminal trial, and my final sentence’ (Rawlinson 2017).

It was indeed the judge’s last case before she retired. The remarks she made might seem innocuous to many observers. She said expressly that she was not putting responsibility on the victims rather than the rapists. She was offering the sensible advice that if you have too much to drink you are rendering yourself vulnerable: take care. Within hours, however, the judge came in for heavy criticism.

The campaign group End Violence Against Women condemned the comments. ‘When judges basically blame victims for rape – by suggesting how much alcohol a woman drinks or what she wears is part of what causes rape – we remove the responsibility from the man who did it. That is really alarming’ (Rawlinson 2017).

The judge did not say that the amount of alcohol consumed or the way she dressed was in any way part of the cause of the rape. Notwithstanding that, Northumbria Police and Crime Commissioner, Dame Vera Baird, and Alison Saunders, Director of Public Prosecutions, also characterized Judge Kushner’s comments as victim-blaming. It was further alleged that her comments would make victims think they would not be believed and would deter them from reporting the rape (Rawlinson 2017).

In the circumstances she received support from an unexpected quarter. The victim in the trial, Megan Clark, waived her right to anonymity and appeared on television in the BBC’s Victoria Derbyshire show. She said:

I think [*the judge*] was absolutely right in what she said, but it was taken out of context. She put the blame massively on rapists, not victims. She just simply said to be careful basically, which is smart advice. I know it wasn't my fault. It's never the victim's fault; they aren't the problem, regardless of what I was doing. I felt I put myself in that situation. I need to be more careful (Harrison & Hatchard 2017).

This suggests that it is a very precarious tightrope that judges may have to walk in the days of #Me Too. In a perhaps highly unusual sequel the judge and the victim later became friends (Epstein 2017).

[F] CONCLUSION

The standard and reputation of English judges is still high. There will always be occasional bad appointments and bad decisions. This article deals with a smattering of such situations. A brief surf of the internet reveals others both in the UK and in other common law jurisdictions. Sometimes judicial misconduct can be put right on appeal, but that is an expensive and uncertain remedy. The whole purpose of the JCIO is to deal with complaints of misconduct. It is an independent statutory body which supports the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline. Its activities in relation to the cases considered in this article give rise to some concern, in particular about its efficiency, fairness and consistency.

It seems to take an unconscionably long time to reach its decisions. One of the complainants about Judge Lynch's language said that it had taken an extraordinary amount of time to reach a decision. It had taken about five months, which is quite quick for the JCIO. Why it should have taken five months to decide when there was no dispute about the language used and the judge had apologized is not explained. It took the JCIO nine months to rule on the complaint about Smith J on the Addleshaw Goddard matter. As to the complaint about his conduct in the BA case, the JCIO still had not heard the complaint when he retired some two years and three months after the complaint had been made. Of course, the JCIO has many complaints to consider; many of these are about judicial decisions not judicial conduct and therefore outside the remit of the JCIO. From the statements on the JCIO website it is clear that the majority of complaints which are upheld are about justices of the peace, and many of these relate simply to the JP failing to sit for the required number of days. Nevertheless, in the absence of any explanation, the record for expedition is not impressive.

It is interesting to compare the treatment of Peter Smith J with the treatment of the judges dismissed for watching pornography, although the allegations of misconduct are vastly different.

Smith was allowed to continue drawing his full judicial salary from summer 2016, when he agreed to cease sitting, until the end of October 2017, when he retired. Judicial salaries at that time for puisne High Court judges were £179,768 (Ministry of Justice). Thus, he received somewhere in the region of £220,000 from public funds for doing nothing. He then retired on a full judicial pension.

He was guilty of incompetence. Although his judgment in the Da Vinci case was upheld, it was so badly drafted that much of the time on the appeal was spent in deciding what he meant. In the *Harb* case his shortcuts in deciding credibility meant that the whole case had to be reheard. Normally the Court of Appeal will not interfere with a judge's findings of fact, unless there was no evidence on which to base the findings. The justices would say that the judge had the advantage of seeing the witnesses. The appeal will turn on the law, and the Court of Appeal will either uphold or overrule the judge's decision. It is highly unusual to order the case to be reheard by a different judge.

The costs incurred by Smith's incompetence, the various applications to recuse and the various appeals must run into at least tens of thousands of pounds, and very probably hundreds of thousands.

The criticisms of him made by the Court of Appeal and Lord Pannick's article, endorsed by the Court of Appeal, show him to have been biased, unreasonable, bullying and arrogant. His behaviour was said to have damaged the reputation of the legal system. After sitting as a judge for over a dozen years he had a fundamental lack of understanding of the proper role of a judge.

Now compare the pornography judges. They were not incompetent, biased, unreasonable, bullying or arrogant. Did their behaviour damage the reputation of the legal system? Certainly not before the announcement by the JCIO. Their misbehaviour consisted of legal activity conducted in private. Did their misbehaviour call for discipline? The Chief Justice of New Zealand thought there was no need for discipline in the case of Justice Fisher, a High Court Judge. He had looked at 'adult movies' on court computers for about 90 minutes over two weeks. District Judge Bullock's misuse of his computer was very similar. He had accessed the material on two occasions for a limited time.

Assuming that the misbehaviour did call for discipline, what were the options open to the JCIO? The remedies open to the Lord Chancellor and Lord Chief Justice under the Constitutional Reform Act 2005, section 108(3), are, in order of severity, formal advice, formal warning, reprimand and removal from office. Surely a reprimand would have been sufficient. As to the effect on the reputation of the legal system, a lot would depend on the manner in which the JCIO statement was phrased. Their statements are usually very vague. In the case of Judge Boora, it was merely stated that he had used inappropriate language in a private capacity. Since Judge Lynch had not been disciplined for using one of the worst swear words in the English language and adopting another in open court, the mind boggles at what inappropriate language Judge Boora used in private. In the same vein the JCIO could have issued a statement that the judges had been reprimanded for inappropriate use of court computers. That would hardly have damaged the reputation of the legal system.

It may be objected that that would have been too vague, but the JCIO has not exactly been sedulous in giving information in its public statements. In the case of the reprimand to Peter Smith J no direct information was given at all. The statement merely upheld the criticisms of the Court of Appeal without specifying them, and referring to the AG case, but not giving any citation for it. A layman, or even a lawyer unfamiliar with the case, would have had no idea from the JCIO statement what constituted Smith's misconduct. If they had wanted to know, they would have had to access the law report to find out that Smith had descended into the arena and cross-examined a witness as if he, the judge, were counsel acting for the other side; had given unsworn evidence from the bench in an application that he had to decide; and had made totally baseless allegations of bad faith in the making of the application.

The fact that the JCIO made the statement about the judges on the same day is strange. The judges were from four different courts, at different levels and with different jurisdictions. It seems a highly unlikely coincidence that complaints about them had all been made at the same time, or that the JCIO had dealt with all of them with equal expedition. The announcement of all four simultaneously seems designed to achieve maximum publicity and, more worryingly, to cause maximum embarrassment and humiliation to the judges.

Moreover, it is strange that the statement said that District Judge Maw would have been removed from office had he not retired. He had retired in September 2014, some six months before the statement was issued

(Courts and Tribunals Judiciary 2014). It is not clear what stage the disciplinary proceedings had reached before he retired. A spokesman for the Lord Chancellor and Lord Chief Justice said that he had resigned before the conclusion of the disciplinary process (Barrett 2015). That means that the disciplinary process continued after he had resigned. One wonders on what basis this was done and why it could not have been done for Smith J. He too resigned before the conclusion of the disciplinary process, yet in his case the JCIO said that in accordance with its rules, all conduct investigations automatically cease when a judge retires. It is not the only time the JCIO has criticized a judge after he has retired (See JCIO statement re Andrew Campbell 2016). It seems rather like kicking a man when he is down.

The lack of transparency in the JCIO’s decision about the four judges drew widespread criticism from MPs and the press, to no avail. The contrast between the treatment of the four judges and Smith J is stark. Two of the judges who were full time were deprived of their livelihood, apart from being publicly embarrassed and humiliated. It is not clear what effect the dismissal would have had on their pensions. It must have at least reduced their entitlement. Smith suffered no loss for a catalogue of misconduct. A blogger pointed out that judges who had fallen asleep during cases had not been dismissed (Barrister Blogger 2015).

In the absence of any explanation from the JCIO for the delay in hearing the complaint against Smith, one can only speculate. Joshua Rozenberg speculated that the JCIO had done a deal with Smith so that, provided he ceased sitting, it would delay a hearing until after the date he could retire with a full pension (Rozenberg 2017a). This speculation has a lot of force. If Smith was mentally unfit to defend himself, he was mentally unfit to sit and should have resigned. A better deal would have been that he should either resign or the hearing would continue.

It may be that there was good justification for the decisions and delays of the JCIO, but the lack of transparency means that a question mark hangs over its ability and fitness for purpose to deal with cases expeditiously, fairly and consistently.

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PUBLIC AND PRIVATE REALMS OF THE ADMINISTRATIVE JUSTICE SYSTEM: HOMELESSNESS CASES IN ENGLAND

PATRICIA NG¹

Mary Ward Legal Centre

Abstract

Applicants who need urgent housing assistance from local government in England hope to gain the benefit for which they have applied. Should they fail to secure assistance or actual temporary accommodation, effective dispute processes would need to be in place within the administrative justice system. Yet, what would effective dispute management mechanisms look like to homeless applicants who might be experiencing ‘applicant fatigue’? This article examines the situation of the homeless applicant, aspects of whose private life is being processed by a public administrative and legal system, and considers the measures that need to be in place for homeless applicants to be able to access the full benefits of the non-legal and legal mechanisms.

Keywords: homelessness; complaints; reviews; applicant fatigue; applicant-administrator relationship

[A] INTRODUCTION

Homeless applicants in England who need urgent housing assistance from local government hope to receive the benefit they have applied for. If immediately homeless, the hope could be an immediate offer of accommodation, which would be adequate, in good condition and suitable for the applicant along with his or her household members, if there are

¹ My gratitude to Professor Michael Palmer for his continuing guidance, encouragement and support. Any mistakes remain my own responsibility. The views contained in this article are solely those of the author.

any.² The Housing (Homeless Persons) Act 1977 and subsequent revisions applied to both England and Wales until 27 April 2015, when the homelessness provisions of the Housing (Wales) Act 2014 came into force, following constitutional reforms in the UK. The legislation currently in place in England is the Homelessness Reduction Act 2017, which amends part VII of the Housing Act 1996. The 2017 Act contains the more ‘pro-active’ duties, while the ‘reactive’ duty can be found in the 1996 Act. Homeless applicants attempt to engage in an apparently simple administrative application process for assistance for a very basic human need—housing—while at the same time they may be navigating the welfare benefits system for monetary assistance from the government. Simultaneously, applicants might be trying to deal with the very conditions that may have caused their homelessness in the first place, as well as other practical or legal problems that might be interconnected. The lack of stable accommodation or being homeless means that homeless people would automatically be considered by society to be vulnerable. Seeking assistance to address this basic need becomes a priority because homeless applicants hope that accommodation will help them, their family and their belongings to be safer. However, social vulnerability does not automatically mean that a homeless applicant would be considered to be vulnerable under the homelessness law, particularly if she or he is a single person. This article addresses the question: what does ‘applicant fatigue’ inform us about the existing administrative justice system and about the place of complaint and review processes in relation to homeless applicants?

This article argues that the pressure of daily fatigue, due to homelessness, in a homeless applicant’s life means that any administrative actions that are unfair, unjust or wrong and any decision-making process that is unfair or unjust causes additional burdens and fatigue. By extension, the availability of complaints procedures and review processes could then in reality function as mere symbols for a homeless applicant, rather than providing substantive methods for an applicant to participate in a process to acquire the benefit for which she or he has applied. In this case, a homeless applicant hopes to gain access to assistance or actually attain a basic human need of shelter. An administrative action or a negative decision, along with applicant fatigue,

² However, see the case of Ben and Carrie, and their two young children, who spent a total of 26 weeks in a bed and breakfast hotel (B&B). The family lived in one room and shared cooking and washing facilities with other residents. No other family lived in the hotel (LGSCO 2017: 4). Unfortunately, as the LGSCO report indicates, there are other families who are routinely placed into inadequate accommodation for long periods. Authorities cannot place households which include a pregnant woman or dependent children for longer than six weeks in a B&B when no other accommodation is available (Homelessness (Suitability of Accommodation) (England) Order 2003): see also MHCLG (2018: paras 17.31-17.44).

potentially creates an impasse in the homeless application process, to the detriment of the applicant. In this situation, it would be helpful to examine the applicant–administrator relationship. However, good administration and meaningful access to justice could assist homeless applicants to break this ‘stuckness’. The social vulnerability of homeless applicants suggests that a consideration is required individually of related issues, as well as how different issues interconnect to each other; issues such as administrative justice, which is also connected to social or housing justice and access to justice (Ng 2009).³

Within the administrative justice system, it is possible to make complaints when there is maladministration⁴ and service failure which has had an adverse effect on the complainant, thereby causing injustice. Review processes have a two-fold impact. First, as part of a two-component statutory appeal process, following a negative homelessness decision, a request for an internal review would have to be made first; secondly, in relation to any problems where it is arguable the local authority has made a wrong decision or has exceeded its authority. For example, in the non-provision of interim accommodation during the enquiry process, potentially it would be possible for an applicant to make a claim for judicial review. The complaint and review processes are the more common non-legal and legal remedies available to address problems in relation to homeless applicants. However, since the implementation of the Access to Justice Act 1999, litigation can only be considered as a last resort. Bearing in mind that an applicant would already be experiencing the cumulative effects of his or her homelessness, when an applicant feels that he or she has been treated unfairly or has been issued with a wrong or unjust decision by a local government officer, which could mean that emergency housing assistance has been denied, it would be natural for an applicant to want the problem to be resolved as quickly as possible. However, any negative administrative action or decision in relation to any welfare assistance claim would more likely cause additional fatigue.

³ Housing justice focuses on the procedural aspects of administrative justice and the dispute management process itself, with the aim of leading to a fair and just decision, even though a homeless applicant may not have been able to achieve a successful substantive outcome.

⁴ Although not defined in legislation, the definition of maladministration, in terms of service failure, include: delay; poor record-keeping; failure to take action; failure to follow procedures or law; poor communication; and giving out misleading information. See LGSCO, ‘How to Complain: What We Can and Cannot Look at’.

Yet, the literature has indicated potential problems with the complaints mechanism (Gulland 2011)⁵ and the low take-up rate in challenging negative decisions by review (the first part of a two-part appeal process) (Halliday 2001; Cowan, Halliday & Ors 2003; Cowan & Ors 2017).⁶ A reason for the low number of applicants seeking review of an unsatisfactory decision could be connected to ‘grievance apathy’ and ‘appeal fatigue’, or an encompassing term that Cowan and colleagues call ‘applicant fatigue’ (Cowan, Halliday & Ors 2003: 138-141; see also Cowan & Ors 2017). ‘Grievance apathy’, like political apathy where most people do not vote in most elections, is the situation when most grievants do not name, blame or claim and enter into a dispute (Felstiner & Ors 1980-1981: 636). Whereas ‘appeal fatigue’ is the circumstances when complainants ‘rarely persevere beyond the first point of complaint’ (Cowan, Halliday & Ors 2003: 138), ‘applicant fatigue’ consists of two elements of fatigue: first, there is exhaustion from the cumulative effects of previous or synchronous events in homeless people’s lives, which is often connected to the circumstances of their homelessness. Secondly, this cumulative exhaustion drains energy from an applicant having to deal with any appeal process following a negative decision in relation to any welfare claim (Cowan, Halliday & Ors 2003). To this definition, I would add that, in addition to cumulative daily living fatigue that depletes energy from an applicant having to deal with maladministration and service failure, an applicant might just ‘let go’ of a negative decision as an event that took place in this period of the applicant’s life. This essay adopts the term ‘applicant fatigue’. Given that only a low number of people will complain following an erroneous decision, ‘thoroughness and procedural fairness are more important in primary adjudication than they are in appellate processes’ (Ison 1999: 23). Hence, it is essential to bear in mind the significance of how ‘fairness’ is played out in the pre-decision applicant and administrator relationship.

In addressing the central question of this essay on ‘applicant fatigue’ and the place of complaint and review processes within the administrative justice system, three analytical tools could assist us in understanding

⁵ Gulland considers the informal complaints system in relation to users of social care services. See note 31 below. The effectiveness of formal complaints procedure and socially appropriate responses to complaints has been discussed by Lloyd-Bostock & Mulcahy (1994). The co-authors argue that not all claimants seek compensation. In pursuing a claim, some claimants are only interested in being provided with an explanation, apology or preventing the situation happening to others in future (Lloyd-Bostock & Mulcahy 1994:145).

⁶ However, Cowan & Ors found an increasing upward trend in the volume of internal review applications, although this could possibly be connected to an increase in the volume of decisions being made under the homelessness legislation (2006: 388).

potential problems that could prevent applicants from accessing or experiencing the full effectiveness of the complaint and review mechanisms. Socio-legal analytical tools, legal consciousness (Cowan 2004; Cowan & Ors 2006) and the dispute transformation process (Felstiner & Ors 1980-1981) could enhance our understanding of the applicant and decision-maker relationship, as well as an impasse that a homeless applicant could experience in pursuing any challenge when faced with negative administrative action or decision. Legal consciousness research, which seeks to understand people's routine experiences and perceptions of law in everyday life, began life in the United States (Cowan 2004; see also Merry & Silbey 1984; Ewick & Silbey 1998). The dispute transformation paradigm strives to make sense of events that a person with a 'justiciable' (Genn 1999 & Ors) problem might experience in the pre-dispute stages of naming, blaming and claiming. The starting point being whether a person is likely to experience a 'perceived injurious experience' which then leads to this person naming the experience as such. The examination of the transformation and emergence of a dispute takes place within the specific environments from which injuries might or might not be perceived, as well as people's responses to 'experience of injustice and conflict' (Felstiner & Ors 1980-1981: 631-632).⁷ Finally, intersectionality provides us with an understanding, perspective and acknowledgment of the individual experience of the specific environments from which disputes might or might not emerge. For,

Intersectionality investigates how intersecting power relations influence social relations across diverse societies as well as individual experiences in everyday life. As an analytic tool, intersectionality views categories of race, class, gender, sexuality, nation, ability, ethnicity, and age—among others—as interrelated and mutually shaping one another. Intersectionality is a way of understanding and explaining complexity in the world, in people, and in human experiences (Hill Collins & Bilge 2020).

At this stage two points would need to be raised, first, a legal system which only allows litigation as a last resort presents potential problems. Second, as suggested above and now necessary to emphasize, just as important an issue is the interconnected discussion of dispute management and access to justice in the situation of the homeless applicant. It is important to bear in mind that administrative law, being a constituent of public law—regulating the relationship between the individual and the government—attempts to equalize the imbalance of power between the individual and the government. Moreover, there is a

⁷ Carrie Menkel-Meadow (1985) has criticized the dispute transformation model as providing only partial answers and focusing on processes and not outcomes.

need to further address the imbalance of power through access to justice, if the government is serious about enabling the more vulnerable people within society to challenge administrative decisions. Unfortunately, litigation has already been restricted through the civil procedural principle of litigation being the last resort.⁸ For homeless applicants, because of their social vulnerability, dispute management is inextricably connected with access to justice issues. Moreover, since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPOA 2012), eligibility for legal aid has been restricted (Hynes 2012). The ongoing problems connected to legal advice deserts (Law Society 2019), limitation of legal aid (Hynes 2012) and the closure of county courts (Caird and Priddy 2018) further contribute to the restriction of access to justice for homeless applicants.

The discussion within this article has been located within the literature on administrative justice, alternative dispute resolution and socio-legal studies and, to a lesser degree, social justice. Administrative justice arguably resides within the broader framework of social justice in terms of equal effective legal rights. While the literature on the relationship between the decision-maker and the potential recipient of welfare benefits is more developed, there has been less attention on the homeless applicant and administrator or bureaucrat relationship. First, a discussion of ‘applicant fatigue’ will take place within the context of homelessness applications and the dispute processes available within the administrative justice system. The homeless applicant and administrator relationship will then be explored before the article concludes. The main focus of this article will be on homeless applicants, in England, seeking assistance in relation to the main housing duty.⁹ The term, ‘homeless applicant’ will be used because authorities would still need to take a homeless application if there is reason to believe that an applicant may be homeless or threatened with homelessness, regardless of the subsequent duty owed.

[B] HOMELESSNESS APPLICATIONS AND DISPUTE PROCESSES WITHIN THE ADMINISTRATIVE JUSTICE SYSTEM

In England, it is possible for people who are homeless or who are threatened with homelessness to seek assistance at their local authority.¹⁰

⁸ See Civil Procedural Rules and Pre-Action Protocol for Judicial Review.

⁹ See note 11 below.

¹⁰ See Davies (2017) and Davies & Ors (2019) for further information.

New legislation, the Homelessness Reduction Act 2017 (hereafter the 2017 Act), which was implemented in 2018, created new pro-active homelessness duties on authorities in England. The 2017 Act also amended part VII of the Housing Act 1996 (hereafter the 1996 Act), which contains the more reactive homelessness duty.¹¹ The new duties apply to homelessness applications made on or after 3 April 2018. The existing reactive homelessness duty contained in part VII of the 1996 Act now intersects with the more recent homelessness prevention¹² and relief¹³ duties. As soon as an authority is satisfied that an applicant is homeless or threatened with homelessness and is eligible for assistance, it must carry out an assessment (1996 Act, section 189A). A personalized housing plan (PHP) should then be drawn up following the assessment. The PHP should contain an action plan of the steps to be taken by all the parties involved to prevent or relieve the applicant's homelessness.¹⁴ Local authorities are expected to make every effort to reach an agreement with the applicant in relation to the PHP. The parties are likely to be the local council, the applicant and possibly the landlord or an agency assisting the applicant. In carrying out both the preventive and relief duties, authorities must take into account the PHP.¹⁵

The 2017 Act extended the types of decisions that could be statutorily appealed. Types of decisions include the steps an applicant has been expected to take in the PHP in relation to the prevention duty; notice given by the authority to end a prevention duty; the steps an applicant has been expected to take in the PHP in relation to a relief duty; and notice given by the authority to end a relief duty (1996 Act: section 202). In addition, the ending of the prevention and relief duties can be reviewed. Both duties

¹¹ To be eligible for the main housing duty (section 193 of the 1996 Act)—a duty on the authority to provide accommodation until the duty ends—an applicant must be able to meet five criteria—homelessness, eligibility for assistance, priority need, unintentional homelessness and local connection (Ministry of Housing, Communities and Local Government (MHCLG) 2018: chapters 6-10 and 15)—which authorities need to take into account in carrying out enquiries and the decision-making process. Interim accommodation ought to be provided when an applicant meets the lower threshold of evidence and the authority has reason to believe that the applicant may be homeless, eligible for assistance and in priority need (section 188 of the 1996 Act).

¹² Applies to all those threatened with homelessness within 56 days and who are eligible for assistance. Priority need is not an issue, although the prevention duty does not extend to an authority having to secure accommodation. An authority should intervene and prevent homelessness, so that households can remain in their accommodation (MHCLG 2018: chapter 12).

¹³ The relief duty places onus on authorities to take reasonable steps to secure accommodation for any eligible homeless applicant. Again, priority need is not an issue, and the authority does not actually have to provide accommodation, unless an applicant would be considered to be in priority need for accommodation (MHCLG 2018: Chapter 13).

¹⁴ See MHCLG 2018: chapter 11.

¹⁵ See [Shelter Legal](#) for information about the prevention and relief duties.

could be brought to an end if an applicant deliberately and unreasonably refuses to take any of the steps he or she had agreed to take in relation to the PHP, or the authority had included in the PHP the steps the applicant should take where agreement could not be reached. However, an applicant can also request a review, should he or she disagree with the authority's proposed steps in the PHP.¹⁶

For homeless applicants who wish to challenge an unsatisfactory written decision, an internal review forms the first part of a two-part statutory appeal process. This means that a homeless applicant should be issued with a written decision first and, at the same time, should be informed of a right to request a review because there is a 21-day deadline within which the request has to be made. However, a request for a review of the homelessness decision would need to be made first and a review decision made before an application could be made to the county court to appeal an unsatisfactory review decision on a point of law. A judicial review-type enquiry by a judge will then be carried out (section 204 of the 1996 Act). In addition, where applicants believe that an officer is not dealing with their application properly, they will be able to make a complaint.¹⁷

In terms of the public authority's complaints procedures, usually the grievant would need to pass through all the stages of the internal complaints process first before making a complaint to the Local Government and Social Care Ombudsman (LGSCO). In a sense the LGSCO would be the last resort for complaints unless an authority has not resolved the complaint or a complainant has not received a response within a reasonable amount of time, which is usually 12 weeks.¹⁸ In addition, the LGSCO cannot investigate if the complainant has or had a right of appeal or could take legal action and the LGSCO considers it to be reasonable for the complainant to do so.¹⁹ This means that an applicant could raise a complaint during the enquiry process. Any service failure would then be rectified as soon as possible following an investigation. However, it is not always possible for service failure to be corrected before

¹⁶ See LGSCO (2020) where the LGSCO report on the implementation of the 2017 Act two years later. Unfortunately, common problems that occur include: delay in authorities assisting people; communication problems, including the non-issue of clearly written decisions or not informing applicants of their appeal rights, and not updating PHPs.

¹⁷ LGSCO, [Homelessness Applications Fact Sheet](#).

¹⁸ See the [LGSCO website](#). In certain circumstances, it is possible for complainants who are dissatisfied with the outcome of the LGSCO decision to seek a review of the decision or to seek a judicial review: see '[Challenging our decisions](#)' on the website. .

¹⁹ See LGSCO note 4 above.

the issue of a homelessness decision, given the need for a complainant to exhaust the internal complaint process first and the time period that the LGSCO considers to be reasonable for a response from an authority.²⁰ In the case of Ms B, the LGSCO investigator reported that if the LGSCO had not started investigating in June 2019, even though Ms B had not complained to the local authority before contacting the LGSCO, then the authority possibly would not have offered her any accommodation until the day of eviction on 11 February 2020 (paragraphs 37, 40 and 43).²¹ The LGSCO follows its own six principles of good administrative practice which set the standards expected of local government, when it investigates the actions complained about (LGSCO 2018).²²

Problems that arise during the enquiry of a homeless application which would not be covered by the appeal process are potentially judicially reviewable. Judicial review has been the main route available for rectifying decisions made by local government officials which are either wrong, or made outside of their remit of power, or where there has been an abuse of power in an act or omission.²³ However, judicial review can only be considered as a last resort. In urgent cases, a claim could be made immediately.²⁴ Where a judicial review claim is not urgent, claimants would be expected to follow the Judicial Review Pre-Action Protocol. Where there is no right of appeal, disputing parties are instructed to consider ‘some form’ of alternative dispute resolution (ADR) first. This might be discussion and negotiation, ‘public authority complaints or reviews procedures’, ombudsman or mediation.²⁵ Timing and efficiency—in terms of costs and preventing delays, transparency, and claimants’ disputing behaviour—appear to be the key factors that courts take into account.²⁶ Although the dispute processes are separate processes and

²⁰ It takes about 13 to 26 weeks for cases to be investigated and completed by an LGSCO investigator. (LGSCO 2019).

²¹ Report by the LGSCO: Investigation into a Complaint against London Borough of Haringey (Ref No 19 014 008), 25 June 2020.

²² (1) Getting it right; (2) being service-user focused; (3) being open and accountable; (4) acting fairly and proportionately; (5) putting things right; (6) seeking continuous improvement.

²³ See [Shelter’s website](#) for the types of decisions that can be judicially reviewed: for example, local authority refusal to accept a homelessness application or a fresh homelessness application; the non-provision of accommodation pending the internal review; local authority refusal to provide interim accommodation pending a decision on the homelessness application; suitability of interim accommodation.

²⁴ Para 6 of the Pre-Action Protocol for Judicial Review.

²⁵ Paras 8-9 of the Pre-Action Protocol for Judicial Review.

²⁶ See Pre-Action Protocol for Judicial Review.

have been described as such, the circumstances of a homeless applicant mean that more than one process might be resorted to at any one time.

Some homeless applicants do not always understand the situation they are attempting to address, nor are some able to articulate the difficulties they experience or the nature of assistance they need. What is clear though is that the applicant struggles with a welfare system that is meant to assist them, with bureaucrats that expect co-operation from the applicant, non-confrontational engagement and an acceptance of the intrusion into their privacy with endless patience. It is a system where every detail about decisions applicants had made about their accommodation, their relationship status, their financial situation, medical conditions, dependency issues, or child care arrangements is questioned (Cowan, Halliday & Ors 2003; Ng 2009; Bretherton & Ors 2013). Furthermore, within the dispute-processing framework, although some do make formal complaints, the applicant is more likely to have quarrels with the bureaucrats, engaging in verbal exchanges at an informal level when dissatisfied rather than confrontation that involves taking formal action.²⁷

As explained above, ‘applicant fatigue’ (Cowan, Halliday & Ors 2003) could play a considerable part in the applicant’s inaction to challenging negative homelessness decisions. Just as delays and uncertainty based on non-communication or insufficient information provided by an officer could cause more fatigue, any problems become part of an accumulative effect in causing an extra burden in having to deal with any appeal process in relation to any welfare assistance claim. The applicant might already be fatigued from ‘the product of previous or concurrent events in their lives, often related to the circumstances which surround their homelessness. These events have depleted their energy to pursue a challenge to the welfare bureaucracy’ (Cowan, Halliday & Ors 2003: 139). When an applicant has reached an impasse and becomes stuck in trying to move forward with an application, the ‘stuckness’, when there is no movement for applicants, raises questions about this inertia: does the applicant feel that he or she has no choice other than to accept a negative decision? For those who had decided to lump it, why? For those that decide to avoid having to confront the situation, why? Yet, just as difficult

²⁷ However, see Gulland (2011) at note 31, who examined the informal complaints stage in relation to users of social care services.

would be complainants who are angry (Susskind & Field 1996).²⁸ This anger could be connected to being treated unfairly or with a lack of respect.

Alternatively, rather than experiencing ‘applicant fatigue’, an applicant might just have ‘let go’ of a negative decision during part of a particular period in life that has been dominated by difficulties. This is passive, rather than active, decision-making. Therefore, just as an applicant would experience the weight of daily living fatigue through being homeless, as a series of events taking place, a negative decision might be viewed as just yet another event occurring in that period of the applicant’s life when the applicant might have felt powerless to take any action to resolve problems in any area of his or her life. This inaction is different from ‘avoidance’, although the ‘acceptance’ does fall within the inaction range in the typology of dispute responses (Palmer & Roberts 2020). ‘Avoidance’ does require action in the sense that a decision has to be made to disengage and avoid the person with whom there has been a disagreement. The action is then avoidance, creating a disturbance in the social relationship, leading to economic, psychological or social losses (Felstiner 1975: 695-696), whereas to ‘lump it’ requires a decision to let go, to do nothing about the problem, rather than to respond for various reasons (Felstiner & Ors 1980-1981).

At this point, the dispute transformation process could help us to understand why there is inaction. Furthermore, it could be that an applicant might benefit from legal advice and assistance, particularly

²⁸ Susskind and Field’s book focuses on disputes that impact on the public, such as the environmental impact of oil spills and accidental release of toxins—whether large-scale or smaller—and substantial residential and industrial development projects, and the interactions between the public and corporations as well as government agencies. However, the types of anger caused by the problems and the outcome of assessment of the public in not being listened to are lessons that could be applied to the situation of the individual. Although individuals who experience problems with an administrative decision are very much individual cases, individual grievants are also part of a group of unhappy and probably angry applicants. Susskind and Field suggest that the ‘powerful’, which would include government agencies, should first listen to the concerns of the other side: ‘People’s frustrations at having little to say in their lives will only be increased if their attempts to explain the situation as they see it go unheeded.’ Second, the more powerful should relinquish power in order to gain power by involving the weaker party in decision-making. What this means is not to give up control, but it does mean ‘helping to balance the accessibility of information’ (1996: 31). While Susskind and Field review solutions in terms of consensus-building between disputing parties, and even within communities, it could be argued that, in the same way, public administrators should engage in ‘consensus-building’ within the administrative relationship. As the authors assert: ‘When people feel they have not been treated fairly, or with respect, their anger multiplies’ (1996:17). Angry publics mean that public resources are also spent on dealing with conflict and, ultimately, litigation, when such resources could be better spent to ‘accomplish the tasks government has been empowered to do’ (1996: 238). This is apart from the trust that the government needs to maintain with the public in order to be able to be seen to be carrying out its governance with sufficient competence.

because of the applicant's social vulnerability. A homeless applicant might need assistance—legal or non-legal—to break the impasse he or she reaches. At the same time, the lawyer or caseworker in this situation might well become the main agent of transformation (Felstiner & Ors 1980-1981; Menkel-Meadow 1985), converting the struggles of the applicant and administrator to a dispute, by launching a claim for judicial review or possibly to make a complaint,²⁹ provided the complaint could be addressed in a timely manner to break the impasse. In the LGSCO Case of Ms B, mentioned above,³⁰ the LGSCO investigation could have been the timely intervention that Ms B had needed in order to break the impasse that the local authority had reached in refusing to provide interim accommodation in advance of the eviction date. This was despite the authority knowing about Ms B's housing circumstances since June 2019, after her landlord had served her with a notice of seeking possession, and that she had six children, some of whom had disabilities.

In general, the complaints and review mechanisms exist to address struggles that homeless applicants experience with local government decision-makers in terms of demonstrating their emergency housing need in accordance with set legal criteria. As there is no guarantee the benefit applied for would be granted, the mechanisms available to address problems between applicant and bureaucrat would need to ensure that the administrator remains accountable for his or her actions. The mechanisms would also need to be effective for applicants who are often socially vulnerable because of their personal circumstances that led to the emergency housing assistance application in the first place. Sossin discusses the substance, as opposed to the symbols of participation and accountability in relation to democratic administration and the goals courts in Canada place on participatory rights and administrative decision-making (2002: 848-849). The criticism being that the Canadian courts, as does the government, place a greater emphasis on the symbols of participation and accountability, rather than the substance.

[C] PRIVATE LIVES PROCESSED IN A PUBLIC SYSTEM

In understanding the limits of participation for an aggrieved homeless applicant, the administrative justice system can be seen to consist of both private and public elements. However, within the separate elements, there

²⁹ Alfieri discusses the lawyer's reinterpretation of the client narrative and 'the notion of poverty law advocacy as a medium of storytelling' (1991: 2111).

³⁰ Note 21 above.

is also a fluidity of movement, which could involve the use of different dispute mechanisms, at different stages of the dispute or series of disputes, which falls into both the private and public realms of the administrative justice system.

The private realm of the administrative justice system can generally be characterized as ‘informalism’ or the resort to managing disputes or struggles between the applicant and administrator using ADR processes, which, in the case of the homeless applicant, will be the complaints system. Any decision made within the informal context remains private to the parties within the struggle, in that decisions are not usually published unless the complaint has been investigated by the LGSCO and a decision made.³¹ Nor are the decisions of internal reviews usually published and made available to the general public.³² The applicant and administrator relationship, from homelessness enquiry through to the complaint stage—should one or a series of complaints arise—therefore, is essentially one that stays private and internal to the local authority. However, it should first be borne in mind that applicants are seeking assistance from local government, which is connected to public law and public resources that are also protected by the public officers. Within this context, the council officer engages in an ‘intimate’ administrative relationship (see section D below) seeking information from an applicant of what would usually be information of a private nature and which would have stayed private but for the applicant needing assistance at an extremely difficult time in his or her life. As Sarat puts it, ‘being on welfare means having a significant part of one’s life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private’ (1990: 344). The ‘intimate’ administrative and decision-making relationship is conducted under the shadow of potential last resort litigation, which is played out in an adversarial legal system, that a council officer who had issued a decision, as a representative of an authority, might need to defend. Essentially an applicant’s struggle with a public administrator, within the current administrative justice and civil litigation systems, remains within the private realm unless or until it reaches the public domain.

³¹ Gulland examined the informal stage of local authority complaint procedures for users of social care services, which includes decisions on charging and allocation of services. There is a first-stage informal process. In practice, the authorities did not record the details of the informal complaints (2011: 484-486).

³² Interestingly, the Law Commission has categorized internal and external reviews as managerial responses (2006: paras 5.33-5.37).

The public realm of the administrative justice system could generally be seen as ‘formalism’ or the resort to dispute-processing mechanisms that would lead to the publication or public announcement of the outcome of the management of the dispute. In the homeless applicant’s situation, this could be a LGSCO-published decision,³³ judgment subsequent to judicial review or an appeal: a so-called objective and external assessment of the homeless application dispute leading to the publication of the outcome. It could be argued that the statutory appeal process a homeless applicant would need to engage in as a result of an unsatisfactory decision demonstrates the fluidity of the public and private realms of the administrative justice system. An applicant would need to request a statutory review first—which falls within the private realm—until and provided the circumstances allow the applicant to appeal an unsatisfactory review decision to the county court on a point of law. Once the statutory appeal process has been initiated, values connected to the adversarial culture become part of the process. Yet, for most of the time, the applicant and administrator relationship has been conducted within the private realm of the administrative justice system, with the applicant divulging knowledge that is ‘inward’—of an intimate nature (Sossin 2002: 826). The applicant is essentially ‘bargaining’ in the shadow of litigation as a last resort, even if the applicant is not aware, or does not become aware until after he or she seeks legal advice and representation. This article does not focus on the applicant and decision-maker dispute within the public domain but on the possibility of this occurring.

Given the social vulnerability of homeless people, legal advice and assistance, as well as representation, are important factors. Yet, there has been a decrease in access to justice since 2010 in England (Hynes 2012), in terms of legal advice and representation (Law Society 2019), as well as the closing down of local courts (Caird & Priddy 2018)—widely documented—which includes a mandatory imposition to settle. Within the context of the low number of homeless applicants requesting reviews subsequent to a negative decision, good administration will lessen the daily living hardship that applicants would experience as a result of maladministration causing injustice. Following Sossin’s argument below, an acknowledgment and a willingness for the administrator to honour the ‘intimate’ relationship, within a framework for the mutual exchange of ‘inward knowledge’, might prevent maladministration or wrongful, unjust or unfair decisions being made.

³³ Although the identity of the complainant remains anonymous.

[D] THE APPLICANT AND DECISION-MAKER RELATIONSHIP

It is worth remembering at this point the social vulnerability of the homeless applicant in terms of the interconnected problems experienced which cause fatigue in daily living. That fatigue could also be a significant reason as to why there is a low rate of challenges to negative homelessness applications. Being homeless means that daily living fatigue is part of an accumulative effect that impacts on an applicant's ability to challenge any negative welfare applications, also termed 'applicant fatigue'. Or the applicant could just have accepted a negative decision as nothing more significant than only an event in his or her life, just as an applicant might just accept the power imbalance within the applicant-administrator relationship.

There have been different characterizations of the administrator. The bureaucrat works within an organizational culture that might well include discrimination and racism (Halliday 2000), with organizational culture viewing applicants as 'undeserving' (Cowan, Halliday & Ors 2003). Bureaucrats have also been characterized as socially constructing applicants. For example, this could mean that, if an applicant had a physical illness which was apparent, such as using a walking stick, shortness of breath or amputated limbs, this was 'a strong indicator of vulnerability' (Bretherton & Ors 2013). There is a body of literature which focuses on the decision-maker as a 'street-level bureaucrat' working within a context where there is 'fiscal crisis' or tight budgetary controls, with bureaucrats restricting access to public services (Lipsky 2010; Hunter & Ors 2010). The working environment is one where there is a need to balance efficiency against administrative outcomes or targets set by managers that have to be met by the local government department. In this environment, administrators develop routines of practice and 'narrow their range of perceptions' of the applicants to public services (Lipsky 2010: 83-86). This makes it easier for bureaucrats to reject an application. With the latitude administrators have within the decision-making process because they are able to exercise discretion, the administrative relationship becomes more complex. Discussions have also focused on the impact of judicial review decisions on decision-making within local government (Halliday 2000). Yet, regardless of the characterization of the administrator working with homeless applicants, 'gatekeeper'—or the practice of the deterrence of the making of homeless applications—continues to be a role that has been associated with such bureaucrats (Alden 2015a; House of Commons Communities and Local Government Committee 2016: 16-19, 22-24).

As many homeless applicants do not have legal representation when making a homeless application, it is possible to characterize the administrative relationship during the homelessness enquiry stage as one of negotiation (Ng forthcoming 2020). Following Gulliver's developmental aspect of his negotiation model, we are able to view an 'essential patterning' (Gulliver 1979: 174) of different negotiating stages. The patterning in the negotiation journey the parties are on takes them from a position of 'relative ignorance, uncertainty, and antagonism toward increased understanding, greater certainty, and co-ordination' (Gulliver 1979: 173). However, phases may sometimes overlap, and parties might return to earlier stages or might even skip phases. Although the approach is more commonly used to explain how an outcome is arrived at following the initial emergence of a dispute (Gulliver 1979: 121), the negotiating stages will assist to give us insight into the applicant-administrator relationship. There are eight phases:

- ◇ phase 1: search for an arena;
- ◇ phase 2: composition of agenda and definition of issues;
- ◇ phase 3: establishing the maximal limits to issues in dispute;
- ◇ phase 4: narrowing the differences;
- ◇ phase 5: preliminaries to final bargaining;
- ◇ phase 6: final bargaining;
- ◇ phase 7: ritual affirmation; and
- ◇ phase 8: execution of the agreement.

Gulliver's developmental aspect of his negotiation model interconnects with a cyclical process comprising a repetitive exchange of information and learning between the parties (Gulliver 1979: 82). The cyclical process of information exchange and learning enables both parties to reassess position and strategy each time more information is received and would also enable parties to adjust expectations and preference in their negotiations. As Gulliver puts it, 'there is a need to obtain information in order to get a better understanding of the opponent—his expectations and demands, his attitudes, strategies, strengths and weaknesses, together with any exchanges in all these matters' (1979: 84).

If we view the in-between stages of Gulliver's phases of negotiation—the point at which there is a breakdown during the transition of one phase to another—this is where an applicant and administrator would likely reach an impasse in the negotiation relationship. Applying Felstiner and colleagues' dispute transformation paradigm and asking questions about the level of legal consciousness in relation to both the applicant and administrator, might enable us to have a greater understanding of why

some applicants challenge unsatisfactory decisions. Although Gulliver's cyclical model of information exchange and knowledge helpfully provides a structure within which to view the movement of knowledge within the negotiation process, Gulliver's developmental aspect of his negotiation model has been criticized as presuming that a settlement will be reached eventually (Moore 1995: 17). In addition, Gulliver's cyclical model does not really address the power imbalance in information exchange and knowledge within the administrative negotiation relationship. However, it is here that Sossin (2002) might be able to assist.

Focusing on the impartiality, fairness and reasonableness in the administrative process and the benefit that an applicant hopes to be successful in gaining from a public administrator, Sossin asserts that the applicant-administrator relationship is one that is based on an intimate relationship. The list of characteristics that would be present in an intimate relationship include trust, interdependence—which would involve transparency because of a level of 'inward knowledge' required about 'how the other thinks and acts' (2002: 811)—fairness (2002: 822-827), honesty (2002: 832), vulnerability (2002: 851) and the capacity to listen to each other (2002: 855).

Based on the understanding that the administrative relationship is 'predicated on the exchange of information', the administrative relationship comes from an administrative culture that could be characterized as remoteness, alienation and objectification, which includes 'invasive interactions' (2002: 811). In terms of information exchange, this means that the administrator 'will hold all the cards' with the applicant being entitled to minimal information and, at the same time, will be expected to 'disclose whatever facts are requested or required'. However, applicants seeking an exchange of information in relation to the bureaucratic system or about the bureaucrats themselves would be met with responses of confidentiality or irrelevance (2002: 811). Sossin suggests that an applicant-administrative model of intimacy could be based on 'the convergence of vulnerability, knowledge, trust and power in the decision-making process'. This could assist in levelling the playing field of knowledge in the applicant-administrator relationship and the perspective of each other (2002: 843). In essence, the choice is 'between administrative relationships, which enhance dignity, freedom and self-realization, and those which thwart our humanity' (2002: 848). Finally, Sossin submits that vulnerability in the administrative relationship could be addressed by viewing the relationship as 'giving rise to fiduciary-like obligations' (2002: 851).

Viewed from the perspective of an intimate relationship, it would be clearly evident that an ‘intimate’ administrative relationship contradicts the remedies available when there are problems with the decision-making relationship (Sossin 2002).³⁴ The effects of the adversarial processes are more likely to cause a greater rift than to have a restorative effect. Sossin asks ‘how can a quintessentially private experience (i.e. an intimate relationship) enhance a quintessentially public process (i.e. administrative decision-making)?’ (2002: 813).

Gulliver’s and Sossin’s views appear to be mutually supportive of each other. Additionally, the interconnected frameworks of legal consciousness, dispute transformation process and intersectionality could provide us with greater insight into the applicant–administrator relationship. While there is a well-developed literature on the individual analytical tools, an assessment that combines all three ideas enables us to appreciate not only why some applicants do not challenge negative decisions, while others do, but that understanding will come from an individual as well as at group level. For example, if we were to view the applicant–administrator relationship through the prism of intersectionality, we would be asking questions about the background of both the applicant and administrator, in terms of their ethnicity, class, gender, age, ability, to name some examples. A factor to consider is that homeless applicants do not belong to a homogeneous group and that homelessness has been socially constructed through both political debate and in the media (Hutson & Clapham 1999). If we consider the possibility that anybody could become homeless—through circumstances and personal decision-making about life events which occur simultaneously with decisions made by other people in our lives, which then bring about a series of events eventually causing homelessness—then we are already aware that people do not become homeless through only one set of circumstances.

In terms of a combined analytical approach, Hefner (2013) argued for the incorporation of intersectionality theory into the analysis of the emergence and transformation of disputes. In addition, with regard to the question of whether someone has legal consciousness, and the extent of legal consciousness that an administrator has (Hunter & Ors 2016), why some applicants are more likely to have legal consciousness could be explored via the dispute transformation process and the intersectionality framework.

³⁴ Sossin clearly states that it is not the content of information exchanged between decision-makers and affected parties that is of public concern, but the nature of the relationship between the two groups (2002: 813).

[E] CONCLUSION

The homeless are some of the most vulnerable people within any society, experiencing a range of practical, health and legal problems that interconnect, and in their entirety have an effect of causing fatigue and exhaustion in daily living. When faced with problems during the homelessness enquiry or in relation to a negative decision in terms of an emergency housing assistance application, having to challenge and sustain any legal contest at any level, with or without assistance and representation, becomes a burden. Such stresses have an accumulative effect on an applicant's fatigue connected to daily living. This might explain why some applicants who have been issued with a dissatisfactory decision might not take any action to challenge. Alternatively, given the circumstances of someone who is homeless, a negative decision could be viewed as just one in a series of events occurring in the homeless person's life, at a time when he or she might have felt powerless to take any action to resolve problems in any area of their life.

The emphasis of litigation as a last resort post-2000 after the implementation of the Access to Justice Act 1999 might well have caused greater hardship and problems for homeless applicants over the years—particularly so since 2010 and LASPOA, leading to the restriction of legal aid, given the environment within which the administrative justice system has been operating. The homeless applicant in need of government assistance through litigation has been confronted with a civil justice system emphasizing informality at the expense of formality. Informalism could be effective within the context of a well-resourced legal advice and representation system. Although, at the same time, informalism also means the making of individual decisions in private and which, in the main, are not published. This could work, provided local government policies are also revised in line with the LGSCO decisions to prevent systemic problems from continuing, and provided working practices are also reflected in the change in policies. Unfortunately, financial resources are finite in terms of the provision of local public services.

Public resources should be protected, as should the applicant and administrator relationship be honest, open and transparent. Sossin has argued that vulnerability in the administrative relationship could be addressed by viewing the relationship as 'giving rise to fiduciary-like obligations' (2002: 851). Should Sossin's argument be accepted, then trust, interdependence, honesty and the capacity to listen to each other within the 'intimate' applicant-administrator relationship could mean that many homeless applicants who end up 'accepting' negative decisions

might understand and accept that decision without feeling they have been treated wrongly, unfairly or unjustly, which would only add accumulatively to the fatigue and burden of living life in difficult circumstances.

However, protection of public resources does not mean that the dominating culture within the civil justice system should be conciliatory if it means that cases that require litigation, especially ones that involve public law, end up being side-lined by an ADR process because cost is the dominating factor.

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PUSHING CORRUPTION AND MONEY LAUNDERING INTO REVERSE MOMENTUM: ECHOES FROM THE CORPORATE GOVERNANCE ARENA

EJIKE EKWUEME¹

IALS, University of London

Abstract

In this article, the author emphasizes how corruption and money laundering have caused incalculable economic damage to society. The two problems are intricately linked and very difficult to separate. The board of directors should introduce an enhanced corporate governance mechanism(s) alongside other countermeasures in order to minimize weaknesses in the current system. In exercising their corporate function(s), aside from other committees, the board should focus more on the audit committees. It is very important that the board uses the services of competent non-executive directors (NEDs) on the audit committees. NEDs should monitor the authenticity of audit reports and minimize the occurrence of fictitious financial reports that aid fraud. Efforts at whistle-blowing should be encouraged with rewards by the board for curtailing fraud through such brave conduct. Fictitious and vexatious reports should not go unpunished. The time is ripe for boards to focus on corporate ethics and make sure that they are practised across the entity from ‘the top to the shop floor’. The corporate culture should be seen to nurture the best behaviour in people. This approach has very strong potential to minimize fraudulent and dishonest behaviours that translate into corruption and, by implication, money laundering.

Keywords: corruption; money laundering; board of directors; whistle-blowers; non-executive directors; corporate ethics

¹ Much of the research in this article was carried out while the writer was a PhD candidate of the University of London. Special thanks are due to an anonymous external reviewer for comments on an earlier draft. All remaining errors are entirely the responsibility of the author.

[A] INTRODUCTION

The enormous problems posed by corruption and money laundering have presented societal, economic and political dilemmas to the constituted authorities in a wide range of jurisdictions. The effects of these problems are experienced across many jurisdictions with a greater part of the impact arguably felt more in less developed countries. The extent of the damage is usually dependent on the robustness of the mechanisms adopted by the authorities. This also depends on the attitude the authorities exhibit towards confronting the above phenomena, with perhaps the larger share of the issues being laid on their doorsteps with more blame going to financial institutions, sometimes epitomized by the banks. It is partly due to the manner in which these legal persons are managed that corporate governance has become one of the important issues in efforts to reduce the problems of corruption and money laundering. The importance of the efforts to contain corruption and money laundering by means of enhanced corporate governance is that it will be beneficial to society as a whole. This is not lost in the minds of various policy-makers globally. They are aware that corruption and money laundering if allowed to continue unhindered will have a distorting impact on economic growth and the planning needed for such growth.

As a result, the robustness of the checks and balances in corporate circles has become important. When natural or legal persons as the case may be, in their respective commercial activities, make their 'illegal profits' they, in order to reintegrate their looted proceeds into the legitimate economy, will eventually want to avoid the established rules and regulations. When this is successfully accomplished, this money may be legitimately used in the formal economy. For the culprits, spending this loot legitimately without being detected by the long arm of the law is obviously important. This article argues that it is likely that the issue of corporate governance when robustly utilized has a strong potential to restrict corruption and money laundering. There are many firms that contribute to the economic wellbeing of the wider society, and it is important that corruption and money laundering be checked in companies to avoid undermining the economic order and economic growth.

Higher standards of corporate governance, characterized by an effective and robust board of directors, together with introduction of sound corporate ethics and sounder and stronger non-executive directors (NEDs) are necessary for dealing with problems of corruption and money laundering. Some corporate collapses were caused or brought about by the issues of fraud which likely involved serious cases of corruption. The

eventual demise of the Enron Corporation and the Bank of Credit and Commerce International (BCCI) more than 15 years ago are examples of lax corporate governance that encouraged corruption and money laundering (Ekwueme 2020). Of course, corruption is amorphous in its outlook, and there is a consensus that it is one of the predicate offences of money laundering. In addition, the two are symbiotically connected. For most corruptly generated money to be legitimately reused, it has to go through the money laundering process.

This article is divided into five parts. The first will address some of the relevant definitional matters that are present in corporate governance. The second part addresses the effectiveness of corporate governance as a good tool to be used to reduce the issue of corruption and money laundering. The third part will focus on the essence of the role that an effective board of directors will input to reduce corruption and money laundering. Fourthly, the issue of corporate ethics, which possibly has been neglected, will be discussed to show its importance in checking the problem. Lastly, the paper will address the importance of NEDs in fighting the scourge and then offer brief conclusions.

[B] DEFINITIONAL ISSUES ASSOCIATED WITH CORPORATE GOVERNANCE

The term ‘corporate governance’, and its everyday use in the financial press, is a relatively new phenomenon of the last two-and-a-half decades (Mallin 2015). The use of the term seems to have been on the increase since the last financial crisis of 2007/2008. Serious blame was aimed at corporate governance mechanisms in failing to prevent the fraud and corruption that were seen to be serious contributory factors to the demise of many companies.² The author does not necessarily anticipate that the definitions ascribed to the term in this article should be accepted by everyone. This is as a result of a non-conflating attitude to the term. It will not be unsurprising for divergent views to emerge and, more importantly, we should bear in mind that corporate governance is still ‘evolving’.

A generally accepted definition of corporate governance has not yet evolved. Tellingly, there may be a plethora of explanations or definitions of what corporate governance is all about. In fact, traditional concepts describe corporate governance as a complex set of constraints that shape the *ex post* bargaining over the quasi-rents generated by a firm or as every device, institution or mechanism that exercises power over decision-

² The corporate collapse of both Enron and BCCI readily fits this. Here, the looted funds were laundered by the culprits largely as a result of a weak governance setup.

making within a firm (Macey 2008). Briefly stated, corporate governance may be said to deal with decision-making at the level of board of directors and top management, through the different internal and external mechanisms that ensure that all decisions taken by directors and top management are in line with the objective(s) of a company and its shareholders respectively (Mulbert 2009).

A definition was also presented by Shleifer & Vishny (1977). They describe corporate governance as a process that deals with the ways in which suppliers of finance to corporations assure themselves of getting returns on their investment. An even wider definition was presented by the Organisation for Economic Co-operation and Development (OECD) Principles 2004, namely: a set of relationships between a company's management, its board, its shareholders and stakeholders. It also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interest of the company and its shareholders and should facilitate effective monitoring. It must be noted that one of the objectives is to curtail corruption and money laundering. This is very important.

Transparency International (TI), recognized internationally as one of the best anti-corruption non-governmental organizations, defines corporate governance to mean the procedures and processes on how private sector organizations are managed and controlled (Transparency International 2009). Tellingly, there may be a plethora of explanations or definitions of what corporate governance is all about. Nevertheless, Sir Adrian Cadbury makes the useful general observation that corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society (Cadbury 1999).

As we note, there are various understandings of what corporate governance stands for. It can also be seen as a set of arrangements through which organizations are accountable to their stakeholders. The author points out, however, that this is not yet a 'mainstream' topic approach. It must also be observed that, as the situation now stands, as a matter of accountability, corporations focus more on shareholders than stakeholders. Recently (2020), there has been heated academic debate

about corporate purpose. The idea that firms should move from ‘shareholder profit maximization’ to a sort of ‘stakeholder maximization’—‘stakeholderism’—did not find support in the recent work of Bebchuk & Tallarita (2020). This attitude, the authors posit, is merely illusory, rhetorical and can best be described as a sort of public relations gimmick and cannot be practicable. This is irrespective of the fact that in the USA, as of summer 2019, the respected Business Round Table group (BRT)³ announced a shift in corporate approach in the USA which possibly has a strong potential to rethink the corporate approach. In any case, the debate on ‘stakeholderism’ is still extant, as at the time of writing.

[C] EFFECTIVE CORPORATE GOVERNANCE AS AN ANTIDOTE TO MONEY LAUNDERING AND CORRUPTION

Of course, bribery, which has been classified as a subset of corruption processes (corruption also has other facets like extortion, embezzlement, fraud etc.), can be reduced by robust corporate governance. This will lead to a significant decrease in the level of money laundering. Good, effective, corporate governance encourages an environment that promotes economic growth by improving the performance of honestly managed and financially sound companies (Arsalidou & Krambia-Kapardis 2015). However, it does not necessarily follow that good corporate governance will definitely guide companies and their stakeholders from the consequences of bribery/corruption and money laundering. Indeed, corporate collapses happen for various reasons. But the consensus by academics is that there is little doubt that lax corporate governance plays some part in their downfall (Arsalidou & Krambia-Kapardia 2015). In truth, typical scenarios of corporate collapses that evidenced corruption in their demise as a result of lax corporate governance issues include but are not limited to Enron in the USA and Parmalat in Italy. Corruption and bad governance were evident in others like Satyam in India, Carillion in the UK and Petrobras in Brazil. In fact, it seemed to be the case (it was actually the case) that their anti-corruption policies and internal controls were not effective (Mallin 2015).

³ This is a very influential association of USA corporate chief executive officers from more than 180 major public firms. The market capitalization of these companies is not less than \$13 trillion. In summer of 2019, they committed themselves to lead their firms for the benefit of stakeholders. By doing so, they effectively announced a revision of their earlier position. It must be noted that BRT, earlier in 1997, committed itself to ‘shareholder maximization’. The World Economic Forum published a manifesto after December 2019 that urged companies to focus on this new paradigm.

The presence of an effective corporate governance system, within institutions and across economies, promotes a level of confidence that is fundamental for the purposes of appropriate functioning of the market economy (US Agency for International Development & Centre for International Private Enterprise 2009: 7). It reduces bribery and corruption, which, of course, usually converge and lead to money laundering. When companies embrace and enhance a good governance ethos, they have more chances of doing well by eliminating bribery and corruption. On the other hand, if firms/companies do not exhibit a very robust display of 'prudent checks and balances' this could lead to corruption, fraud and other negative activities, including laundering. The general public is likely to suffer, as funds meant for developmental projects would be frittered away as a result of lax monitoring apparatus in state-owned firms.

In point of fact, TI has indicated that a strong corporate governance system is a vital component of a company's efforts to reinforce appropriate incentives and practices and to address the corrupt practices they confront (TI Policy Position 2009: #3). We should also bear in mind that it has been shown that, without good corporate systems in place, the overall impacts of anti-corruption initiatives are reduced and the growth of companies and the countries where they operate is undermined (Wu 2005).

It is suggested that, where there is evidence of bribery and corruption, money laundering will, in most cases, be a natural sequential event. Generally, this will potentially drive away genuine investors willing to participate in economic ventures. Good corporate governance serves as a solid framework to secure investor confidence, enhance access to capital markets, promote growth and also strengthen economies. In fact, aside from providing for clear game rules and robust checks and balances, corporate governance systems help to lower company costs and evidently increase economic output (OECD Principles 2004). Bad governance encourages dirty money for laundering purposes and with likely negative consequences on the economy.

The corporate governance framework varies from country to country, each with its particular legal, regulatory and institutional environments. We need to note that there is never a one-size-fits-all mechanism for addressing the problems. However, there is something very similar in the various frameworks. They all define the responsibilities and behaviours that are needed of the company's owners and managers for the business to operate successfully. In fact, business momentum is usually slowed down when there are issues of bribery and corruption.

The processes that characterize strong corporate governance systems align in many respects with the key elements of anti-bribery tools. Most of these are encapsulated in TI's Business Principles for Countering Bribery, introduced in 2002, including effective risk management, integrity, transparency standards and accountability. The Principles are the products of collaborative efforts between companies, academics, trade unions and non-governmental organizations to combat bribery and corruption. We are aware that when bribery occurs in the private sector, it may happen in a company, between citizens, between companies, and in dealings with the public sector plus private citizens. Effective corporate governance prevents bribery and therefore also corruption or, at the very least, limits its negative effects. Additionally, good corporate governance is usually grounded on socially acceptable principles. It also promotes honest and responsible behaviour and, possibly, adheres to its practices and to the letter and the spirit of the law. Of course, collectively, these are antitheses to corruption (Krishnamurthy & Ors 2011).

[D] THE BOARD OF DIRECTORS' ROLE IN COUNTERING CORRUPTION AND MONEY LAUNDERING

The board of directors is a key aspect of promoting corporate governance. In most corporate setups, the board of directors plays a very significant part in making sure that the entity delivers on its corporate objectives. When there is an efficient board, this trickles down positively on to the corporate behaviour of that organization. In fact, the board of directors leads and controls a company. Therefore, an effective board is highly fundamental to the success of a company. It is the link between managers and investors, and it is very important for good corporate governance and investor relations.

The role of the board of directors was aptly captured by Sir Adrian Cadbury. It is his observation that the board of directors is responsible for the governance of its company. The shareholders role in governance is to appoint the directors and auditors and to satisfy themselves that an appropriate governance structure has been put in place. The responsibility of the board includes setting the company's strategic aims, providing the leadership to put them in effect, supervising the management of the business and reporting to shareholders on its stewardship. The board's actions are subject to laws, regulations and the shareholders in a general meeting (Cadbury Report 1992).

There are two kinds of board structure: the unitary board and the dual board. The unitary board is the type that is found mainly in the UK, the USA and Nigeria. It is characterized by a single board comprising both the executive and NEDs. The unitary board is responsible for all aspects of the company's activities. All the directors are working to achieve the same goals. In a dual board structure, there is the presence of both a supervisory and executive board of management. However, there is usually a clear separation of functions. The supervisory board is responsible for the running of the business. Here, an interesting aspect of the scenario is that members of one board are prohibited from being part of the other board. There is a clear distinction between management and control (Mallin 2015). This varies from country to country.

For an effective corporate governance that will limit corruption and money laundering, the board of directors headed by the chair should make sure that 'strategic positive' corruption antidotes are in place in the company. One of these is the presence of sub-committees. Arguably, the most important is the audit committee. Others include the remuneration and the nomination committees. But for ease of analysis, this article will focus on the audit committee. In the UK, there was the Smith Review on Audit Committees. This was a group that was appointed by the Financial Reporting Council as far back as 2003. The committee was of the opinion that, while all the directors have a duty to act in the interest of the company, the audit committee has a particular role, acting independently from the executive, to ensure that shareholders' interests are properly protected in relation to financial reporting and internal control (Smith Review 2003: 186, paragraph 1.5).

What the review actually did was to define the audit committee's function in corporate governance in terms of explaining its role of 'oversight', 'assessment' and also 'review' in the corporate setup. In fact, the members of the audit committee must satisfy themselves that there is a robust and appropriate system of control in the company. It has to be recognized that the committee does not itself engage in monitoring activities. However, the writer is of the view that once there is a proper arrangement of capable corporate characters, this will provide an excellent check on the negative activities in the company. It has what is described as a 'positive trickledown effect'.

In truth, it is the role of the audit committee to make sure that it reviews the scope and the outcome of the audit. It must try to make sure that the objectivity of the auditors is always maintained. This will also involve the review of audit fees that are paid for non-audit work and the

general independence of the auditors. In fact, the audit committee provides a very useful nexus between both the internal auditors and external auditors and the board. It must also ensure that all the relevant issues related to the audit are relayed to the board (Smith Review 2003).

The audit committee role may also include reviewing the arrangements that are put in place for staff members who raise concerns or complaints about the negative incidents going on in the organization. It is a fact that some of these incidents when eventually investigated do sometimes lead to uncovering of fraud in a particular company. These individuals are, of course, usually known as whistle-blowers. A whistle-blower named Sharron Watkins made her concerns known to Andrew Fastow, the chief financial officer at Enron, the defunct US energy company, and to the firm's auditors, Arthur Anderson (now also defunct). She reported on the fraudulent financial conduct and corrupt practices that went on in Enron. The US authorities responded and, after investigation, indicted Enron for its massive accounting fraud that was perpetrated by the directors in the company. The 'Enron Case' has been characterized as the biggest bankruptcy case in US corporate history. The directors created so-called special purpose entities, which they used to launder their ill-gotten wealth. Watkins was protected by the Whistleblower Protection Act 1989. This Act was made a federal law in the USA in order to protect whistle-blowers that work for the government and report agency misconduct. However, in the US as elsewhere, whistle-blowers are often placed in a difficult and vulnerable position by their act of reporting what otherwise might be seen as 'business secrets'.

It must be noted that for whistle-blowing to be considered legitimate it has to satisfy one of the following conditions: be made in the public interest; reveal a criminal offence (like fraud, miscarriage of justice) or that the company is breaking the law by not having, for example, the right insurance; the possibility of risk or actual damage to the environment; or it is believed something is being covered up.⁴ In the UK, this is covered by the Public Interest Disclosure Act 1998. This has been copied across various jurisdictions as a model in protecting whistle-blowers (Stephenson & Levi 2012), but it has come under serious criticisms as lacking the ingredients necessary to encourage robust whistle-blowing reportage. It is therefore suggested that, for corporate governance to be more effective, the legislation be amended to include the provision that anyone who blows the whistle should be entitled to 50 per cent of the recovered money if the information is successful. Also corporate governance should be made a

4 Gov.uk (2020) [Whistle Blowing for Employers](#).

compulsory subject in tertiary institutions with emphasis on whistle-blowing. Additionally, the international financial institutions like the International Monetary Fund (IMF) and the World Bank should include as a benchmark for granting their facilities that countries should have a robust mechanism of corporate governance in their firms. Moving forward, financial aids should be extended to countries that need them to strengthen the regulatory apparatus that oversees corporate governance.

In fact, readers may be familiar with what went wrong with the liquidated BCCI when the bubble burst as a result of numerous incidents of fraud, corruption and money laundering. It has been suggested that, had there been an earlier whistle-blowing mechanism in that bank, the numerous frauds could have been discovered much earlier. The bank collapse put in jeopardy, some US\$8.7 billion in international trade because it complicated payments for export contracts managed by that bank. In BCCI, there was an autocratic corporate governance environment.

[E] CORPORATE ETHICS AS ANTI-CORRUPTION AND MONEY LAUNDERING THERAPY

A good area that the board of directors are encouraged to focus on in the corporate setup to reduce the incidence of corruption and money laundering is corporate ethics. We should be aware that underlying the very foundation or the root of corporate governance and the provision of moral compass is simply good ethical behaviour. And yet, surprisingly, the ethical behaviour of companies is rarely recognized as a solid cornerstone of good corporate governance. However, in many ways, ethics underlines much of business behaviour around the globe. This is irrespective of the fact that it may be at the board or staff level, and also regardless of that company's geographical location, size, or industry. The manner business decisions are arrived at matters seriously from ethical and pragmatic standpoints. This is not only applicable to only the OECD companies but also inclusive of companies from developing countries that may be involved in regional trade (Sullivan & Ors 2020).

The truth is that there are robust anti-corruption laws in very powerful countries. The USA, for example, has the Foreign Corrupt Practices Act 1977. We should also bear in mind that, in the USA, there has been an enactment of the Revised US Sentencing Guidelines that is applicable to corporate defendants. More so, the UK has in place the Bribery Act of 2010. The above laws, one can point out, have possibly forced boards to

take additional responsibility for directors' ethics compliance and training to reduce the liability risks.

Some of these laws have extraterritorial capability that has placed legal responsibility on both small and large firms for the attitude of their suppliers and distributors in the global supply chain. The after-effect of the enforcement of these laws has had the impact of putting hefty pressure on companies to seek effective non-corrupt companies to deal with in their business activities. This effectively has the impact of strengthening the internal anti-corruption and bribery mechanisms of companies. Internal compliance with the checks and balances has to be a key element of the board's approach to risk management. There are now embedded in company's compliance systems robust ethical codes that are against corruption and bribery and which are not just present for 'box-ticking.'

Most companies have started looking inwards and cultivating ways to make sure that they are not contributing to or encouraging the climate of corruption. And a way of demonstrating this is that the board of directors through the company's ethical codes sends out a strong message and also leads by example, demonstrating a 'top-to-bottom' attitude against corruption. The idea is simply that the board makes sure that the relevant national and international commitments for leadership against corruption trickle down through the whole company to the very last employee on the shop floor.

The writer takes the view that it was the 'surprising' demise of Enron more than-one-and-a-half decades ago that triggered very serious attention by more companies over the establishment of ethical subcommittees and ethics codes in companies. There was massive fraud and corruption in the Enron case. Indeed, the directors indirectly hid massive loses and laundered money to corruptly enrich themselves to the detriment of other stakeholders. Surprisingly, many corporate codes are silent on explicit mention of ethics committees. It is posited that this is not good given the frequent unethical behaviour and breaches (fraud is a typical example) perpetrated by some company employees.

It is possibly on account of the need for corporate leaders to behave in an ethical manner in business relationships that some institutional shareholders are being exhorted to engage more with their investee companies. They are expected to act more like shareholders. It translates to the fact that the management of ethical issues can be seen or viewed as a form of risk management. Bribery and corruption that eventually culminates in money laundering fit this template.

Companies that have actually been found to be negligent in respect of ‘anti-corporate governance activities’, or convicted of fraud or other such unlawful conduct, in actual fact do get a mitigated sentence. This is so in most situations on account of the fact that these companies had actually set up ethical committees and ethical codes in their organization. The truth is that ethical programmes may be seen to involve a very small financial cost, but in the long run this will save the company a lot of money. In the USA, for instance, corporations can significantly lower or reduce the fines that they have incurred judicially when found guilty in criminal matters. This is achieved by showing that an effective ethics programme had been present (Crane & Ors 2008).

Business ethics and good corporate governance, one can surmise, are deeply rooted in the foundations laid out in global universal values. A global consensus on the applicability of shared morals across nations is embedded in the Universal Declaration of Human Rights 1948. Many of these principles are now reflected or found in some landmark documents on ethical business behaviour. They include but are not limited to the following: the OECD Anti-Bribery Convention 1997; the United Nations Convention Against Corruption 2003; and the International Chamber of Commerce Rules of Conduct to Combat Extortion and Bribery Rules 2005.

It is a fact that when companies adhere to the ethical codes or principles devoid of bribery and corruption the effect is that these companies attract investors. The truth is that most investors are willing to pay extra for well-governed companies. In fact, the Global Investor Opinion Survey—carried out by McKinsey among over 200 professional investors that collectively manage approximately US\$2 trillion in assets in 31 countries, including Russia—revealed that a significant majority of investors are more than happy to pay a premium for well-governed companies.⁵ On the other side of the spectrum, we must also note that some well-managed or governed corporate entities are also not necessarily the ones that one would point to as having very high ethical standards. In other words, it is possibly right to indicate that ethical behaviour is not necessarily a condition precedent in a well-governed company. But on balance, it is right to have a good ethical culture. When corporate entities

⁵ It is good to note that fundamentally, what gave impetus to this survey which started in the USA was as a result of the ‘shareholders’ activism.’ The willingness of investors to pay a higher premium will be dependent on the jurisdiction that the said firm is. The belief is that in sophisticated corporate environments like the USA and the UK, robust corporate governance exists, and this attracts considerable amount of investors willing to pay higher premiums. The chances of corporate fraud with better governance mechanisms are significantly lower as a result of ‘better checks and balances.’

embrace good governance ethos, they have more chance of doing well by eliminating bribery and corruption, the author surmises.

Additionally, the UK Institute of Business Ethics found that companies that were involved in implementing ethics training programmes did better than those that just professed only business ethics devoid of implementation (Ugoji 2007). It is the submission of the writer that it is a fact of corporate life that when companies are publicly associated with bribery and corruption, it seriously corrodes their reputational value. And one of the outcomes is simply this—a very high propensity for loss of commercial deals or businesses.

When there is adherence to ethical corporate behaviour, it reduces the incidence of corrupt behaviour. This is definitely a sign of prudent corporate governance. It can translate into very palpable benefits for the firm as it is an important risk mitigation tool. Interestingly, this was revealed in a study of Standard and Poor 500 firms that was carried out by Deutsche Bank. It showed that companies with strong and improving corporate governance actually outperformed those with poor or declining governance practices. This was by 19 per cent over a period of two years (Grandmont 2004).

The author is convinced that currently there is a growing recognition that, when there is sound corporate culture that encapsulates and encourages ethical behaviour and integrity, the effect of this would be to enhance sound corporate governance. This will naturally translate into reducing the incidence of sharp practices. Of course, it is recognized that this could fuel money laundering by the actor(s) to hide the ‘gains’ on account of the fact that the money was acquired through illegitimate means. But, frankly, on the flip side of the issue, the commercial world has already suffered or witnessed cases of corporate collapse and massive financial losses, a situation mainly caused as a result of weak or non-existent corporate culture as indicated above.

[F] THE PIVOTAL ROLE OF NON-EXECUTIVE DIRECTORS IN COMBATING CORRUPTION AND MONEY LAUNDERING

In any corporate set-up, all directors are jointly responsible in the eyes of the law for any shortcomings in the firm. This is the position in respect of their fiduciary duties (Companies Act 2006: section 172). Their loyalty, one can indicate, is to the company and not to the shareholders. From January 2019, directors in the UK began to include a statement in their

strategic reports on how they considered their fiduciary duties as indicated in section 172. It is fair to infer that NEDs are simply the mainstay of a robust corporate setup. Competent ones have to be appointed by the company to make this happen. Of course, when there is corporate stability necessitated by the efforts of NEDs, this arguably leads to efficiency that translates into antidotes to fraud and corrupt activities in that company.

The role of NEDs is two-dimensional. Firstly, and most prominent in the last 16 years in the corporate world, is that they act as a counterweight measure to the executive directors. The importance is that this will help to ensure that no one person or group of persons has an over-bearing influence on the board. Secondly, they make serious contributions to the overall leadership and development of the company.

It is very important that, when the NEDs are appointed to help stabilize the company, and check corruption and money laundering, it is crucial that these appointments are done on merit. More so, the NED(s) must have an excellent background in compliance-related matters. This is what they will use to checkmate fraud in the company. Aside their key roles in the company, NEDs must be assigned to a key committee such as the audit committee. This will assist them in monitoring the company's financial reports to detect fraud. It is from here that their expertise would be seriously felt and, as a result, a positive trickle-down effect that minimizes corruption will be noticed. Aside the above, the importance of NEDs was echoed as far back as 1992 when the Cadbury Report was published in the UK. It emphasized the huge importance of NEDs.

The OECD has also emphasized the importance of NEDs, especially in regard to monitoring financial reporting. It has implored boards to make sure that they assign a sufficient number of non-executive board members that have the ability to exercise independent judgement in respect of tasks that may prompt conflict of interests. Typical examples include financial reporting, nomination and executive remunerations (OECD Principles 2015). It is important to note that financial reporting can be manipulated to hide the fraudulent activities that help fritter funds away from the company through the laundering process.

The UK Code also recognizes the crucial importance of NEDs in companies, more particularly in monitoring financial statements. The Code emphasizes that they must be satisfied with regard to the integrity of the financial information. Additionally, the company's financial control and systems of risk management must be robust and defensible (UK Corporate Governance Code 2014).

The position taken in this article is that the message which the UK Code sent out is simple—fraud can be hidden in companies by the presentation of false financial statements by the accountants. The money that has been fraudulently made through corruption can then be laundered to camouflage the fraud. This will then enable the perpetrators to spend the money in the legitimate economy. However, the presence of NEDs that are financially very literate in the audit committee has a solid potential to detect this. Of course, the aim in reality is to reduce corruption in corporate circles.

Interestingly, a study of UK companies has found a positive link between the presence of NEDs that happen to be executive directors in other companies and positive accounting performance of those companies. The effect is stronger if these directors are executive directors in their previous companies. Indicatively, there is a positive effect when these NEDs are made members of the audit committee. The results proved to be largely consistent with the view that NEDs that are executives in other firms will always contribute to both the monitoring and advisory functions of the corporate board (Muravyev & Ors 2014). It is also important to note in this analysis by the author that, when you include the NEDs and audit committee to check for vices, the firm should also do a ‘cost-benefit analysis’. It is admitted that there could be possible cost implications to the company, but on the balance of probability the devastating negative implications in allowing corruption to fester, in the author’s opinion, is worth the cost. There could be divergent opinion on this, with the counterview taken that both NEDs and the audit committee could be burdened in acting outside their supposed remits.

[G] CONCLUSION

In point of fact, corporate governance as a discipline, as evident from the last two-and-a-half decades, can be said to have contributed significantly to reductions in the incidence of corruption and money laundering. However, this was and still is dependent on whether the legal persons involved made robust efforts through their respective boards of directors to inculcate significant ‘anti-corruptions mechanisms’. Typically, the organization should be seen to have in place a robust ‘whistle-blowing’ facility and inculcate the habit of allocating the relevant personnel to the audit committee that are generally seen to have the ability to detect when financial reports are tampered with. Indeed, the issue of corporate ethics must be given its due attention in the companies and the days of ‘box-ticking’ to pretend to satisfy compliance-related issues must be relegated

to the background to invigorate the corporate fight against the twin-like vice. Prudent NEDs will always add very significant qualitative anti-fraud value in companies, especially when they focus on the audit committee. This will definitely check the frittering of the firm's financial resources that often occurs through corruption and money laundering. It would be helpful for both the IMF and the World Bank to review their modalities in extending facilities by including tighter corporate governance compliance in firms as a condition.

Indeed, the combination of the above corporate governance ingredients will enhance the required 'checks and balances' needed and should present a significant platform in reducing the incidence of corruption and money laundering. Perhaps the issues noticeable in the demise of Enron and BCCI and other collapsed corporate entities could have been contained if properly robust anti-corruption mechanisms had been in place. While it is wishful to think that financial crime such as corruption and money laundering will be completely contained through enhanced corporate governance mechanisms, we can at least aspire to reducing incidents to the barest possible minimum.

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CHINA'S NEW FOREIGN INVESTMENT LAW: AN OPEN-AND-SHUT CASE FOR FOREIGN INVESTORS?

ZHANG XIAOYANG

Law School, Beijing Foreign Studies University

Abstract

China's legal framework for governing foreign investment has recently been considerably streamlined in comparison to its former self. The newly promulgated Foreign Investment Law of the People's Republic tends to level the investment playing field in the country so that foreign investors can no longer enjoy significant privileges that have been unavailable to domestic firms and entrepreneurs. Operating a relatively non-discriminatory mechanism, such as has been introduced, will in practice mean reliance on a negative list approach to confine inflows of overseas capital to specifically identify sensitive sectors. As China has committed its market to opening up on a much grander scale in the foreseeable future, the new foreign investment regime and accompanying ideology may not necessarily deter foreign investors from looking for opportunities in the foreseeable future.

Keywords: China; foreign investment; negative list; market opening-up

[A] THE NEW FOREIGN INVESTMENT LAW

China's Foreign Investment Law finally came into force on 1 January 2020,¹ after its draft version experienced an approximately five-year course of public consultation, amendment and formal legislation.

China's erstwhile legal landscape in foreign investment matters emerged in the late 1970s. It was then prodigiously amplified and consolidated throughout the 1980s. Essentially, three representative codes (i.e. the Sino-Foreign Equity Joint Venture Enterprise Law; the

¹ The National People's Congress (China's national legislature) passed the Foreign Investment Law on 15 March 2019.

Sino-Foreign Cooperative (Contractual) Joint Venture Enterprise Law; the Wholly Foreign-Owned Enterprise Law) then played a dominant role throughout the past four decades or so. They delivered, among other things, the primary legal ground rules for foreign investors to deploy and utilize these three prescribed types of business vehicles in China's inward investment arena, mostly from a technical, operationally oriented standpoint (Zhang 2016: 73). By reference to the three specific codes, a vast number of multi-pronged regulatory decrees, administrative guidelines and context-sensitive government policies/directives simultaneously and subsequently emerged, leading to the creation and development of a virtually separate legal framework exclusively applicable to foreign investment and to overseas investors launching various direct investment projects in the China market at the time. Against such a backdrop, needless to say, overseas investors and their Chinese counterparts have not been held to the same standards for an astonishingly long time period, justifiably or otherwise not able to compete on a level playing field, at least from a legal and institutional perspective.

Such legal groundwork has now been immensely reshaped. With the Foreign Investment Law brought into full effect, the preceding three specific laws have concomitantly been abrogated (Foreign Investment Law, Article 42, paragraph 1), meaning that they could no longer be executed in practice nor enforced in the courts. And apart from the Foreign Investment Law, China's current legal framework for overseeing inward investment matters also includes the Implementation Code of the Foreign Investment Law, as well as China's Supreme Court's Judicial Explanation on applying the Foreign Investment Law in practice (hereinafter referred to as 'Judicial Explanation'), both promulgated in December 2019 and effective on 1 January 2020, alongside an earlier Administrative Manifesto for registration of foreign investment enterprises (hereinafter referred to as 'Administrative Manifesto'), which was promulgated in December 2019 by China's State Administration for Market Regulation, a ministerial-level government agency having made its first appearance just a couple of years back in 2018.

While the Foreign Investment Law does not openly say so, enjoying concretely prescribed prerogatives is now legislatively denied to foreign investors and their businesses stationed in the China market. Theoretically speaking, there will no longer be any inequalities in the regulation of foreign investment and Chinese investment. In this respect, the most drastic change having come about in the past years is perhaps the abolition of foreign investors' once highly lucrative tax benefits (effective from 2008 with China's two separate enterprise income tax laws

unified into a single taxing code applicable to both foreign and domestic businesses in an undifferentiated fashion, especially in terms of tax rates and available impetus) (Zhang 2007: 79-103). On the face of it, we may say that long gone are those days when enjoying special privileges on a substantial basis in various ways could statutorily or simply administratively be determined, becoming solely available to foreign investors and their business concerns active in the China market. Now the three cornerstone codes are explicitly stated in the law to have accomplished their historic mission, thus dismantling the old regime and establishing the leading role to be played by a new system, especially the freshly formed Foreign Investment Law.

The Foreign Investment Law has made it quite clear that China will continue with its firm market opening-up stance as one of the country's basic national strategies and will encourage foreign investors to legitimately invest and engage in investment-related activities in the country (Foreign Investment Law, Article 3, paragraph 1). In this sense, China is committed to relying on a more liberalized approach to facilitating foreign investment transactions and a predictable market environment where fair competition between all market players can be realized (Foreign Investment Law, Article 3, paragraph 2). And as far as foreign investors are concerned, unless they venture to test the water in any restricted industry or banned sector included in China's prescribed negative lists, they will be treated equally, being subject to the same laws, regulations and government policies as those to be applied to their domestic counterparts in the same market (Foreign Investment Law, Articles 4 and 9). On the other hand, the Foreign Investment Law sets great store on maintaining a two-way equal treatment of foreign investment with a view to preventing Chinese outward investors' legitimate rights and interests overseas from being unfairly infringed and intentionally singled out (Foreign Investment Law, Article 40).

On the whole, China's new Foreign Investment Law, as it is now written, is a fairly short statute containing 42 Articles grouped into six chapters, namely: (1) 'General Provisions'; (2) 'Promotion of Foreign Investment'; (3) 'Protection of Foreign Investment'; (4) 'Regulation of Foreign Investment'; (5) 'Legal Responsibilities'; and (6) 'Supplementary Provisions'. In contrast, the draft version initially circulated in 2015 was a more lengthy piece, embracing 170 Articles divided into 11 chapters, which are characterized as: (1) 'General Provisions'; (2) 'Foreign Investors and Foreign Investment'; (3) 'Market Access Regulation'; (4) 'State-Security-Based Examinations'; (5) 'Information Returns'; (6) 'Promotion of Foreign Investment'; (7) 'Protection of Foreign Investment'; (8) 'Coordinating the Handling of

Complaints and Grievances’; (9) ‘Supervision and Inspection’; (10) ‘Legal Responsibilities’; and (11) ‘Supplementary Provisions’ (Zhang 2016: 74).

Taking a closer look at these two versions may simply suggest a conclusion that the draft law does not stand comparison with the final version, in terms of appropriateness, intelligibility, or pithiness of legislative style and substance. This might be due to the fact that a new generation of China’s law-makers in today’s times have acquired a much better command of legislative techniques and become more professionally experienced. Compared to the former statutes and regulatory codes in regard to governing foreign investment, the overall layout of and the key themes demonstrated in the Foreign Investment Law now appear far more succinct. They are in general fairly cogently designed and reasonably well presented, giving rise to an overhauled institutionalized framework offering enhanced competence.

[B] ‘FOREIGN INVESTMENT ENTERPRISES’ AND ‘FOREIGN INVESTORS’

The newly created Foreign Investment Law has substantively taken the place of the relevant predecessor laws and regulations, though in a rather general vein. However, the old term ‘foreign investment enterprise(s)’ is not shelved or abandoned under the new regime. It has permeated China’s laws and regulations in the field of foreign direct investment over the long period of the past 40 years, and now the new law characterizes the legal position of ‘foreign investment enterprises’ as those firms registered in China under Chinese law wholly or partially capitalized by foreign investors (Foreign Investment Law, Article 2, paragraph 3). By doing so, first of all this practically ensures non-stoppage of such a designation’s current shelf life, which in theory may continue to be sustained for an inestimably long, drawn-out period of time. Moreover, such a change clearly suggests the retention of categorizing this sort of business organization (which can unquestionably substantiate its overseas ownership ingredients in one way or another) as something distinguishable from its Chinese peers which are, on the other hand, deemed able to stand out as of an unmixed indigenous nature.

What the Foreign Investment Law mostly zeroes in on is cementing ‘a framework that will emphasize equal national treatment of foreign investment, putting foreign investors on equal footing with domestic investors in the China market and giving them equal protections’ (Zhang & Tsoi 2019). Nevertheless, foreign investment enterprises are still being

characterized under today's Chinese judicial system as a special type of business organization, and that is an important reality.

Also, the compulsorily highlighted business registration particulars pertinent to foreign investment enterprises will likely perpetuate how foreign investment transactions are carried on in the Chinese market. The Implementation Code of the Foreign Investment Law indicates that new businesses additionally created by many of the existing foreign investment enterprises, which have already established or furthered their presence in the China market from the ground up—provided that the new businesses concerned are not to be located outside Chinese territory—may still be classified as foreign investment enterprises, in the same way as their funders and/or their parent companies (Implementation Code of Foreign Investment Law, Article 47).

It should be realized that, in practice, the terms 'foreign investment enterprises' and 'foreign investors' may become interchangeable if they are used when a multinational conglomerate carries out its Chinese business. Particular attention therefore needs to be drawn to the present version of the transliteration of the title 'Foreign Investment Law'. Here, the draft version literally denotes 'foreign investment law'. But a translation of the final version of the law points to a law regulating foreign commercial organizations and business persons more generally who conduct inward investment activities in the country. While a subtle difference might be hard to uncover at first glance, its outcome has in effect recalibrated the focus of the Foreign Investment Law in practice, making it somewhat tilted towards foreign investors, rather than specifically targeting inward foreign investment as such.

Regardless, it can be unmistakably recognized under the Foreign Investment Law that foreign investors currently consist of the following three sorts of market player: 'foreign natural persons', 'foreign firms' and 'other organizations', who directly or indirectly carry on investment activities in China (Foreign Investment Law, Article 2, paragraph 2). Here, the first two categories 'foreign natural persons' and 'foreign firms' can easily be understood in most circumstances as referring to individual entrepreneurs and business enterprises, respectively. Nevertheless, the Foreign Investment Law is silent on the denotation of the third category 'other organizations'. In the draft version of the Foreign Investment Law, it is explicitly acknowledged that two extra types of entities are classifiable into the general grouping of foreign investors under Chinese law, i.e. (i) 'the government of another country or jurisdiction, or that government's affiliated agency/organization'; and (ii) 'a recognized international

organization' (Zhang 2016: 75). But the wording of the finally enacted and promulgated Foreign Investment Law shows that these two additional types have been deleted.

It is difficult to assess at this moment as to whether the third category 'other organizations' currently listed in the final version encompasses in practical terms those two additional types of entities identified in the draft law. Hazardous a guess may arrive at offering an answer that is negative. This is because there are worries about the possibility of inadvertently entrapping the Foreign Investment Law (a law formulated supposedly to cope with international commerce in that particular area mostly involving Chinese authorities vis-à-vis numerous foreign companies as civil subjects of equal legal status in a primarily private law context) through its implementation in practice in issues falling within the realm of public international law (other than in a nationally contextualized economic law sense). The Chinese authorities look to concentrate their efforts on foreign private investment, instead of paying much heed to, for example, financial assistance programmes found in mainstream international financial organizations, influential non-governmental bodies, or foreign governments' loan schemes (unless resort to such sources is absolutely necessary).

[C] OLD WINE IN NEW BOTTLES?

Over the preceding 40 years or so, China has endeavoured to maintain a cohort of thoughtfully devised foreign investment-related legal rules. China's former laws and regulations governing foreign investment issues, before the new Foreign Investment Law was enacted as a comprehensive statute, were commonly known chiefly to embrace a series of relevant laws, legal principles and regulatory rules (also including countless government policies/advice shaped at different times and/or applicable to different localities). They were primarily based on the key contents of the three specific laws noted earlier, the promulgation of which had been prioritized over many of China's other laws in order to speedily architect a legal environment where foreign investors could feel assured that their investment in the China market had safeguards, especially as the development of China's general legal system at the time was still rather limited. Content-wise, the focal points of the three specific laws were of several types: Chinese-foreign joint ventures as well as solely owned foreign subsidiaries, i.e. 'equity joint ventures'; 'co-operative (contractual) joint ventures'; and 'wholly foreign-owned enterprises' (Zhang 2016: 73). These three kinds of business vehicles are generally known as 'foreign

investment enterprises', in the form of which they used to be both regulated and otherwise provided for in the China market. They must register with the Chinese authorities, although they may continue to operate, being run either in the form of an incorporated body or a simple partnership without an independent legal personality, depending on the circumstances and subject to the foreign investors' choice.

The new Foreign Investment Law and its Implementation Code are watershed legal developments. The three earlier laws, together with their prescribed implementation rules and other detailed normative documents, have now been repealed (Foreign Investment Law, Article 42, paragraph 1; Implementation Code of Foreign Investment Law, Article 49, paragraph 1). The Foreign Investment Law proclaims that foreign investment enterprises' 'organizational structure', '[internal] organizational bodies' and protocols that have a binding force shall follow the relevant provisions stipulated in China's Company Law, Partnership Law, etc. (Foreign Investment Law, Article 31). But foreign investment enterprises which have lawfully come into being and operated in accordance with the provisions of the three specific laws and their implementation rules and other normative provisions are permitted a grace period of five years commencing from the start of 2020 during which they may keep their original 'organizational structure' and '[internal] organizational bodies' unchanged (Foreign Investment Law, Article 42, paragraph 2; Implementation Code of Foreign Investment Law, Article 44, paragraph 1). Alternatively, they may choose to revise their 'organizational structure' or reshape their '[internal] organizational bodies', by doing so in accordance with the provisions in China's Company Law or Partnership Law, and then procedurally have their prior registration particulars in this respect legally modified to conform with those in the new law. Thus, they will be able to have themselves repackaged, coming into line with the category of general business entities (e.g. those in the most ordinary form of companies or partnerships) (Implementation Code of Foreign Investment Law, Article 44, paragraph 1).

But what is meant by the second term '[internal] organizational bodies'? While this should not be too difficult to comprehend, what may become potentially problematic is the rather general term 'organizational structure'. Neither the provisions of the Foreign Investment Law nor those in its Implementation Code offer assistance to our understanding.

Since the late 1970s, China has gone to great lengths to attract foreign investment. The history of the evolution of Chinese law over the past 40 years or so unarguably attests to the fact that the buildup of China's

general business law regime (which is most closely connected to the conventional forms of companies, partnerships, or sole traders) obviously lagged behind the regime for absorbing foreign investment and regulating foreign investors making inroads into the China market through their various investments. This was especially the case during the best part of the 1980s and 1990s. Accordingly, as per the Implementation Code of the Foreign Investment Law, starting from 1 January 2025, any existing foreign investment enterprise, as long as it has not yet revised its 'organizational structure' in order to be consistent with China's Company Law or Partnership Law, will be denied by the Chinese authorities should it seek to alter any of its other registration particulars previously documented (for example, particulars registered in connection to some critical capitalization matters) (Implementation Code of Foreign Investment Law, Article 44, paragraph 2).

Further, notwithstanding either an accomplished establishment of or conversion into China's ordinary forms of companies or partnerships, pursuant to the Administrative Manifesto, from 1 January 2020 onwards, both brand new foreign investment enterprises and also existing bodies need to continue to have their registration or re-registration indicate formally their link with foreign investment, either being characterized as 'foreign investment' or more specifically 'investment from Hong Kong, Macau or Taiwan' as the situation warrants. Also, in accordance with the Administrative Manifesto, notarization of overseas investors' particulars has now been made a mandatory condition for registration and re-registration purposes. This was not the case under the previous legal framework. However, it is provided in the Administrative Manifesto that personal investors coming from Hong Kong, Macau or Taiwan can dispense with meeting this requirement. In effect this exemption may most probably serve as a form of special treatment for residents living in jurisdictions covered by the 'one country, two systems' formula, such as Hong Kong.

Traces of 'equity joint ventures', 'co-operative (contractual) joint ventures' and 'wholly foreign-owned enterprises' (i.e. those three core business vehicles depicted in China's three specific laws on foreign investment, though now all annulled) can nonetheless be detected in the newly promulgated Foreign Investment Law. In this regard, the Foreign Investment Law first and foremost points to the following four scenarios where foreign investment is characterized as taking place in the China market: (1) a foreign investor either solely or in conjunction with 'other investors' jointly establishing a foreign investment enterprise in China; (2) a foreign investor procuring stocks, shareholdings, assets allocated or other equivalent rights and interests in China; (3) a foreign investor alone or

together with 'other investors' jointly investing in a newly launched project in China; and (4) any other mode of investment (counting as foreign investment) as stipulated in the relevant Chinese laws, administrative regulations or China's State Council's decrees/guidelines (Foreign Investment Law, Article 2, paragraph 2). And according to the Implementation Code, the term 'other investors' does comprise Chinese natural persons (Implementation Code of Foreign Investment Law, Article 3), to say nothing of embodying Chinese business organizations (which can be registered either as legal or non-legal persons) joining those Chinese-foreign joint ventures in their capacity as foreign investors' local partners (as has kept on happening in the past for many years under the old regime).

Hence, it can be perceived in the context of the Foreign Investment Law that various Chinese-foreign joint ventures or foreign corporations' fully held subsidiaries incorporated in China may still exist and continue to function in the China market at the present time and in the not-too-distant future as well. What is perplexing to foreign investors is that the former three specific laws and those other rules and policies formulated on the basis of these three cornerstones may not appear to be in exact congruence with what is prescribed in China's Company Law and Partnership Law currently in force. For instance, China's Company Law has rescinded any minimum capital contribution requirement and deadline (with exceptions in certain specialized fields, mostly pertaining to the financial markets), no matter whether it relates to a small private company or a sizable corporation that goes public. China's former laws and regulations on foreign investment issues, however, set great store by the capital contributions made by foreign investors (or together with their Chinese partners) through foreign enterprises, in terms of volume, deadline, ratios between overseas and indigenous capitalization, or limitations on capital contributions in kind etc. So, literally adhering to China's new Foreign Investment Law and China's Company Law or Partnership Law, in the process of restructuring (within the five-year grace period granted) existing foreign investment enterprises may to a certain extent confuse foreign investors and their deputies or proxies.

[D] NEGATIVE LISTS—A LEGAL BASIS OR AN IMPROVISED MAKESHIFT?

Conventionally, many of China's laws and regulations on foreign investment matters, irrespective of whether at the national level or on a local basis, are characterized as being government policy-oriented in

nature, even though in theory they should occupy a paramount position. This is true also of the Foreign Investment Law. The conclusive enactment of China's Foreign Investment Law came about during the course of a ferocious US–China trade war, particularly in 2018 (Wong & Koty 2020). An official tone has been set in an authoritative assertion that the Foreign Investment Law 'aims to improve the transparency of foreign investment policies and ensure domestic and foreign enterprises are subject to a unified set of rules and compete on a level playing field' (State Council of PRC 2019). To that end, Chinese authorities have engineered a negative list approach in order to eliminate, or at least to curb, unsuitable inflows of overseas capital if they are deemed discordant with China's market access policies administered at the present time. The prescribed negative lists are fluid in character. Both political and economic benefits might be made out of adroitly marshalling the use of such an adaptive policy tool.

However, it is still uncertain what are the real origins of resorting to a negative list approach on an international arena, given that we know this is ammunition for the host country's authorities when needed. As a matter of fact, China and the USA have disagreed over the lengthiness of the negative list, especially in 2016 when the two sides got bogged down in the negotiations on their proposed Bilateral Investment Treaty. The latter eventually stalled without apparent advancement (Zhang 2016: 76–77). But in today's circumstances, relying in practice on an array of negative lists can be portrayed as perhaps the most distinctive feature of the Foreign Investment Law, the promulgation of which may have been put on hold for quite some time due to such considerations. Nevertheless, the Foreign Investment Law now unequivocally provides that China is relying on a pre-admission national treatment and negative list system to handle foreign investment (Foreign Investment Law, Article 4, paragraph 1). So, only those foreign investors making their investment in the fields outside the designated negative lists will be able to enjoy general national treatment—that is, a treatment that is not inferior compared to Chinese domestic investors (Foreign Investment Law, Article 4, paragraph 2). In this regard, China's State Council is mandated to be responsible for releasing from time to time the required negative lists and/or sanctioning their issuing by authorized government agencies (Foreign Investment Law, Article 4, paragraph 3).

Looked at as a whole, China's negative lists are sector-specific, composed of 'prohibited industries' and 'restricted industries' (Dezan Shira & Associates 2019). Prohibited industries are categorically off-limits to foreign investors (Dezan Shira & Associates 2019). Restricted industries are not entirely out of bounds, so foreign investors are not completely

forbidden from tapping into them, as long as those intending foreign investors can satisfy certain preconditions indicated in the negative lists (e.g. being bound by the mandatory proportion requirement of adhering to 'shareholding limits' imposed on foreign capital in certain financial industries), and subject to obtaining 'prior approval from the government' (Dezan Shira & Associates 2019). Also pursuant to China's Judicial Explanation, in the case of a foreign investor launching an investment project in a prohibited industry, the court will support any claim that a contract entered into on the basis of such an investment is void. In the event of a foreign investor investing in a restricted industry, according to the Judicial Explanation, the court will support any assertion that a contract formed because of such an investment is void on the ground of being in violation of the relevant restrictive market access criteria.

In normal circumstances, prospective foreign investors may come across two types of negative lists issued by Chinese authorities: (i) the negative lists tailored for foreign investors only; and (ii) the negative lists applicable to all kinds of investors, including both foreign investors and their indigenous Chinese counterparts (Dezan Shira & Associates 2019). The first type covers the following two lists applicable to foreign investors exclusively: (1) 'The Special Administrative Measures on Access to Foreign Investment (2019 edition)', applicable to foreign investment projects carried out outside China's Free Trade Zones (Dezan Shira & Associates 2019); and (2) 'The Free Trade Zone Special Administrative Measures on Access to Foreign Investment (2019 edition)'. This is a less restrictive list applicable to foreign investment projects conducted within China's Free Trade Zones (Dezan Shira & Associates 2019), i.e. a group of specifically designated enclaves visibly or otherwise cordoned off where bracing for foreign investment is supposedly far more unhindered, in comparison with local jurisdictions at various levels outside those Free Trade Zones. In June 2020, China's National Development and Reform Commission and Ministry of Commerce issued to the public the 2020 version of the negative lists, and this is the latest version. The second type comprises the following two lists applicable to all investors (regardless of whether they are foreign or domestic in terms of nationality or ownership): (1) 'The Negative List for Market Access (2018 edition)' (Dezan Shira & Associates 2019); and (2) 'The Guidance Catalogue of Industrial Structure Adjustment (2011 edition) (2013 amendment)' (Dezan Shira & Associates 2019). On the other hand, adopting a negative list approach may in reality have to yield to the relevant international conventions or agreements, if there are indeed such conventions or agreements in existence to which China currently happens to be a party. That is to say, in the case of China

having joined an international convention or agreement, under which barriers to market entry can be entirely eliminated or partly reduced in favour of foreign investors in certain circumstances even though doing so obviously departs from what is dictated in China's prevailing negative lists, the international convention or agreement concerned will prevail (Foreign Investment Law, Article 4, paragraph 4).

But, generally speaking, the very existence of such negative lists and some necessary adjustments likely to be made to them at varying intervals will likely exacerbate foreign investors' scepticism about the value of investing in China, with its new inward investment environment.

As reported by an official source, 'China is set to become the world's largest national market' and one which foreign investors might continue to focus on, particularly in respect of industries that are internet-based, relating to 'information technology' and 'artificial intelligence' where China's innovation capability is fast expanding (MOFCOM 2020). Such a macro-background may allow for China's market opening-up to continue at a rapid pace, with the current negative lists to be further trimmed (MOFCOM 2020), especially during the periods of tailwinds. Foreign firms and entrepreneurs continue to encourage the Chinese authorities to roll out a new programme of market liberalization. But nevertheless, Chinese authorities are also not reluctant to air their concerns about '[s]ecurity, standards, consistency with international norms' (MOFCOM 2019), when facing the pressing issue of enabling foreign private investment to enjoy greater market access, especially in those fields strategically important for China's national wellbeing and safety (Foreign Investment Law, Article 35; Implementation Code of Foreign Investment Law, Article 40).

In addition, there are several major worries in foreign investors' minds which might be usefully addressed. This may perhaps be long overdue, and it is best to get them ironed out quickly. So, where might foreign investment fit in a bustling Chinese economy with such a colossal market peopled by 1.4 billion consumers and which is increasingly more competitive and selective? Are there any new manufacturing or service-sector hot spots where foreign companies might invest, given that China now possesses a fully comprehensive manufacturing base and a good supply chain system that is very cost effective (though regrettably perhaps not so competitive in terms of craftsmanship, and also high profit margins)? The dust-up between China and the US in their trade war is centering on China's further opening-up, especially in the financial fields. Other Western countries (e.g. mature economies based in the EU) which

are allied to the US are not so aggressive, but they basically also hold a sceptical view.

So far as the Chinese authorities are concerned, there is no doubt that they will continue to count on inflows of foreign capital into the country, so as to encourage economic growth. They will also encourage local industries to look to the global market. But both market forces and strategic contemplation may make them decide that further shrinkage of the current negative lists by a significant margin would be difficult, at least in the short term. However, their response to foreign investors' expectations should not be seen as indifferent. In the trade negotiations, the US side has gone out of its way to challenge China's current mechanism in regard to trade deficits, market liberalization and intellectual property protection (particularly emphasizing the necessity of banning any forced transfer of intellectual property rights). Coincidentally or not, answers to many of those compelling questions can now be unearthed in relevant provisions contained in chapter 2, 'Promotion of Foreign Investment', and chapter 3, 'Protection of Foreign Investment' under the Foreign Investment Law.

On the other hand, gaining greater access to China's financial markets may always be difficult. Chinese authorities have consistently attached paramount importance to the safeness and stability of China's financial markets. Despite foreign investors' robust demand for more market liberalization in the financial fields, China's legislature has kept the Foreign Investment Law clear of too many detailed technical elaborations with respect to further opening domestic financial markets for foreign investors, leaving that sort of work to an appropriate administrative authority to accomplish and to continue to monitor as time goes by.

For instance, on 1 May 2019, one of China's key government agencies, the China Banking and Insurance Regulatory Commission, made public 12 proposed new policies in relation to further liberalizing China's banking and insurance industries (Zhang 2019). They include:

- 1 'removing the ownership cap in a Chinese commercial bank by either individual Chinese banks or individual foreign-funded banks';
- 2 '[r]emoving the total asset requirement of USD 10 billion for foreign banks to set up locally incorporated subsidiaries and the total asset requirement of USD 20 billion for foreign banks to set up branches';
- 3 '[r]emoving the total asset requirement of USD 1 billion for overseas financial institutions to invest in trust companies';

- 4 '[a]llowing overseas financial institutions to invest in foreign-funded insurance companies';
- 5 '[r]emoving the requirements of 30 years of operation and USD 200 million total assets for foreign insurance brokers to conduct insurance brokerage business';
- 6 '[b]roaden[ing] the scope of Chinese shareholders in Sino-foreign joint-stock banks by canceling the requirement that the sole or major Chinese shareholders must be financial institutions';
- 7 '[e]ncouraging and supporting overseas financial institutions to carry out equity investment, business and technical cooperation with private banking and insurance institutions';
- 8 '[a]llowing foreign insurance group companies to invest in and set up insurance institutions';
- 9 '[a]pplying the unified qualification requirements for foreign insurance groups in China to initiate and establish insurance institutions with those for a Chinese insurance group';
- 10 'relaxing market access requirements for both Chinese and foreign financial institutions to establish consumer finance companies';
- 11 '[r]emoving the approval requirement for foreign banks to conduct RMB business, and allowing foreign banks to engage in RMB business upon their business commencement'; and
- 12 '[a]llowing foreign banks to conduct the agency business for fee collection and payment' (China Banking and Insurance Regulatory Commission 2019).

Better still, while a parallel legal framework for governing foreign investment will likely not be built again, the Foreign Investment Law has maintained a certain sort of continuity from the former system. It points out that 'foreign investors' and 'foreign investment enterprises' may have the possibility of enjoying privileges in a designated line of business or locality in China where foreign investors are particularly encouraged to invest, so as to accommodate the need for generating necessary economic and social development momentum on a nationally upward scale (Foreign Investment Law, Article 14). However, the Foreign Investment Law is responsible for providing only relevant guiding principles. In terms of foreign investor privilege much will depend on the circumstances, infused with a touch of utilitarianism, no matter how minor it may seem. In practice, China's pilot free trade zones and certain improvised benefits of a one-off nature are examples of such privilege. Since 2013, when the Shanghai Free Trade Zone was launched, China has established 18 pilot

free trade zones in total, radiating across 60 per cent of varying local jurisdictions (*International Daily News* 2019). Another example is that any income in connection with the Beijing 2022 Olympic and Paralympic Winter Games will be given a tax holiday for enterprise income tax purpose (ASIALLIANS 2019).

[E] CONCLUDING REMARKS

So in general, we can say that China does not need foreign capital in the way it did in the early days of economic reform, but continuing strong inward investment certainly encourages the belief that China's economic policies and practices are on the right track. Chinese authorities are not willing to see foreign investors leave the China market for good in any large numbers and will surely take timely action to arrest a downturn in this regard if there are warning lights which convincingly flash red.

Moreover, the growing consumption power of the Chinese populace remains very appealing to foreign investors as irresistible now as it was in the past, although there will be unavoidable humps and bumps in the cards. It may not be an exaggeration to claim that foreign investment is still the bellwether of China's economic activeness and perhaps its national well-being

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**LIONS IN THE WHIRLIGIG OF TIME—STEPHEN
SEDLEY’S *LIONS UNDER THE THRONE: ESSAYS
ON THE HISTORY OF ENGLISH PUBLIC LAW** AND
*LAW AND THE WHIRLIGIG OF TIME*****

PATRICK BIRKINSHAW¹

University of Hull

Stephen Sedley retired from the Court of Appeal in 2011. In retirement at Oxford he delivered the lectures that became *Lions under the Throne*. As the subtitle to the book explains, these were essays on the history of English public law. As well as being a barrister, judge and visiting professor, he is also an author and reviewer of numerous pieces on law, legal doctrine, legal history and legal biographies. The latter, together with sketches on musicians, including Bob Dylan with whom he gigged in 1962, and occasional writings constitute the contents of the *Whirligig* collection which followed on from *Ashes and Sparks* in 2011.

Both volumes under review continue the display of Sedley’s consummate control and grasp of legal doctrine, knowledge of legal history, the broader context of legal development and sharp observation of character and personality. Added to which is a literary style which is pellucid, engaging, witty, graphic and easily accessible to a non-lawyer. His style mixes respectful levity with the sharp sting of appreciation of the worms-eye view of the law: its injustices, its often adventitious nature, its human foibles and defaults, and its unpredictability. To take one of numerous examples of the latter, consider his treatment of secret trials and special advocates introduced in the UK to deal with the threat of terrorism (Sedley 2015: 167). The Court of Human Rights in the *Chahal* case in 1996 was informed that Canada had already introduced such a secret system: ‘In fact, it was not until 2002 that Canada legislated for closed hearings on security-sensitive immigration cases, and the legislation was struck down by the Canadian Supreme Court for incompatibility with the [Canadian] Charter right to a fair trial.’

* Cambridge University Press 2015.

** Hart 2018.

¹ Emeritus Professor of Public Law. Once again, I am grateful to Martin Gallagher for his advice and comments.

The title of *Lions* is taken from a quote by Francis Bacon. The image of lions *under* the throne contains an ambiguity: wild powerful beasts in subservience, not unlike those in the zoo. They know their place. Is there a hint that on occasion they may unleash their strength when occasion demands it?

Lions sets out to provide a ‘series of test-drillings into a land mass’ and not a ‘panoptic history of English public law’. When he wrote *Lions*, the latter was not provided for, he explains. I am of the generation that still felt the influence of the Diceyan view that administrative law did not exist in England because special courts separate from the civil courts did not adjudicate upon the administration and the citizen as in France. I was fortunate to have been educated in a law school which not only debunked Dicey but which gave prominence to the emerging field of public law when old principles were put to new use in an expanding state. Dicey’s nostrums and weaknesses were exposed. Nor was the course’s focus fixed solely on the courts. While it is easy to see that now not only have administrative law and administration been heavily influenced by judicial principle, it was common not to look far beyond the courts in explaining our constitution and redress of grievance. The public lawyer often missed the core elements of how our constitution worked and on which judges said little, despite Dicey’s strictures that the ‘English’ constitution was a judge-made constitution based on precepts of private law relationships, and how limited courts were in effective grievance redress. Today, the courts’ contribution to constitutional law and human rights protection has been revolutionised. A public law matrix has evolved. As we shall see, this has caused a reaction in government, not for the first time, and one suspects not for the last. Non-judicial redress of grievance is now also commonplace on the syllabus.

Lions traces the re-emergence from earlier centuries of public law litigation in England after the comatose interlude of much of the 20th century—the ‘Lions in winter’. It is a personal account, for he was a barrister then judge in some of the most significant cases. As he is aware, it was a re-awakening of the necessity for legal protection in much of the common law world and beyond (Sedley 2015: 44). One case not referred to was where he represented a prisoner named Williams who had been subjected to prolonged detention in the control unit (CU) at Wakefield prison (*Williams v Home Office* (1981)). His case for Williams was a masterclass in its invocation of basic principles of common law and the European Convention on Human Rights (ECHR) (in pre-Human Rights Act 1998 (HRA) days) in its attack on the illegality of a brutal regime. The regime was not unlawful, the court ruled. The Bill of Rights prohibited

‘cruel and unusual punishment’; while the CU may have been cruel, it was not unusual in the context of England’s prisons.

Prior to the judicial self-denial of the 20th century, Sedley describes how in the 19th century the judiciary set about overseeing the regulatory state spawned by the economic expansion of the industrial revolution. The civil service became professionalised, careerist and powerful. It was a jurisdiction the extent and nature of which was determined by the judges themselves. He highlights the grievous error in Dicey’s strictures about no *droit administratif* existing in England. We didn’t call it that, but F W Maitland famously wrote how, by 1888, over half the cases reported in the Queen’s Bench Division concerned administrative law.²

Long before that, as Sedley explains in the section in *Lions* entitled ‘Histories’, the Court of Common Pleas had ruled that the King’s ministers did not have powers of judicial officers of the state to order arrest or search and seizure warrants. It was not as clear cut as that in terms of historical precedents, but Lord Camden’s famous judgment in *Entick v Carrington* (1765) struck a resounding chord for some semblance of a separation of powers and protection of liberty from arbitrary power. That is how it came to be seen by later generations. The fact that ministers were liable in a personal capacity, seized on by Dicey as an example of his Anglo-centric account of the rule of law, did not prevent attempts to confer on ministers the immunity of the sovereign. This was eventually scotched in *M v Home Office* (1994).³ The result otherwise would have meant that the outcome of the English Civil War would have been reversed.

There are no doubt people who would like to do this, but it would return us not to good King Charles’s golden days – an imagined tranquil age of benign absolutism – but to a seething quarrel between monarch, ministers, Parliament and judges about where state power lay (Sedley 2015: 82).

‘Histories’ also contains an account of the law reforms of the interregnum (see also Sedley 2018: chapters 1 and 4) which had a beneficial influence on subsequent developments including the 1688-1689 Bill of Rights, although the connection was not acknowledged by succeeding generations (2015: chapter 4). Like the Remainer cause in the EU referendum, the republican Commonwealth after 1649 had a bad popular press and its

² The lectures, which Maitland delivered in 1887-88, were published in *The Constitutional History of England* (1908). See page 505.

³ The court found contempt for breaching an injunction but did not order a judicial penalty against the erring minister, leaving that to Parliament.

beneficent legal reforms have been overshadowed by the banning of Christmas and outlawing *la dolce vita*! The last chapter in this part (chapter 5) offers a prognosis of the future of public law. The mood has become ominous.

The self-confidence with which the legal profession entered the 1990s, reflected both in the anxious tone of the civil service's handbook [on trying to stay clear of judicial strictures] and in the amusement it generated among administrative lawyers, are no longer part of the landscape (Sedley 2015: 108).

And what if Parliament itself becomes the oppressor? Quoting Lord Radcliffe, Sedley writes that parliamentary sovereignty had long become the instrument of sovereign power invoked by government rather than the institutional holder of sovereign power in its representative capacity as the grand chamber of the nation. His hope is that the respective sovereignties of Parliament and the courts do not assume a deference of the latter to the former but generate 'a constitutional morality built on the rule of law and adapted to its time' (2015: 119). Although senior judges have supported such a union, it is doubtful whether many MPs would willingly accept their role being demoted to a partner and not a manager.

This leads Sedley (2015: 119) to a discussion of the radical questions opened up by the House of Lords in 2005 in *Jackson v Attorney General* (2015),⁴ in particular Lord Steyn's question whether, if Parliament were to set about disrupting fundamental constitutional standards or processes, its sovereignty—'a principle', said Lord Steyn, 'established on a different hypothesis of constitutionalism'—might have to be 'qualified' by the courts. Judicial objection to unconstitutional acts of the legislature is not new but has a centuries-old heritage, he explains.

What may be developing in this situation is a constitutional model in which the respective sovereignties of Parliament and the courts, rather than assuming an ultimate deference of the latter to the former, interact (as common law, prerogative and statute did four centuries ago) in generating a constitutional morality built on the rule of law and adapted to its time (Sedley 2015: 119).

The sovereignty of Parliament is continued in chapter 7 in the section entitled 'Themes' (Sedley 2015: 149). The Levellers in the Civil War, he writes, saw the risk of abuse of Parliament's power 'in the first days of parliamentary supremacy' and the antithesis between abuse and natural law. They argued that Parliament was no more than a delegate of the

⁴ The case concerned the legality of the Hunting Act 2004, which was made under the procedure in the Parliament Act 1949, as well as the legality of the 1949 Act itself.

people. '[S]ince natural law denied the people the power to tyrannise over others, Parliament was under the same constraint: We could not confer a power that was not in ourselves' (quoted at 149).

The Levellers' Agreement of the People in 1648, he continues, sought to lay down: 'That no representative shall in any wise render up, or give, or take away any of the foundations of common right, liberty or safety' (ibid).

The acceptance by the court in the *Jackson* case mentioned above that the judges had power to determine whether a statute was lawful and whether it complied with the Parliament Act 1911 may not be 'a recognition of such radical limitations on the legislative power; but it is not unrelated, at least in kind, to the larger stride taken by the US Supreme Court in *Marbury v. Madison* when it established the reviewability of congressional legislation for unconstitutionality' (Sedley 2015: 149). *Factortame v Secretary of State for Transport* (1990) was not dissimilar when, in upholding Parliament's will in the European Communities Act 1972, the Law Lords decided that part of Parliament's merchant shipping legislation was void for inconsistency with the European Communities Act and EU law. As he is correct to emphasise, 'the larger question is whether the rule of law makes the courts custodians of fundamental standards which they are required to uphold even if Parliament says otherwise' (Sedley 2015: 149; and see Birkinshaw 2020b—my review of Sumption 2020).

'Themes' also discusses the royal prerogative, orders in council and the Privy Council. The prerogative has featured in both *Miller* cases in the Supreme Court concerning Article 50 of the Treaty on European Union and the prorogation of Parliament (*Miller v The Secretary of State for Brexit* (2017) (No 1) and *Miller v The Prime Minister* (2019) (No 2)). The judgment on Boris Johnson's proroguing of Parliament in September 2019 partially answers a question (posed at Sedley 2015: 141) as to whether there are unreviewable prerogative powers:

What if honours were to be granted in return for payment? What if a war of aggression were to be launched in breach of international law? What if a prerogative Order in Council were to be made for an ulterior purpose or a corrupt motive? Would the courts be forbidden by constitutional principle to intervene; or might constitutional principle, on the contrary, require them to do so?

In a case which still has to be fully unravelled for its constitutional significance, the Supreme Court ruled unanimously that the Prime Minister did not have power to advise Her Majesty that Parliament should be prorogued for an unusually prolonged period in the absence of good

reasons which were not forthcoming. Such a prorogation undermined Parliament's sovereignty and its own responsibility for exacting accountability from the executive. Parliament's voice at a crucial stage of Brexit negotiations had been throttled.

Sedley's discussion of the Ram doctrine under which ministers purport to exercise personal powers of the Monarch as a third source of law distinguished from statute and prerogative offers valuable warnings. What should be taken to mean that ministers have implied powers to do what is necessary to achieve legitimate statutory or prerogative objectives was invoked to attempt to justify the use by ministers of personal powers for public purposes without specified limit. Individuals in their personal capacity have power to act stupidly without restriction save damage to themselves or their property. Ministers *qua* ministers have no such power other than to act in the public interest which brings with it controls based on public law. His belief that the doctrine is really an ancillary implied power to do what is necessary to achieve lawfully conferred objectives and is subject to public law controls protecting human rights, fair process and so on clearly merits support. But, as he writes, 'this leaves open the question of the existence and ambit of the power itself' (Sedley 2015: 139).

Ram has not attracted the controversy of several years ago, but a recent case of the Investigatory Powers Tribunal has provided an examination of a not dissimilar question in relation to MI5 (*Privacy International v Secretary of State for Foreign Affairs* (2019): the tribunal split 3:2 in favour of the government). The claimants challenged a policy in a direction which was publicly acknowledged to exist by the Prime Minister on 1 March 2018, which they submitted purports to 'authorise' the commission of criminal offences through participation in criminal activity by officials and agents of the security service MI5. This was in order to gain intelligence to assist MI5 in its statutory objectives. The claimants submitted that the policy was unlawful, both as a matter of domestic public law and as being contrary to the rights in the ECHR, as set out in Schedule 1 to the HRA.

The specific episodes involved 'running' agents in terrorist groups to gather assistance and information for MI5. Such groups had allegedly been engaged in murder, including the notorious episode of solicitor Pat Finucane in Northern Ireland. The use of terrorist groups to assist MI5 was not empowered specifically by the Security Service Act 1989 which stated there shall continue to be a security service (previously under prerogative powers) under the authority of the Secretary of State. The majority ruled that the powers in the direction were a necessary

implication of the services' statutory powers which continued prerogative 'pre-existing activities' under the 1989 Act.

It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time, in particular in the context of the 'Troubles' in Northern Ireland (*Privacy International*: paragraph 62).

The power did not authorise and did not confer an immunity under criminal or civil law for wrongdoing such as murder or wrongful homicide, and it was not unlawful for being secret.

Sedley is right to ask (2015: 190-191) whether the security and intelligence services' powers, here and elsewhere, operate outside effective legal control? Are they outside the tripartite separation of powers—legislature, judiciary, executive? 'Do the security services now possess a measure of autonomy in relation to the other limbs of the state which requires constitutional recognition'? Do their secret operations outside effective public scrutiny and their autarchic existence make this inescapable?⁵ 'The argument also invites the further question whether, and to what extent, developments of this kind are now an unpalatable necessity'.

Quoting Bagehot's 'prophetic' observation that the English constitution is framed on the principle of choosing a single sovereign authority and making it good and the American upon the principle of having many sovereign authorities and hoping that their multitude may atone for their inferiority, Sedley takes the opportunity to make some transatlantic observations (2015: 174). We have moved on from a position in the USA where the President and legislature can be locked in mutual paralysis while the Supreme Court remakes the law as Sedley describes it—although that scenario may be revisited. Trump's presidency has been a remarkable exercise in autocracy. Presidential nomination of federal judges, his control of the Senate and the lack of security of senior officials such as James Comey together with his rule by executive order, exercise of pardoning powers and reliance on fake news and plain lying offer a frightening spectre of populist constitutionalism and a disregard of what

⁵ The Intelligence and Security Committee of Parliament oversees the security and intelligence services and its powers were bolstered by the Justice and Security Act 2013. The committee produced a report on Russian involvement in British political activity, the publication of which Boris Johnson controversially delayed before the 2019 general election (Intelligence and Security Committee 2020). The report was not published until July 2020 when a new committee was appointed in dramatic circumstances when Johnson's preferred chair was rejected by the committee in favour of an alternative.

W D Guthrie (1912) termed ‘constitutional morality’.⁶ One is looking for judicial towers and Damascene conversions such as that undergone by former Ku Klux Klan clansman and subsequent Supreme Court justice Hugo Black who, as Sedley reminds us, wore white robes frightening black people and who became the judge who wore black robes frightening white people! Exaggeration is easy but it is difficult to think of so much turning on one presidential election.

I might cavil over a few points. His description of the Court of Star Chamber being ‘in substance’ the first court of public law in England perhaps deserved a reference to Holdsworth’s description of the *Cursus Scaccarii* as ‘possibly the nearest approach to a body of administrative law that the English legal system has ever known’ (1922: 239 and see 246–264)?

At page 210 he writes that the ‘state’ is never used in statutes. The penumbra of uncertainty over the legal concept of the ‘state’ in UK law which is addressed below does not mean the term ‘state’ is not used in statutes. The Official Secrets Act 1911 famously provided opportunity to raise defences against unauthorised disclosure ‘in the interest(s) of the state’ which allowed Clive Ponting to be acquitted from charges under the Act in relation to his disclosure of the ‘Crown Jewels’ concerning the sinking of the *General Belgrano* in the Falklands war. Secretary of State is used ubiquitously in statutes—our government would find it impossible to operate if it wasn’t—and the civil service is termed the ‘Civil Service of the State’ in the Constitutional Reform and Governance Act 2010 and so on.

Let me follow with these powerful insights, and I quote directly:

For much of the twentieth century the constitutional dominance of the executive was a practical reality which rested on the weakness of Parliament and the acquiescence of the judiciary. That relationship changed radically in the later part of the twentieth century as the judiciary became more interventionist, and there is every reason to think it will go on changing in the twenty-first as government becomes increasingly presidential and a professional civil service grimly watches the repopulation of Whitehall by ministerial placemen and policymakers (Sedley 2015: 192).

⁶ The phrase did not of course originate with Guthrie. Guthrie upbraided political demagoguery, but the article is a conservative defence of US Supreme Court decisions striking down social and labour regulatory statutes under the 14th amendment. The legislators, he argued, acted under distortion of the facts—‘fake news’? I am grateful to Martin Gallagher for this reference.

In an age of Boris Johnson and Dominic Cummings, how prescient is this? And look at the consequences of the absence of the ‘state’ as a legal concept in the explanation of the public realm of governance in our law:

The insubstantiality of the state itself in public law reflects the fact that the state has never been a monolithic entity. The constitutional unity of an iconic Crown elegantly disguises the heterogeneity of the state which it represents. For centuries the state has been, as it still is, a site both of collaboration and of conflict among its separate but interdependent powers – the legislature, the judiciary, ministers and their executive departments, and today arguably the security establishment. All of these now function in the name of a monarch whose throne since 1689 has been in the gift of Parliament. Unlike the many states in which power flows down from a written constitution, power in the United Kingdom flows up from the state’s component elements, making the Crown its receptacle, not its source (Sedley 2015: 228).

The last example comes from his discussion of autocratic executives. The growth of unbridled executive power, in many countries today despotism, has been a recurrent theme along with the rise of populist nationalism and a retreat from international cooperation and global networking in the 21st century. In countries which do not have a despotic tradition, I include the USA and UK, nonetheless the success of Brexit and the election of Donald Trump signal an attack on balanced constitutionality. Read Sedley on the antimony between the rule of law and the rule of government, i.e. an executive which does not answer, and feels no need to answer, for decisions of high governance.

The authoritarian view – that the state (like the heart) has its reasons of which reason knows nothing – has never gone away. In recent years it has been emerging from the law and economics movement in the US, where critics point to the endemic failure of modern democracies to curb executive power. They argue from this not to the need for a renewal of representative democracy or an intensification of judicial review of executive action but to a need to accelerate the trend towards executive autonomy, brushing aside what they call tyrannophobia and trusting public opinion, much as Dicey did, to control a technocratic presidential executive. In the American context of a directly elected presidency, the proposal may be doing little more than conferring intellectual respectability on what is already happening. For parliamentary rather than presidential democracies, the idea is arguably retrogressive and even dangerous – but that does not mean that we shall not hear more of it (Sedley 2015: 274).

On the next page, he continues:

The fact that five years later Berkeley [the judge in *R v Hampden* (1637) (the *Shipmoney* case) who ruled that the King’s case to tax without consent of Parliament was justified by the rule of government

not the rule of law] was impeached by the Long Parliament, along with the rest of the high court bench, for high treason – he was eventually convicted of a lesser offence and fined – does not diminish the significance of his pronouncement. First, he uses the expression ‘the rule of law’ not in the limited sense of some specific proposition (e.g. that it is a rule of law that you may not profit by your own wrong) but in the generic sense in which, three and a half centuries later, Dicey was to use it. Secondly, he counterposes the rule of law to the rule of government. This is a subtlety which was to escape Dicey; yet the dichotomy is critical, because it points up the risks inherent in a separation of powers – a topic to which Dicey devoted very little attention – unless each of the powers is itself checked by the others or (in the case of Parliament) by a free electorate (Sedley 2015: 275).

Where does one draw the line on what is included in the rule of government and what is subject to the rule of law and judicial supervision? Proroguing of Parliament is clearly a subject which the present Prime Minister believes to be a matter of unchecked governmental will. But in Boris Johnson’s ideal world would this be true of political decisions generally—and if so, all of them? If not all, which? The courts in the last 20 years have wrestled conscientiously to calibrate levels of justiciability in the most sensitive of questions. The higher the level of policy touching upon international or diplomatic matters, the less inclined they will be to review a decision. The more the rights or interests of an individual are involved, the more exacting a scrutiny will become. Sometimes, I would have preferred the courts to have gone further in their supervision than they did.⁷ The lions in Bacon’s trope, from which the title of the book is taken, have to support the throne; but they should not be deprived of their claws and teeth.

Lions concludes with a brief resumé of the rule of law. Perhaps the author could have spent longer on setting out different conceptions of the rule of law. The throw-away comment in the quotation below about making the poor richer and the rich less opulent displays a less substantive version of the rule of law which requires justification. His

7 There are three very difficult cases which come immediately to mind, and I do not argue without more that the decisions were wrong: *R (Corner House Research) v Director of the Serious Fraud Office* (2008), concerning the pulling of an investigation into corruption in arms contracts by the director, widely believed to be under prime ministerial instruction. Compare *R (Campaign against Arms Trade) v Secretary of State for International Trade* (2019) and legality of export licences and sale of arms to Saudi Arabia where the award was struck down on the assessment of breaches of international humanitarian law. Secondly, *R v Gentle* (2008) and use of the HRA and ECHR to question the legality of a war in which the plaintiff’s son (a member of the armed services) died; and *R (Carlile) v Home Secretary* (2014)—where an Iranian dissident was excluded from the UK, preventing her addressing meetings in the palace of Westminster. Her objective was to establish a democratic secular and coalition government in Iran committed to the rule of law and respect for human rights. Her presence in the UK ‘would not be conducive to the public good for reasons of foreign policy and in light of the need to take a firm stance against terrorism’, the Home Secretary insisted.

account is not a detailed theoretical analysis of the concept, although he argues it is linked to democratic government, an independent judiciary and competent and uncorrupt administration. This is not a concept which is fixed immutably in time. His coda is not a prescription for perfection but sets a premium on reducing injustice, and I quote his own words:

What it signals today is a shared ideal that individuals and society should not be subject to the whim of the powerful, and that their rights and obligations should be determined by laws made by an elected legislature which respects fundamental rights, administered without discrimination by independent and competent judges, and enforced by an uncorrupt executive. To this extent the rule of law is egalitarian, though it cannot make the poor richer or the rich less opulent. But so long as it can contribute to Amartya Sen's project of minimising injustice in the world, it will still be an ideal worth pursuing (Sedley 2015: 280).

Needless to say I can say very little, given the demands of space, about the stimulating insights on the right to be heard, sitting (the 'private' bodies subject to judicial review), the separation of powers, tribunals and other subjects covered. On legal standing the role of public interest groups has been crucial, and the courts have been accommodating for well explained reasons. Liberty has been central in human rights litigation as has Privacy International. Gina Miller was crucial in the Brexit litigation and all parties accepted in *No 1* that the case was properly before the court. In *No 2* the Supreme Court ruled the matter was justiciable. The Good Law Project (GLP)⁸ has been at the forefront on cases dealing with the award of government contracts in the Covid crisis without, it is claimed, procedural safeguards. Procedures have been waived under regulations and the result, GLP argues, has been award of contracts amounting to billions of pounds, some in extremely questionable circumstances which have raised the most serious questions of waste of public money and, it is alleged, favouritism. The only parties with a private law interest are the government departments and the contractors, including those who were not awarded contracts who are 'economic operators' under the relevant regulations. The courts have confined the law of standing under relevant regulations in procurement cases (see e.g. *R (Chandler) v Secretary of State* (2009); *Wylde v Waverley BC* (2017)).⁹ Public interest groups must have a right to argue the case on behalf of the public interest where there is the possibility of an abuse of power where they are not acting frivolously or as busybodies. Who else can,

8 See the [Good Law Project](#) and its page on 'The PPE Fiasco'. The latter contains the government response rebutting the claim.

9 GLP argues that, as there are no unsuccessful bidders, only GLP can make a public interest challenge.

apart from the Attorney General? The latter is a member of the very government that is allegedly acting unlawfully.¹⁰

We have seen Sedley's allusion to the less confident ambience of judicial review post the 1990s. Labour and Conservatives have attacked judges, judicial review and human rights judgments. Autocrats do not like to be checked, whether by law or any other opposing force. The Conservative manifesto of December 2019 promised a Constitution Commission to examine the working of our constitution, especially judicial review and human rights, the prerogative and the House of Lords. On 31 July 2020 an 'independent panel' was appointed by the Secretary of State for Justice to examine judicial review.¹¹

Nearly three-quarters of a century ago, Sir Alfred Denning, delivering the 1949 Hamlyn lectures, believed that English justice had just about reached perfection. In concluding his Hamlyn lectures in 1998, Sir Stephen said: 'Half a century on, as it seems to me, we have a lot to be glad of and a lot to build on, but much still to worry about and with luck and judgment, to resolve' (Sedley 2015: 56). The one theme to emerge from this book is that the pursuit of justice and governmental accountability is never-ending. One has to hope that there will continue to be judges of Sedley's ability, courage and humanity to carry on that pursuit.

There are no large thematic claims for his work in *Whirligig* (Sedley 2018). Most of it is reactive—coats hung on other people's pegs, as the author puts it in the 'Introduction'.

Whether he is exploring (chapter 1) an anti-historicism denying law's past in any present or future role (Dicey who believed, for instance, that Magna Carta had nothing to do with our present constitution) or the

¹⁰ The present Attorney General, Suella Braverman, has been notable for her attack on a 'politicised judiciary': 'Politicians must take back control from unelected, unaccountable judges who are acting like political decision-makers' (Fouzder 2020). Braverman provoked political controversy when on 23 May 2020 she tweeted her public support for Dominic Cummings' notorious apparent breach of lock-down when he travelled to Durham in the height of the Covid pandemic, a journey for which he was under police investigation. She and the justice secretary both believed that upholding the law and rule of law under the Ministerial Code and oaths of office did not include international law in relation to the UK Internal Market Bill in September 2020. See *R (Gulf Centre for Human Rights) v The Prime Minister* [2018] EWCA Civ 1855 for a contrary ruling i.e. that the omission of 'international' was not a matter of substance as 'law' includes 'international law'.

¹¹ See Press Release, 'Government Launches Independent Panel to Look at Judicial Review' (31 July 2020). It is chaired by Lord Faulks QC, who has written as a former minister of the time wasted in policy development by judicial review, and contains three academic lawyers. The terms of reference include: 'Whether the terms of judicial review should be written into law; whether certain executive decisions should be decided on by judges; which grounds and remedies should be available in claims brought against the government; and any further procedural reforms to judicial review, such as timings and the appeal process.'

pressing of the past into the service of today without regard to the passage of time and changed context, Sedley analyses the almost adventitious progress towards a coherent public law from common law process by using and advancing precedents such as *Anisminic v Foreign Compensation Commission* (1969), rather than confining them. Jonathan Sumption attempted such a confinement in his dissenting judgment in *R (Privacy International) v Investigatory Powers Tribunal* (2019) without success. Sedley's concern is the ebb and flow of leading precedent and reaction to it. 'Without history there is no law' stands in stark contrast to Dicey's 'there is no legal history only law'.

Between the short-sightedness of either ignoring history or its wrongful application to the present, Sedley argues for an analysis which, for instance, when one looks closely at the 1215 Magna Carta, what it produced over centuries was 'the nourishment of a deep-lying and long-term consensus that no power stands outside law and that there exist fundamental rights which no government, whether monarchical or elective, has power to deny' (Sedley 2018: 4). The common law has filled this 'insatiable maw'. The theme of ebb and flow, progress and retreat, is continued in the history of English law. Sedley shows a gimlet eye for detail and irony in all the essays in this work.

Given his background, there is an unfeigned reverence for the common law technique and its development, at least, should he add, in the hands of the right craftsmen? That, of course, begs the question. The world of chance, uncertainty, the unexpected comes from his many years in legal practice as advocate and judge. While he is quick to criticise Panglossian accounts of history, does he come close to this when dealing with the common law? That despite bad decisions, bad or short-sighted judges and lawyers, it will, somehow, be alright on the night? To claim too much for the common law technique is acknowledged, as he shows in debunking Dicey's claims that ours is a 'judge-made constitution'. There again, he displays a fascination for time's revenge on things which people may consider timeless. The changing contours of what is meant by human rights for instance, as he shows in the partly eponymous chapter 3, are shaped by human argument and not a universal truth. He explores the contingency of human rights development in space (latitudinal), time (longitudinal) and varying philosophical bases, relativism and absolutism. The only certainty is that human rights will not stay as they are today (Sedley 2018: 50).

His perspective throughout many of these essays is, understandably, that of the practitioner; the user and maker of common law substance.

The topsy-turvy world of happenstance will not fit many academic models of law. Sedley sees the rough edges, the dangerous waters, the opportunist's cunning, the tyrant's greed and institutional imperfections. Out of this mess, good men and women have striven for a better and fairer world. He illustrates the common law's contribution.

A review of Richard S Kay's *The Glorious Revolution* is an opportunity to revisit the tumultuous events of 1688-1689. The Glorious Revolution, Sedley writes, was 'a defining moment in Britain's constitutional history because it placed the authority of the Crown in the gift of Parliament and thereby decisively shifted the location of sovereign power from monarchy to legislature' (Sedley 2018: 56). The interregnum did not commence until 1688, argues Kay, and ended on William and Mary's accession in 1689. It did not arise in 1649 on Charles I's trial and execution because his son inherited the throne although not crowned. But on the same argument in 1688 on James's purported abdication, or later on his death, his son James Edward Stuart would be the rightful king on the constitutional rules of regal succession. The 'interregnum' of 1649-1660 was a legal nullity according to conservative historiography because there was no sovereign to approve Bills and summon Parliament! Both in *Lions* and *Whirligig* Sedley shows the enormous reforms in law in the period 1642-1660, including our one and only written constitution. Parliament legislated without the King. Sovereignty could exist without a Crown.

Sedley's gifts as an exponent of graphic prose are illustrated whether dealing with: judges and ministers (reprising the *Entick v Carrington* discussion in *Lions*); the margin of appreciation and Strasbourg's failure to take rights seriously (*Handyside v UK* (1976)—the 'Little Red Schoolbook' case); domestic law and Strasbourg jurisprudence; the separation of powers and the fourth estate—MPs naming parties involved in legal proceedings protected by confidentiality; the role of the judge and judicial misconduct (while it is true that no English judge has faced impeachment for 300 years, Harman J and Peter Smith J, both Chancery judges, took early retirement (1998 and 2017 respectively) after controversial behaviour as judges); anonymity and the right to lie—'no-body believes there in a utopian forum, a marketplace of ideas, where truth drives out the false' (Sedley 2018: 92; and consider events in UK and US public life since 2016).

I pause to say a little about judicial misconduct and parliamentary motions and royal assent for removal of senior judges (Sedley 2018: chapter 13). No procedure is laid out for this and Sedley reasons that this method for removing senior judges is far from desirable. Just think of

judges ruling against parliamentary legislation (see above) which abuses human rights or abolishes judicial review where Parliament and sponsoring ministers have an interest. The parliamentary process originally based in the Act of Settlement should be replaced by a panel of ‘appropriate status’ with a power of recommendation to the Lord Chief Justice of dismissal of a senior judge (New Zealand has such a panel). The possibility of political bias, he believes, would be significantly reduced.

Judicial recusal deals with the question of apparent bias in judges and switches to the role of juries in the internet age. At the Krays’ trial for the murder of one of their victims, long before the internet age, the trial judge allowed defence counsel to question the prospective jurors on their knowledge of the twins. ‘Within half an hour they had a jury of twelve citizens who apparently never read a newspaper or watched the television news’ (Sedley 2018: 125).

The right to die highlights the abomination of how the private Bill procedure may be sabotaged to prevent humane, popular and widely supported reforms. The 2017 Brexit case (chapter 16) was not about the legalisation of political issues: it was about the politicisation of legal issues when the judges were defamed for doing their job and the Justice Secretary, Liz Truss, failed to defend them from press calumny. There is a vivid short passage (Sedley 2018: 135) on Article 50 and the legislation that followed *Miller No 1* (2017) and ‘petulant’ deficiency in parliamentary drafting authorising notification to the EU of the UK’s intention to leave the European Union. *Whirligig* was published before *Miller No 2* (2019), dealing with the prorogation of Parliament in 2019. Both cases involved different aspects of the prerogative power. While I agree now with the majority outcome in the first case, that ministers *alone* cannot bring about a fundamental change to the UK constitution, I can see why there was unanimity in *No 2* in ruling unlawful actions by the Prime Minister that undermined our constitutional foundations (Birkinshaw 2020a).¹²

Arbitration (Sedley 2018: chapter 18) in a constitutional legal system addresses non-judicial dispute resolution. In *Lions* he wrote on the new tribunal system and, although he is not engrossed solely by judicial

¹² I write ‘now’ because, despite Lord Reed’s powerful dissent, there was, as the majority ruled, an overriding constitutional change brought about by the government. All parties and the courts operated on the basis that the service of notice under Article 50 was ‘irrevocable’; see *Wightman v Secretary of State for Exiting the European Union* (2018) where the European Court of Justice ruled this not to be the case. My view before the domestic litigation commenced was that notice was revocable and that a conventional understanding of dualism meant that serving notice was a matter for the prerogative (Birkinshaw 2016).

bodies, he made one of the most critical judgments on ombudsman inquiries before a judicial/ombudsman rapprochement emerged in later case law (see *Cavanagh v Health Service Commissioner* (2005)). I felt the criticism of the ombudsman was overly harsh and might inhibit effective ombudsman investigations. Sedley would argue that all public bodies must operate within their allotted boundaries and fairly.

‘Detention without trial’ (chapter 19) reviews A W B Simpson’s book. There is a timely reminder of the fact that, after Atkin’s resounding and widely lauded case for constitutionalism in *Liversidge v Anderson* (1942), Atkin in effect accepted a little further on in his judgment that little could be done to defend liberty when national security *was* cited by the Home Secretary to be in issue (Sedley 2018: 149). There is good sense in the old legal aphorism: read, read on, read carefully! There is also a nice sense of irony illustrated on the ending of executive detention regulation 18B—the communists wanted the ban on the *Daily Worker* lifted but Oswald Mosley’s detention to continue! A Denning quotation on a detention in Leeds during the Second World War brings home qualifications on that judge’s presumed liberalism (Sedley 2018: 149 and chapter 34).

‘Originalism’ (chapter 20), which Sedley describes as ‘a form of resistance not to judicial law-making but to the law that judicial liberals make’, may not be the burning issue of several years ago in debate about US Supreme Court judges and their rulings. Why? Because the US Supreme Court judicial pendulum has swung to the right and conservatism (Sedley 2018: 154). He argues that ‘politicisation of the US Supreme Court has collapsed a major part of the distinction between law and politics in the USA and significantly realigned the separation of powers’ (Sedley 2018: 150). The Supreme Court case *Citizens United* (2010) on removing legal limits on corporate financial interventions in elections is, he writes, an example of ‘living originalism’ (Sedley 2018: 155), i.e. painting the law in a right-wing gloss. We are reminded of executive prerogative today and Trump’s nomination of federal and Supreme Court judges. To their credit Supreme Court recent decisions have given judgments against Trump. The demise of Ruth Bader Ginsberg, and the battle over her replacement, will have a pivotal outcome on the future balance of the court. But I point out above the almost unbridled concentration of power in the President is an issue which has to be revisited in the US constitution before the President becomes the American Crown.

There are reviews of works on the British constitution—by Loughlin—and Bogdonor’s *The New British Constitution*. In the latter Sedley’s view is

that the attack on the HRA has gone quiet after the real Eurosceptic target, Brexit, was achieved (Sedley 2018: 169). This is not true, and the UK government's non-commitment to the ECHR has been a major issue in UK/EU trade talks. Boris Johnson highlighted 'updating' the HRA as an issue for examination by his commission on the constitution, but so far the HRA has not been included (see above, although see the Overseas Operations (Service Personnel and Veterans) Bill 2020). Reviewing Bogdanor gives Sedley the opportunity (Sedley 2018: 171) to ponder a clash between judiciary and Parliament mooted by some judges 'off parade' and subsequently in case law, notably by Lords Steyn and Hope (post Parliament Acts' legislation above) and then *obiter* in other case law (Birkinshaw 2020b).¹³ How would it end, he asks? 'We do not know and most of us would prefer not to find out!' A constitutional moment of truth is not on the cards, Sedley believes. Does he know his judicial brethren too well to sense they would never force the issue? Some constitutional changes are irreversible, he believes, and these include devolution and the new systems of judicial appointment in England and Wales. Appointment of part-time judges (recorders) by tick-box and examination may well reward those self-promoters who may be mediocre and discard those with real talent. The old system of judicial patronage was open to abuse, but clearly he has problems with its replacement.

Bogdanor's arguments for the emergence of a new constitution will have to address MPs' behaviour, the private members' Bill procedure and composition of the House of Lords. An appointed House of Lords is capable of restraining, albeit temporarily, a government-controlled Commons bent on ill-considered actions. Would an all-elected upper chamber remove the superiority of the Commons? If so, with what consequences? Without answering these points any new constitution 'would be a lame thing' (Sedley 2018: 174).

The UK's constitution is not a fact but a process, a space to be watched (Sedley 2018: 174). Like Heraclitus, Sedley is arguing that the constitution is like the moving river: one never steps twice into the same river; the water has moved on. Declaring a new constitution is therefore 'jumping a gun that may never go off' (*ibid*).

¹³ The Supreme Court and Court of Appeal have both accepted the possibility that, in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law would be able to declare such legislation unlawful. See *Moohan v Lord Advocate* (2014), paragraph 35 per Lord Hodge with Baroness Hale and Lords Neuberger, Clarke and Reed; *Shindler v Chancellor of Duchy of Lancaster* (2016), paragraphs 49-50; and *R (Public Law Project) v Lord Chancellor* (2016), paragraph 20.

‘Abuse of power’ allows him to revisit some themes from *Lions*—not uncommon in *Whirligig*. It also allows him to quote the wife of the dictator: ‘power is delightful and absolute power absolutely delightful’ (Sedley 2018: 178).

Sharp-eyed, insightful studies of individuals, including senior influential judges such as Diplock, Scarman, Denning, Bingham and Sumption, are in ‘People’. Sedley is right to criticise Sumption’s 2011 Mann lecture, developed in his 2019 Reid lectures, warning judges not to meddle in politics (Birkinshaw 2020b). I find the critique spot on and he clearly shows that Sumption did not fully understand how *droit administratif* operates. Neither mentions, however, one crucial constitutional reform of 2008 in France that allowed the Conseil d’Etat (and the civil appeal court) to refer a case to the Conseil Constitutionnel for the latter to determine the constitutionality of legislation and to declare it invalid. From a former century, he includes among the judicial vignettes Lord Mansfield, and words quoted by Lord Mance chime well here:

In another famous decision, *Alderson v Temple* (1768) 4 Burr 2235, 2239, he showed a different concern: ‘The most desirable object in all judicial determinations, especially in mercantile ones (which ought to be determined upon natural justice, and not upon the niceties of the law) is to do justice’. [According to Junius in the *Evening Post* 1770] ‘In contempt of the common law of England, you [Mansfield] have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect?’ (Mance 2011)

Sir Thomas More is also there—Henry VIII’s protagonist and not the NHS Covid 2020 hero, as is the far lesser known John Warr, 17th-century polemicist, radical and fierce (fervent) egalitarian.

As a future judge who played a session with Dylan in 1962, he clearly appears disenchanted with the star Dylan was becoming by 1965; by 1966 an icon. Dylan has ‘given up the effort to write better songs’ (in May 1965: Sedley 2018: 258). *Highway 61 Revisited* and *Blonde on Blonde* followed in 1965 and 1966 respectively and, maybe after a motorbike crash revived his talents, Dylan hasn’t stopped recording since!

Finally, the short ‘Occasional Pieces’ show his skill as a story-teller and humourist.

These two books are richly entertaining, full of insight, wisdom and humanity. *Lions*, he writes, is written primarily for judges, practitioners and students, although he hopes legal academics, legal historians and

political scientists will find things to think about. This comes after an apologia for not being a professional academic. I am reminded of Karl Llewellyn's aphorism on lawyering: 'Technique without ideals is a menace. Ideals without technique is a mess' (1945: 346). This is far from saying that a possessor of technique and ideals may not utilise them for evil purposes. It does emphasise the aridness of technique alone in the law unless combined with deeper objectives—one hopes aiming for justice.

In 'Colonels in horsehair' (Sedley 2018: chapter 21, 162), which is a review of sceptical essays on human rights by academic lawyers, Sedley expresses his own reservations on human rights in operation: capture of rights litigation by the already powerful and wealthy; a billiard-table view of society where individuals simply bounce haphazardly and momentarily off each other; the state viewed as the natural enemy and not powerful private concerns so graphically illustrated by data tech and tech and finance corporations. But of the book itself, he writes, it is a 'jeremiad' not against the 'deep structures of law but at the modes of its administration' (ibid). Sedley has set the examination of the deep structures of common law, the 'grain within the stone' as Jacob Bronowski in the TV series from the 1970s—*The Ascent of Man*—almost expressed it, at the heart of his writings. His work deserves a readership far beyond judges, practitioners and students. It should be read by anyone who cares about justice, the rule of law and the accountability of those, at whatever level, who wield governmental power. I end with the submission that the judicial guardians of the constitution must be independent, display fortitude, and act with integrity and sagacity in following the deep structures of the law. Otherwise *facilis est descensus averno*.

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HAROLD LASKI AND HIS CHINESE DISCIPLES: A WORKSHOP ON THE LEGACY OF LASKI'S LEGAL PHILOSOPHY

XU TING

University of Essex

Abstract

On 2 July 2020, a virtual workshop entitled 'Harold Laski and His Chinese Disciples: A Workshop on the Legacy of Laski's Legal Philosophy' was organised by Dr Ting Xu (School of Law, University of Sheffield; now Professor of Law, University of Essex). This workshop was supported and funded by Professor Xu's British Academy Mid-Career Fellowship (2019-2020) on 'Harold Laski and His Chinese Disciples: Using Biographical Methods to Study the Evolution of Rights'. This workshop provided the first opportunity for UK and Chinese studies scholars to discuss Laski's long-neglected impact on China, contributing to reviving an interest in the significance and legacy of Laski's legal philosophy. Speakers included eminent scholars who have conducted research in related areas, including Professor Roger Cotterrell (Queen Mary University of London), Professor Ross Cranston (London School of Economics and Political Science (LSE)), Dr Peter Lamb (Staffordshire University), Professor Martin Loughlin (LSE), Professor Michael Palmer (SOAS University of London) and Professor Francis Snyder (Peking University School of Transnational Law). Twenty-five people participated in the workshop, including academics, students and several members of the public.

[A] INTRODUCTION

This workshop regarding the influence of Harold Laski on China had several objectives. The first was to uncover Laski's impact on intellectual thinking and institution building, in particular the evolution of rights, in Republican China (1911-1949). In addition it aimed to apply biographical methods to the study of law and explore new materials and methods for comparative law, legal history and socio-legal studies. And, thirdly, it was hoped that the workshop would revive interest in the legacy

of Laski's legal philosophy and its contemporary implications as part of the study of the legal history of China–Britain relations. These aims of this workshop also formed the key themes in the discussion.

[B] CONTEXT

Harold Laski (1893-1950) was one of the most important twentieth-century public intellectuals. He taught political science at the LSE from 1926 to 1950. He was also one of the major theorists of democratic socialism. While Laski's impact on the English-speaking world has been well studied (see, for example, Martin 1953; Kramnick and Sheerman 1993; Newman 1993), his equally profound influence on intellectual thinking and institution building in Republican China (1911-1949) and its contemporary implications have been overlooked by both academics and lay audiences for decades.

China's search for modernity and democracy has been heavily indebted to Laski, even though Laski never set foot in China, and China never occupied a place in his writing and thinking. The discussion and dissemination of Laski's work was driven by Chinese intellectuals' search for solutions to what were seen as 'indigenous' problems standing in the way of the attempt to build a modern and democratic China. Laski's idea of rights was particularly attractive to Chinese intellectuals and had a great impact on the conception of human rights in Republican China. The appreciation of Laski's work was, however, interrupted by Communist rule in 1949. The development of rights in China was suppressed in the Cultural Revolution (1966-1976), and Laski's significance in China was therefore neglected for decades.

Laski's teaching influenced many Chinese students when he taught in the United States in 1916-1920. Those students include Zhang Xiruo (1889-1973, Professor of Political Science at Tsinghua University and Secretary of Education 1952-1958) and Lu Xirong (1895-1958, Head of the School of Law at the National Central University and one of the founders of the Chinese Association of Political Science). Zhang Xiruo published a book review on Laski's *Communism* in *Xiandai Pinglun* (*Modern Review*) in 1927, which was probably the earliest Chinese language review of Laski's work. Zhang Xiruo wrote *Zhuquan lun* (*On Sovereignty*) in 1925, one of the earliest introductions to Laski's political thought in China. Lu Xirong published a discussion of Laski's political thought on sovereignty in 1934.

Laski also influenced Chinese intellectuals who did not study in the United States but who had travelled to Europe to pursue further study, for example Zhang Junmai (also known as Carsun Chang, 1887-1969, a social democratic politician, theorist of human rights, and drafter of the Constitution of Republican China). Zhang Junmai translated Laski's *Grammar of Politics* into Chinese in the years 1926-1928.

The British parliamentary system and cultural and philosophical traditions attracted many Chinese students to choose to study in the United Kingdom. After Laski returned to England and started teaching at the LSE in 1926, he supervised a number of Chinese students, including Qian Changzhao (1899-1988, secretary of the Ministry of Foreign Affairs 1928-1929 and Senior Vice-Minister of Education 1930-1932), Chen Yuan (also known as Chen Xiyong, 1896-1970, Dean of the Faculty of Arts at Wuhan University), Hang Liwu (1903-1991, Professor of Political Science at the National Central University, founder of the British-Chinese Culture Association, and Deputy Minister of Education 1944) and Wang Zaoshi (1903-1971, lawyer and advocate for human rights and Head of the Department of Political Science at Guanghua University). There were also scholars who may not have been directly supervised by Laski but considered themselves as Laski's students, for example Luo Longji (1898-1965, founder of the China Democratic League and advocate for human rights).

In the 1920s, these Chinese elite students returned to China and became academics, government officials and journalists. They occupied positions of great influence before the Communist Party took power in 1949. In China, Laski's students formed literary societies and provided intellectual platforms for the dissemination of Laski's thoughts. They also influenced more Chinese intellectuals to discuss, translate and publish Laski's work.

[C] PAPERS DISCUSSED AT THE WORKSHOP AND BIOGRAPHICAL METHODS

The workshop started with Professor Xu's presentation on her draft paper entitled 'Travelling Concepts: Harold Laski's Disciples and the Evolution of the Human Rights Idea in Republican China (1919-1949)'. This paper focuses on a case study of Harold Laski's long neglected but very significant influence on the evolution of human rights, one of the key concepts that has emerged in China's search for modernity and democracy. It examines the idea of human rights as a 'travelling concept', draws on Edward Said's discussion on 'travelling theory' and published

biographies of the Chinese intellectuals who were highly influenced by Laski, and applies and develops actor–network theory in a new context. In so doing, this article explores the ways in which Laski’s conception of rights was translated, reinterpreted and recast as a human rights idea in Republican China (1911-1949). It sheds new light on our understanding of the ways in which the concept of human rights may ‘travel’ across different contexts.

Professor Xu also discussed the application and development of biographical methods in her presentation. Biography provides a rich and important source of materials for socio-legal studies and the study of legal history (Sugarman 2014). As a methodological strategy, it remedies the shortcomings of the dominant approach to studying law that overlooks individual stories and contributions in favour of an examination of concepts, systems and events. For example, the LSE Legal Biography Project draws upon legal biographies and autobiographies to study the legal system and culture and the evolution of case law and statute. Other initiatives include Duxbury (2004) on Pollock, Lacey (2004) on Hart, Dukes (2008 and 2009) on Kahn-Freund, and Mulcahy and Sugarman (eds 2015) on legal biography and legal life-writing. However, very few of these studies have a strong comparative focus.

Professor Xu discussed the ways in which the paper developed a comparative biographical approach to studying the ways in which the human rights idea travelled in China, transcending jurisdictional and disciplinary boundaries. It did so by examining a series of biographical studies of the Chinese intellectuals who were highly influenced by Laski’s discussion on rights and their relationships with individuals, groups and the state. Analysis of individual biographies is located in the cultural, political and social context in which Laski and these Chinese intellectuals lived. This comparative biographical approach falls into the genre of ‘intellectual biography’ through which we can examine ‘wider movements, ideas, and processes’ through the medium of the individual (Parry 2010: 217). The combination of Said’s travelling theory, actor–network theory and biographical methods enables the examination of individual contributions to the emergence of the human rights idea and the ways in which the human rights idea travelled through the individual’s interaction with their friends, mentors, networks, institutions and social movements, as well as their translation and dissemination of Laski’s works. The human rights idea was further developed in a larger debate on human rights among Chinese intellectuals and embedded in the draft of a new constitution.

[D] DISCUSSION AT THE WORKSHOP

Professor Xu's talk was followed by five presentations from the speakers and rigorous and in-depth discussion of her paper from the audience; each presentation addressed one of the objectives/themes of the workshop. Professor Cotterrell's and Professor Palmer's presentations addressed the theme on Laski's impact on intellectual thinking and institution building, in particular, the evolution of rights in Republican China. Professor Cotterrell discussed Laski's focus on rights and explored the possibilities of developing Laski's work on rights from the sociological perspective and relevant challenges. Professor Palmer introduced Laski's legacy in China as part of a wider LSE influence in China on the thinking and practice of issues such as rights and liberty and suggested that the comparative legal studies literature on the diffusion of law might be a useful perspective with which to examine the impact in China of Laski and other scholars at the LSE. Professor Cranston's presentation focused on the use of biographical methods in legal research. He gave an overview of the LSE Legal Biography Project, introduced different types of legal biography, and examined the limits of traditional legal biography. Dr Lamb and Professor Loughlin focused on the legacy of Laski's legal philosophy in their presentations. After giving a brief overview of Laski's legal philosophy, Dr Lamb discussed Laski's legacy in China after the 1950s. He argued that Laski's influence is still alive and important for promoting democracy and the rule of law in China. Professor Loughlin discussed the ways in which Laski provided an intellectual framework for public law, as well as political jurisprudence. Professor Snyder outlined and examined the legal history of China–Britain relations from the Opium Wars to the handover of Hong Kong in 1997 and its contemporary implications in his presentation.

[E] CONTEMPORARY IMPLICATIONS

For the contemporary implications of the workshop, we examined the complex interaction of social, political, economic and intellectual forces that have shaped the travel of legal and political ideas in general and the human rights idea in particular from a transnational perspective. Laski seems almost forgotten today. Yet at the workshop we discussed the relevance of Laski's ideas to many contemporary issues we are dealing with in our own time, including the relationship between the individual, society and the state, the socio-economic conditions that make social democracy feasible, and the ways in which we may mitigate the tensions between liberty and state control.

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NEW EMPIRICAL STUDIES ON THE SUPREME COURT OF THE UNITED KINGDOM: A BOOK TALK

ALEX SCHWARTZ

Faculty of Law, The University of Hong Kong

On 2 June 2020, the Centre for Comparative and Public Law (CCPL) at the University of Hong Kong hosted a ‘webinar’ discussion with the authors of two recently published and path-breaking empirical studies on the UK Supreme Court: Rachel Cahill-O’Callaghan, author of *Values in the Supreme Court: Decisions, Division and Diversity* (Hart 2020); and Chris Hanretty, author of *A Court of Specialists: Judicial Behaviour on the UK Supreme Court* (Oxford University Press 2020).

Cahill-O’Callaghan explained how her book, *Values in the Supreme Court*, draws on theory and methods from psychology to show that varying value-orientations underpin decisions in the Supreme Court. In particular, she finds that split decisions often reflect a division between judges with opposing value priorities: those judges that are inclined to favour the values of traditionalism and conformity and those judges that are inclined to favour the value of universalism.

Hanretty explained how his book, *A Court of Specialists*, illuminates the powerful influence that legal specialisation has on all stages of the Supreme Court’s decision-making process. As Hanretty explained, however, his book’s empirical findings suggest that political ideology also has an important influence on the court’s decisions—although most decisions are unanimous, patterns of agreement and disagreement in split decisions can be explained in terms of an underlying left–right ideological dimension of disagreement.

The ensuing discussion was chaired by Alex Schwartz, Deputy Director of CCPL, and it touched on methodology, future directions for empirical research on judicial behaviour in the UK, and the political implications of the books’ important findings.

**FU HUALING, MICHAEL PALMER, ZHANG
XIANCHU (EDS)—
TRANSPARENCY CHALLENGES FACING CHINA**

BJÖRN AHL

University of Cologne*

That China faces transparency challenges has never been more obvious than during the first weeks of the Covid-19 pandemic. When the whistleblower doctor Li Wenliang and others spread warnings of an unknown severe respiratory illness online at the end of December 2019, the information was censored, and police reprimanded the whistleblowers. China's online censorship regime has slowed down local and global responses to the pandemic and demonstrated how restricting information in China can have extremely far-reaching global implications. Edited by Fu Hualing, Michael Palmer and Zhang Xianchu, this volume on *Transparency Challenges Facing China* is a very timely and highly relevant contribution to an evolving field that investigates the regulation of transparency in authoritarian systems.

Transparency in liberal rule-of-law systems is a fundamental element of the legal and political order that enables democratic processes and is upheld by the effective judicial protection of freedom of speech and other fundamental rights. In contrast, authoritarian systems are built on non-transparent decision-making processes. Consequently, they embrace transparency in a more instrumentalist and selective manner. This general perception of the state of transparency in authoritarian legal systems has been reinforced by the initial cover-up of information about the spread of Covid-19 in Wuhan. Zhang Xianchu summarizes the general limits of transparency in an authoritarian system in the chapter about 'Transparency Challenge to China's Socialist Market Economy'. He concludes that 'the top priority of totalitarian governance in China has remained the security and stability of the political regime, and this is to be safeguarded even at the cost of the efficiency of the market and social

* Professor and Chair of Chinese Legal Culture, University of Cologne.

justice' (at 42) and, we may add, in the case of the Covid-19 pandemic, at the cost of people's health and life.

However, what the implications of that goal of preserving regime stability are for the regulation of transparency in different areas of Chinese law has been changing rapidly over the past two decades and requires in-depth analysis of those fields. Such valuable analysis is provided by this edited volume. The book distinguishes between three areas of regulation of transparency: market-oriented economic reforms, institutional and processual contexts, as well as themes that potentially challenge China's current political order ('political-legal sensitivities').

In the chapter about 'The WTO's Transparency Obligation and China' Henry Gao investigates the implementation of the international trade law requirement of the transparency of domestic trade-related laws and regulations. He concludes that the problems in the implementation process are mainly caused by the system of decentralized law-making and by conflicts amongst ministries at the central government level. The author argues that the limits of external pressure to improve transparency are determined by a political system that retains the overall claim to control information. Xi Chao and Cao Ning discuss the role of transparency in the Chinese securities market in the chapter 'Greater Transparency, Better Regulation! Evidence from Securities Enforcement Actions'. They find that investors react to information on enforcement actions against firms if the firms themselves release the information or if information disseminated by the regulator is reported in the financial media. Fu Hualing finds in the chapter about 'The Secrets about State Secrets: The Burden of Over-classification' that the Chinese government classifies much information as state secrets even though it does not qualify as such. The author argues that this practice of excessive secrecy has a negative impact on governance. He concludes that the main reasons for this practice lie in the overly vague definition of state secrets, a decentralized classification system, the lack of meaningful judicial review, as well as a secretive mindset within the administration.

With regard to institutional and processual contexts, the post-2013 period has witnessed a concentration of personal power in the hands of the Chinese Communist Party General Secretary. This development is widely regarded as a return to the unchecked authoritarianism that undermined the law and institutions. However, against the backdrop of rule-of-law regression and illiberal policies the current administration has introduced ground-breaking institutional reforms. Many of them have also brought about the somewhat counterintuitive result of increased

transparency and institutional autonomy. A case in point is the increase of judicial transparency that was achieved in 2014 by the introduction of the Supreme People's Court open access database archiving the decisions of every court in China. Currently, the database contains over 90 million court decisions and has overtaken almost all Western liberal democracies with regard to the accessibility of full-text court decisions. The database has changed the structure of communication among legal professionals and promoted the centralization of the judiciary and the professionalization of judges. Susan Finder, in her chapter on 'China's Translucent Judicial Transparency', goes beyond the open access database for court decisions. She discusses the Judicial Work Secrets Regulations that require, *inter alia*, keeping secret how various actors of the party-state affect the operation of the judiciary. Transparency requirements also include the publication of basic information about judges and courts and judicial statistics. Another focal point is the instruments for guiding the adjudication of lower courts, such as judicial normative documents, opinions, responses and local court guidance. The author concludes that the development of a 'comprehensive legal framework institutionalising the right to access to judicial information' (at 173) is rather unlikely. Instead, the Supreme People's Court is seeking an incremental increase in transparency, which is currently implemented unevenly and limited by political sensitivities. Further, Sun Ying and Zhang Xiang review transparency initiatives in legislative processes in their chapter on 'Strategic Openness: An Overview of Open-Door Legislation in the PRC'. They conclude that managed participation in law-making contributes to the resilience of the Chinese authoritarian regime as it serves as an instrument to absorb expressions of social discontent. Consequently, the current transparency practices in law-making processes are unlikely to lead to a democratization that imposes effective limits on state authority. In his chapter on 'Public Hearing in China: A Failed Revolution or a Successful Distraction?' Huang Yue analyses public hearings in Chinese administrative procedure law. With regard to hearings in environmental impact assessments, the author found a lack of responsiveness, as there is only a 'rather vague linkage between the hearing and policy-making outcomes' (at 196). Overall, given the tightening authoritarian framework, he questions the sustainability of participatory elements in administrative policymaking. In the chapter 'Transparency, Propaganda and Disinformation: "Managing" Anticorruption Information in China', Li Ling assesses the quality of transparency of anticorruption activities. She finds that publicly available information on corruption has increased significantly during the post-

2013 period. She argues that control over such information has been tightened in order to produce convincing propagandistic anticorruption narratives that isolate corrupt conduct from overall affairs of the Party.

The third part of the book relating to political-legal sensitivities discusses the application of legislation on open government information, the social credit system, citizen participation and online public supervision. In the chapter on ‘Transparency as an Offence: Rights Lawyering for Open Government Information in China’ Zhu Han and Fu Hualing discuss how transparency legislation has been used as a tool for legal activism. They found that the formal open government information institution ‘has largely failed to address the transparency concerns of rights lawyers and other sectors of civil society’ (at 250). This caused an increase in extra-institutional mobilization for transparency, which in turn triggered more repressive action of the party-state. Chen Yongxi discusses the judicial practice of open government information litigation in the chapter entitled ‘Taming the Right to Information: Motive Screening and the Public Interest Test under China’s FOI-like Law’. He concludes that the ‘Chinese courts haven’t identified or recognized any public interest that pertains directly to holding the government accountable to the public’ (at 288). Instead, courts tend to require that those requesting information do so by asserting specific rights, such as property rights. Peng Chun analyses the practice of abusive open government information requests in the chapter ‘The Shadow of Transparency: Defining, Debating and Deterring Vexatious OGI Requests in China’. Chen Yongxi and Anne Sy Cheung study the protection of personal data within the framework of the social credit system in the chapter about ‘The Transparent Self under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System’. While there exists an impressive body of literature on the evolving Chinese scoring system that evaluates the trustworthiness of government bodies, corporations and individuals, scholars have paid less attention to the legislation protecting personal information. The chapter fills this gap in the literature. The authors conclude that current legislation does not sufficiently limit the party-state’s collection, aggregation and exploitation of personal data on the citizens’ social behaviour. Finally, Han Rongbin discusses various public online participation mechanisms in the chapter entitled ‘Supervising Authoritarian Rule Online: Citizen Participation and State Responses in China’.

Overall, this is a timely and thought-provoking book that contains excellent up-to-date research. It covers broad terrain and focuses on most

crucial areas of authoritarian regulation of transparency. The book is highly recommended reading for students and researchers of China who are interested in legal and social science approaches to transparency.



Transparency Challenges Facing China (2020) FU Hualing, Michael Palmer, ZHANG Xianchu is published in hardback by Wildy Simmonds & Hill in the Law in East Asia Series, priced £65.00/£24.04 ISBN 9780854902606.

LING ZHOU—ACCESS TO JUSTICE FOR THE CHINESE CONSUMER: HANDLING CONSUMER DISPUTES IN CONTEMPORARY CHINA

MARIA FEDERICA MOSCATI

University of Sussex

This is an impressive and well-written analysis of consumer dispute resolution in contemporary China. With its market-oriented reforms, the People's Republic has experienced enormous socioeconomic changes over the past 30 years, so that the comrade in Mao's times has now become a consumer, and one who busily enjoys the many shopping malls and burgeoning online spending opportunities. The book is based on intensive field research in a large city in China and, at one level, offers a first-class ethnographic account of the kind that is very difficult to achieve in the authoritarian context of the People's Republic. Indeed, it is also a very exceptional study of the nature and workings of a specific Chinese social organization (the local Consumer Council).

The monograph explores issues that relate not only to consumer protection, but also to alternative dispute resolution, socio-legal studies, and Chinese legal development. It also shows the value of bottom-up studies of Chinese law and the legal system, which hitherto have been lacking. Many existing studies of Chinese law have been exclusively top down, overlooking important aspects of Chinese legal development and the manner in which local institutions and processes actually work. On the basis of her detailed empirical research, Dr Zhou in this book offers important insights into law, justice and everyday life at the local level in China today, and this volume therefore fills an important gap in the current literature. These local processes are significant for understanding broader issues of order maintenance and civil society development. In looking at consumer disputes *per se*, Dr Zhou shows how they are for the most part 'dissolved' rather than 'resolved'. Even local judges see compromise and stability as preferred outcomes, rather than deciding issues by the application of legal norms. So, while law casts its shadow (including in particular, the possibility of punitive damages for breach of the provisions of consumer law and regulations and of food safety law and

regulations), negotiations and mediation play very substantial roles in the handling of consumer disputes.

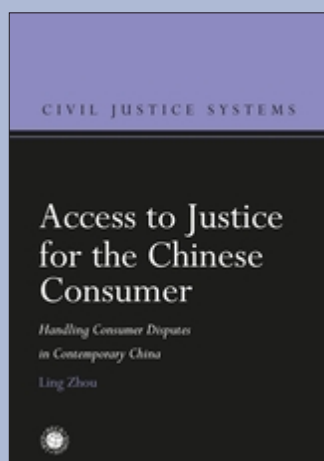
Also important are a group of ‘professional consumers’. These social actors are not legally qualified but rather educate themselves in consumer and related law and with impressive skill use a range of legal, social and political processes and possibilities to secure what are often good settlements. They are thereby able to make a living from their consumer ‘work’. Longstanding Chinese distrust of strategic conduct in asserting rights, however, also makes these local figures and their claims a matter of some controversy, and local officials sometimes take the view that such strategic conduct is not ethically correct—and therefore to be discouraged. On the other hand, Dr Zhou sees these figures as an equivalent, in China’s authoritarian context, of the ‘consumer citizen’, who are in their own way contributing to a stronger civil society in the People’s Republic. She locates her findings to greater theoretical effect by contextualizing the ‘Comrade to Consumer, to Consumer Citizen’ progression in China in comparative legal studies.

Chapter 1 of the study sets the scene, and points out, among other things, the limited attention given to consumer issues in China in the English language studies of both Chinese legal development and also the wider comparative consumer protection literature. In the Chapter (3) which follows, the nature of and problems in consumer protection in China are considered. As China remains a socialist system and one with traditions of paternalistic governance, the notion of a consumer with ‘rights and interests’ (*quanyi*) as seen in contemporary Chinese law and society is considered, including analysis of the extent to which in the People’s Republic there has now emerged something like the ‘consumer citizen’ found elsewhere in the world, especially western liberal democracies. This theme is also considered in some detail in Chapter 5.

Chapters 3 to 7 discuss findings primarily based on Dr Zhou’s fieldwork, analysing consumer protection and regulatory bodies, the manner in which the consumer grievant chooses a particular forum and processes for securing redress, how these bodies handle not only consumer grievances *per se* but also reports of defective consumer goods and service. Also examined are the ways in which Chinese understandings of ‘mediation’ are culturally distinctive, and the book shows that the preferred style of mediation is one that is strongly interventionist and judgmental in nature, close to what would be identified in the general literature as ‘evaluative’ and ‘broad’ in style. Chapter 5 offers a very substantial analysis of a new kind of figure in local consumer protection—

the ‘professional’ consumer or complainant—that is, non-lawyers who develop expert knowledge about consumer standards, and rules and practices of complaint and redress. Official attitudes, often ambiguous in nature, towards their presence and work are also analysed. Chapter 6 also provides an examination of the relationship between civil proceedings, administrative litigation and other forms of court-focused access to consumer justice in China. Like the preceding Chapter, it considers in some depth the ‘professional’ complainants (or litigants), who are regular users of the courts in consumer disputes, and explains the strategies by which they achieve their compensation goals. The following Chapter (7) shows the reader the various social and political methods that consumers use to assert their rights and interests, demonstrating how new, more public, avenues of redress are now being used, including the possibility of public interest litigation, requests for disclosure of government information and media-assisted online dispute resolution. But the book also points out the significance of China’s unwillingness to develop an ombuds system—either in general or specifically for the consumer. The concluding Chapter (8) argues *inter alia* that the consumer protection system in the People’s Republic is such that, while functioning primarily through process of negotiation and mediation in the shadow of administrative power, it nevertheless often delivers a great deal of simple, speedy and inexpensive justice for the Chinese consumer.

The study offered by Dr Zhou shows the reader in a remarkable manner a China that is becoming more consumer friendly and, despite constraints, having developed some degree of consumer activism. Although this book is primarily intended as an empirical study, it is also apparent that the research findings of the study have significant theoretical relevance and will have an important impact. It is likely that a wide range of readers will find much to interest them in this fine piece of work.



Access to Justice for the Chinese Consumer: Handling Consumer Disputes in Contemporary China (2020) by Ling Zhou is published by Hart & Beck and is part of the Civil Justice Systems Series edited by Christopher Hodges. Price: £55. ISBN 9781509931057.

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

Re-opening of IALS Library

The Library of the Institute of Advanced Legal Studies (IALS) is now offering the following services.

'Book a Study Desk' service

Via the new **Book a Study Desk** scheme, IALS Library members can now book one of 55 individual 'socially distanced' library study desks on the third and fourth floors of IALS Library using an online booking system at home. Once a booking is confirmed, members can visit 17 Russell Square to use the booked study desk and to browse our national law collections on the third and fourth floors.

- ◇ A staff-fetching service for books located on floors L2 and L3 is also available for readers.
- ◇ Two self-service photocopiers are available for reader use on the second floor.
- ◇ 10 library research carrels have been reopened.

'Click, Collect & Return' book loan service

IALS Library members can continue to request books via the IALS Library catalogue at home and come in to IALS to borrow the

Library's books from the Library Enquiry Desk on the second floor.

All other library services continue to be available virtually to meet readers' legal research needs:

- ◇ Quick questions: Click on the 'Chat with a librarian' side bar
- ◇ Longer reference enquiries: email ials@sas.ac.uk
- ◇ **Remote access** to our extensive collections of e-books, e-journals and legal databases
- ◇ **Virtual legal research training sessions**, delivered live
- ◇ **Autumn 2020 training programme**
- ◇ Detailed **online guides** to our research collections
- ◇ **Podcasts**
- ◇ **A guide to open access and other free online resources** for legal researchers
- ◇ **Join IALS Library**

Building Transformation Project Update

The Project Team is continuing to explore options and costs for limited, further works on the lower floors of the Institute.

Barnaby Hone Appointed as Visiting Professor of Practice

The first Visiting Professor of Practice took up his role at the Institute of Advanced Legal Studies (IALS) on 1 October 2020. [Barnaby Hone](#) will strengthen the connection between IALS and legal practice, particularly in the work of the [Centre for Financial Law, Regulation and Compliance \(FinReg\)](#).

The position of Visiting Professor of Practice is a new one at IALS and is filled by invitation for a fixed term of one year. Appointment is made on the basis of professional standing; contribution to IALS; and demonstrated interest in promoting the importance of links between academic scholarship and legal practice and policymaking.

The inaugural Visiting Professor of Practice, Barnaby Hone, has a wealth of experience in international asset recovery, white collar crime, and financial regulation. He is recognised in these areas in the Legal500 and Chambers and Partners. His practice has encompassed work throughout Europe, Africa, the Caribbean, the Americas and Asia, including providing advice to countries such as Kosovo and the British Virgin Islands on developing or improving their asset recovery legislation. He is a contributor to the leading practitioner guide on asset recovery: *Millington and Sutherland Williams on the*

Proceeds of Crime Act (Oxford University Press, 5th edn, 2018). He also sits as a Fee Paid Tribunal Judge, presiding over Immigration and Asylum matters.

Upon his appointment being confirmed, Barnaby stated:

I am honoured to be appointed as the first Visiting Professor of Practice and look forward to building closer links between academics and practitioners.

Commenting on the appointment, the Director of IALS, Professor Carl Stychin, said:

I am delighted with the appointment of Barnaby Hone as the inaugural Visiting Professor of Practice at IALS. Barnaby brings an enormous range of skills and expertise to the Centre for Financial Law, Regulation and Compliance, and to the Institute more widely. His contribution will be invaluable, and we all look forward to welcoming him. Barnaby's appointment underscores—and enhances—the important role of IALS at the intersection of legal academia and practice.'

Selected Upcoming IALS Events

The Director's Series 2020/2021: Law and Humanities in a Pandemic

The Institute of Advanced Legal Studies (IALS) is pleased to announce the programme for the 2020-2021 [Director's Series of Seminars](#) on the topic of 'Law and Humanities in a Pandemic'.

This series of monthly remote workshops organized on the Zoom platform by IALS during the 2020-2021 academic year seeks to 'make sense' of the wide-ranging relationship between law and the pandemic through the insights of the humanities, broadly understood as the set of cultural influences which are shaping the use of law and the responses to it. Authors will present their work-in-progress for 20 minutes, followed by questions from the audience and discussion. The intention is to publish the papers following the completion of the series.

The COVID-19 pandemic already has had a vast array of legal implications which have dramatically altered daily life. While liberal, universal rights such as liberty and privacy are being radically curtailed in the name of public health, legal responses impact upon populations in radically unequal ways. These dimensions include—but certainly are not limited to—race, gender, disability,

vulnerability and social class. Legal interventions are consistently justified on the basis of science, which is assumed to be unequivocal and beyond debate. At the same time, resistance to legal action is also apparent, as rumours and conspiracy theories—like the virus itself—multiply around the globe.

Alongside the introduction of public policy measures, systems of legal regulation and compliance (which were often themselves justified on the basis of public protection) are being modified or suspended in the name of necessity, with no indication as to when or how they will be restored. Moreover, the relationship between law and discretion has been reshaped, and this in turn has impacted upon individuals and communities.

Attendance at the workshops is free, but advance registration is required. Registration information will be available on the 'Events' section of the IALS website.

Centre for Financial Law, Regulation and Compliance (FinReg) Webinar Series: The Bribery Act—Ten Years On

The Bribery Act received Royal Assent in April 2010. This expansive piece of legislation was introduced not only following recognition that the previous 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).

The 2010 Act both updated and reformed the anti-bribery framework. It contains a robust range of offences: bribing a person; being bribed; bribing foreign officials; and failure to prevent bribery. The Act extends to activity that takes place in the UK 'or elsewhere'. Significantly, not only can the company itself be prosecuted, but so too can individual officials (with penalties up to 10 years' imprisonment).

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 to say: '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. Questions persist as to whether the Act is being 'adequately enforced'; 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).

Starting on 10 November 2020, the FinReg has organized a series of webinars to discuss and analyse the Bribery Act, 10 years on from its enactment.

Information Law and Policy Centre (ILPC) (Online) Annual Conference 2020: AI and the Rule of Law—Regulation and Ethics

This year's event will take place online on Thursday 19 and Friday 20 November.

Lord Clement Jones CBE will deliver this year's ILPC Annual Lecture entitled: 'AI: Time to Regulate?' Lord Clement-Jones is Chair of the House of Lords Select Committee on Artificial Intelligence and Co-Chair of the All-Party Parliamentary Group on Artificial Intelligence.

KEYNOTE SPEAKERS

- ◇ Ellis Parry (Information Commissioner's Office)
- ◇ Joanna Bryson (Hertie School, Berlin; University of Bath)

- ◇ Julian Huppert (University of Cambridge; Home Office Biometrics and Forensics Ethics Group)
- ◇ Graham Smith (Bird and Bird)
- ◇ Lorna Woods (University of Essex)
- ◇ Hamed Haddadi (Imperial College London; Brave Software)

Podcasts

Selected law lectures, seminars, workshops and conferences hosted by the Institute of Advanced Legal Studies in the School of Advanced Study are recorded and accessible for viewing and downloading from the [SAS IALS YouTube channel](#).

Contributors' Profiles

BJÖRN AHL

Björn Ahl is Professor and Chair of Chinese Legal Culture at the University of Cologne. He is also President of the European China Law Studies Association. Professor Ahl has considerable experience in China law research. His research focuses on constitutional development, in particular on judicial reforms and rights litigation, in China. Chinese administrative law and practice of public international law are further focal points in his research. Areas of research interest include comparative law, legal transfers, and legal culture, especially as related to Greater China and Chinese legal development. Professor Ahl has also recently taken up a position as a visiting professor at the University of Helsinki's Finnish-China Law Centre, where he will work with colleagues on issues of Chinese law, including comparative law, in China, public law, the social credit system, court practice, and Chinese understandings of international law. Email: bjorn.ahl@uni-koeln.de.

PATRICK BIRKINSHAW

Patrick Birkinshaw is Emeritus Professor of Public Law at the University of Hull. He was Editor in Chief of the quarterly journal *European Public Law* between 1995

and 2018. He has authored numerous books including: *Government and Information* (with Dr Mike Varney 2019) and *European Public Law—The Achievement and the Brexit Challenge* (2020). He worked as a specialist adviser to the Commons Public Administration Select Committee and frequently acted as a government adviser. He was a member of the transparency team for Nirex and the Nuclear Decommissioning Authority and was an ombudsmen on information requests. He has worked on several national research councils. Email: p.birkinshaw@emeritus.hull.ac.uk.

EJIKE EKWUEME

Ejike Ekwueme graduated from the University of Calabar in Nigeria with degrees in History and Law. He is a member of the Nigeria Bar and was also admitted as a Solicitor of the Supreme Court of England and Wales. He holds a doctorate degree in law with emphasis on financial crime, and a Masters' in Law in International Corporate Governance, Financial Regulation and Economic Law from IALS, University of London. He also holds a Masters' degree in International Transport and Maritime Law from London Metropolitan University. He is a Member of the Chartered Institute of Arbitrators, UK. He has previously, published on issues

relating to money laundering. His research interests are in financial crime, corporate governance, international arbitration and maritime law. Email: ejike.ekwueme@postgrad.sas.ac.uk and eeejike@hotmail.com.

AMY KELLAM

Amy Kellam is an Associate Research Fellow at IALS, University of London. 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 research on law and violence and is hosting a public event on domestic abuse for this year's [Being Human Festival](#). Email: amy.kellam@sas.ac.uk.

MARIA FEDERICA MOSCATI

Maria Federica Moscati is Senior Lecturer in Family Law at the University of Sussex. An Italian advocate and trained mediator, she holds a PhD from SOAS, University of London. Before undertaking her

doctorate, she worked for Save the Children Italy, specializing in children's rights. Her main research interests lie at the intersection of dispute resolution, access to justice, comparative family law, children's rights, sexual orientation and gender identity, reproductive health and rights. Several of her research projects have been awarded funding. Dr Moscati is co-director of the Centre for Cultures of Reproduction, Technologies and Health at the University of Sussex and joint editor of the journal *Mediation, Theory and Practice*. Email: m.f.moscati@sussex.ac.uk.

BARRIE LAWRENCE NATHAN

Barrie Nathan is a Visiting Professor at Sun Yat-Sen University, Guangzhou, China, and a Visiting Lecturer at SOAS, University of London. After graduating with an LLB (Hons) from King's College, University of London, he was called to the bar and has spent most of his working life practising as a barrister in a wide range of common law and chancery areas. He has appeared in virtually every type of court except the House of Lords/Supreme Court, although he was a pupil when he observed the leading trusts case of *Gissing v Gissing* argued in the House of Lords. He was the Principal Lecturer on the Lord Chancellor's Training Scheme for Young Chinese Lawyers for 10 years until the scheme came to an end. He has had articles published in *Trusts*

and Trustees, the *Journal of Comparative Law*, the *New Law Journal* and the *Solicitors' Journal*. He currently teaches Contract Law at SOAS on the LLB course and has previously taught Civil and Commercial Conflict of Laws, and Procedural Principles and Ethical Standards on the LLM. His research interests include the judiciary. He has an MA in Applied Linguistics from Birkbeck College, University of London. He is a keen photographer and some of his photos may be viewed on his [website](#).

PATRICIA NG

Patricia Ng currently works as an Access to Legal Services Adviser at the Mary Ward Legal Centre in London. She holds a PhD in law from SOAS, University of London. Her research interests include dispute processing and access to justice, particularly from law in context and socio-legal perspectives. She has mainly worked for the not-for-profit sector, in two main areas—housing and homelessness, and violence against women and girls.

She has contributed in a range of voluntary sector roles including as housing adviser and caseworker, campaigner, and through policy and research work in relation to gendered violence and its many impacts on black and minoritized women and girls. Email: patricia.ng@btinternet.com.

ALEX SCHWARTZ

Alex Schwartz teaches in the Faculty of Law at the University of Hong Kong. His research is focused on courts and judicial behaviour, particularly in the context of deeply divided, transitional, and crisis-prone polities. He is currently working towards a book on judicial power in 'difficult' contexts. Email: schwartz@hku.hk.

XU TING

Xu Ting is of Professor of Law at the University of Essex. She graduated with an LLB from Sun Yat-Sen University and then gained her LLM (with Distinction) and PhD from the London School of Economics. Professor Xu is the author of *The Revival of Private Property and its Limits in Post-Mao China* (Wildy, Simmonds & Hill Publishing, 2014), and co-editor of *Property and Human Rights in a Global Context* (edited with Jean Allain, Hart Publishing, 2015) and *Legal Strategies for the Development and Protection of Communal Property*, Proceedings of the British Academy, vol 216 (edited with Alison Clarke, Oxford University Press, 2018). Her research interests are situated in the fields of property law; comparative property law; Chinese law; law, governance and development; property and human rights; socio-legal studies; comparative law; political economy; and the travel of legal and political ideas from society to society.

Professor Xu is currently a British Academy Mid-Career Fellow (2019-2020) working on a project entitled 'Harold Laski and his Chinese Disciples: Using Biographical Methods to Study the Evolution of Rights in Republican China (1911-1949)'. Email: ting.xu@essex.ac.uk.

ZHANG XIAOYANG

Zhang Xiaoyang is a professor in the Law School of Beijing Foreign Studies University. He is now an Advisory Board Member of the *European Journal of Comparative Law and Governance*; Editorial Board Member of the *International Journal of Private Law*; Editor on the International Advisory Committee of the *International Journal of East Asian Studies*; and Advisory Board

Member of the *Journal of Philosophy of International Law*.

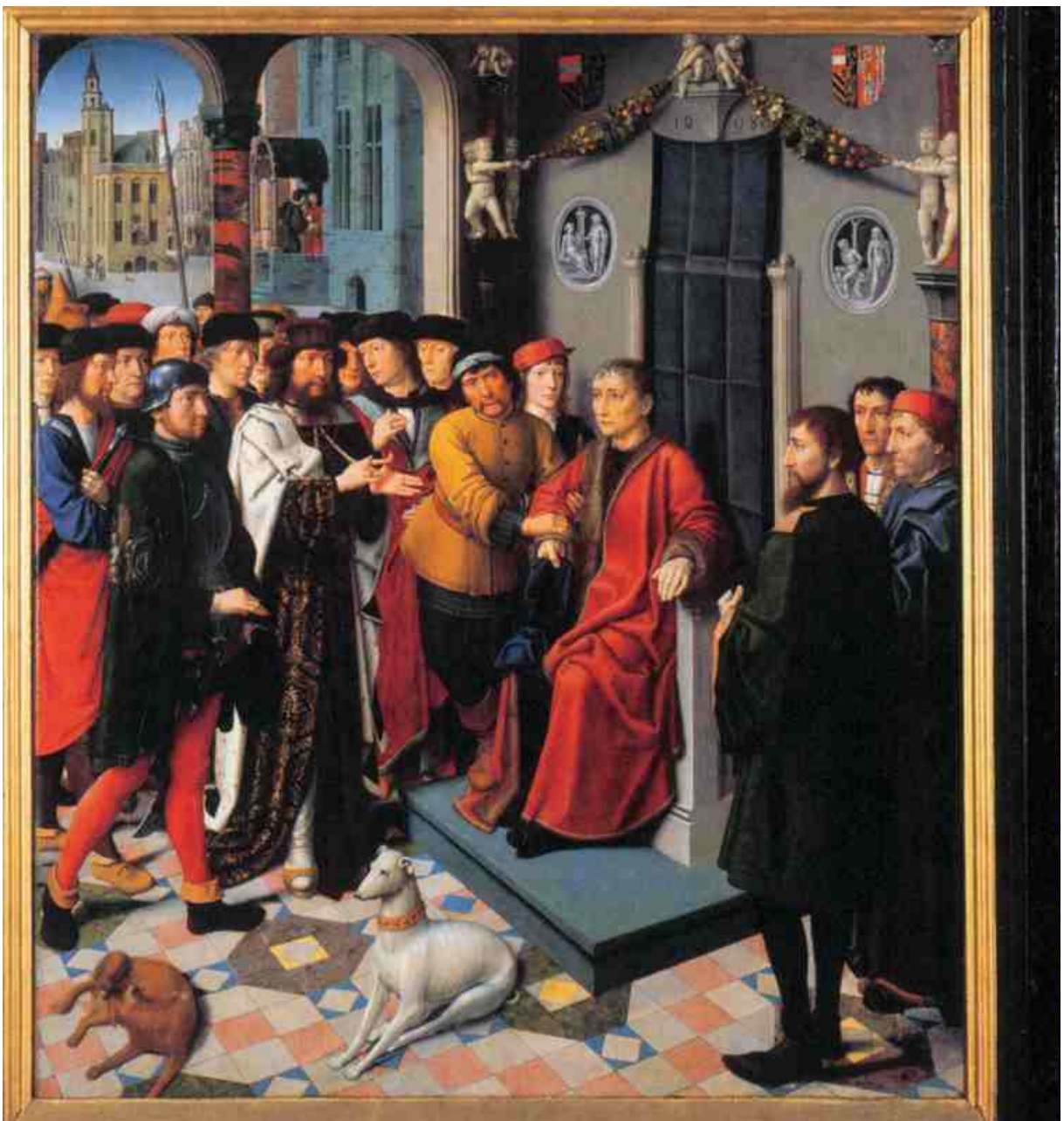
Xiaoyang has many papers to his credit released through international outlets such as the *International Company and Commercial Law Review*, *Business Law Review*, the *International Business Law Journal*, the *International Trade Law and Regulation*, *The Company Lawyer*, the *Denning Law Journal*, *Deakin Law Review*, the *Journal of International Commercial Law*, the *Journal of Business Law* etc. His sole-authored book *Chinese Civil Law for Business* is widely read by the international community. Email: zhangxiaoyang2002@hotmail.com.

Visual Law

In 1498, when Gerard David completed the *The Judgement of Cambyses*, the portrayal of secular subjects in a diptych—a format long associated with religious subjects—was established enough in Early Flemish art to merit little comment. Nonetheless, David's painting was then, and remains now, extraordinary for its overt

political messaging and graphic depiction of violence.

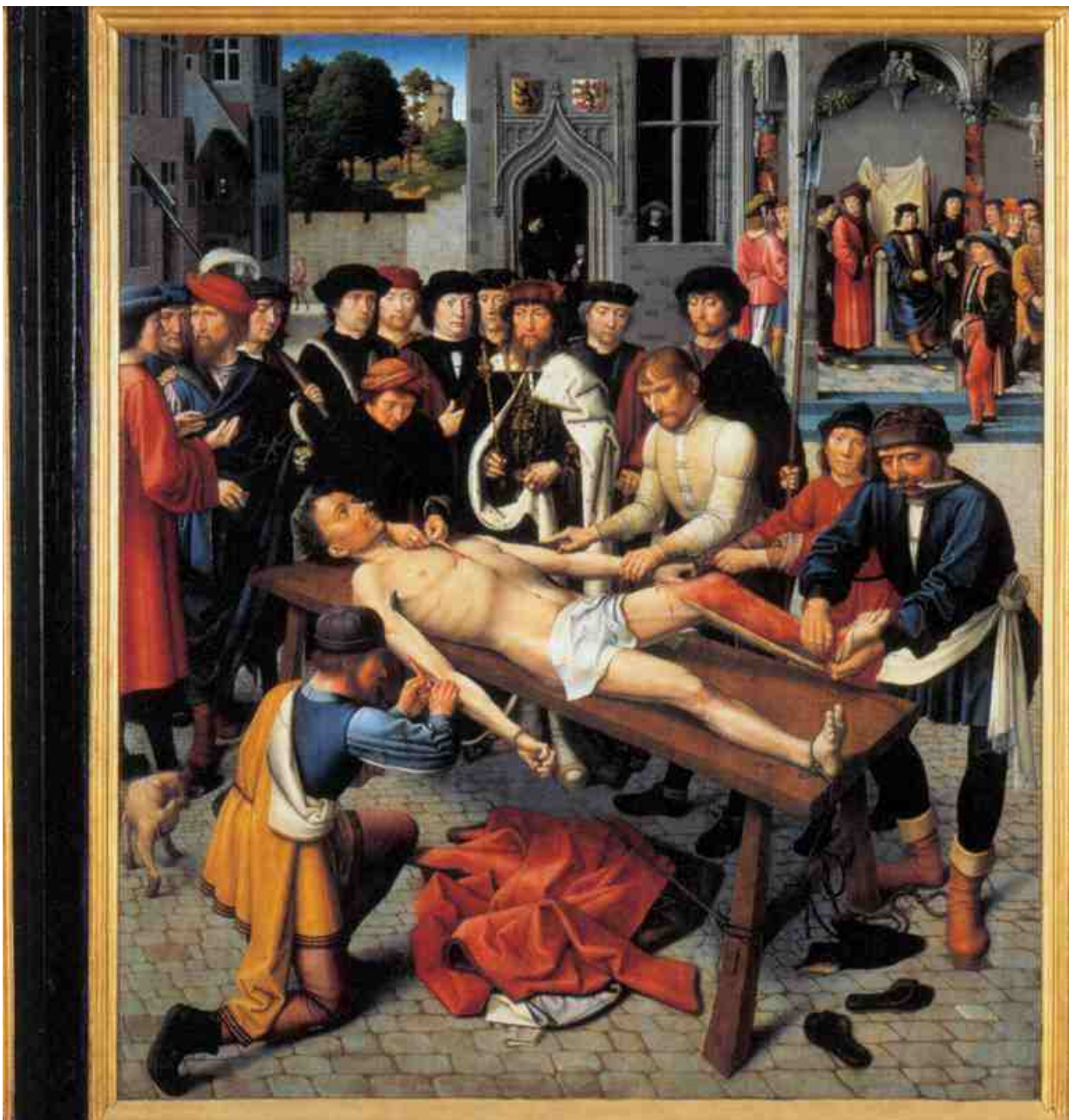
The diptych was commissioned by the aldermen of Bruges; a city that between 1482–1492 was in a state of turmoil following its rebellion against Maximilian of Austria. After the intervention of the pope and the Holy Roman Empire, Maximilian became regent



of a defeated Bruges in 1492. It was in this context that *The Judgement of Cambyses* was commissioned; a visual reminder to the people of Bruges that failure to conform to the regime would incur harsh penalty. The panels depict the Persian story of Sisamnes, a corrupt judge flayed alive by order of King Cambyses. The left panel shows the arraignment of the judge by the

king. One of Sisamnes crimes, accepting a bribe from a merchant, is shown in the background. The right panel shows the flaying of Sisamnes. It also shows, in the upper right, Sisamnes successor judge, his son Otanes, sitting on a chair draped with his father's skin.

Unlike traditional diptychs, which were hinged so as to be used as portable religious mementos or church altar pieces, *The Judgement*



of *Cambyses* panels were hung as ‘justice panels’ in the justice hall of the Bruges city hall. Miergroet (1988: 133) concludes that David had little if any artistic discretion, being under instruction as to the subject and iconography by the Burgundian court. The painting went through several redraftings before completion, and its under-drawings reveal the scruffy dog licking its rump (panel one) to be a final addition. So too was the street dog scratching itself at the feet of the chattering noblemen (panel two). It is tempting, although possibly fanciful, to imagine that this intrusion of everyday informality was a subversive commentary on the context and purpose of the commission by the artist; particularly when set against the gruesome relish with which the flayers carry out their task under King Cambyses’ inscrutable gaze, in a setting embellished by the iconography of public law and governance.

Not only did *The Judgement of Cambyses* go through several adaptations in production, but also in its cultural significance. From its origins in a tale recounting punishment of judicial misconduct, to its reimagining as a public work to warn against judicial and political non-conformism, *The Judgement of Cambyses* lives on as a political message in the contemporary world.

In 2019 it became the subject of a Russian court case when a creditor in a bankruptcy case, Stanislav Golubyov, sent Krasnodar Regional Appellate Court documents in an envelope

decorated with a copy of David's painting. In response the court demanded an explanation to determine ‘whether it was a display of disrespect to the court’ and ‘whether there are grounds for imposing a fine ...’. In December 2012 a copy of the painting was paraded by protestors at Moscow’s Zamoskvoretsky district court, following the sentencing of Maksim Luzyanin to four-and-a-half years in prison for participating in protests against Vladimir Putin. Similarly, supporters of former Ukrainian Prime Minister Yulia Tymoshenko displayed a poster of the painting at a 2012 hearing where she was appealing a seven-year prison term for alleged corruption (Coulson 2019). It is hard to imagine that David—despite his commission’s clear purpose to function as what Miergroet (1988:133) calls a ‘painted political manifesto’—could have imagined that *The Judgement of Cambyses* would live on as a visual message about law and governance over half a millennia after its completion.

References

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