

# Amicus *Curiae*

*The Journal of the Society for Advanced Legal Studies*



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## EDITOR'S INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

HKU and CUHK, Hong Kong

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Welcome to the first issue of the fourth volume of the new series of *Amicus Curiae*. We are grateful to contributors, readers and others for supporting the progress that the new series of the journal is making.

In 2004, the New Zealand Government discontinued the right to appeal to the Privy Council. It established the Supreme Court as New Zealand's highest court and severed all formal links to the Privy Council. In his contributed essay, 'Reflections on the Roles of Apex and Intermediate Courts

in New Zealand', Justice Forrie Miller (IALS-SAS Inns of Court Research Fellow in the first quarter of 2022) examines and reflects on developments following the Supreme Court of New Zealand's replacement of the Privy Council as the last stop in the judicial system. The reform gave the Supreme Court a broad jurisdiction, offered an accessible location, and it was anticipated that, as a final appellate court, the Court would function effectively. The Court has been successful in shaping and adapting law appropriate for the conditions

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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](mailto:amicus.curiae@sas.ac.uk)

By post: Eliza Boudier

*Amicus Curiae*, Charles Clore House,  
17 Russell Square, London WC1B  
5DR

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Article or short Note to a future  
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[webpages](#) to view the Style Guide  
and submission information.

of New Zealand. However, its output has been lower than expected, and Justice Miller explains that is attributable to appellate structures and pathways that constrain demand for its services. He examines the impact this has had on longstanding appellate norms and the distribution of responsibility for law development between the Supreme Court and Court of Appeal. He offers insightful suggestions for reform, focusing on the approach that appellate courts ought to take to leave and to precedent, adhering closely to the common law case-by-case tradition. Justice Miller suggests dialogue about possible reforms is needed.

Geoffrey Samuel's contribution entitled 'Can Doctrinal Legal Scholarship be Defended?' reflects on the nature of such scholarship and considers the arguments put forward by Mátyás Bódig,<sup>1</sup> in a recent major study defending the doctrinal approach to understanding law. Professor Samuel offers a careful characterization of the manner in which doctrinal legal scholarship developed and is defined in civil and common law traditions, noting its much later emergence in the common law world, and how the influence of Realism tends to make many American legal scholars more accepting of perspectives from other

disciplines. While emphasizing that he sees the value of much doctrinal scholarship for the courts and the legal profession, and that in its creation impressive legal minds are at work, he doubts that it is capable of generating, in itself, new knowledge. He finds unconvincing the defence of doctrinal scholarship offered by Professor Bódig and based on an epistemological approach characterized as the 'rational reconstruction of the law'. This approach justifies legal doctrinal research from an entirely internal position. It gives little attention to the possibilities offered by interdisciplinarity, and to examining how ideas from other disciplines might facilitate better doctrinal legal scholarship. Dworkin's interpretive analysis has more to offer as, for example, it accepts that the judge's search for structural fit cannot be considered in isolation either of political theory or of social goals and the actual method is best explained through reference to, or analogy with, literary criticism. Doctrinal legal scholarship has significant value for judges, lawyers and other sections of the legal community. However, Professor Samuel argues, it is found wanting when it comes to establishing general truths about society, or generating new ideas.

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<sup>1</sup> Mátyás Bódig (2021) *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Elgar Studies in Legal Research Methods) Cheltenham: Edward Elgar.

Martin Kwan's essay explores the debate that surfaces from time to time in Hong Kong about the freedom of courts in the Special Administrative Region freely to refer to foreign authorities. There is a lack of agreement in legal and judicial circles on this matter. The contribution argues that, for three important reasons, such freedom should be allowed and encouraged. First, constitutional considerations are less constraining in the Hong Kong case. Secondly, the professionalism of the courts in Hong Kong means that such freedom will be used responsibly. Thirdly, Hong Kong has a fairly small case pool, so the practical and doctrinal insights from foreign authorities are very useful. The author takes a positive view of the broader approach, pushing the courts in Hong Kong to reach out more to the jurisprudence of foreign authorities, and to exercise less self-restraint.

There follow several contributions that are part of a larger study on issues and developments in alternative dispute resolution, with other essays to be published in the next issue (4.2): Francis Boorman 'Developments in the History of Arbitration: A Past for the Present?', Bryan Clark 'Mandatory Mediation in England and Wales: Much Ado About Nothing?', Debbie De Girolamo & Dominic Spenser Underhill 'Alternative Dispute Resolution and the Civil Courts: A Very British Type of Justice—

The Legacy of the Woolf Reforms in 2022', Nicholas Gould & Olivia Liang 'Conflict Avoidance and Alternative Dispute Resolution in the UK Construction Industry', and Matthew Vickers 'Civil Justice Reform: An Ombudsman Perspective'.

In the UK and elsewhere, there have sometimes been quite prominent and interesting cases in which a judge has been convicted, or accused, of a crime. This contribution to the Notes section by Barrie Nathan entitled 'Judges in the Dock' looks at judges who have themselves fallen foul of the law while still serving as a judge, or prior to their appointment, or post-retirement. He observes that the most obvious criminal offence of which judges are accused or guilty is bribery. Other offences which have come to light include smuggling, murder, perjury, perverting the course of justice, and passing sentences too heavy or too light. The essay examines the ways in which such judges have been dealt with and points to the disparities of sentence that follow conviction.

The Notes section continues with Dr Samia Bano's review of a new study by Anna Marotta entitled *A Geo-Legal Approach to the English Sharia Courts*. This study by Professor Marotta uses a 'law in context' perspective to examine the emergence and development of Muslim communities in Britain

(and Europe), the issues of pluralist legal orders that have emerged as a result, and debates about identity formation in relation to legal and non-legal Muslim family law decision-making. The study addresses persisting and critically important issues of the manner in which Muslim religious systems of dispute resolution operate in the western legal orders of Europe and the United Kingdom, the lived experience of Muslims in minority diasporic British communities in respect of their practice and understanding of Islamic family law, and, more fundamentally, asks how do western legal systems accommodate religious and cultural difference? One of the strengths of the book is the analysis of the ways in which case law has emerged and been interpreted in English courts, and difficulties with notions of 'rights' that fail to encapsulate Muslim identity. The 'geo-legal' analysis illustrates how official and unofficial legal rules are used by various actors to defend their ideas of law and to implement their values and strategies. Dr Bano recommends the volume to us as a significant synthesizing and interdisciplinary contribution to the study of law and Muslim legal pluralism.

'Putting a Social and Cultural Framework on the Evidence Act: Recent New Zealand Supreme Court Guidance' is a contribution that includes two seminar presentations, one by Justice

Goddard (New Zealand Court of Appeal) and the other by counsel Mai Chen (Public Law Toolbox Chambers, and Superdiversity Institute for Law, Policy and Business). These addressed certain aspects of the New Zealand Supreme Court decision in *Deng v Zheng* [2022] NZSC 76. Justice Goddard was the presiding judge in *Zheng v Deng* [2020] NZCA 614, the Court of Appeal judgment appealed to the Supreme Court. Mai Chen appeared with two other lawyers on behalf of the intervenor, the New Zealand Law Society. Their presentations discuss issues relating to guidance on bringing relevant social and cultural information to the attention of the court. The central concern of the case was whether the parties, who were Chinese and conducted their business relationship in Putonghua, had entered into a legal partnership, despite an absence of formal documentation. If such a partnership was found to exist, an account would need to be taken to divide the assets and liabilities of the partnership following its dissolution. Two issues arose relating to the culture of the parties. First, whether the meaning to be ascribed to the Chinese term 公司 (*gongsi*), often translated into English as 'company', bore a meaning broader than that of 'company', so that it could be extended to include 'firm' or 'enterprise'. In particular, different translators used different terms in

their English translations of the expression 公司 (*gongsì*), without explaining why.

Secondly, to understand the significance of the term 关系 (*guanxi*), often translated into English as ‘relationships’ or ‘connections’. The Supreme Court determined that a partnership between the parties clearly did exist, documentary evidence showing a shared understanding as to the nature of the business relationship. In addition, the Court offered brief comments on how, where relevant, the social and cultural framework within which one or more of the protagonists may operate might be brought to the attention of the court, including through expert evidence and court-appointed experts to establish adjudicative facts. This is important, as New Zealand becomes a more culturally pluralistic superdiverse society on a bicultural (with Indigenous Maori) base. What are commonly accepted social and cultural facts in the country will increasingly be located in the practices of those first and subsequent generations of ethnic groups in New Zealand. Increased scope for judicial notice to be taken of such facts will likely evolve, and what are reliable published documents.

Barnaby Hone’s contribution ‘Professor of Practice: A Note on How to Make the Role Work, and How Practitioners and Academics Can Work Together in a Better Way’

reflects on his experiences during his nearly two-year appointment recently at the IALS as the Professor of Practice for Financial Regulation (FinReg). He offers his thoughts about the role of ‘Professor of Legal Practice’ and how it might be used in other institutions. He concludes that such appointments work best where the institution has specific strengths in the practitioner’s own professional areas, which in this case was asset recovery and money laundering. In addition, the dual nature of the role means that mutually agreed and well-planned arrangements and events should be in place. Finally, the person appointed should attempt to immerse themselves in the academic world they have joined, despite the continuing pressures of professional work.

In his review of the study edited by Felice Batlan and Marianne Vasara-Aaltonen (2021) under the title *Histories of Legal Aid: A Comparative and International Perspective*, Daniel Newman sees much value in a work that brings together case studies from a range of jurisdictions of legal aid and its development, and which contributes to the growing scholarship on legal aid and the role it plays in helping the socially and economically disadvantaged to secure access to justice and legal services. It offers analysis of legal aid in Belgium, Chile, China, Finland, France, Germany, Russia and the United States.

Newman points out how the legal aid situation in the book under review is considered in greater historical depth than many other contributions to the discourses of legal aid—which tend to focus on the contemporary situation—offering understanding of the cultural and political forces that have shaped the legal aid system in each of the eight countries studied in the book. Newman points to important aspects of the development of legal aid that emerge from the book, including the increasing need to tackle the problems faced by poor people in rapidly changing societies—which includes the role of philanthropy to fill the gaps in the state—and how distinctive political considerations of particular jurisdictions have been important in shaping legal aid developments worldwide since the Industrial Revolution. Transplantation of ideas and practices of legal aid has been important too. Another significant influence has been the manner in which the legal profession has grown in various societies, helping to shape legal aid into particular forms. Newman concludes by suggesting that studies such as the book under review show how sociolegal studies can be meaningfully enhanced by drawing upon the insights offered by comparative legal studies.

In their Note ‘Sleep-Facilitated Sexual Assault: An Analysis of Case Data Featuring Female and Male Victims of Rape’, Phil Rumney and

Duncan McPhee consider issues in a hitherto under-researched but long-standing form of rape in the United Kingdom (UK), namely the rape of victims who are asleep at the time that offence occurred, and in which the perpetrator is a male. They call for better understanding of the rape of those who are sleeping and in the criminal justice and police response to this problem. Their analysis draws on police rape investigation files for empirical data and concludes that the evidence and its analysis reveal a form of sleep-facilitated victimization that often involves the targeting of female victims. More research is needed on the frequency of this form of offending (especially as victims are sometimes unaware that they have been assaulted), its treatment by criminal justice professionals (especially where there is a previous history of domestic violence), scepticism in cases involving repeat offending, the use of offers of shared accommodation as a lure, and so on so that we gain better understanding of the manner in which sex offenders target sleeping victims and the means by which they perpetrate their crimes.

This issue of *Amicus Curiae* also contains a special remembrance, authored by Dr Amy Kellam, for James Crawford—international judge, lawyer and scholar—who passed away on 31 May 2021. We find cause to remember one of Crawford’s many achievements at this time, for the current 77th



session of the United Nations General Assembly (UNGA) is scheduled to consider the possibility of an international convention on the Responsibility of States for Internationally Wrongful Acts. Crawford's work was instrumental in the creation of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which were adopted by the UNGA in 2001. The law of state responsibility has its origins in the 19th century, but it has undergone significant development in recent years. This is due in no small part to Crawford's systematic distillation of the general principles of state responsibility into a set of rules for determining when a state is responsible for wrongful acts, as well as what consequences flow from that responsibility. The Articles are now considered to be the authoritative statement on the law of state responsibility. Crawford's work has had a lasting impact on the development of international law. He will be remembered for his dedication to the law, his good humour and his commitment to legal scholarship.

While this issue was in production, we received the sad news of the death on 4 September 2022 of Phil Rumney (joint author of the above-mentioned Note on 'Sleep-Facilitated Sexual Assault'). Phil's co-author in this issue, Duncan McPhee, has contributed

a short celebration of Phil's life and work which we are pleased to be able to include.

The issue concludes with Francis Boorman's Visual Law essay entitled 'Sporting Arbitrations: 18th-Century Rules for Boxing'. This provides an illustrated and succinct account of 18th-century sporting arbitration. At that time, boxing was becoming increasingly professionalized and commercialized, and the site of extensive gambling. The arbitrators were accorded wide-ranging powers of decision-making. Dr Boorman's insightful contribution shows a set of rules for pugilistic bouts held in a major Tottenham Court Road venue. The rules reflect the processes ordinarily found in 18th-century commercial arbitration. Each party chose an arbitrator, and the two selected then in turn nominated an umpire who would decide matters on which the arbitrators failed to agree.



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## REFLECTIONS ON THE ROLES OF APEX AND INTERMEDIATE COURTS IN NEW ZEALAND

FORRIE MILLER\*

Judge of the Court of Appeal, New Zealand

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### Abstract

The Supreme Court of New Zealand replaced the Privy Council as New Zealand's final appeal court in 2004. Appeals to the Privy Council in the general civil jurisdiction lay as of right, but all appeals to the Supreme Court were to be by leave. The legislature chose not to change appellate structures and pathways which had long been designed to limit the number of appeals by leave. Rather, it was hoped that the Supreme Court's broader jurisdiction and accessible location would allow it to meet its objectives as a final appellate court.

The Supreme Court has done much to develop law for New Zealand conditions. But the number and quality of leave applications constrain its substantive output, which has apparently stabilized at a level substantially lower than was predicted in 2004. The underlying causes can be located in appellate structures and pathways which constrain demand and also affect the Court of Appeal.

This paper examines those constraints and the Supreme Court's attempts to address them. It identifies consequences for the distribution of law development and supervision of precedent as between the Supreme Court and Court of Appeal. The paper is a call for dialogue rather than a prescription for reform, but it does suggest that consideration should be given to adjusting pathways to improve the range and quality of work decided by panels of three and five judges. It argues that courts in an appellate hierarchy must pursue a collaborative approach if

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\* I thank the Inns of Court for their generous sponsorship of the 2020 Inns of Court Visiting Fellowship at the Institute for Advanced Legal Studies, University of London. I gratefully acknowledge the comments of Sir Douglas White, formerly a Judge of the Court of Appeal and President of the Law Commission, and Dr Bridgette Toy-Cronin, Director, Civil Justice Centre, University of Otago, and the assistance of Caitlin Anyon-Peters and Siobhan Davies, my clerks at the Court of Appeal. Errors are my own. This paper will also be published in the *New Zealand Law Journal* [2022] (forthcoming).

law is to be developed in a reasonably timely and cost-effective way in the common law case-by-case tradition, and it suggests that is best done through appellate restraint and conservative application of the rules of precedent.

**Keywords:** appellate courts; distribution of responsibility for precedent; appeal pathways and leave criteria.

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## [A] OUTLINE

This paper is divided into six parts. Part B surveys the legislative history to identify important policy choices and assumptions that were made when the Supreme Court was established and which still underpin complex appellate pathways. Part C considers demand for the Supreme Court's services in practice and how the Court has responded to it. Part D argues that the causes of limited demand are structural, and that they also affect the Court of Appeal. Part E addresses judicial policy towards law development and stewardship of precedent in New Zealand's appellate hierarchy. Part F offers some observations about reform and an invitation to dialogue. Part G concludes.

## [B] POLICY CHOICES ABOUT APPELLATE STRUCTURES AND PATHWAYS

### The Supreme Court established

Arguments for and against abolition of Privy Council appeals were examined in 1994 by the Solicitor-General, John McGrath QC. He observed that most countries with a second appeal court are federations in which the apex court resolves differences among lower courts and delivers consistency in the law, and he recommended a single right of appeal, arguing that with some modifications the Court of Appeal was capable of handling the law development function of a final court. Pointing to the modest number of Privy Council appeals, the Solicitor-General identified a risk that a specialist second appeal court might find itself short of work (McGrath 1995: 70, 18). He did not examine the implications, beyond recognizing that judicial talent would be wasted if the country's most senior judges were underutilized.

In the 1999 general election the Labour Party campaigned for a domestic Supreme Court. In a discussion paper issued the following year the Attorney-General, the Hon Margaret Wilson, identified the rationales

as sovereignty and responsiveness to New Zealand values and needs (Office of the Attorney-General: 2000):

Ending the right of appeal to the Privy Council represents an important next stage in the development of our national independence. It provides us with an opportunity to create an indigenous justice system, which truly represents our values and meets our needs. Our focus must be on an inclusive and enduring appeal structure that will provide access to justice for all New Zealanders.

It will be seen that the Supreme Court was to be no mere substitute for the Privy Council, which originally assumed judicial functions to contribute to political cohesion within the British Empire and had come to defer to the Court of Appeal on questions of policy (Shapiro 1980: 639).

The paper emphasized that the Privy Council heard few New Zealand appeals—just 91 in the years 1990 to 1999—and identified the cost of such appeals as a major barrier. It identified several options, one being simple abolition with the Court of Appeal as the final court, and invited comment on the central question whether New Zealand needed two tiers of appeal (Office of the Attorney-General 2000: para 3 ‘Introduction’). It recognized a risk, inherent in any two-tier structure, that the final appellate judges might be underutilized (Royal Commission on the Courts 1978: para 298).<sup>1</sup>

The political decision to establish a Supreme Court having been taken, the Attorney-General commissioned an Advisory Group to advise on the Supreme Court’s purpose, structure, composition and role. The Advisory Group reported in 2002 (Ministry of Justice 2002). It identified what were later described as the overarching objectives of the Supreme Court Bill: the Supreme Court would offer improved accessibility, cover a wider range of matters and better respond to local conditions. The Advisory Group recommended a minimum of two opportunities for appeal from all substantive court proceedings. The Supreme Court should hear appeals over ‘the full range of case’ even if that meant a third appeal (Ministry of Justice 2002: para 65). That was necessary if the Supreme Court was to focus on ‘judicial clarification and development of the law’ within the limits of judicial decision-making; that is, by deciding particular cases. The Supreme Court should have jurisdiction to remedy serious miscarriages of justice whether arising from factual or legal error.

The Advisory Group concluded accordingly that appeals should be general appeals by way of rehearing, meaning the Supreme Court could

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<sup>1</sup> The impact of population size on a two-tier appeals system was considered in Royal Commission on the Courts (1978: 298). The Commission predicted that a second appellate court which replaced the Privy Council would hear 5-10 appeals per annum.

resolve factual issues and hear evidence in exceptional cases (Ministry of Justice 2002: para 134). All appeals should be by leave of the Supreme Court itself, and the leave criteria should not unduly limit the scope of its work. The recommended criteria were: a significant Treaty of Waitangi or tikanga Māori issue; a matter of general or public importance; a matter of commercial significance; a need to resolve differences of opinion between courts, or within a court; a substantial miscarriage of justice; and the interests of justice (Ministry of Justice 2002: para 153). It was thought unlikely that the Supreme Court would permit second appeals against concurrent findings of fact below.

The Advisory Group predicted that the Supreme Court would hear between 40 and 50 appeals per year (Ministry of Justice 2002: para 73). It attributed the predicted increase over the Privy Council's New Zealand caseload to the Supreme Court's greater breadth of jurisdiction, its relative accessibility, and future legal developments in fields such as human rights. The number was said to be similar to the workload of final courts in Australia, Canada and the United Kingdom (UK). The Advisory Group thought the risk of underutilization was low, drawing attention to the output of the Court of Appeal, which determined 593 appeals in 2001 and sat Full Courts in 48 of them (Ministry of Justice 2002: paras 73-77).

The Advisory Group recommended that five judges should suffice to handle the Supreme Court's workload, meaning that all would sit on every appeal (Ministry of Justice 2002: para 85). At that time the Court of Appeal sometimes sat as a Full Court comprising all seven permanent members.<sup>2</sup> Recognizing that the number of judges customarily increases at each level in a court hierarchy, the Advisory Group recommended that

*Table 1: Volume of leave applications to final appellate courts\**

<b>Final appellate court</b>	<b>Year</b>	<b>Leave applications filed</b>	<b>Leave applications decided</b>	<b>Leave granted</b>
<b>Supreme Court of Canada</b>	2002	523	498	48
<b>House of Lords United Kingdom</b>	2002	253	274	94
<b>High Court of Australia</b>	2001-2002	497	353	80
<b>Supreme Court of the United States</b>	2001-2002	7,924	8,023	88

\* Source: Justice and Electoral Select Committee (2003), Table 5

<sup>2</sup> At that time the Judicature Act 1908 permitted a maximum of seven judges, though the seventh was sometimes seconded from the High Court: see section 57(2). The Chief Justice was also a member but did not usually sit.

practice should cease. However, the Court of Appeal should remain able to sit as five:

the group wishes to retain a strong Court of Appeal as it would continue to be, in practical terms, New Zealand's primary appeal court (Ministry of Justice 2002: para 182).

Controversy had always attended proposals to replace the Privy Council with a domestic court, partly from fear of judicial activism.<sup>3</sup> This may explain why debate during the legislation's passage did not focus closely on whether appellate pathways would deliver enough quality work. The Justice and Electoral Select Committee did draw comparisons with other final appellate courts. It stated that these courts heard between 60 and 80 appeals annually and noted the substantial number of leave applications filed (see Table 1).<sup>4</sup>

The Select Committee estimated that the Supreme Court would deal with 140 'matters raised' per year. This evidently referred to the number of leave applications. It compared this estimate with the same overseas jurisdictions (see Table 2).<sup>5</sup>

*Table 2: Number of matters raised annually in selected final appellate courts\**

Country	Year	Number of matters	Population (million)	Number of matters per million people	Appeal judgments per million people
<b>Australia</b>	2001/02	922	19.8	46.6	3.2
<b>Canada</b>	2002	608	31.5	19.3	2.8
<b>United Kingdom</b>	2002	360	58.8	6.1	1.2
<b>United States of America</b>	2001/02	8,024	290.8	27.6	0.3
<b>New Zealand</b>					
• <b>Proposed Supreme Court</b>	n/a	140	4.0	35.0	10.0
• <b>Privy Council</b>	2002	17	4.0	4.3	3.0
• <b>Court of Appeal</b>	2002	665	4.0	141.3	118.0

\* Source: Justice and Electoral Select Committee (2003), Table 6

<sup>3</sup> The flavour was captured by Richard Cornes (2004).

<sup>4</sup> Justice and Electoral Committee (2003) at 43. Tables 1 and 2 in this article are reproduced from the report.

<sup>5</sup> In these jurisdictions it appears from annual reports of the courts concerned that the Select Committee's term 'matters raised' corresponded to leave applications and appeals decided plus appeals as of right, constitutional references, applications for removal and electoral matters. Hence the total of leave applications and substantive decisions is less than the total 'matters raised' for these courts.

On a per millions of population basis, the predicted number of ‘matters raised’ was 35. This estimate was not explained. The Committee referred obliquely to appeal pathways, cautioning that comparisons with other final appellate courts were difficult because the Court of Appeal served as both an intermediate and a second appellate court. That suggests concern about demand for the Supreme Court’s services. But the Committee did not examine appeal pathways. Nor did it develop the assumption, apparent from Table 1, that the Supreme Court would grant about 30% of leave applications.<sup>6</sup> Lastly, it did not draw attention to its estimate that the Supreme Court would decide about 40 substantive appeals per year, which is both a smaller total number and a far higher rate per million of population than the corresponding figures for other final courts. In a media release accompanying the Bill the Attorney-General predicted that the Supreme Court would decide about 55 appeals annually.

The leave criteria which emerged from the legislative process are found in section 74 of the Senior Courts Act 2016 (carried over from section 13 of the Supreme Court Act 2004):

**74 Criteria for leave to appeal**

- (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
  - (a) the appeal involves a matter of general or public importance; or
  - (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
  - (c) the appeal involves a matter of general commercial significance.
- (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.
- (4) The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.
- (5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a).

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<sup>6</sup> This percentage assumes that successful leave applications and the resulting appeals are decided in the same year.



Under these criteria the Supreme Court must decline leave unless satisfied that it is in the interests of justice to decide the appeal, and it is in the interests of justice to do so if the appeal meets the criteria in subsection (2). There are in substance two grounds: a matter of general or public importance or a substantial miscarriage of justice. A significant treaty issue or matter of general commercial significance is deemed to be of general or public importance.<sup>7</sup> As the Supreme Court recognized in an early decision, *Junior Farms Ltd v Hampton Securities Ltd (in liq)* (2006), the substantial miscarriage ground allows it to remedy an error of fact or law which is not of general or public importance, but that does not mean that the Supreme Court is free to engage in general error correction; to justify leave the error should be ‘of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case’ (*Junior Farms* at para 5). The subsection (2) criteria do not limit the jurisdiction in subsection (1), but it must be a rare case in which the interests of justice would require leave for a second or third appeal which presented neither an issue of general or public importance nor a miscarriage of justice.<sup>8</sup>

## The Court of Appeal continued

The Court of Appeal now comprises the President and no fewer than five nor more than nine other judges, collectively known as the Permanent Court. The complement is currently 10. The Court of Appeal normally sits in divisions of three, and most cases are heard in divisional courts comprising one permanent member and two High Court judges appointed for a specified period, usually two weeks. In 2019 22 High Court judges sat in this capacity, together amounting to three full-time equivalents.

The Court of Appeal has long retained the power to overrule its own decisions, a practice which it justified following the Supreme Court’s establishment on the ground that it remains the court of last resort in most cases (*R v Chilton* 2006: para 98).<sup>9</sup> It is, of course, bound by Supreme Court decisions, but it shares with that court an important characteristic: freedom to depart from its own decisions when necessary to develop law (*Ardern* 2018: 69).

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<sup>7</sup> The proposed inclusion of the application of *tikanga* in law was resisted by groups representing Māori interests and not pursued.

<sup>8</sup> Section 237 of the Criminal Procedure Act 2011 provides that a second appeal court may give leave to appeal against conviction where the appeal raises a question of general or public importance or there may have been a miscarriage of justice. This does not preclude an appeal to the Supreme Court that is otherwise in the interests of justice—see section 213(1)—but it is consistent with the proposition that there are in substance only two grounds.

<sup>9</sup> The Court attributed its last resort status to ‘restrictive leave requirements’.

Significant appeals are usually heard by three permanent members, though it is sometimes necessary to assign them to divisional courts. Very occasionally a Full Court of five is convened. A protocol states that the decision to sit a Full Court is that of the President, who will normally convene one only if the case concerns a sentencing guideline or ‘involves issues of evidence, procedure or practice of general application, or some other issue ... of major significance to other cases, particularly if there is no right to apply to the Supreme Court for leave to appeal’ (Court of Appeal nd).

Because a Full Court is now limited by statute to five judges, the entire Permanent Court cannot sit, nor can it conduct *en banc* review of divisional decisions. This presumably explains why the Advisory Group recommended in 2002 that the Supreme Court’s leave criteria should include resolution of differences of opinion within a lower court. In practice the Court of Appeal’s workload means that the judges deal regularly with common issues, and its processes for proofing judgments and circulating them before issue also reduce the risk of conflict. It is more likely that divergent opinions will emerge from lower courts and be reconciled by the Court of Appeal, which stands at what Sir Jack Jacob called the point of crucial convergence in courts’ structure (1987: 217).

The Advisory Group also contemplated that the Supreme Court would reduce the need for the Court of Appeal to sit Full Courts, allowing a reduction of one in the permanent complement of seven.<sup>10</sup> However, the expectation that the Supreme Court would reduce the burden on the Court of Appeal was mistaken. The complement dropped to six for a period of months in 2006 but was increased to nine in 2007 and to its present level in 2010.

## Legislative policy choices about appeal rights

Appeal rights are creatures of statute, intended to strike a balance between accuracy of outcomes and expediency in a system that is funded by the state. The statutes have much to say about where the legislature has struck the balance and the role that each court is expected to play.

### ***One appeal as of right***

One appeal ordinarily lies to the next court in the hierarchy. The appeal is on the merits, and the objective is error correction. The appeal lies of right, though the longstanding rule in the Court of Appeal is that, having had the first instance judgment to which they are entitled, an

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<sup>10</sup> The Chief Justice was also a member, *ex officio*.

appellant in civil proceedings must ordinarily pay security for costs to protect the respondent.<sup>11</sup> All second appeals are by leave, meaning that the uncertainty, delay and expense they occasion must be justified.

### ***Resources devoted to appeals***

An appellate hierarchy is normally an inverted pyramid in which an appeal from a single trial judge is heard by three judges and a second appeal, where permitted, is heard by five or more. Louis Blom-Cooper QC described the inverted pyramid as a philosophy of ‘good, better, best’; not only are appellate judges promoted for seniority and merit, but they also ‘present a phalanx of combined expertise numerically sufficient to overrule (where necessary) the judgment below’ (Blom-Cooper 1971). The decision to allow the Court of Appeal to sit as five, the same number as the Supreme Court, evidences a legislative expectation that it may have the last word in some areas.

Civil appeal pathways in New Zealand follow the inverted pyramid model for cases tried in the High Court, but not for those originating in the high-volume lower courts. Appeals from judgments of the District Court and specialist tribunals lie to a single judge of the High Court (District Court Act 2016, section 124), and a second appeal lies to the Court of Appeal by leave (Senior Courts Act 2016, section 60). Some second appeals are confined to a question of law.<sup>12</sup>

Criminal appeal pathways split first appeals between the Court of Appeal and the High Court. In the Criminal Procedure Act 2011 a decision was made to classify offences into four categories. In brief summary, category one offences are those not punishable by imprisonment, and category two comprises those punishable by a maximum term not exceeding two years’ imprisonment. Category three comprises those offences punishable by two years or more that could be tried in the High Court or the District Court and for which the defendant might elect jury trial, while category four comprises High Court-only offences. Conviction appeals lie to the Court of Appeal against decisions of the High Court or District Court for offences where jury trial was elected, and sentence appeals lie to the Court of Appeal from sentences passed by the High Court or by the District Court if the defendant elected jury trial and the sentence was imprisonment for a term exceeding five years (Criminal Procedure Act 2011, sections 230 and 247). In the result, much judge-

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<sup>11</sup> *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at paras 3-6.

<sup>12</sup> See, for example, Accident Compensation Act 2001, section 163; Resource Management Act 2009, section 308; Human Rights Act 1993, section 124; and Immigration Act 2009, section 246.

alone trial and sentencing work attracts a right of appeal to a single judge of the High Court rather than the Court of Appeal.

This approach was adopted to prevent the Court of Appeal being overburdened. The legislature retained existing pathways to preserve the Court of Appeal's supervisory function, but it was to remain a second rather than a first appeal court for less serious criminal work. The Law Commission recognized that the threshold of five years' imprisonment would limit Court of Appeal oversight of sentencing for common and socially important offences (for example, those involving workplace safety or environmental pollution), but there was no appetite for a more significant overhaul. Appellate pathways were deferred for future consideration (New Zealand Law Commission 2012: para 11.1).

### ***The Court of Appeal may be bypassed in exceptional circumstances***

The Supreme Court has jurisdiction to hear an appeal from a court other than the Court of Appeal in certain circumstances, but under section 75 of the Senior Courts Act 2016 it may not do so unless there are 'exceptional circumstances that justify taking the proposed appeal directly' to the Supreme Court. So, the legislation permits 'leapfrog' appeals which bypass the Court of Appeal but envisages that they will be rare. In every other case the pathway to the Supreme Court runs through the Court of Appeal. Circumstances might be exceptional where the appeal challenges a judgment of the Supreme Court that the Court of Appeal must follow, or raises an issue which is already before the Supreme Court in another case.<sup>13</sup>

### ***A strict approach to leave for second or third appeals***

As explained above, the grounds for a second or third appeal to the Supreme Court may be reduced to a substantial miscarriage of justice or an issue of general or public importance. Legislation conferring second appeal jurisdiction on the Court of Appeal is generally to the same effect,<sup>14</sup> though in some instances an appeal is confined to a point of law.<sup>15</sup>

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<sup>13</sup> See, for example, *Taylor v Jones* [2006] NZSC 104 (granting leave to appeal) and *Taylor v Jones* [2006] NZSC 113 (explaining the reasons for granting appeal). Leave has also been granted where the same issue is to be argued in another case: *Commerce Commission v Vodafone New Zealand Ltd* (2010) (granting leave to appeal) and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at paras 4 and 49, explaining the reasons for granting leave to appeal.

<sup>14</sup> Criminal Procedure Act 2011, sections 237 and 253; and *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

<sup>15</sup> See note 12 above.

Most leave applications invoke the general or public importance ground. The standard is traced to the 1922 judgment of Salmond J in *Rutherford v Waite* (1923). At that time the Judicature Act 1908 provided simply that a second appeal to the Court of Appeal was by leave of the High Court.<sup>16</sup> Salmond J held that leave should be granted only on ‘good cause shown’; that followed because the requirement for leave was based on the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that there be an end to litigation) (ibid 35):

It is in the public interest not merely that the administration of justice shall be free from error, but also that it shall be cheap and speedy. Appellate jurisdiction is established to secure the first of these purposes; but restrictions are imposed on that jurisdiction for the purpose of securing the second. In exercising discretionary authority to permit an appeal the Court must weigh these conflicting purposes against each other and determine which of them is entitled to prevail in the individual instance.

It followed that on an application for leave the Court of Appeal must be satisfied that ‘the appeal will raise some question of law or fact which is capable of *bona fide* and serious argument’ (ibid 35). It was not enough to point to a substantial question of fact for which there was much to be said on both sides; the applicant must show that ‘there is some interest in the case, public or private, to outweigh the cost and delay that would result from further proceedings in the Court of Appeal’ (ibid 35). Something more was needed than ‘the mere direct interest of the appellant’ in the case (ibid 36):<sup>17</sup>

The interest which justifies the grant of leave to appeal must, I think, be some interest, public or private, beyond the more direct interest of the appellant in the subject-matter of the litigation. ... The appeal, for example, may involve some question of law the proper determination of which is a matter of general and public importance. Or the action may be a test case on the issue of which other claims or disputes of the same nature between different parties are dependent. Or the decision appealed from may be one which affects the appellant’s reputation and not merely his pecuniary interest. Or it may be of such a nature as to affect his business generally, and not merely his pecuniary interest in the subject-matter of the particular action: as, for example, a decision adverse to an insurance company as to the meaning of a clause in its standard form of policy.

The language of general or public importance found its way into the Summary Proceedings Act 1957, as part of the test for a second appeal to the Court of Appeal in judge-alone criminal proceedings (Summary

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<sup>16</sup> Section 67 (as enacted from 4 August 1908 to 31 March 1980).

<sup>17</sup> To the same effect see *Snee v Snee* (1999).

Proceedings Act 1957, section 144). The same test was adopted for second civil appeals in what is still the leading authority, the Court of Appeal's 1998 judgment in *Waller v Hider* (1998).<sup>18</sup> The court emphasized that on a second appeal it is not engaged in the general correction of error; its primary function is to clarify the law and determine whether it was properly applied below. Nor is every error of law of such public or private importance as to justify a further appeal in litigation which has already been twice ruled upon. An issue of fact is seldom of public importance, but it may be of private importance where, for example, the amount at stake is very substantial or the decision reflects seriously on the character or conduct of the would-be appellant or has serious consequences for them, such as insolvency. Even then, leave cannot be assured in the face of concurrent findings of fact in the courts below. The Court of Appeal undertook a cost-benefit analysis, estimating the costs of the second appeal and weighing them against the amount at stake.

## [C] THE SUPREME COURT'S CASELOAD AND RESPONSES TO IT

In this section I survey the size and quality of demand for second and third appeals from the Court of Appeal and examine the implications. I emphasize that to find that demand is limited is not to suggest that the Supreme Court has been unable to meet its objectives; as I note in section E, it has done much to develop New Zealand law. Rather, I contend that there is a correlation between limited demand and the standard of appellate review, that modest demand has affected the distribution of responsibility for law development and supervision, and that there is some misalignment of leave practice as between the Supreme Court and Court of Appeal.

### Leave applications constrain the court

Figure 1 records numbers decided by the Privy Council in the 15 years preceding the Supreme Court's establishment, and by the Supreme Court since 2004. The average for the nine years between 2010 and 2019 is 22.<sup>19</sup>

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<sup>18</sup> Second appeals were brought under section 67 of the Judicature Act 1908, which provided for leave but did not specify the test.

<sup>19</sup> Data for the Supreme Court's first decade is found in Stockley & Littlewood (2015: 24). The annual average for that period was also 22. I exclude the years before 2009 because the court was in an establishment phase and the number of leave applications exceeded 100 for the first time in 2009. Note that not all leave applications lead to a decision; a few are withdrawn.

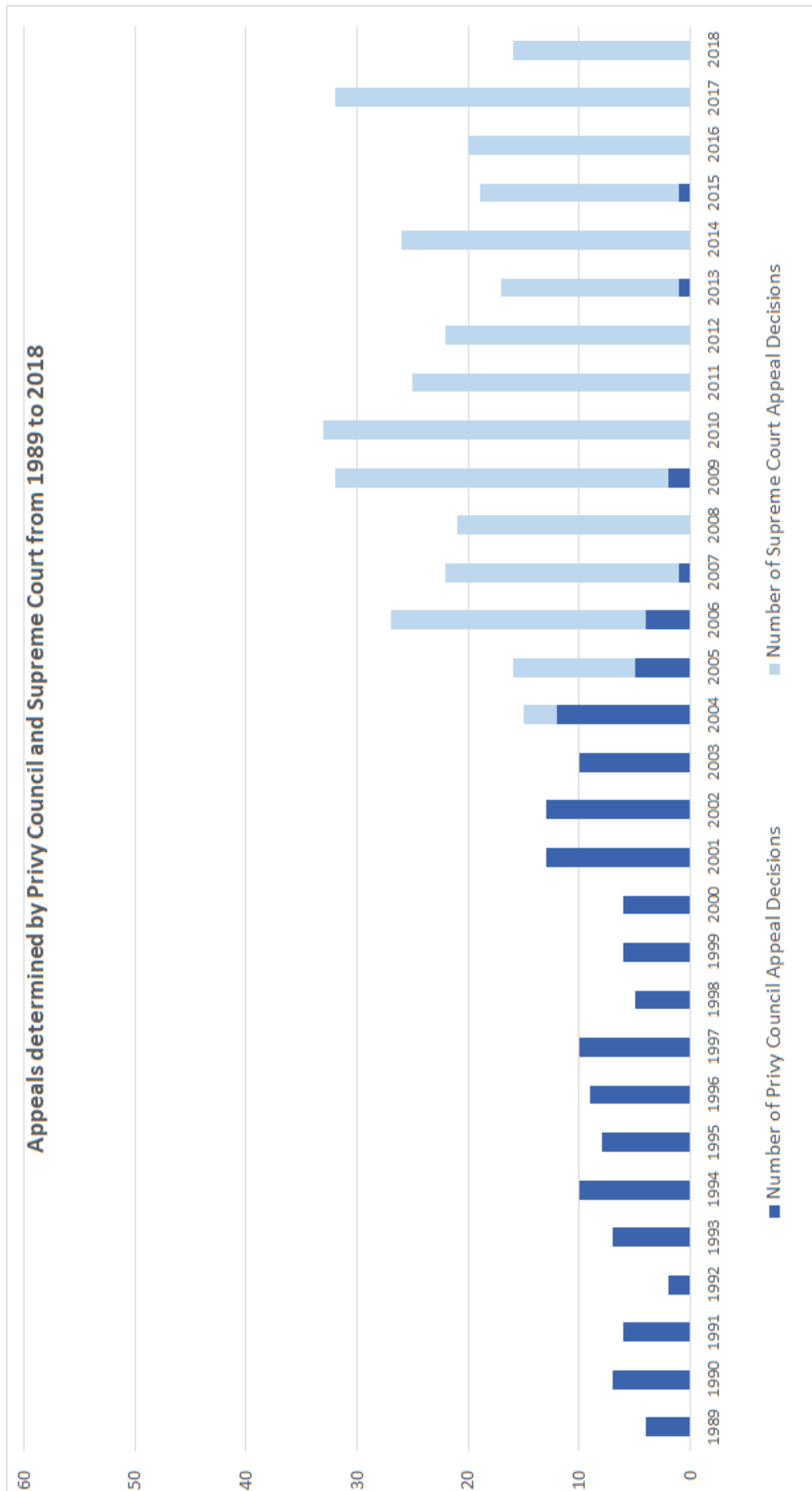


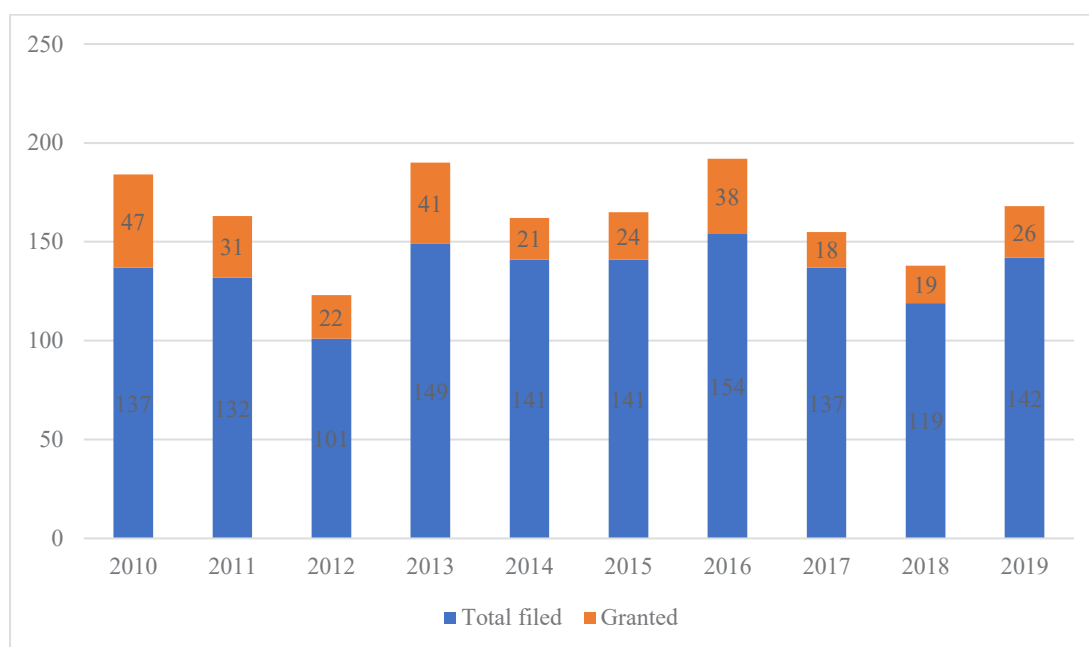
Figure 1: Appeals determined by Privy Council and Supreme Court from 1989 to 2018

By way of comparison, in 2019 the United States (US) Supreme Court delivered 69 substantive decisions, the UK Supreme Court 68,<sup>20</sup> the Supreme Court of Canada 72, and the High Court of Australia 61.<sup>21</sup> The difference is less substantial than it might seem, because these courts have larger complements than the New Zealand Supreme Court and some sit in divisions to hear substantive appeals. They must also devote resources to hearing devolution or other constitutional cases.

Civil appeals have not increased much in number from those decided by the Privy Council, to which most lay as of right (the leave requirements were formalities). Sir Peter Blanchard estimated that of the 53 appeals heard by the Privy Council in the five years preceding the Supreme Court's establishment, 17 would not have been given leave under the Supreme Court's criteria (Blanchard 2015: 58). Put another way, in each of those years the Privy Council heard about 11 appeals of which about seven merited leave. In the years 2015-2019, the Supreme Court granted an average of 15 leave applications in civil proceedings.<sup>22</sup>

Leave applications have averaged 135 per year since 2010. On average the Supreme Court granted 25% of them over the same period. The bar graph in Figure 2 records leave applications since 2009.

*Figure 2: Leave applications since 2009*



<sup>20</sup> The Court's 12 judges hear about the same number of cases when sitting as the Privy Council.

<sup>21</sup> Where sittings span two years, these numbers are for the 2018-2019 sitting year.

<sup>22</sup> This represents leave applications actually granted in each of those years. Where more than one appeal was given leave in the same proceeding, they have been treated as one.



Table 3: Leave applications to apex courts

<b>Court</b>	<b>Leave applications in 2019</b>	<b>Leave granted in 2019</b>	<b>Appeals decided in 2019</b>
US Supreme Court	6442	73 (1%)	69
UK Supreme Court	201*	59 (29%)	68
Supreme Court of Canada	542	36 (7%)	72
High Court of Australia	565	43 (8%)	61

\* Numbers in England and Wales are restricted by pathways which sometimes require a lower court's approval

Other apex courts typically receive more leave applications and grant a smaller proportion of them, as the data from 2019 in Table 3 demonstrate.<sup>23</sup>

The overall quality of leave applications is low. Anyone whose appeal has been dismissed by the Court of Appeal may ask the Supreme Court for leave. An applicant need not first apply in the court below or have that court certify an issue worthy of further appeal. About 25% of leave applications between 2009 and 2013 were brought by lay applicants. That pattern has continued; in 2019 40 of the 142 leave applicants were self-represented. Few such applications are found to merit leave. A substantial proportion are procedural in nature and some challenge decisions made by a single judge of the Court of Appeal, such as refusals to waive filing fees. In 2020 the Supreme Court decided 86 leave applications from substantive decisions of the Court of Appeal. Lastly, many leave applications are brought in the Supreme Court's criminal jurisdiction (in 2019 42% were in crime). Making the point that few of these cases merit a second appeal, Sir Peter Blanchard wrote that 'human nature being what it is, no doubt a large proportion of those persons whose appeals were unsuccessful continue to regard themselves as having suffered from a substantial miscarriage of justice' (2007: 5-6).

## Approach to jurisdiction

The Supreme Court has sometimes taken what it has described as a 'reasonably expansive' approach to jurisdiction (*J (SC93/2016) v Accident*

<sup>23</sup> This table collates data from various annual reports for the relevant courts. Where the reports are issued according to the financial year, the data is from the 2018-2019 financial year. The report for the US Supreme Court refers to appeals argued, not leave granted, so the number should be treated as an approximation.

*Compensation Corporation* 2017: at 9). Generally, legislation provides that a decision of the Court of Appeal to decline leave is final, in both civil and criminal proceedings (Senior Courts Act 2016, section 68; and Criminal Procedure Act 2011, section 213(3)). The Supreme Court has held that it may entertain ‘leapfrog’ appeals from the High Court in such circumstances, though the jurisdiction is rarely exercised.<sup>24</sup> It has also granted leave to bring an appeal against conviction where the appellant’s conviction had been quashed in the Court of Appeal.<sup>25</sup> The Supreme Court also held that section 67 of the Judicature Act 1908, which deemed final a decision to refuse leave for a second appeal to the Court of Appeal, was confined to substantive appeals; that is to say, it did not preclude a further appeal to the Supreme Court against an interlocutory decision of the High Court.<sup>26</sup> This led the legislature to affirm that appeals against interlocutory decisions of the High Court also require leave.<sup>27</sup>

## Appellate review now facilitates intervention on second appeal

Appellate practice in New Zealand has long rested on a series of institutional norms. I describe them as such, although some are found in legislation and rules of court, because they are largely within the control of the judiciary. They are by no means unique to New Zealand.<sup>28</sup> In his comparative analysis of appellate justice in England and the United States Robert J Martineau remarked that, although they differ in many ways, intermediate appellate courts in the two jurisdictions had adopted remarkably similar practices (Martineau 1990: 239). They were examined in a detailed study, published by Thomas Y Davies of the California Court of Appeal for the First Appellate District (1982) and discussed by Sir Jack Jacob in his Hamlyn lectures (1987). Some can be traced to the common law’s ancient hostility to appeal and deference to the jury.<sup>29</sup> To the extent that they are of more modern origin, they likely respond to pressure of

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<sup>24</sup> See, for example, *Sena v Police* (2018).

<sup>25</sup> *C (SC29/2021) v R* (2021).

<sup>26</sup> *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309. This led the legislature to specify, when enacting the Senior Courts Act 2061, that appeals against interlocutory decisions of the High Court also require leave.

<sup>27</sup> See Judicature and Modernisation Bill 2014 (178-2), explanatory note.

<sup>28</sup> New Zealand practice is traceable to the Supreme Court of Judicature Acts 1873-1875 (UK).

<sup>29</sup> Appeals began in English law as proceedings in error, brought against the judge, in which the question was not what the true judgment ought to be but whether the judge had erred: *Sunderland* 1930: 485.

business experienced by intermediate appellate courts, including New Zealand's.<sup>30</sup>

The first group of norms relate to the nature and scope of an appeal. The decision under appeal is treated as presumptively correct and the appellant must show that it was wrong (*Rangatira Ltd v Commissioner of Inland Revenue* (1997) at 139). The appellate court does not actually rehear the evidence, notwithstanding that many appeals are formally by way of rehearing (Senior Courts Act 2016, section 56). Rather, it rests its decision on the trial record. New evidence is presumptively inadmissible on appeal, in both civil and criminal proceedings: the test is the interests of justice but a party is expected to put up their best case at trial, so new evidence is screened for freshness, credibility and cogency.<sup>31</sup> A related norm is that the court entertains with reluctance a point not taken below<sup>32</sup> or an amendment to pleadings.

The second group concerns the standard of review. An appellate court traditionally paid a substantial degree of deference to the finder of fact. The court would not interfere if there was substantial evidence for the finding reached by the trial court, even if that court relied on evidence that did not sustain it (Jacob 1987: 234). The trial court was given significant latitude on decisions characterized as discretionary.<sup>33</sup> And the appellate court would excuse errors that it considered harmless.

A third group of norms concern effectiveness, especially in supervision of trial practice. The Court of Appeal seeks to dispose of criminal appeals expeditiously. It requires written submissions which permit relatively brief hearings and processes much of its criminal business in divisional courts, producing short decisions many of which were once delivered orally or within a very few days of the hearing.<sup>34</sup>

The Supreme Court has modified some of these norms. In *Austin, Nichols v Stichting Lodestar*,<sup>35</sup> it held that an appellate court must form its own

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<sup>30</sup> The number of judgments delivered by the Court of Appeal increased from 78 in 1960 to 458 in 2000: Richardson 2009: 307.

<sup>31</sup> In civil proceedings, the traditional test was found in *Drageicevich v Martinovich* (1969), applying *Ladd v Marshall* (1954). See also *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* (1998) at 193 per Tipping J and *Sturgess v Dunphy* (2014) at para 15. In criminal proceedings, see *Bain v R* (2004) and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at para 120.

<sup>32</sup> *Attorney-General v Horton* [1999] UKPC 9, [1999] 2 NZLR 257.

<sup>33</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* (1987) at 440-441; *May v May* (1982) at 169-170; and Jacob (1987: 234).

<sup>34</sup> Sir Ivor Richardson noted that around 70% of decisions were of no more than 10 pages and in the years 2000 and 2007 only about 4% exceeded 30 pages (2009: 308).

<sup>35</sup> [2007] NZSC 103, [2008] 2 NZLR 141.

view of the merits in a general appeal. The court may make appropriate allowances for the trial court's advantages, but if it forms a different view it must act on that view. In *Kacem v Bashir*<sup>36</sup> a majority extended this rule by markedly reducing the number of first instance decisions that are considered discretionary and hence warrant deference so long as the outcome was reasonably available to the trial court: 'the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary' (at para 32).

These decisions were controversial. The former Chief Justice, Dame Sian Elias, considered *Austin, Nichols* no more than a restatement of existing law,<sup>37</sup> while an academic commentator said that the case 'meant that the thinking regarding appellate intervention changed fundamentally' (Beck 2011: 269-270). In my view *Austin, Nichols* was a restatement—a warning shot across the bows of lower courts—so far as it concerned the standard of review for decisions that are not considered discretionary.<sup>38</sup> Its significance is rather that to require fuller reasons of a first appellate court to facilitate a second appellate court's search for error in that court's decision on further appeal.<sup>39</sup>

*Bashir* did effect substantive change, making New Zealand law significantly more receptive to appeals. The UK Supreme Court declined to follow it in *Re B (A Child) (Care Proceedings: Threshold Criteria)* (2013: para 38), describing *Bashir*'s use of an evaluative standard in care proceedings as 'interesting' but adhering to the 'conventional' view that because there is a range of available outcomes such decisions are discretionary.<sup>40</sup>

These decisions have changed appellate practice, arguably for the better. To require fuller reasons of a lower court is to improve the overall quality of justice. But they encourage appeals without necessarily affecting outcomes.<sup>41</sup> Appellate courts have jettisoned discretionary reasoning for

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<sup>36</sup> [2010] NZSC 112, [2011] 2 NZLR 1.

<sup>37</sup> *Austin, Nichols* note 35 above, at para 6, describing the approach to appellate review set out in the judgment as 'well established'.

<sup>38</sup> The Supreme Court held that the decision under appeal was not discretionary: see para 17. The rule that an appellant is entitled to the benefit of the appellate court's opinion was essentially a restatement of what had been said in *Shotover* (1987). The principle is traceable to English authority: see *The Glanmbanta* (1876) at 288. But see Rodriguez-Ferrere (2012) arguing for a richer understanding of deference to the trial court.

<sup>39</sup> Blom-Cooper (1971: 372). The Supreme Court's decision in *Sena v Police* (2019) is to similar effect in judge-alone criminal trials.

<sup>40</sup> Australian law appears to take a similar approach; see Prince (2022: 213).

<sup>41</sup> It is unclear what effect additional reasons have had on productivity in intermediate courts.

evaluative review in many areas following *Bashir*,<sup>42</sup> and there must have been cases which were decided differently in consequence. But there is no evidence that rates of reversal have risen as one might expect had the standard of review been lowered. There may be two reasons for that. Other appellate norms survive, as the Supreme Court was at pains to emphasize in *Austin, Nichols*; in particular, allowances are still made for the trial court's advantages, and the rule that an appellant must show that the court below was wrong is routinely invoked when dismissing an appeal on the merits.<sup>43</sup> And appellate judges were always expected to review the record and decide whether the decision below was wrong. If persuaded that it was, they would likely intervene: if not, they would dismiss the appeal shortly. That is what happened in *Austin, Nichols* itself; the Court of Appeal spoke of deference to the first instance decision-maker but it acted on its own briefly expressed view of the merits, and for that reason its decision was upheld.

### A liberal approach to the statutory leave criteria

There is evidence that the Supreme Court followed the traditional approach to leave in its early years. Sir Peter Blanchard, who was among the first appointees and had written the judgment of the Court of Appeal in *Waller v Hider*, remarked that 'public and general importance is a well-understood test that excludes disputes that are largely factual or involve construction of unique documents' (Blanchard 2015: 66). He explained that the Supreme Court had tried to maintain a consistent approach to leave applications. In other extrajudicial writings, he referred approvingly to *Waller v Hider* and stated that, unless a case will serve as 'a precedent generally', the Supreme Court is unlikely to grant leave, and added that 'second level review of facts is undesirable', citing Privy Council practice (2007: 4). He remarked, however, that the case most likely to get leave is one that will 'give the Supreme Court the opportunity' to clarify the law in a particular area (2007: 5).

However, the Supreme Court has not adopted *Waller v Hider*. Indeed, it does not appear to have cited that decision or its antecedent, *Rutherford v Waite*.<sup>44</sup> The Supreme Court always gives brief reasons when refusing

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<sup>42</sup> See, for example, *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308, in the context of bail. This resulted in a minor spate of bail appeals but (because for bail the first instance judge is usually better able to assess and monitor risk between arrest and trial) little change in outcomes.

<sup>43</sup> See *Austin, Nichols* note 35 above at para 13. This approach has been adopted by the Supreme Court in later decisions: see, for example, *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at paras 58-60.

<sup>44</sup> Based on a database search of the Supreme Court's decisions.

leave. It tends to cite the statutory criteria without elaboration. Those criteria leave unstated considerations that were traditionally taken into account on a second appeal and still are when the Court of Appeal weighs a grant of leave on a second appeal: whether the proposed appeal is genuinely arguable, whether the appeal turns on the question that is said to be of general importance, and whether the appeal justifies the additional costs and delay of hearing. I do not mean to suggest the Supreme Court has discarded these considerations. On the contrary, it routinely refuses leave on the ground that the proposed appeal is not seriously arguable. The point rather is that these considerations do not appear to be integral to the test for leave, needing always to be made out if the principle that finality should prevail after one merits appeal is to yield.

The Supreme Court's rules provide that an applicant must justify leave against the leave criteria but do not state that the Supreme Court itself must identify a specific question of general or public importance, or a substantial miscarriage of justice, when granting leave (Supreme Court Rules 2004, rule 15). In recent years it has adopted a practice of granting leave in the broadest terms; the approved question is whether the Court of Appeal was right to allow or dismiss the appeal, as the case may be. The number of appeals for which this is the stated question of general or public importance increased steadily from one (out of the total of 22 granted leave) in 2015 to 11 (out of 28 granted) in 2019.

It seems accordingly that the Supreme Court's approach to leave is sometimes, though not always, more liberal than the traditional test. This may be necessary if the Supreme Court needs more cases to deliver on its objectives. In that case, the Court of Appeal presumably ought to take the same approach in cases that come to it by leave, if only to open the pathway to the Supreme Court.

## [D] CAUSES AND CONSEQUENCES

### A problem of structure

The number of substantive decisions delivered by the Supreme Court remains reasonably constant. In 2020 it delivered 21 substantive judgments. That the causes are structural can be seen when the Supreme Court of Appeal's work is analysed.

The Court of Appeal delivers about 700 judgments annually. It does not follow that there is a large pool of cases in which a further appeal to the Supreme Court is both warranted and likely, for several reasons. First,

many judgments of the Court of Appeal are interlocutory in nature. The Supreme Court hears a substantial number of pretrial appeals in criminal proceedings.<sup>45</sup> In 2020 the Supreme Court delivered 424 final judgments, 331 in crime and 93 civil. Second, these were almost all first appeals, many of which involve the application of settled law to facts. They include 111 sentence-only appeals, which seldom raise issues of principle. Third, the Court of Appeal itself hears few second appeals. In 2020 it received just 64 applications and granted 14 of them.<sup>46</sup> Finally, there remain a substantial number of cases which are intrinsically significant or raise some issue of general importance, but the losing party may not think the issue on which leave is sought will change the outcome on further appeal, and some will not be sufficiently motivated or able to bear the associated expense and delay.

## Consequences for the Court of Appeal's law development function

The Court of Appeal has always seen law development and stewardship of precedent as integral to its work. In all but a very small number of cases its decision is in practice final. But the Court of Appeal's law development function has been circumscribed by the Supreme Court's approach to its own jurisdiction. With the caveat that it can be difficult to categorize judgments, a substantial proportion of the Supreme Court's output comprises 'system administration' cases, by which I mean evidence and process. I estimate that 25% of Supreme Court judgments delivered in 2014-2019 fell into this category, with 14% comprising evidence cases. System administration cases can raise important issues, but the Court of Appeal exercises supervisory jurisdiction over these fields and relevant rules are sometimes found in that court's own processes.<sup>47</sup>

To some extent this development may be explained by pressure on the Court of Appeal. When the Evidence Act 2006 was enacted the Court of Appeal's workload precluded assigning all significant cases to the

<sup>45</sup> The volume of interlocutory appeals in criminal cases was noted in an issues paper: New Zealand Law Commission (2018: paras 1.15-1.16). The Law Commission questioned the value of pretrial evidence admissibility appeals. In its final report the Commission noted that in 2015-2016 'a quarter of all appeals related to the Evidence Act' (2019: note 67). At the time of writing some 36% of criminal appellate filings concern pretrial rulings. Many rely on grounds which would not likely succeed on appeal on the evidence actually led at trial, and they are often brought when trial is imminent.

<sup>46</sup> Unfortunately, court systems do not record this data consistently. This is the most accurate estimate available. In 2021 the corresponding numbers were 51 and 10.

<sup>47</sup> The Supreme Court has delivered judgments on procedural rules dealing with waiver of security for costs and extensions of time to appeal in the Court of Appeal: see *Reekie v Attorney-General* note 11 above and *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

Permanent Court or Full Courts. Most were decided in divisional courts, which left development of evidence law in the hands of the Supreme Court. Its work in that field has extended to hearing pretrial appeals. By contrast, when the Criminal Procedure Act 2011 was enacted, significant cases were assigned to the Permanent Court, and with one exception those decisions have proved final.<sup>48</sup>

Change in the law development function of the Court of Appeal is most clearly seen in connection with Full Courts. A decision to sit as five is a statement that the Court of Appeal expects its decision will be final. In practice Full Courts are far less common than they once were<sup>49</sup> and much rarer than one might expect given the Court of Appeal's supervisory control of trial practice. They are convened when the Court of Appeal is establishing sentencing guidelines, that being a field which the Supreme Court has generally left to the Court of Appeal. They may also be used when the Supreme Court is reconsidering a precedent of its own.

## To grant more leave applications would be counterproductive

To the Supreme Court's credit, it has resisted the temptation to fill its docket with the cases on offer. That would confront legislative policy and compromise the work of the Court of Appeal, as just explained. And a final appellate court cannot allow itself to become a court of error correction, for two reasons.

First, there is seldom a single correct outcome which the Supreme Court is more likely to discover than were the courts below. In most cases reasonable minds can differ. Lord Atkin remarked that about one-third of appeals are allowed at each level and there is no reason to suppose that the proportion would be any less if there were a still higher tribunal (Atkin 1927; Blom Cooper & Drewry 1969). Justice Jackson of the US Supreme Court put the point another way, saying that 'we are not final because we are infallible; we are infallible because we are final' (*Brown v Allen* 1959: at 540).

Second, to the extent that apex courts practise error correction, deciding individual cases on their factual and legal merits, their advantages are,

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<sup>48</sup> *McAllister v R* note 14 above; *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482; and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1. *Wiley* (dealing with the miscarriage of justice test for a criminal appeal) is the exception; the Supreme Court concurred in *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85.

<sup>49</sup> As noted earlier, 48 Full Courts sat in 2001. In 2019 the number was 1. Andrew Beck surveyed the decline in numbers in his 'The Five-Judge Court' essay (2009).



as Le Sueur and Cornes put it, inherently limited (Le Sueur & Richard Cornes 2000). On questions of fact, the Supreme Court is seldom better placed than was the intermediate court and may be at a disadvantage *vis-à-vis* the trial judge. Because it is final the court must also cultivate its authority (Ardern 2018: 72), which depends on it being seen to deliver a higher quality of adjudication.<sup>50</sup> The point can be illustrated using cases in which the outcome is determined by a minority of the judges to adjudicate upon it. *Brooker v Police* and *Bathurst Resources v L & M Coal Holdings*<sup>51</sup> were not error correction cases—leave was granted on an issue of principle, and once granted the Supreme Court had to decide the outcome itself—but both were controversial partly because an overall minority prevailed in the result.<sup>52</sup> The short point is that error correction attracts controversy of a kind that an apex court can do without.

## Reform

To identify structural causes is to invite a structural solution. I discuss reform briefly in section E, but without offering specific proposals. There is a prior question about the resources New Zealand should devote to appeals, which I do not attempt to answer. The exercise would also require analysis, which I have not attempted, of the appellate work of the High Court and the types of work which merit a first appeal to a bench of three judges. Absent structural form, solutions are to some extent available to the judiciary, as I next explain.

## [E] JUDICIAL POLICY TOWARD THE DEVELOPMENT AND STEWARDSHIP OF PRECEDENT

In this section I take existing appellate pathways and structures as given and address questions of judicial policy toward law development and the supervision of precedent, identifying a risk of inefficiency in an appellate hierarchy and arguing for restraint and a collaborative approach to mitigate that risk.

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<sup>50</sup> Drewry (1968: 448) discussing *Blyth v Blyth* (1966).

<sup>51</sup> *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] NZCCLR 17.

<sup>52</sup> See Farmer (2015) and McLauchlan (2021).

## Common law methodology in an appellate hierarchy

Judges make law by deciding cases. This has long been considered the virtue of the common law, which is thought to produce law of superior quality as the courts close in incrementally on a fully articulated rule. In the words of Lord Mansfield, the law ‘works itself pure’ case by case (*Omychund v Barker* 1744: at 23).

The fewer cases an apex court decides, the harder the court finds it to make law in the common law tradition. For this reason, Justice Scalia argued that final appellate courts ought to express their reasons in general terms (Scalia 1998). He reasoned that appellate courts which stick closely to the facts confer too much discretion on lower courts, and he argued that to adopt a general rule is to exercise restraint, because by adopting the rule the final court itself promises to abide by it. Some US courts have adopted a rule that a *ratio* extends to issues that were not necessary to the outcome but were germane and resolved after reasoned consideration (Tyler 2020). To similar effect, the High Court of Australia held that lower courts should follow ‘seriously considered dicta’ of the High Court (*Farah Construction Pty Ltd v Say-Dee Pty Ltd*;<sup>53</sup> see Chen 2021). The leading proponent of a broader approach in New Zealand is Professor Scott Optican, who argues that the Supreme Court focuses too much on case-by-case analysis and too little on policy, leaving important questions unanswered (Optican 2017: 432).

The contrary argument is that an expansive approach assumes both that law development is the apex court’s preserve and that the court is competent to decide on a wide range of controversies that are not before it. In his retirement address, Justice Keith Mason, President of the New South Wales Court of Appeal, characterized the High Court’s insistence on lower courts following its *dicta* as well-meaning but mistaken, calling it an attempt to monopolize development of the common law (2008). In New Zealand, Sir Douglas White, writing extrajudicially, argued that it would be an error were the Supreme Court to attempt to insist on its *dicta* being followed, observing that lower courts can be relied on to defer to seriously considered *dicta* to the extent appropriate (2019).

Restraint is best understood not as a promise that the court which pronounces a rule will abide by it but as a discipline that appropriately distributes power among courts, allowing those lower in the hierarchy to develop the law. There are good reasons to understand and exercise restraint in this sense.

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<sup>53</sup> [2007] HCA 22, (2007) 230 CLR 89.

To begin with, because their opportunities to revisit the law in any given field are sometimes few and far between, apex courts may inhibit law development. *Hessell v R*<sup>54</sup> illustrates the point. The case concerned sentencing methodology, and specifically the way in which trial courts were to administer guilty plea discounts. The Court of Appeal had authorized discounts of one-third, following English practice, and set a scale under which the discount was reduced progressively as trial approached. The Supreme Court found this methodology an unwarranted constraint on the discretion of sentencing judges. However, it also stated that the discount could not exceed 25%, and by making that decision the Supreme Court set in stone an important component of sentencing methodology. The Supreme Court has not had the opportunity to revisit it. The Court of Appeal, which has ample opportunity and might wish to do so (*Moses v R*),<sup>55</sup> cannot.

Error may also be entrenched. At one time some law and economics scholars argued that the common law is efficient because an unsatisfactory rule of law is more likely to engender litigation (Rubin 1977). But this view of the law assumes mistakenly that a case which reaches court is typical of the class of disputes to be governed by any resulting rule, and further that future cases will remain representative; that is, the rule created at time A will not change the pool of disputes that reach trial at time B (Hadfield 1992). Once those assumptions are discounted, it can be seen that, far from working the law pure, judicial decisions may perpetuate error. The higher the level at which this happens, the harder it is to remedy.

Need we worry about this? Apex courts settle disputes which ought to have been refined in lower courts, their processes are deliberative, and they are staffed by leading judges who sit as a large panel. But there is a risk of error in the choice of reasons. It is the product of phenomena known, following the work of Professor Kahneman and others, as the availability heuristic,<sup>56</sup> anchoring<sup>57</sup> and issue framing.<sup>58</sup> Judges at all levels of the court hierarchy may too readily perceive the instant case

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<sup>54</sup> [2010] NZSC 135, [2011] 1 NZLR 607.

<sup>55</sup> [2020] NZCA 296, [2020] 3 NZLR 583.

<sup>56</sup> The availability heuristic is a tendency to evaluate the frequency of events by availability ie by the ease with which relevant instances, including the case to hand, come to mind. It may lead the decision-maker to err by overestimating or underestimating the frequency with which an event will recur.

<sup>57</sup> Anchoring is a tendency to rely too heavily on initial information about a property of an event or thing. It may lead a decision-maker to assume that future instances will share that property.

<sup>58</sup> Issue framing is a tendency to emphasize a subset of potentially relevant considerations, leading later decision-makers to focus on that subset to the exclusion of other considerations.

as representative of a class, or as exceptional. Supreme Court processes seldom equip judges to know the characteristics of the class to be governed by a given rule, let alone the impact of their decision on the class. There are also cases in which the facts are highly salient, meaning that they may lead the court to choose a rule which leads to the right outcome on the facts (Schauer 2006: 899; Schauer & Zeckhauser 2009).

The literature suggests that final appellate courts are not immune. Professor Schauer offered examples, drawn from the US Supreme Court, of the availability heuristic leading to unsatisfactory rules (Schauer 2006: 901). His leading example was the 1964 decision in *New York Times v Sullivan* (1964), in which the court adopted an actual malice standard for liability in defamation. An Alabama jury had used a massive damages award to punish so-called northern agitators who published an advertisement condemning public officials for resisting desegregation. Schauer argued that but for these extraordinary facts the court might not have adopted so restrictive and unique a standard. Indeed, errors of this kind may be somewhat more likely in apex courts. The fewer a court's opportunities to revisit an issue, the greater may be the risk that it will find the case at bar a suitable vehicle for rule-making.

Judicial law development ought to be efficient, by which I mean timely and reasonably free from error. For the reasons just given, efficiency in law development usually counsels restraint in appellate courts' choice of reasons, especially where their opportunities to return to the field may be few. It also invites a restrained approach to leave for second appeals, leaving law to be settled at a lower level unless there is reason to intervene. So, a second appeal court should not ordinarily grant leave on a significant point of law unless necessary to ensure lower courts behave consistently or there is reason to think the first court was wrong; that is to say, it should not take the case merely so the law may be settled by the second court itself. The second court should also take care not to restate governing law in a way which may inhibit future development by lower courts.

All of that said, reasons always invoke some rationale of wider application and a second appellate court must reason from policy if it is to develop law. Innovating to meet changing social conditions is one of the Supreme Court's objectives, to which I return below.<sup>59</sup> Its decisions may also be closely parsed for meaning by later courts seeking to extract

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<sup>59</sup> That this was one of the objectives for the Supreme Court cannot be doubted. The extent to which it is permissible for a court to make law within the limits of judicial decision-making remains contentious; I do not engage with that argument, but rather contend that there is good reason to be conservative. See Watts (2001).

underlying policy reasoning; and if so, it may be better that the Supreme Court articulate any such reasons itself.

The common law manages the risk of error or over-reach through the rules of precedent. A *ratio decidendi* is a proposition of law that was necessary to the outcome of the case.<sup>60</sup> The *ratio* may be confined to the proposition that given facts A and B the law is X. It usually extends to any reason which the precedent court expressly or impliedly considered necessary to the outcome, and it excludes any reason given but for which the outcome would be the same (Cross & Harris 1991: 40, 56 and 72).

It is the *ratio* that binds subsequent courts, and they define it in the exercise of their duty to deliver a just outcome according to law in the case at bar. They must decide what a precedent stands for and whether, having regard to its material facts, it governs the case before them. If a precedent is unclear, a subsequent court need not spell out a *ratio* with great difficulty in order to be bound by it, for that is likely to generate the very confusion that the precedent ought to prevent (*Great Western Railway v Owners of SS Mostyn* 1928: at 73 per Viscount Dunedin; *Actavis UK v Merck & Co*,<sup>61</sup> para 83). The subsequent court may decide that part of a precedent court's reasons did not bear the court's authority but was merely a proposition assumed correct to decide the case (*Baker v R* 1975: at 788 per Lord Diplock). More controversially, the precedent court's reasons need not be conclusive. A subsequent court may hold that the reasons were objectively non-dispositive. It may also find they were expressed more broadly than necessary; this because rarely can a precedent court examine the application of its reasons in all other cases.<sup>62</sup> In the last resort a lower court may follow a binding precedent while offering its opinion that the precedent is wrong, so inviting an appeal to the precedent court (*Broome v Cassell* 1972: 874-875).

Underpinning all of these rules can be discerned a policy of the common law, to limit the binding force of judicial precedent by presuming that the precedent court attended less closely to matters not strictly necessary to the outcome.<sup>63</sup> It is appropriate to use the language of presumption. A subsequent court inquires into what the precedent court intended, seldom

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<sup>60</sup> Garner (ed) 2019.

<sup>61</sup> [2008] EWCA Civ 444, [2009] 1 WLR 1186.

<sup>62</sup> Cross & Harris described this as a residual power to restrict the scope of a rule stated by a precedent court (1991: 74). See too MacCormick (1987: 180), Mason (1988), Gageler & Lim (2014: 546). The rationale was well expressed in *Cohens v Virginia* (1821) at 399.

<sup>63</sup> Sentencing guideline decisions are a notable and sometimes controversial exception; an attempt is made to gather a representative sample of cases which the Supreme Court uses to set guidelines of general—but not binding—application.

finding it necessary to go beyond expressed reasons. But where necessary the subsequent court may establish the *ratio* by deciding whether the reasons were necessary to the outcome. In this way the common law achieves three objectives: it distributes judicial power, ensuring that facts may continue to make law in trial courts; it manages the authority of the past over the present; and it recognizes limits to courts' institutional competence.

Of course, a subsequent court must act in what Jeremy Waldron described as a responsible spirit of deference; it must examine the precedent closely and employ it as a basis for decision to the extent applicable (Waldron 2012: 26).<sup>64</sup> From time to time a court which declines to follow a precedent may earn a rebuke from a higher court, as Lord Denning famously did in *Broome v Cassell* (1972).<sup>65</sup> But the subsequent court usually refines the precedent, recognizing its policy while narrowing or enlarging its scope. It is through engagement with its reasoning and scope, by commentators as well as judges, that a judicial opinion may find eventual acceptance as a rule of law. Viewed in this way, law development is not a series of authoritative pronouncements but a process which is essentially collaborative in nature.

The rules outlined here apply to horizontal precedent as well as vertical, hence 'precedent' and 'subsequent' court. But they are especially important in a hierarchy in which an appellate court has only occasional opportunities to revisit its decisions, and in which the possibility of error in law development is taken seriously. In such a world, restraint and a conservative approach to precedent—meaning a strict approach to ascertaining the *ratio*—can facilitate timely law development and also mitigate the occasional misstep. The responsibility for doing so is shared by all courts in the hierarchy.

## Judicial dialogue about law development and stewardship of precedent

There has been little judicial dialogue, whether formal (meaning through judgments) or otherwise, about the approach that New Zealand courts ought to take to law development following the Supreme Court's establishment. Structural constraints on access to the Supreme Court have received little recognition. The Supreme Court is plainly conscious

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<sup>64</sup> See also Lewis (2021) arguing that a court which is not obliged to follow a precedent may still have good reason to do so.

<sup>65</sup> In that case the Court of Appeal had flatly declined to follow a judgment of the House of Lords, *Rookes v Barnard* (1962) which it found unworkable.

of a need for caution. It evidently recognizes that to take on a case can be to assume ownership of the field. It has granted leave to settle a point of law only to decide, after full argument, that the point does not require decision on the facts.<sup>66</sup> It has also declined leave on the ground that it wants to see how cases develop in lower courts before entering the field.

With respect to precedent, the Supreme Court has made a commitment to *stare decisis* (the doctrine that earlier decisions must be followed), holding that it will ordinarily abide by its own decisions and those of the Privy Council before it (*Couch v Attorney-General (No 2)* (2010)).<sup>67</sup> It sometimes follows earlier decisions of the Court of Appeal. It has not asserted that its *dicta* are binding.<sup>68</sup> But commentators have pointed to cases in which it decided issues that did not strictly arise.<sup>69</sup> And its practice of not pinpointing a specific question when granting leave can make it harder to identify what the decision stands for.

For its part, the Court of Appeal has held that it need not follow a superior court's decision on a point of law that was essential to the outcome where the earlier court merely assumed the law was correct.<sup>70</sup> However, the point is rarely if ever taken in practice.

There is a cultural dimension to precedent which merits examination. Sir Anthony Mason, the former Chief Justice of Australia, drew attention to it when he suggested that Australian courts sometimes were too deferential, treating precedent as an 'attitude of mind' rather than a judicial policy, with the result that from time to time courts abdicated their function by applying non-binding decisions and *dicta*.<sup>71</sup> By way of contrast, some English judges disapproved openly of the UK Supreme Court's occasional early practice of delivering multiple concurring judgments.<sup>72</sup>

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<sup>66</sup> See, for example, *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935 at para 28; and *Tauranga Law v Appleton* [2015] NZSC 3, [2015] 1 NZLR 814 at para 4.

<sup>67</sup> Lower courts continue to be bound by Privy Council decisions.

<sup>68</sup> Lord Halsbury's famous statement in *Quinn v Leatham* (1901) that every judgment 'must be read as applicable to the particular facts proved' and as 'only an authority for what it actually decides' was approved in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at para 127, but in a minority judgment, and the precedent under discussion (*Simpson v Attorney-General (Baigent's Case)* (1994)) was a Court of Appeal decision predating the Supreme Court.

<sup>69</sup> Evans & Fern (2015: 57); Farmer (2015: 61) discussing *Gibbons Holdings v Wholesale Distributors* (2008) and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444; and Watts (2021).

<sup>70</sup> *Combined Beneficiaries Union v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at para 49; and *Baker v R* (1975) at 788.

<sup>71</sup> Mason (1988: 106).

<sup>72</sup> *Birmingham City Council v Doherty* [2008] UKHL 57, [2009] AC 367; and *Grundy v British Airways plc* [2008] EWCA Civ 875, [2008] IRLR 815.

Courts seldom find it necessary to subject precedents to critical analysis with a view to distinguishing them. The *ratios* are usually narrow and uncontroversial. Nor does a busy intermediate court go in search of opportunities to distinguish precedent.<sup>73</sup> So evidence of absence is not evidence of deference. But there are examples of deference or caution which was arguably unnecessary or even unhelpful.

The Supreme Court's 2010 decision in *Vector Gas v Bay of Plenty Energy*<sup>74</sup> supplies the clearest illustration. The Supreme Court was unanimous in the result, which could have been reached without determining whether prior negotiations are admissible to interpret a contract. It chose to address that subject, but the judges wrote separately and they did not resolve the tension between expressed and intended meaning that is inherent in Lord Hoffman's well-known *Investors Compensation* principles.<sup>75</sup> It made sense not to distinguish *Vector* on the ground that what the Supreme Court had said about negotiations was *obiter*; the Supreme Court had spoken with care and presumably the judges would take the same views if presented with a case that did turn on that issue. But a lower court could not have been faulted for finding that the decision contained no binding *ratio*. None did so expressly. Rather, a variety of approaches emerged, most seeking to apply *Vector*.<sup>76</sup> Some chose to follow one of the five judgments, others attempted a synthesis.<sup>77</sup> A few ignored it. A strict approach to precedent would have led courts to *Boat Park v Hutchinson*, a 1999 case in which the Court of Appeal followed *Investors Compensation* (1997), so adopting the principle that negotiations are inadmissible. In hindsight, attempts to follow *Vector* likely did the law a disservice by delaying a remedy which only the Supreme Court could administer.<sup>78</sup> Eventually the Court of Appeal offered a restatement in *Bathurst*, holding that intention is not ascertained by looking at prior

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<sup>73</sup> *Blackwell v Edmonds Judd* [2016] NZSC 40, [2016] 1 NZLR 1001 at para 54, where the Supreme Court held that the Court of Appeal ought to have distinguished an earlier Supreme Court judgment.

<sup>74</sup> *Vector Gas* note 69 above.

<sup>75</sup> The issues were surveyed by Dawson (2015: 233).

<sup>76</sup> The cases and commentary were gathered by Palmer & Geddis (2012: 303). The Supreme Court has since acknowledged that *Vector* left the law unsettled on this point: *Bathurst Resources Ltd v L & M Coal Holdings Ltd* note 51 above at para 74.

<sup>77</sup> As I did, writing for the Court of Appeal in *Malthouse Ltd v Rangatira Ltd* (2018).

<sup>78</sup> The Supreme Court did clarify the law of contractual interpretation in *Firm PI v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432, but that case did not concern the admissibility of pre-contractual negotiations, which was accordingly left for another day: Summary Proceedings Act 1957, section 144.



negotiations.<sup>79</sup> That led to the Supreme Court finally settling the law in 2020, a decade on from *Vector*, in favour of the intended meaning approach.

*R v Te Huia* (2006) was a hard case in which cautious use of precedent led the Court of Appeal to deliver an outcome which, as the Court of Appeal acknowledged with regret, was contrary to fundamental fairness.<sup>80</sup> The Court of Appeal was faced with a Supreme Court decision dealing with retrospective penalties and found itself unable to depart from an interpretation of a general prohibition on retrospectivity that had formed part of the Supreme Court's chain of reasoning.<sup>81</sup> The prohibition was statutory and the Supreme Court had given the language a definitive meaning, hence the apparently insuperable obstacle. But as the Court of Appeal recognized, the Supreme Court had addressed a specific context (a prisoner's statutory release date) and could not have turned its mind to the quite different circumstances of the case at bar, which concerned eligibility for minimum periods of imprisonment.<sup>82</sup> It may not be permissible for a lower court to find that a higher one was *per incuriam*,<sup>83</sup> but the higher court's failure to cite essential sources may be evidence that it was deciding a narrow issue and did not intend that its apparently general reasoning should extend to the circumstances of the case at bar.

In both examples a Supreme Court precedent caused difficulty for lower courts but their responses were not attributable to anything the Supreme Court had said about scope and force of precedent. Rather, courts chose to defer, with results which a more conservative application of the rules of precedent might have mitigated or avoided. They evidently did not think such an approach was open to them, which suggests shared understandings about precedent should be revisited to ensure they are fit for purpose in New Zealand's court system.

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<sup>79</sup> *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 113, [2020] NZCCLR 26 at paras 41 and 46.

<sup>80</sup> Although it is one of few cases dealing with the Court of Appeal's approach to Supreme Court precedent, the decision is unreported.

<sup>81</sup> *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 (SC).

<sup>82</sup> The Supreme Court had not referred to authority, including the Court of Appeal's own decision in *Chadderton v R* (2004) which, like *Te Huia* (2006), concerned eligibility for minimum periods of imprisonment. As the Court of Appeal also recognized, the Supreme Court had approached retrospectivity differently in yet another setting, eligibility for preventive detention: *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145.

<sup>83</sup> The rule states that a court's decision is not binding if given *per incuriam*: *Young v Bristol Aeroplane Co Ltd* (1944). In English law it applies only to decisions of the same court, for reasons given in *Miliangos v Frank (Textiles) Ltd* (1976) at 477-478 per Lord Simon.

## [F] REFORM OPTIONS

As indicated earlier, reform proposals are beyond the scope of this paper. I sketch three broad options, not as proposals but to organize some observations. They should not be taken to express a preference, except for clarity of policy.

I preface them by summarizing the Supreme Court's purposes, as derived from the legislation and legislative history. They are: to make law, and to oversee its development and application by other courts; to innovate, modifying the law to meet changing social conditions in New Zealand; to decide significant issues regarding the Treaty of Waitangi; to remedy substantial miscarriages of justice; to decide the most important cases; and to oversee the operation of the court system.

The first of these is implicit in the leave criteria and the Supreme Court's position at the apex of the court system. The second was the principal justification, after sovereignty, for establishing a domestic court. The legislation expresses the third as a subset of the 'general or public importance' limb, but it is constitutional in nature and is lent emphasis by section 66(1) of the Senior Courts Act 2016, which continued the Supreme Court to hear 'important legal matters, including matters relating to the Treaty of Waitangi'. The fourth and fifth reflect the need to maintain public confidence in the court system. The final three recognize that pressure of business in trial and intermediate courts creates a rare risk of errors that are sufficiently important to require remedy on further appeal to a court whose deliberative processes are protected by a leave mechanism. Higher quality adjudication is sometimes included in a list such as this, but it is a second-order consideration; the Supreme Court sits as five and is permitted more deliberative processes so it may better deliver on its principal objectives.

### Altering structures and pathways to increase the Supreme Court's caseload

The first option would involve changing appellate structures and pathways to increase the Supreme Court's substantive output to meet the original projections. It would allow the Supreme Court to reach more issues of substance and with greater frequency. Having regard to the output of the Court of Appeal, this likely would mean revisiting the allocation of first appellate court work between the High Court and Court of Appeal, assigning more of it to divisions of three judges and perhaps reducing the number of pretrial appeals to offset the increased workload. As noted

above, it is debateable whether many pretrial appeals are a good use of the Court of Appeal's time. That would result in more decisions of the District Court and specialist tribunals reaching the Supreme Court as second, rather than third, appeals and reduce the time such appeals sometimes take to reach finality.

## Conservative application of leave criteria

A more traditional approach to leave might result in the Supreme Court delivering fewer substantive judgments than it does now, but given New Zealand's small population the Supreme Court should still be able to deliver substantially on its objectives regarding law development and innovation. The two books published to mark its first decade illustrate that the Supreme Court had already covered a good deal of ground.<sup>84</sup> Lacking federal or specific constitutional jurisdiction or the need to supervise multiple appeal pathways, it can focus on the general law.<sup>85</sup> In some areas—Bill of Rights methodology and relationship property, for example—it has developed the law extensively. Had it been left to the Court of Appeal, which cannot control its workload, some of these opportunities might not have been seized. The original estimate of 40-55 cases annually was evidently not based on any qualitative analysis of demand for second appeals. The risk that the Supreme Court would not face a full docket was recognized and deemed an acceptable cost of a two-tier appellate system.

## A middle ground

Opportunities exist to enlarge appellate pathways to increase the amount of quality work available to the Supreme Court without modifying existing structures:

- a. There remain a few fields in which legislation provides that the Court of Appeal is final, though they are unlikely to generate many third appeals.<sup>86</sup>
- b. There may be other, socially important fields in which a first appeal ought to lie to the Court of Appeal, or in which tightly controlled administrative processes might facilitate transfer of significant trials to the High Court, or appeals to the Court of Appeal.

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<sup>84</sup> Russell & Barber (2015); and Stockley & Littlewood (2015).

<sup>85</sup> This point was made by the Advisory Group: Office of the Attorney-General (2000: 45).

<sup>86</sup> Accident compensation appeals are perhaps the leading example: see Accident Compensation Act, section 163(4).

- c. Second appeals to the Court of Appeal might receive some encouragement. In *McAllister v R*<sup>87</sup> the Court of Appeal stated that it would take the same approach to leave as the Supreme Court, but in practice it adheres to the traditional test (at para 32).<sup>88</sup> In 2020 the Court of Appeal granted 15% of second appeal leave applications.
- d. The Court of Appeal denies the Supreme Court jurisdiction by refusing leave to bring a second or interlocutory appeal to the Court of Appeal; the exercise of that power might be reviewed. In *McAllister* the Court of Appeal also said that to open the jurisdictional pathway to the Supreme Court it would sometimes elect to grant leave but dismiss an appeal.<sup>89</sup> It is unclear to what extent that practice is followed.

## [G] CONCLUSION

Policy choices about courts' roles determine the nature and size of demand for their services, and caseload in turn influences their behaviour over time. New Zealand's recent history offers a case study in why that is so and how it can shape law in an appellate hierarchy that rests on common law methodology. Existing pathways deliver fewer second appeal-worthy cases than was anticipated in 2003. A review is timely. Independently of that, judicial policy toward law development in New Zealand's courts hierarchy merits attention. This paper is an invitation to dialogue on these questions.

**Justice Forrie Miller** (LLM, Toronto: BA/LLB (Hons), Otago) was appointed to the High Court of New Zealand in 2004, and to the Court of Appeal in 2013. A profile is available on the Courts of New Zealand [website](#).

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<sup>87</sup> *McAllister v R* note 14 above.

<sup>88</sup> The difference of approach is perhaps most clearly illustrated by *Downer Construction v Silverfield Developments* [2007] NZCA 355, [2008] 2 NZLR 591 at paras 36-37.

<sup>89</sup> *McAllister v R* note 14 above at para 39.

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## CAN DOCTRINAL LEGAL SCHOLARSHIP BE DEFENDED?

GEOFFREY SAMUEL

Kent Law School

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### Abstract

This review article investigates the question whether doctrinal legal scholarship can be defended. And it does so in the light of a new book by Mátyás Bódig that sets out an epistemological defence of this scholarship. The second half of this article critically examines this work, while the first half looks more generally at how doctrinal legal scholarship is defined in the civil and common law traditions and how it has traditionally been defended in the United Kingdom. One secondary question that is considered is whether doctrinal legal scholarship is of any greater value, epistemologically, than scholarship in astrology. The article is sceptical as to whether doctrinal legal scholarship can be defended, except as scholarship providing assistance to the legal profession and judiciary.

**Keywords:** astrology; Bódig (Mátyás); Dworkin (Ronald); doctrine; epistemology; hermeneutics; methodology; theory.

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### [A] INTRODUCTION

The recent results from the Research Excellence Framework ought, once again, to encourage academic lawyers to reflect on what they do. Is their role only to assist the legal profession and the judiciary with their more reflective views on the law and legal analysis? Or is their role to advance knowledge? The purpose of this review article is to consider this question in the light of a new book defending legal doctrinal scholarship. However, before turning to this new work this article will examine the notion of doctrinal legal scholarship and the epistemological problems that attach to it. Is, for example, doctrinal legal scholarship more valuable, in terms of the pushing at the boundaries of knowledge, than, say, astrological writings?

## [B] DOCTRINAL LEGAL SCHOLARSHIP

What is doctrinal legal scholarship? One obvious way to respond to this question is to look at what this scholarship has been from its inception to the present day. There is not a lack of literature in respect of this diachronic view. Several French works have examined the notion of *la doctrine*, either directly under this title, or as an historical approach to legal methodologies and legal science (see, for example, Jestaz & Jamin 2004; Champeil-Desplats 2016). The question is important in France because to become a professor of law one has to demonstrate a high level of competence in doctrinal legal scholarship. In other words, one has to be a good legal doctrinalist. What, then, is a good doctrinalist? One can only really answer this question by first determining what is *la doctrine* and secondly by describing the methodology that is associated with it. As for *la doctrine*, this is, synchronically, although rather tautologously, defined as the body of writings of law professors whose mission is, and has been, to comment on positive law. The methodology that accompanies this mission is termed *la dogmatique*, which to the English ear has a rather pejorative orientation but does not to the ears of all jurists within the continental (civil) law tradition. *La dogmatique* has been defined as ‘a learned, reasoned and constructive study of positive law from the angle of what ought to be (*devoir être*), that is to say what ought to be the desirable and applicable solution’ (Jestaz & Jamin 2004: 172). Another professor has defined this methodology more precisely:

The dogmatic approach consists, then, in reproducing, categorising, putting in order and systematising the law. Three principal results are expected: a) a manifestation of law as a unitary system complete and coherent in itself; b) classifications and categorisations created according to logical criteria (exhaustive, absence of overlap, and non-contradiction); c) the formulation of concepts and principles which reflect ‘the totality of the legal order being studied’ in such a way that they permit the resolution of any type of case (Champeil-Desplats 2016: 87).

When one views both the writings of professors and *la dogmatique* from an historical perspective what emerges is not just a very long tradition stretching back over two millennia (or more) but also a history marked by changes in methodology (see further Samuel 2022). These changes were themselves provoked by shifts in epistemological outlooks, but, in the civil law tradition, the object with which these methods engaged has principally remained the same, namely the body of Roman laws known as the *Corpus Iuris Civilis* (see Stein 1999). The object of juristic scholarship has largely been, then, an authoritative text and the scholarship that has attended this text was for many centuries after its rediscovery in the

11th-century commentaries. There was, in consequence, the text and the commentaries on it. Gradually these commentaries freed themselves from actual attachment to the books and sections of the *Corpus Iuris* and from the 16th century onwards there started to appear independent books on Roman (civil) law which were free-standing in the sense that they both re-systematized the Roman law and reduced it more and more to a set of abstract propositions. One of the most famous of these books was Jean Domat's *Loix Civiles* published towards the end of the 17th century (discussed in Gordley 2013: 141-147). Legal scholarship on the continent had moved from detailed commentaries on each text of the *Corpus Iuris* to much shorter works setting out Roman law as a series of coherent normative principles (*regulae iuris*). Reform of the law, Henry Maine famously noted, meant reform of the law books (Maine 1890: 363). With codification in France in 1804 the scholarly process repeated itself: in the first stage were commentaries on each article of the *Code civil* followed by a second stage where independent manuals and treatises—*la doctrine*—came to replace such commentaries (although these did not disappear).

This doctrinal scholarship based on an authoritative text in the discipline of law is analogically close to theology which is equally a discipline whose object of study has been authoritative texts. Both disciplines could, accordingly, be said to be governed by what might be termed an 'authority paradigm' within which a text is given an absolute authority (Samuel 2009). By this is meant that the texts can be criticized and engaged with in very different methodological ways, but they cannot be dismissed just as the natural scientist cannot dismiss inconvenient facts in nature. The texts are the very foundation of scholarship. Indeed, the foundational principle of the authority paradigm was well expressed by the early Italian medieval jurists: *non licet allegare nisi Iustiani leges*. Or, as another glossator put it: *omnia in corpore iuris inveniuntur*. One can only reason using the materials in the *Corpus Iuris Civilis* (Errera 2006: 46, 53). Another way of viewing this authority paradigm orientation is to see it as a matter of adopting an internal point of view. As one common lawyer discussing legal scholarship has put it: the 'doctrinal method is a doubly "constrained" or "circumscribed" way of thinking'. This is because:

First, the doctrinal scholar is constrained in the sense that one is seeking to understand practices that emerge from a specific set of materials. There is, so to speak, a closed or sealed system from within which answers must be sourced.

And:

Second, the doctrinal scholar is seeking to understand those practices as a participating member of an ‘interpretive community’, which includes judges and practitioners, using the received methods of that community (Varuhas 2022, forthcoming).

There are, arguably, two epistemological consequences that flow from this situation. The first is that history provides one of the most fruitful means of understanding what it is to have legal knowledge. Or, put another way, modern legal scholarship is the result of a two-millennia ‘project’ which, if studied, will provide all the elements that have gradually built up to form the basis of contemporary legal knowledge (on which see Jones 1940; Gordley 2013).<sup>1</sup> The second, more negative, consequence is that the authority paradigm could well have doomed doctrinal legal scholarship to remain trapped within an institutional and epistemological framework that will probably mean that it has, now, nowhere to go in its ability to furnish serious advances in legal knowledge. In turn this has resulted, at least in the common law world if much less so in the civilian one, in a proportion of academic lawyers turning to other disciplines—to interdisciplinarity—in order to escape from this epistemological doldrum (Cownie 2004; Siems 2011; Husa 2022).

This last point is of course in need of development, especially as some recent writing is now attempting to challenge this doldrum assertion. However, before looking at these challenges, something needs to be said about what has been, and what is, the view of legal scholarship in the common law world. The first and obvious point that needs to be made here is that, compared to Continental Europe, there is no long tradition of legal scholarship in England since there were virtually no legal academics before the 19th century. Indeed in 1846 a Parliamentary Select Committee Report concluded that there was no legal education worthy of the name to be had in England and Wales. The most notable piece of scholarship before this date was Sir William Blackstone’s *Commentaries on the Laws of England* (1765-1770), which was an attempt to re-organize the common law along Roman institutional lines (Cairns 1984). An academic tradition of substance developed only in the 19th century in the United States and in the 20th century in England and Wales. Serious reflection in England on the nature of academic scholarship is therefore a somewhat recent phenomenon.

What, then, is the role of an academic lawyer—a jurist—in the common law world? One can note again that common lawyers do not of course employ the term dogmatic for obvious reasons, but do they in substance see doctrinal legal scholarship in much the same way? In the middle of

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<sup>1</sup> The idea of a ‘project’ is taken from Gordley (2013).



the last century Herbert Jolowicz thought that textbooks and articles were important as guides to the case law and that if they were good they were more than mere guides; such books and articles would not just systematically arrange the cases but also extract from them general principles of law and show how such principles might be developed (Jolowicz 1963: 314). A similar view was expressed in a lecture by Robert Goff examining in more detail the different roles of judge and jurist (Goff 1983). The late Professor Gareth Jones, in his defence of traditional legal scholarship, similarly thought that the jurist's task was 'to *assist* the judge in finding principle which may lie buried in a morass of case law and to consider the wider implications of the acceptance or rejection of that principle' (Jones 1996: 10 emphasis in original). More recently several publications have examined in some detail the role of academic scholarship. Jason Varuhas in a contribution to an edited work identifies four methods which he describes in the following way:

This chapter identifies and elaborates upon each of these methods. Listed in order of increasing sophistication, they are: (i) description, which may for example involve summarizing a case; (ii) derivation, which involves distilling legal propositions from legal materials; (iii) systematization, which involves organization of interconnected legal propositions into categories, which form part of a wider system; and (iv) interpretivism, which involves interrogating normative justifications which explain legal propositions or categories, and refining one's account of those legal phenomena by reference to those justifications (Varuhas 2022, forthcoming).

Whether this description is equally applicable to legal scholarship in the United States is much more ambiguous. Certainly, the four methods identified by Varuhas are not absent, but the influence of Realism tends to make many American legal scholars more open to perspectives from other disciplines. Legal formalism is likely to be less watertight so to speak; other disciplines intrude. One should not be surprised by this more interdisciplinary outlook given the history of Realism, Critical Legal Studies and Law and Economics within American law schools—a history that has created a profound scepticism on the part of some academic legal scholars about the intellectual value of the methodology associated with 'dogmatic' legal reasoning (Priel 2021). Yet are all academic lawyers who display something of an interdisciplinary attitude to be classed as 'realists' (or worse)? According to some common lawyers the answer to this question is that the moment one does engage in an interdisciplinary pursuit one is no longer indulging in proper academic legal scholarship. Dan Priel has noted that doctrinal scholars viewing their discipline from an internal viewpoint 'see themselves as "practical" scholars who aim to help the courts reach better decisions, and they do that by a

careful reading of the cases seeking to derive from them a coherent set of rules and principles already found in them, a task for which there is no need for any serious knowledge of history, economics, psychology, or philosophy' (2019: 165). Indeed, he goes on to point out, for these scholars interdisciplinarity is an 'enemy' which may provide observations *about* law but cannot contribute to the study *of* law (2019: 167). Moreover, it is not just history that is irrelevant, but equally legal history: for the 'way [a] rule came about is neither here nor there' (2019: 174).

## [C] METHODOLOGY OF LEGAL SCHOLARSHIP

An epistemologist of the social sciences would surely observe from the above juristic comments that there is much going on, both expressed and implied, in these assertions about doctrinal legal scholarship. If one focuses on Jason Varuhas' four 'methods'—although he is reflecting comments (consciously or unconsciously) made by others discussing what civilians call the 'dogmatic' method—they would seem to reveal some more specific approaches (Varuhas 2022, forthcoming). What he means by 'derivation' is essentially induction which when employed by 'pioneering scholars' who having identified 'core concepts' were able to give 'shape and structure to what had been a formless mass'. These generalized propositions, he says, give 'practical guidance' and so abstraction has 'significant practical value'. The second method is systematization or, more prosaically, classification and categorization of the inducted legal propositions, which 'are the basic unit of the systematizing enterprise' because these 'are organized into a scheme which evinces an internal, deductive logic'. From induction one now moves, it would seem, to deduction. Yet systematization does more than establish a deductive model; it provides a map of the law and this is what makes systematizing legal textbooks so important in terms of legal knowledge. One is involved, he says, in a kind of legal cartography. Varuhas sees this systematizing method as having provided a major advance in legal knowledge within the common law world:

Treatises, adopting the systematising methodology, are largely responsible for establishing the fields of law we know today, as recognized fields. This was a significant shift for a system in which legal thinking had traditionally been organized around the formulary writ system, which focused the legal mind on procedure and factual matrices (Varuhas 2022, forthcoming).

As for interpretivism, this, according to Varuhas, is the highest form of doctrinal method. It 'involves articulation of "second-order", "deep" or "archetypical" propositions, which stand behind, explain and justify

first-order propositions'. It is a matter of second-order propositions which are 'vital in that they demonstrate that the categories that make up the system are normatively significant'. Interpretivism involves identifying doctrinal patterns and then explaining those patterns. Yet what is the actual methodology of this interpretive approach? Varuhas says that it is a matter of a creative tension between 'fit' and 'justification'. What, then, is meant by 'fit'? Varuhas explains it as follows:

When it comes to legal interpretation what has to fit is the given normative justification. But what must it fit with? It must fit with an account of the normal, proper or received body of legal practices, which are referable back to legal materials and recognizable and plausible in the eyes of the interpretive community. In this way fit is a threshold requirement for the success of an interpretive account. If the account of the law is not accepted as plausible, the interpretation shall fail (Varuhas 2022, forthcoming).

And so 'one is seeking to explain legal phenomena at a certain level of abstraction so as to avoid one's account collapsing into something akin to description'. With regard to 'justification', Varuhas says that this 'explains the phenomenon, where the account of the phenomenon is one that would be accepted as plausible by the interpretive community'.

Jason Varuhas' account of doctrinal method is not particularly original in its analysis since the methods that he describes had already been developed and asserted by previous jurists, in particular by the legal philosopher Ronald Dworkin whose influence with regard to 'fit' and 'justification' seems undeniable (Dworkin 1985). Nevertheless, it is a valuable restating because it does attempt to describe doctrinal methodology, from within the authority paradigm, in some considerable detail in turn permitting academic observers outside of the discipline of law an insight both into the apparent methods of jurists and into the epistemological underpinning of these methods. Justification, for example, is not a matter of correspondence with some external object, as would be the case in most of the natural sciences, but of consensus amongst the 'interpretive community' supported also by a hoped-for systematized internal coherence. Equally, however, the external observer might find herself puzzled by some of this. Just what is this 'legal phenomenon' (or mass of 'legal phenomena') with which these methods engage? One clue here is a comment by another jurist who has asserted that even 'if we closed all the courts, and civil recourse were completely abolished, this would not alter private law and its duties' (Stevens 2019: 121). Legal rights and legal duties are intangible things that exist independently of the physical and social institutions that give expression to law. This is what legal scholars treat as their object of engagement. Yet how are these

abstract forms of knowledge represented? The immediate answer is of course through texts. Roman law is represented through the *Corpus Iuris* and the textual commentaries that it attracted, while contemporary law is represented through legislative texts, reports of cases and doctrinal writings. So, is legal scholarship a matter of engaging with ‘law’ or with texts supposedly giving expression to law (or more precisely giving expression to a shared assumption among participants to act ‘as if’ law exists)? In other words, are legal scholars in the end engaging with something that in itself does not exist (cf Glanert & Ors 2021: 1-30)?

## [D] EPISTEMOLOGICAL CHALLENGE

Given all the doctrinal texts on legal theory and on legal thought, it might seem an outrageous claim to assert that law does not exist. It might not exist in a physical sense, but does it not exist as an intangible intellectual guide as to how to live in society? Does it not exist as a means of achieving certain social goals? One problem here is that some doctrinal scholars claim, as we have seen, that resolving conflicts between the rights of individuals ‘does not depend upon wider social policies or goals, as rights do not take the justification for their existence from such concerns’ (Stevens 2019: 164). Or, as Dan Priel puts it, the phenomenon of law ‘corresponds to a pre-existing, rationally discoverable, order of reality’ (2019: 177). And thus ‘in the domain of private law, ignoring the consequences of decisions that potentially apply to millions is the mark of moral uprightness and legal rigour’ (2019: 181). If the social goals of law are, then, irrelevant, it becomes difficult to embed any epistemological foundation for law in society itself. Law would appear to exist only as some pre-existing conceptual system whose epistemological justification is purely internal to the conceptual model itself. Citing one German jurist of the 19th century, Olivier Jouanjan perhaps sums up the position: it is the legal form which is the figure of the law (*Rechtsgestalt*) and it is this that is of interest to legal science, not its material goals (2005: 219). Earlier Jouanjan had noted that for some German Pandectists ‘the purity of the system in its entirety is the guarantee, and this system is the system of a science of law, of a positivist science’. And in a footnote he adds a comment by Windscheid that ‘ethical, political or economic considerations’ are not ‘the concern of the jurist as such’ (2005: 193). The epistemological justification, in the end, can only be one rooted in the coherence of the system and the ability to generate consensus amongst the internal participants.

Perhaps one way to investigate this problem of existence of law as a distinct intellectual phenomenon is to examine some statements that a

doctrinal scholar might make about the subject, say in an introductory work. At a general level the scholar may say this:

Though the earliest knowledge of *law* dates back to the mists of antiquity, it lives and grows and needs constant re-presentation in the light of current research. Its development may well be compared with that of medical knowledge. From time to time, certain treatments have been believed to be the most effective possible. Further experience changes these ideas and differences of opinion are then acknowledged.

The introductory work would possibly go on to point out that there is a multiplicity of things that will need to be learned but that this should not dismay the student provided he or she follows certain steps. And so 'before a beginner starts his first attempt at a personal *legal analysis* (or "*judgment*" to use the traditional word) he must list all the factors that he finds in the *legal map* before him, and he cannot do this until he has understood each, if only partially'. As the student lawyer becomes more experienced, he or she must start to appreciate the potentialities of the pattern of the *legal system*. It is the potentialities for development which is one of the jobs of the *legal scholar*. The introductory textbook might then go on to say:

He then evaluates future trends. He makes his deductions from these. Such deductions depend on the acumen and experience of the *jurist*. The very common mistake which has brought contumely on to *law* is to confuse the human deduction which may be right or wrong, with the assessment of the trend which can technically be ascertained.

The textbook might illustrate this point with an example from the law of tort. The rule of vicarious liability states that an employer will be liable for torts committed by an employee acting in the course of employment. One aspect of this rule which has proved very problematic is the course of employment issue and at the end of the last century the House of Lords formulated the 'close connection' rule which replaced the older, and narrower, 'frolic of his own' test. If the wrongful act was closely connected to the employment, the employer would be liable (*Lister v Hesperley Ltd* (2002)). Thus, when an employee of a supermarket viciously attacked a customer the supermarket employer was held liable (*Mohamud v Morrison Supermarkets plc* (2016)).

Subsequently, in a case involving the same supermarket, an employee wrongfully leaked a mass of private data onto the internet and to several newspapers, such an act causing damage to a range of individuals who brought claims against the supermarket (*Morrison Supermarkets plc v Various Claimants* (2020)). A deductive approach seems to provide a clear solution:

1. whereas the major premise states that a wrongful act by an employee that is closely connected to his employment will bring the act within the course of employment;
2. whereas the minor premise consists of an employee, employed *inter alia* to transfer data to certain specific recipients, who exceeds the authorization and transfers, wrongfully, the data to non-authorized recipients causing damage to the claimants;
3. then it would logically follow that this act (like the act of viciously attacking a customer) is closely connected to his employment and is within the course of employment.

However, anyone adopting such a deductive approach would be wrong, for the Supreme Court held that the employee was not acting in the course of his employment. The academic jurist examining these cases would therefore be mistaken in thinking that the approach to be adopted in understanding the more recent course of employment cases is one of deductive logic; he or she would be making a ‘very common mistake’. What the jurist should be doing is examining the *trend* to be ascertained from the more recent Supreme Court cases involving vicarious liability. What is the overall movement in respect of employers being held liable for criminal acts committed by their employees? What are the underlying conceptual reasons for moving in one direction towards a greater scope of liability, but then apparently reversing or restraining this movement? What legal methodology did the judges employ in order to effect this correcting trend?

In order to be able to make these ‘deductive trends’ (assessments rather than human deduction), the scholar writing the introductory work might well issue a word of warning and explain how to avoid being disheartened:

Every text-book repeats one sound piece of advice, which is that the student can never hope to be a quick and practised *lawyer* if he relies on copying descriptions from his text-book. This may seem a disheartening difficulty at the beginning, but the way out of it is easy. The student must get an understanding of the meaning of each *concept, category* and *rule*, must understand their strength in the *legal system’s cartography* under consideration, and make a synthesis of his findings.

Perhaps the language of this imagined introduction to law is a little reminiscent of works dating from the late 19th, or early 20th, century. But, as we have seen, the theories of the contemporary conceptualists seem to be little more than a restating of Pandectist thinking and so, whatever the force of these theories, one cannot accuse these common law doctrinal theories of displaying any originality of thought (see further Samuel

2020). What is worse, the quotes from the imagined textbook are taken, with the exception of the words in italics, from a textbook on astrology (Hone 1990). This of course begs a question. Is doctrinal legal scholarship any more relevant to the academic community than a doctrinal work on astrology? For those students not wishing to enter the legal profession, would not studying astrology be as valuable as studying law (at least in terms of transferrable skills)? Would not studying the complex movement of the stars and how this movement (supposedly) correlates with human experience and trends be just as fruitful as studying the zig-zagging opinions and trends of supposedly authoritative judges when faced with, for example, wayward supermarket employees? One of course might argue that astrology has no social value whatsoever since there is not a scrap of scientific evidence that there is any correlation between the movement of the planets and human experience. It is, in short, pseudo-scientific drivel. Yet if one is not permitted to judge the opinions and decisions of the judiciary in terms of social goals, then surely one is dealing equally with a pseudo-social reality? Is one not, in effect, and despite its intellectual challenges, dealing with pseudo-scientific drivel? Those doctrinal jurists who might wish to found their view of law on the philosophy of, say, Emmanuel Kant as a means of differentiating legal scholarship from astrological work might perhaps reflect on a view attributed to the critic Ivor Richards that most critical dogmas of the past are either nonsense or obsolete (see Eagleton 2022: 90). The idea that the legal test whether or not victims of car accidents should receive compensation for their injuries is one based on a rule whose philosophical grounding is to be found in an 18th-century philosopher would, for Richards, have been absurd.

## [E] DEFENDING DOCTRINAL SCHOLARSHIP

In asking these questions one is not denigrating the value of doctrinal legal scholarship as a form of activity that is valuable to the legal profession and to the courts. And one is not questioning the important—vital perhaps—role of the courts and the legal profession as a social and political institution. There is much doctrinal scholarship that is of great value to the legal profession and which displays work emanating from impressive legal minds. The sole emphasis is on *doctrinal* (non-interdisciplinary) legal scholarship. Does it really have a future? Is it capable of generating, in itself, new knowledge?

Mátyás Bódig thinks that it does have a future and mounts what he sees as an exhaustive defence. However, he accepts that trying to maintain doctrinal legal scholarship is ‘fraught with difficulties’, one of these being the ‘ideological aspects of the association with the legal profession’

which has ‘the capacity to compromise the epistemological credibility of the discipline’ (2021: 10). His aim, therefore, is ‘to demonstrate that a precarious balance can indeed be found and maintained between a commitment to the legal profession on the one hand and commitment to academia on the other’ (2021: 10). He sets out to provide a doctrinally orientated legal theory. What is interesting about this mission is his early observation that, with respect to this formulation of a theory of doctrinal legal scholarship, help and support from existing legal theories ‘are hard to come by’ primarily because ‘the contemporary agenda of mainstream legal theory is far removed from the epistemological challenges facing legal scholarship’. Indeed, some ‘academic legal theory has been positively unhelpful’ (2021: 12). One of course should not be surprised by this observation since it has long been obvious that one can be an excellent doctrinal lawyer without ever having studied legal theory. So, what Bódig says he needs to do is to fashion a doctrinally orientated legal theory that explores both the depth and complexity of justificatory issues around law and the methodological profile of legal doctrinal scholarship so that it reflects that complexity. His epistemological and methodological vehicle for achieving this aim is ‘the rational reconstruction of law’ (2021: 13). Regarding the epistemological aspect of this defence, doctrinal legal scholarship, he goes on to say, is to be tied to the concept of doctrinal knowledge and this knowledge revolves ‘around the epistemic relevance of authoritative materials in legal practices’ (2021: 16).

In terms of escaping the authority paradigm it does have to be said at once that this plan does not look promising. And by the time one gets to the fourth chapter this lack of promise becomes more evident. Bódig notes in this chapter that ‘the legal profession casts a long shadow on any attempt at accounting for legal doctrinal scholarship’. He then goes on to observe:

Academic legal work of this kind cannot be framed as an external force seeking to influence legal processes: legal scholars are bound to be participant insiders. The discipline ends up aligned with the professional culture of lawyers. Its epistemological focus comes with an ideological commitment to preserving the dominant position of a professionalised version of doctrinal knowledge in legal practices (2021: 117).

The academic sceptical about the value of doctrinal legal knowledge might perhaps unkindly comment that one hardly needs to spend over a hundred pages before arriving at a conclusion that has been evident to many for a considerable period of time. Indeed, this is an evident conclusion regarding any pursuit of knowledge pursued within an authority paradigm. Worse, Bódig goes on to admit that much doctrinal legal scholarship ‘does not



qualify as producing new doctrinal knowledge' (2021: 127). He should not be criticized for saying this since his point has equally been evident for some time, but, if Bódig is right, then questions must be raised about the viability of doing a United Kingdom doctorate since such research is supposed (or at least was once supposed) to result in new knowledge. Moreover, it would seem that such doctorates are not even of much use to the legal profession either (2021: 138 especially footnote 47). Professor Bódig appears to have gone far in undermining his own project.

This said, his thesis nevertheless deserves a serious critical examination. Bódig's key epistemological notion is something he entitles 'rational reconstruction of the law' (2021: 142). This notion, he says, 'makes it possible to address issues of institutional design without giving up on a specifically doctrinal perspective' and it appears to be a means by which one engages with the law 'depending on the character of the actual or potential problems with the law' (2021: 143). This notion of rational reconstruction does not function in isolation; it has to operate, says Bódig, in conjunction with 'a paradigm of reasonableness that provides standards for testing the truth value of academic legal analysis'. This paradigm must be 'built into the epistemological model [that] scholars rely on' (2021: 136); and it 'gets embedded by associating all aspects of the practices of legal scholarship with rational reconstruction' (2021: 144). Bódig goes on to explain:

The central significance of rational reconstruction commits the discipline to the value of the coherence and integrity of legal practice. It captures the law as a practice that rational agents can live by—despite its deficiencies. And if one is to find 'enough' reason in the law so that rational agents can live by it, doctrinal analysis needs to be able to reproduce the law in a form that more clearly embodies patterns of reasonableness. Even the deficiencies of the law will be defined with reference to patterns of reasonableness revealed from the law by way of interpretative engagement (2021: 144).

What does all this mean? It would perhaps be a little unfair to say that these statements could have come just as easily out of a textbook on astrology, but when one probes the text for enlightenment it seems to come down to 'identifying operative principles' and 'working on systematising the law' (2021: 144, 145). In other words, Bódig seem to be saying much the same kind of things as Jason Varuhas, though in a rather more long-winded way. What, then, is the epistemological foundation for this rational reconstruction embedded in a paradigm of reasonableness? According to Bódig, as 'to the epistemological side of the issue, legal doctrinal scholarship has been captured as being normative, internalist, practice specific, and interpretative' (2021: 149). This 'epistemological'

observation is not inaccurate in that it somehow does not capture the essence of legal doctrinal scholarship. The problem is that the description could, almost, equally apply to astrological doctrinal scholarship.

More interesting, perhaps, is Bódig's rejection of what he describes as two paradigms. These are 'epistemological formalism' and 'empiricism' (2021: 150). The first paradigm is to be found in natural science disciplines such as physics and is defined as a 'formalism [which] makes it possible to organise scientific claims into coherent, systematic and mutually supportive sets' (2021: 150). Bódig, presumably, is not one who is going to start asserting epistemological nonsense such as that Gaius was the Darwin of law or that classifying certain legal actions as 'quasi-contractual' or 'quasi-delictual' is equivalent to classifying all birds as either pigeons or sparrows (cf Samuel 2000; 2004). This, surely, is to be welcomed.

The second paradigm, empiricism, is rejected by Bódig on the basis that it is 'a poor fit for legal scholarship'. This is because, he says, law is a normative discipline that remains a repository of a range of opinions; indeed, he says in a footnote, 'doctrines are fundamentally opinions' (2021: 150). This is a curious comment, not because it is necessarily inaccurate with regard to legal scholarship, but because, first, it seems to display a remarkable ignorance of social and human science writings on epistemology and, secondly, because it appears to be confirming that doctrinal scholarship is little more than an opinion column in a daily newspaper (cf Toddington 1996: 74). A little further on Bódig is more reflective in that he asserts that the problem is that legal scholarship 'represents a qualitatively different model of interpretivism'. But does it? Given that nowhere in his book does he properly discuss social science methodology—there is no discussion of causal, structural, functional, dialectical schemes of intelligibility or of methodological individualism, only some very lightweight analysis of hermeneutics with a superficial reference to Gadamer—his statement must be taken with extreme caution. There is really no proper justification for his assertion 'that in terms of its epistemological features we cannot find a place for legal scholarship in the "methodological triangle" of natural sciences, social sciences and humanities' (2021: 152). How on earth is one supposed to know that legal scholarship is different in its epistemological features if there is no in-depth analysis of the epistemological features of the natural sciences, of the social sciences and the human sciences? There is no discussion or mention of, for example, Jean-Michel Berthelot's contributions to social and human science epistemology (see Berthelot 2006). Indeed, Bódig goes on to say that he can think of only one other discipline with a similar

epistemological profile as law, namely theology. This is hardly surprising, of course, because theology is equally subject to the authority paradigm. Yet there are theologians who have tried to draw epistemological analogies with other disciplines such as mathematics and so doctrinal theology at least tries to be more intellectually sophisticated (see, for example, Puddefoot 2007). One suspects that what we are being fed here is just a more sophisticated, or supposedly more sophisticated, version of the old and tired ‘law is different’ argument. Indeed, just to reassure anyone who might be tempted to look at the interdisciplinary literature on epistemology, Bódig concludes that ‘the epistemological ambitions of legal scholarship are not fully intelligible’ (2021: 243). Comments like this make one want to reach for the astrology textbooks in the hope of finding something a little more sophisticated.

## [F] EPISTEMOLOGY AND METHODOLOGY

Perhaps this comment about astrology is a little unfair—although astrology is a useful ‘discipline’ when it comes to an epistemology that cannot in any way be interdisciplinary since it is a rationalized (in the sense of a tightly constructed set of elements) that bears almost no connection to any other science or social science discipline. It is a completely self-contained pseudo-science full of concepts, signs and notions that have no relation whatsoever with the real world, save the stars and planets. But Professor Bódig has set himself an impossible task in trying to provide epistemological justification from an entirely internal position with, at best, only very little recourse to interdisciplinarity. However, he does seem to recognize this problem, for in a footnote he writes:

It is an important assumption in my inquiry that the epistemological deference to the legal profession poses a distinctive difficulty compared to other professional degrees like engineering or medicine. These disciplines can always anchor the taught material to the relevant natural sciences. For legal scholarship, there are no such ‘fall-back’ disciplines in place (2021: 155 note 91).

Yet this problem is not just confined to legal scholarship itself. It also embraces epistemology: how can one provide a convincing epistemology without a detailed knowledge of the epistemological literature in general? Bódig thinks that concrete examples of legal research can only count as interdisciplinary engagement if one can make sense of it against a background of a settled epistemological paradigm for legal scholarship. The ‘key’, he says, ‘to interdisciplinary engagement, from the viewpoint of legal scholarship, is reaping the epistemological benefits of its hermeneutic mediation between disciplines’ (2021: 196). Yet having admitted that

as a hermeneutic discipline, law ‘is not exactly a factory of new ideas’ and that it is a ‘parasitic discipline’ (2021: 196), it seems bizarre then to go on to argue that ‘the peculiar character of legal scholarship leaves a relatively narrow scope for interdisciplinary engagement’ (2021: 215). Most epistemologists would probably think that the opposite is true. With respect, Professor Bódig gives the impression that he is not that interested either in epistemology or, for that matter, in methodology. Perhaps a little more interdisciplinarity might be in order.

This point needs further development. What Bódig’s book lacks, on the whole, are any very specific clear examples of what amounts to good legal (and non-interdisciplinary) scholarship and also any serious in-depth analysis of methodology in the social and human sciences (see further on this point Samuel 2019). Without such an analysis of method, the discourses on epistemology are always going to appear rather trite. This said, with regard to examples of legal scholarship, Bódig, does, in fairness, give one important clue in a footnote in which he says that ‘textbook writing should be at the heart of legal doctrinal scholarship’ because in ‘terms of cultivating doctrinal knowledge, an influential textbook is a crowning achievement’ (2021: 155 note 89). This assertion is a little odd when on the same page Bódig says that doctrinal training not only ‘may be of debatable academic value’ but also might lack ‘important aspects of adequate preparation for professional legal practice’. Given that textbooks play a fundamental role in many law faculties, what he seems to be implying is that while textbooks represent the crowning achievement in cultivating doctrinal knowledge, they are, intellectually and professionally, inadequate. In other words, Professor Bódig seems to be defending a form of university scholarship which fulfils neither the required intellectual nor the necessary professional criteria. A faculty research director might conclude that this does not look so good for any Research Excellence Framework.

As for methodology, Bódig sees doctrinal legal scholarship as a hermeneutical exercise. Given the considerable literature on hermeneutics one might be forgiven for thinking that this would lead the professor into a serious interdisciplinary investigation and, indeed, there is a discussion, if somewhat brief, of Hans-Georg Gadamer’s contributions. However, Bódig seems to think that Gadamer is more of a hindrance than a help since ‘understanding is always conditioned by the “fore-understanding” of the interpreting agent’ and also ‘intelligible objects (like texts) can always be invested with new meaning’ (2021: 140). Quite so, one might say. What is needed, he says, is an ‘interpretative articulation’ that displays ‘deference to practice-specific authorities and respect for the professional

culture of lawyers' (2021: 141). So much for Gadamer, then, and back to the authority paradigm. For, says Bódig, 'alignment with the prevailing power relations makes it possible to attribute fixed meanings to normative materials' (2021: 141). Legal hermeneutics must display '[d]eference to existing authority structures'. Indeed, he says, 'legal scholarship cannot cultivate just any kind of doctrinal knowledge, and it cannot represent an external point of view on the law' (2021: 141). If nothing else, Professor Bódig provides both lawyers and those in other disciplines with quite an insight into the effect of the authority paradigm on legal knowledge and its generation.

## [G] METHOD AND THEORY

Whether or not Professor Bódig ends up rather undermining his own case about the value of legal scholarship is an interesting question. Yet this is not to suggest that his book lacks some interesting reflections. His analysis of the relationship between abstract legal theory and actual legal practice is noteworthy in the way that he emphasizes not the relationship itself but, rather, the lack of relationship. This lack of any direct relationship stems from Bódig's own 'interpretivist legal theoretical perspective' which implies two theory requirements:

First, it must be capable of making sense of 'doctrinal knowledge' and developing an account of the epistemological profile of the academic discipline designed to cultivate that knowledge. Secondly, it must be able to provide active methodological support to legal doctrinal scholarship (2021: 33).

Anyone who has studied jurisprudence (or legal theory) will of course appreciate the problem. Much abstract legal theory fulfils neither of these two conditions. In fact, few of the classic rule-model or norm-model theories provide any insights into the methodological complexities of legal reasoning as it operates in the actual cases. There are some minimal engagements in rule-model theories such as the judge having a margin of discretion in hard cases owing to the ambiguity of language. But on the whole, as Bódig accurately observes, this abstract legal theorizing is a 'discursive space not shared with doctrinal scholars, comparative lawyers or legal historians' (2021: 39).

Bódig's reaction to this problem is to suggest that theorizing in law takes place at three different levels, abstract theorizing being consigned to level 3. Doctrinal scholars, he says, operate typically at level 1. 'Doctrinal scholarship', he suggests, 'is more directly and closely associated with the analysis of primary legal documents with the help of established

doctrinal tools and methods' (2021: 35). He gives as an example of this kind of theorizing the debates by obligations jurists around the problem of causation in law (2021: 36-37). Level 2 theorizing is the one 'of strategic importance' because it deals with those issues which 'concern the conceptual features that determine the identity and character of concrete legal practices'. This level of 'theorising is often targeted at figuring out patterns of legal evolution through the interactions of legal practices' and he gives as an example here of the 'theorising ... by theoretically minded comparative law scholarship' (2021: 37). Indeed, he not only mentions comparative law, but also legal history of the type that sheds light on the Western legal tradition. This three-level analysis is one of the epistemological strong points of Bódig's book since it does provide an explanation as to why, for example, courses on jurisprudence rarely seem to include—at least if one examines the standard contemporary textbooks—jurists such as Walter Ullmann, Donald Kelley, Harold Berman (mentioned by Bódig), Alan Watson, Peter Stein and Michel Villey. They, according to the Bódig plan, are, or were, operating at level 2 (and sometimes maybe level 1) and not level 3.

What is to be regretted, at least by an epistemologist, is that Bódig fails to exploit, no doubt through his fear of interdisciplinarity, this epistemic framework to provide some real insights into the methods of engagement by lawyers, judges and legal scholars. How does a legal reasoner engage with a text and with a set of facts? Bódig on the whole tends to employ rather generalist terms such as 'interpretive', 'hermeneutical', 'rational reconstruction' and 'constructs of legality'. Certainly, one can begin to identify some of the basic schemes of intelligibility or *grilles de lecture* that a social science epistemologist would recognize; hermeneutics and structuralism are two fundamental *grilles*. But if one examines analytically the reasoning in judicial and scholarly legal texts there are to be found methodological (using the term in its epistemological sense) complexities that go well beyond interpretation and constructivism.

Take for example some ordinary statutory or contractual interpretation cases. In one case the question for the court was whether an injury sustained by a passenger in a multi-storey public car park arose out of the use of the vehicle on a road. Is a public car park a 'road' (*Cutter v Eagle Star Insurance Co Ltd* (1997))? One can of course state that what is required is a hermeneutical engagement: one must go beyond the signifier (road) to discover what it signifies and this involves finding the intention of Parliament (if a statutory text) or the intention of the parties (if a contractual document). However, in both situations in English law, one cannot in principle go beyond the words and look at external evidence as

to what the legislator or contractors intended. In other words, one cannot undertake a serious hermeneutical investigation (although there may be exceptions where the court can look beyond the text). So how does one engage with the word ‘road’? One could adopt a functional approach: what is the function of this textual provision? If the function was, say, to distinguish between a person being injured in a vehicle off the road so to speak and a person injured on public land designed for vehicles it would not be unreasonable to conclude that, functionally, a road should include a public car park because the function of the text is to compensate in this kind of situation. If, in contrast, one wanted to adopt a narrower non-functional approach one could indulge in a dialectical analysis: one contrasts ‘road’ with a ‘car park’ rather as one might define a ‘flood’ as not being just an ‘ingress of water’ (cf *Young v Sun Alliance and London Insurance Ltd* (1977)). If it is a ‘road’ it is not a ‘car park’ and if it is a ‘car park’ it is not a ‘road’. Another possibility is a structural approach: in this scheme one creates a structure out of the elements in play—‘road’ (public), ‘non road’ (private), ‘vehicle’, ‘victim’, ‘compensation’ and ‘compensator’ (potential)—in order to match a conceptual structure within the legal text with a structural analysis of the facts. If there is a match, then ‘road’ will include a ‘car park’; if not, the car park will be excluded from the definition. An example where such a structural approach was adopted by a majority in the House of Lords was in a case involving the interpretation and application of the Animals Act 1970 section 2(2) to the facts of a road accident caused by a panicking horse (*Mirvahedy v Henley* (2003)). The majority looked at the inherent conceptual structure within this difficult-to-understand text and matched it to the facts; the dissenting judges adopted a functional approach (see further Samuel 2018: 168-196, 273-277).

Lawyers do recognize that there are different approaches to textual interpretation, but usually in terms of vague rules such as the literal, golden and mischief rules which to an extent actually mask the epistemological engagements in play. It is, then, surely the role of the legal scholar to penetrate deeper and to identify the different schemes of intelligibility or *grilles de lecture* in play. Yet if the scholar is prohibited from researching and discussing literature from other social science disciplines such penetrating investigations seem *hors de service*. One is just left with weak internal methodological notions which result in law being a hermeneutical discipline that ‘is not exactly a factory of new ideas’ (Bódig 2021: 196). This said, Bódig, in fairness, is not completely dismissive of, or hostile to, interdisciplinary research and so he, himself, might be happy to incorporate some ideas from social science epistemology

and methodology if it can, in the end, improve doctrinal scholarship itself (2021: 215-217). The problem, it seems, is that the ‘influx of non-doctrinal knowledge into legal materials generates adaptation pressures that complicates the job of cultivating doctrinal knowledge of law’ (2021: 216). This, however, can be a good thing if it ‘improves the ability of legal scholars to recognise when developments in other corners of academia call for adjustments in their own disciplinary practices’ (2021: 216). Such a view is hardly going to be unwelcome to those who might be tempted to think that law has more in common with astrology than with other social science disciplines, but what is to be regretted is that Bódig does not pursue this interdisciplinarity issue into a more specific examination (with examples) as to how inputs from other disciplines could actually permit doctrinal legal scholars to up their game so to speak. The paradox is, one imagines, that if Bódig had done this he would have undermined his own defence of doctrinal scholarship, as well as irritating those traditional doctrinal scholars who regard interdisciplinarity as an ‘enemy’.

Engagement with texts by legal scholars is just one side of the methodological coin (so to speak). The other side is an engagement with facts (Samuel 2018, 143-167). What epistemologists in other disciplines have long appreciated is that there is no such thing as a set of ‘brute’ facts (Nadeau 2006); and this has led to some fundamental debates in both the natural and the social and human sciences. It has, *inter alia*, given rise to a dichotomy or tension between anti-realists and realists: ‘anti-realists think narrative structure is imposed on the world to make sense of it for us, whereas realists think that narrative structure, in part, reflects how the world is’ (Currie 2019: 46).<sup>2</sup> Is the narration of facts a description of what is ‘out there’ or is the narrative—that is what is supposedly ‘out there’—a construction of the observing mind? This is particularly difficult for lawyers because since Roman law times facts themselves have become impregnated with legal notions (see Schiavone 2017). Sale, hire, possession and even contracting are just some legal constructs that have gradually been embedded within social facts themselves with the result that these terms might well be used by non-lawyers—for example journalists—in their descriptions of everyday events. This means that facts are never

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<sup>2</sup> Interestingly, the realist versus anti-realist debate in the context of legal scholarship is rather the reverse of the situation to be found in the natural sciences; it was the American realists who raised some fundamental questions about how lawyers view facts and how these facts have been ‘cleansed’ (so to speak) of ones that are irrelevant. As Karl Llewellyn observed, in a litigation problem involving a car accident, facts like the colour of the defendant’s hair or the clothes worn by the claimant are irrelevant, as are many other facts attaching to the status of the parties (married or unmarried for example), the make of the cars involved and so on (1951: 48). Jerome Frank went further. It is not so much the law that makes prediction difficult, but the facts; the difficulty is to foresee what a particular judge or jury will believe to be the facts (1949: x-xi).



neutral and, impregnated with legal notions such as ownership, they are therefore impregnated with an individualist ideology. Doctrinal legal scholars who describe say private law as being about bilateral relations between individuals (which for them oddly include corporate bodies of whatever size) are not just indulging in some neutral legal ‘science’. They are unconscious ideologues which means that a serious epistemological investigation has to probe the conceptual frameworks through which the facts are observed and narrated (Nadeau 2006: 488). What are the metaphysical beliefs of doctrinal legal scholars? What are the ontological engagements, background knowledge beliefs, the specific symbols and language of interpretation, the models of evaluation, the criteria for evaluation for research results and the way these results are shared with others in the same discipline? As Robert Nadeau puts it, the fundamental epistemological question is whether scientists—or in this case doctrinal legal scholars—are prisoners in their ‘gilded cage’ or whether they can escape it (2006: 488). Answers to these questions are not in essence to be found in Professor Bódig’s epistemological investigation, although at times he seems aware that there is an ideological dimension to legal scholarship and its relation to legal practice. It is, then, not really an *epistemological* defence; it is essentially an ideological one masquerading as an epistemological enquiry. His so-called epistemological framework had already delivered the conclusion that he set out to prove, and, reading between the lines, it is not always evident that he fully believes in his defence.

## [H] WAITING FOR DWORKIN

Yet if there is one legal theorist who, so far, and like Godot, seems ever present but somewhat offstage it must be the late Ronald Dworkin. The importance of this jurist is that he did provide a hermeneutical model that not only straddles Bódig’s three levels of theory but also one that actually provides a purpose and a justification for legal scholarship. Of course, his model was not directly concerned with the legal scholar; the object of his theory was the judge and his thesis was concerned with how such a judge ought to go about deciding a hard case. But his famous chain novel analogy—surely now too well-known to need repeating here—can easily be seen as a process that includes legal scholars as well as the judiciary (Dworkin 1986: 229). Judge and jurist are involved in a joint venture in developing the common law for the future but by continual reference to the past (Dworkin 1985: 159). They are both involved in a constructive interpretation in which a judicial decision must always ‘fit’ into this construct of the past precedents as well as taking forward

into the future this constructive enterprise. If this appears fanciful—is the legal enterprise really like a literary project?—it has to be noted that very recently the President of the United Kingdom Supreme Court has proposed a very similar analogy. Lord Reed said that each generation of common law judges ‘inherits a tradition which has been developed over a very long period by its predecessors’. And that these judges ‘have a responsibility to preserve, repair and renew that tradition as necessary, and to pass it on to those who succeed them’ (Reed 2022: 7). He then adds:

Rather like the scriptwriters of a long-running radio serial, they make their own contribution during the period when they are in post, but they have to write in a way which is both continuous with what has previously been written and a development of it (2022: 8).

One can understand why Professor Bódig might want to shy away from any attempt to locate his non-interdisciplinary epistemic thesis in literary theory and Radio 4’s *The Archers*. Nevertheless, the professor does not actually ignore Dworkin completely. He recognizes that interpretivism is associated with Dworkin but goes on to say that this ‘is not the right starting point’ (2021: 28). He prefers Herbert Hart and his analysis of legal concepts and normative mechanisms (2021: 29). Bódig thinks that Hart’s conceptual structures matched to social practices ‘make transparent their character and interconnections with other social practices’ (2021: 30). In contrast the Dworkin model is not explanatory but normative. ‘We need’, he says, ‘to preserve the methodological space for an explanatory project about law with an interpretivist epistemology’ (2021: 57). It is true of course that Dworkin was not providing a theory of how judges reason but how they ought to reason, a normative process so idealistic that it is beyond the wit of an actual human judge leading Dworkin to invent his superhuman Hercules. Yet what really makes Bódig turn away from Dworkin’s version of interpretivism is that it ‘turns the law into a passive recipient of moral and political principles’. Moreover, ‘by organising legal justification around values “imposed” on law, Dworkin runs the risk of conflating justification of the law and *by* (and within) the law – external and internal justification’ (2021: 247). Bódig concludes:

Legal interpretation ends up divorced from the problem of legal expertise, and crucial issues about doctrinal knowledge and doctrinal reasoning drift out of focus. In a way, it turns out that Dworkin’s approach is not interpretive enough. In the end, it does not offer adequate theoretical framing for the core epistemological challenge of legal scholarship: the rational reconstruction of law by way of interpretive engagement with its normative mechanisms (2021: 247).

So much, then, for Dworkin, who now moves offstage again. Who can come onstage to replace him? In his desperation to provide a vision of legal scholarship from a non-instrumentalist perspective (although he says that he is not involved in a crusade against instrumentalism) (2021: 249), Bódig turns to theorists like Ernest Weinrib who claim that ‘there is something specific and irreducible to law’ (2021: 248). There is an ‘inner structure’.

This may be true—although structuralism is hardly a scheme of intelligibility dreamed up by lawyers—but it is also true of astrology. As an astrology textbook says, ‘astrology is a unique system of interpretation’ (Hone 1990: 16). Moreover, and this is the major failing of Bódig’s book, he does not engage directly with, say, Felix Cohen’s view that this kind of Pandectist influenced metaphysical ‘inner structure’ is nothing but transcendental nonsense (Cohen 1935). But, then, anyone who challenges the authority paradigm-orientated legal scholarship misses, apparently, ‘how dependence on the legal profession is constitutive of the very character of the law school and, by implication, of legal scholarship’ (Bódig 2021: 162). With respect, this is an extraordinary statement; the whole point of the authority paradigm in law is that it is embedded in this dependence and so one can hardly say that one is missing the point. However, to Bódig’s credit, he does admit that ‘legal doctrinal scholarship may not be a worthwhile academic pursuit’ (2021: 162). This is a brave admission, but it undermines the idea that legal scholarship can be defended in terms of the academy. In the end, he says legal theory needs to do more to ‘address the objectivity of legal scholarship’ (2021: 263). Well, one might say, quite so.

Now, one is not disputing Bódig’s assertion that lawyers ‘possess a distinctive expertise that involves more than just the thoughtful exercise of moral judgment in the face of practical challenges’. And ‘that legal knowledge cannot be reduced to any other discipline’ (2021: 249). But the same can be said of astrology. What undermines astrology is that other disciplines with more reliable methodologies—astrophysics and astronomy in particular—have shown that astrology is drivel rather than genuine knowledge. A discipline cannot simply remain isolated from other disciplines; they feed into it and provide—or help provide—epistemic validity. Whatever one thinks of Dworkin’s interpretivism, he did realize that external disciplines are fundamental to validating legal knowledge. Thus, his comparison of law with literature indicates that the judge’s search for structural fit cannot be considered in isolation either of political theory or of social goals and the actual method is best explained through reference to, or analogy with, literary criticism (Dworkin 1985:

146-166). In saying this, one is not claiming that Dworkin has provided an epistemology of law. Bódig is surely right to say that it is too normative and Dworkin's hermeneutical scheme certainly does not give an account of what judges actually do, although if Lord Reed is to be believed it might be that the judiciary is moving in a Dworkinian direction. Yet, whatever one thinks of Dworkin's thesis, or theses, he does present a sophisticated academic project in which both judge and legal scholar contribute. And, who knows, such a project might even impress social science referees—or at least a referee from the humanities—examining a grant application from a doctrinal legal scholar.

## [I] CONCLUDING REMARK

Can, then, traditional legal scholarship be defended? The first response is to say defended from what? If nothing much is expected from academic legal scholarship in terms either of new knowledge or of epistemological insights valuable to the social sciences in general, then such scholarship can be defended. All one needs to show is that such scholarship fulfils its purpose of assisting the courts and other parts of the professional legal community. If, however, more is expected; if doctrinal legal scholarship is expected to contribute to the academy in general in respect both of new knowledge and of epistemological insights useful for those outside law, then traditional doctrinal scholarship needs defending. And if anyone is sceptical about the necessity for a defence, they need only read Mathias Siems' chapter on a world without law professors (Siems 2011). It is not that doctrinal legal scholarship has no impact on various sections of the legal community; it undoubtedly has. But in terms of establishing general truths about society or coming up with new ideas, then doctrinal legal scholarship is pretty worthless as others have observed (Siems 2011: 78-79; see also Samuel 2020). Deep scholarly legal research is, probably, only achievable through interdisciplinarity. Professor Bódig clearly wants to counter these views, but, in the end, he does not really tell doctrinal legal scholars who see interdisciplinary approaches as the 'enemy' how they can actually do this. Moreover, some of the authority paradigm methodological notions that he fashions—one thinks of 'rational reconstruction' and 'interpretation'—could sit comfortably in a textbook on astrology.

### ***About the author***

**Geoffrey Samuel** is Professor Emeritus at the Kent Law School UK and formerly a Professor affili   at the   cole de droit, Sciences Po, Paris. He received his legal education at the University of Cambridge and holds

doctoral degrees from the Universities of Cambridge, Maastricht and Nancy 2 (honoris causa). He has also held many visiting posts in France, Belgium, Switzerland, Spain and Italy. He is the author of a considerable number of books, chapters and articles on contract, tort, remedies, legal reasoning, comparative law theory and method and legal epistemology. Professor Samuel's more recent books include *An Introduction to Comparative Law Theory and Method* (Hart 2014), *A Short Introduction to Judging and to Legal Reasoning* (Elgar 2016), *Rethinking Legal Reasoning* (Edward Elgar 2018) and (with Simone Glanert & Alexandra Mercescu) *Rethinking Comparative Law* (Elgar 2021). A new book, *Rethinking Historical Jurisprudence* (Edward Elgar) is about to be published.

Email: [g.h.samuel@kent.ac.uk](mailto:g.h.samuel@kent.ac.uk).

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## IS THE HONG KONG COURTS' ABILITY TO REFER TO FOREIGN AUTHORITIES UNRESTRAINED?

MARTIN KWAN\*

OBOR Legal Research Centre and Fairbank Center for  
Chinese Studies

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### Abstract

Once in a while there is a debate on whether Hong Kong courts should be freely able to refer to foreign authorities, indicating the lack of firm consensus. In light of the need for clarifications, this note affirms the court's ability to refer to foreign authorities for three main reasons. *Constitutionally*, this note is the first to raise that Hong Kong courts have a unique 'constitutional assurance' of their ability to refer to foreign cases. By comparison, other jurisdictions, like England & Wales and Singapore which do not share the same assurance, have even further restrained their power with Practice Directions. *Professionally*, the courts will not blindly rely on foreign authorities given the jurisdictional differences. *Practically*, Hong Kong has a relatively smaller case pool, so the practical insights from the foreign authorities are very useful. Given these three justifications, there should not be any doubt over the courts' power and practice for such.

**Keywords:** common law; Singapore; English law; comparative law; case law; precedent; India; judiciary; legal method.

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### [A] INTRODUCTION

Hong Kong (HK) is an international hub which widely welcomes and recognizes foreign common law practitioners (including judges) and qualifications. It is therefore often taken for granted that there are minimal jurisdictional differences, so foreign common law is flexibly applicable.

However, former Justice of the Hong Kong Court of Final Appeal Henry Litton criticized the reliance on foreign authorities. In his Honour's words:

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The judges, at all three levels of the courts, seem drawn to overseas case law as moths to naked light: apparently brushing aside the inconvenient truth that the common law system operates under the principle of One Country Two Systems. Such mindset spells disaster in the long run. This is not a formula for the long continuation of the common law (Litton 2020).

It is wrong, or ‘troubling’ in Litton’s own words, to adopt a ‘Eurocentric view’ (Litton 2020). To uphold ‘One Country, Two Systems’, Litton is of the view that HK’s common law should develop based on its local context, not the Western context.<sup>1</sup>

Litton’s critique was made in the context of a public law case. However, for the sake of academic discussion, Litton’s view can be framed more broadly, and it raises crucial questions: is the courts’ power or ability to refer to foreign authorities unrestrained? Should it be restrained?

This article studies the legal basis of referring to foreign authorities. When compared with other jurisdictions, the article pioneers the view that HK courts have a unique ‘constitutional assurance’ of their ability to refer to foreign cases. HK is an interesting common law jurisdiction where there is no restraint on the reference to persuasive common law authorities. It is common practice for HK courts to carefully select and adopt cases and arguments from other common law jurisdictions. Furthermore, such a practice is amply justified by practical considerations and benefits.

This article focuses on the basis for the citation of foreign authorities. It will not explore any underlying social or political developments that promote or restrain such a practice. However, as a matter of background, it is helpful to note that there exist these kinds of socio-political objections against the reliance on foreign law. First, some contend that it is inappropriate for unelected judges to incorporate foreign laws, and there is also distrust of foreign cases (Balakrishnan 2010: 6-7).

Second, the openness to foreign precedents may—directly or indirectly as a side effect—be affected by political developments in favour of nationalism, isolationism, or other ideals that promote independence or self-reliance. The reliance on foreign authorities may be perceived as indicating susceptibility to external influences, culture and forces. For example, the former Chief Justice of India K G Balakrishnan noted that the citation of foreign authorities can be ‘a conscious strategy of social transformation’ (Balakrishnan 2010: 15). Instead of merely borrowing the

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<sup>1</sup> Litton’s views sparked widespread debate. According to Cullen’s understanding, Litton’s ‘bedrock position advanced is that the common law we have is the common law specific to Hong Kong ... Influences may be taken into account from other jurisdictions—but there is no such thing as international common law’ (Cullen 2020).

underlying reasoning or arguments from the foreign precedents without quoting the cases, the citation signifies the explicit consideration of the foreign laws. Depending on the context, it could denote recognition, acknowledgment, appreciation, or disapproval of the foreign approach, its standing and its value. This is why the former Chief Justice of India Balakrishnan warned that 'the practice of referring to international instruments and foreign decisions cannot be carried on in an undisciplined manner' (Balakrishnan 2010: 15).

## [B] THE CONSTITUTIONAL ASSURANCE OF THE ABILITY TO REFER TO FOREIGN CASES

Article 84 of the Basic Law (BL) provides that the courts 'may refer to precedents of other common law jurisdictions'. The Court of Final Appeal (CFA) described article 84 as a 'constitutional *approval* of stare decisis ... which specifically recognizes the right to refer to the precedents of other common law jurisdictions' (*Democratic Republic of The Congo v FG Hemisphere Associates LLC* 2011: para 441, emphasis added).

Instead of a mere 'approval', it is arguably more accurate to describe it as a 'constitutional *assurance*' of the judicial power. This is because, although the ability to refer to foreign cases may sound like something taken for granted as part of the inherent judicial powers, other jurisdictions do not share the same freedom and ability. For example, in France—a civil law jurisdiction—the citation of foreign cases can become a ground for annulment (Atwill 2010: 33).

In other common law jurisdictions such as Australia, Canada, England & Wales, and India, the courts commonly refer to foreign cases.<sup>2</sup> Yet, there is no constitutional backing to recognize and entrench such practice. Rather, the former Chief Justice of India Balakrishnan mentioned that the practice 'cannot be carried on in an undisciplined manner', which signalled that it is legally possible and desirable to restrain this practice (Balakrishnan 2010: 15). Theoretically, it is possible for these common law jurisdictions to impose a rule limiting or prohibiting the referral to foreign cases.

Such a potential limitation is not groundless. In England & Wales, there is a Practice Direction providing that the citation of foreign cases must be justified (Practice Direction (Citation of Authorities) 2001; see also Practice

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<sup>2</sup> For Australia, see Lefler 2001: 170; Smyth 2008: 415. For Canada, see Macdougall 1991: 23; McCormick 2009: 91, 108. For England & Wales, see Reed 2008: 259; Mak 2011: 431. For India, see Balakrishnan 2020: 11. For Singapore, see Goh & Tan 2011: 209. For the US, see Waters 2008: 638.

Direction: Citation of Authorities 2012; Fordham 2012: para 11.2.7). This threshold is not low, requiring that ‘there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish’ (Practice Direction (Citation of Authorities) 2001: rule 9.2(iii)). In other words, if the English courts have a domestic binding authority in place, they cannot freely rely on foreign cases.

Similarly, although Singapore is not as restrictive as the English counterpart, a counsel cannot cite a foreign case unless it is ‘of assistance to the development of local jurisprudence on the particular issue in question’ (State Courts Practice Directions 2021 (Singapore): 74(5)(b)).

By striking contrast, there is no rule or restriction in HK over the reliance on foreign cases by courts and counsels.

Replying to Litton’s concern on ‘One Country, Two Systems’, it is interesting to refer to Professor Yash Ghai’s opinion that article 84 BL ‘may be cited to show that the Hong Kong common law was intended to be contrasted with other systems, including the English’ (Ghai 1999: 368). From this perspective, the flexibility afforded by this BL provision—arguably as a reflection of HK’s orientation as an international hub—marks the crucial difference between HK and its past before China’s resumption of the exercise of sovereignty because HK courts can, theoretically, more freely rely on common law authorities than the English courts. Contrary to Litton’s view, the difference with the English system arguably upholds ‘One Country’; whilst the constitutional power to flexibly refer to foreign precedents represents exactly the significance of ‘Two Systems’.

## Non-common law authorities

The HK courts have generally been liberal on human rights issues. Apart from relying on common law cases that support liberal interpretation of human rights provisions (eg *HKSAR v Ma Wai Kwan David* 1997: para 192, which cited the English case of *Minister of Home Affairs v Fisher* 1980: 328), they have also quoted international and European Court of Human Rights (ECtHR) authorities. However, the jurisprudence of the ECtHR does not constitute common law authorities, so they are not within the ambit of the constitutional assurance in article 84 BL.

Nevertheless, there are currently no restrictions on referring to these authorities. In fact, the HK courts frequently refer to ECtHR cases on novel human rights issues, such as *W v Registrar of Marriage* (2013) and *Leung Chun Kwong v Secretary for the Civil Service and Another* (2019)

which referred to English case law and ECtHR authorities on same-sex marriage. The HK courts have maintained a liberal approach and are very open to ideas derived from ECtHR case law, for example most recently in *HKSAR v Fu Man Kit* (2021) on whether the rule against double jeopardy applies to prison disciplinary proceedings. The better view is that cases from the ECtHR represent persuasive arguments and counter-arguments—as opposed to binding law—for HK courts to peruse. This was affirmed by the CFA:

The appropriateness of the Hong Kong courts taking account of established principles of international jurisprudence, including that of the ECtHR, in interpreting fundamental rights in the Basic Law and the BOR was acknowledged by this Court in *Shum Kwok Sher v HKSAR* (2002). The decisions of the ECtHR on provisions of the ECHR in the same or substantially the same terms as the BOR, though not binding on the courts of Hong Kong, are of high persuasive authority and have been so regarded by this Court (*ZN v Secretary for Justice* 2020: para 60).

### Litton's critique of the *Leung Kwok Hung* case<sup>3</sup>

As mentioned above, this article wishes to focus more broadly on the *general* ability to cite foreign authorities, so it will not dwell into the details of the case and Litton's critique.

In brief, Litton's commentary involves the CFA case of *Leung Kwok Hung v Commissioner of Correctional Services* (2020). The legal issue was whether there was discrimination when male prisoners were required to cut their hair short. When applying section 5 Sex Discrimination Ordinance (SDO), the CFA quoted the four-step test from the English case of *R (European Roma Rights) v Prague Immigration Officer* (2004), which was based on a comparable English statutory provision.

Litton thought the quotation was unnecessary and doubted its helpfulness because section 5 SDO has a 'plain ordinary meaning' (Litton 2020). Litton also objected to the citation of a bundle of authorities on 'less favourable treatment'. This article does not agree with this view.

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<sup>3</sup> It is helpful to take notice of three observations when reading Litton's commentary. First, Litton is not against adopting a liberal approach on public law issues. During Litton's judicial service, his Honour endorsed that 'common law rules of construction themselves have a high human rights content' and interpreted the statutory provision in question liberally in order to comply with human rights (*The Attorney General v Mak Chuen Hing & 71 Others* 1996: para 16). Second, Litton is not necessarily against the reference to foreign common law authorities in all circumstances. In the commercial case of *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009), his Honour referred to a Singaporean precedent and post-reunification English cases. Third, on other occasions, Litton has made other suggestions that are highly insightful but unfortunately beyond the scope of this article, such as whether the HK courts tend to cite an excessive amount of foreign authorities (Litton 2017).

First, the four-step test helpfully supports a more organized analysis. When applying section 5 SDO on whether there is a difference in treatment that is less favourable (which corresponds to Steps 1 and 3), section 10 SDO further supplements section 5 by requiring a comparison of whether the circumstances are materially different. Step 2 of the 4-step test conveniently refers to section 10. Step 4 logically follows after establishing section 5's less favourable treatment as it looks at whether there is another satisfactory explanation that is irrelevant to the protected traits (*R (European Roma Rights) v Prague Immigration Officer* 2004: para 73). Therefore, the arrangement of the four-step test is well and logically structured.

Second, whilst referring to foreign authorities can be burdensome, it offers many arguments and counter-arguments for the CFA to consider the issue. The CFA's liberal approach towards public law cases (mentioned in the above subsection) would also call for a thoughtful and holistic consideration of more perspectives. The general benefits derived from foreign authorities will be further discussed below.

## [C] THE PROFESSIONAL SCEPTICISM TOWARDS FOREIGN CASES

### Common law authorities

HK courts will not follow foreign cases blindly or arbitrarily, and will evaluate carefully the merits of the foreign cases' arguments, developments and applications.<sup>4</sup> Foreign cases are treated as persuasive only and are not binding (Yap 2014: 477-478). The courts will deal with foreign cases 'with caution' and are 'keenly aware' of the legal and societal differences with the foreign jurisdictions, in order to develop HK law 'that best suits the needs of the local circumstances' (*Secretary for Justice v Wong Ho Ming* 2018: para 56). The courts' professional scepticism justifies the great power to refer to foreign authorities.

### Non-common law authorities

The courts are acutely aware of the jurisdictional differences with the ECtHR. Reminding itself to be extra careful, the CFA acknowledged the following observations of the Privy Council (*ZN v Secretary for Justice* 2020):

<sup>4</sup> See e.g. *Citic Pacific v Secretary for Justice* 2015 (which refused to follow *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* 2003 on the matter of legal advice privilege).

different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values ... the [European Convention of Human Rights] is a regional human rights instrument and ... the values which it seeks to apply are those of the member states of the Council of Europe ... This means that the scope for inconsistency between the decisions of the court as an international court and the values and practices of individual jurisdictions is necessarily increased (*Lendore v Attorney General of Trinidad and Tobago* 2017: para 60)

...

The decisions of the European Court of Human Rights are *not a source of law* ... [but] *valuable persuasive authority* on the general principles underlying the protection of particular rights ... (*Lendore v Attorney General of Trinidad and Tobago* 2017: para 61, emphasis added).

## Potential judicial oversight

That said, this does not mean that judicial mistake will never occur.<sup>5</sup> Incomplete understanding of foreign law may occur in practice, often due to lack of time and capacity to thoroughly review the jurisdictional and contextual differences. In the words of the former High Court of Australia judge Kirby J:

in the nature of their lives as problem solvers, judges and the advocates who appear before them *often lack the time* to analyse a legal problem *with a full understanding* of the history of the relevant branch of the law, the conceptual weakness of past authority, and *the social and economic context in which the law must operate* (Kirby 2002: 7) (emphasis added).

In this regard, Litton's view could be seen as a warning against inadequate review. Naturally, 'the appeal and normative value' of foreign cases could at times be 'irresistible' (Yap 2014: 471). 'The mere luck that an issue had attracted judicial comment (or had been litigated in another jurisdiction) could tilt the balance of reasons *in favor of deferring to an erroneous view*, just because there were more persuasive sources in its favor' (Lamond 2010: 29 emphasis added).

For example, in the case of *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013), the HK CFA adopted the English test in *Chartbrook Ltd v Persimmon Homes Ltd* (2009) for determining rectification of contract for common mistake. The HK court did not conduct much of a review, with only two paragraphs of supporting analysis (Kwan 2020: 34).

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<sup>5</sup> Other common law courts have made the same mistake. See eg Saunders 2006: 72; Smith 2006: 223; Reed 2008: 264; Bell 2014: 975.

By contrast, the English Court of Appeal held that *Chartbrook* was wrongly decided as a matter of ‘principle and policy’ (*FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* 2019: para 176). The English court reached this conclusion after a careful review of and balance between the competing ‘(1) principles, (2) precedent, (3) policy, (4) the approaches taken in other common law jurisdictions such as the Australia and New Zealand, (5) benefits and limits of the objective approach, and (6) whether injustice will be created by the two approaches’ (Kwan 2020: 35).

After *FSHC Group*’s ruling that *Chartbrook* is wrong *in principle*, it is uncertain whether the HK case remains legally sound and if it should be followed. Being wrong *in principle* means that the doctrinal error could have been revealed much earlier had a more thorough review been done (Kwan 2020: 36).

This issue, however, should not be overstated for two reasons. First, it can be avoided with enough attention. The courts should always remind themselves of the legal requirement to have a *sufficient* judicial reasoning.<sup>6</sup> It was long held that ‘a judge should give his reasons *in sufficient detail* to show ... the principles on which he has acted, and the reasons which led him to his decision’ (*Eagil Trust Co Ltd v Pigott-Brown* 1985: 122 emphasis added). In pinpointing the gist of adequacy, Beck suggested that ‘the essential element of adequate reasons is disclosure of the path of reasoning leading to the decision’ (Beck 2017: 934). Having an elaborated opinion can help ‘minimising the likelihood of appeal’, because it ensures the legal disposition has been properly and adequately justified (Waye 2009: 276).

Second, even if the HK court accidentally relied on a wrong foreign authority, it would not destroy the long continuation of the common law. This is because there are many remedial measures safeguarding against flawed reasoning. The common law and appeal systems are designed to constantly evaluate and mend any flawed decision. In fact, the very search for *ratio decidendi* itself involves a consideration of ‘*the strength and persuasiveness* of the reasons expressed in the judgment(s)’ (*Youngsam v Parole Board* 2019: para 58, emphasis added). When assessing the *ratio decidendi* and its strength, it is trite that the court will, *inter alia*, take into account ‘whether the ruling or its underlying reasoning *has been criticised by commentators or by judges in later cases*’ (*Youngsam v Parole Board* 2019: para 59, emphasis added).

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<sup>6</sup> This norm has been widely adopted in many common law jurisdictions, see eg *Doyle v Banville* 2012: para 2.3; Wellman 1985: 53, 54; Bencze & Ng 2018: 4; McIntyre 2020: 27.



## [D] THE PRACTICAL NEED AND BENEFITS OF REFERRING TO FOREIGN CASES

There are pragmatic considerations which justify the courts' practice of referring to foreign authorities. The courts are not Eurocentric 'as moths to naked light'. The biggest benefit is that it allows HK courts to learn from the wealth of experience from other jurisdictions. This is perfectly described by former Chief Justice Li:

it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence... Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them ... (*A Solicitor (24/07) v Law Society of Hong Kong* 2008: para 16).

Some legal issues have seldom been litigated in HK, thus limiting the case law development.<sup>7</sup> The wealth of foreign authorities provides a diversity of solutions to choose from (Reed 2008: 259). It is especially useful for cases of first impression.<sup>8</sup> In this sense, they can be seen as a source of arguments (Benvenuto 2006: 2741), which saves counsels' and courts' time in developing a line of reasoning from scratch (Reed 2008: 268).

Furthermore, citing and learning from foreign cases is a form of 'judicial dialogue' or 'transjudicial communication' (Slaughter 1994; Benvenuto 2006: 2724, 2726; Balck & Epstein 2007: 793).<sup>9</sup> There is an interesting example of judicial dialogue, with two courts improving a legal principle together. *Shum Kwok Sher v HKSAR* (2002) dealt with the offence of misconduct in public office, and it suggested a number of factors for determining the seriousness of the misconduct such as the nature and extent of the departure from public responsibilities. The English Court of Appeal not only agreed with *Shum Kwok Sher*, but it also added a new factor on the seriousness of the consequence of the misconduct (*Attorney General's Reference No 3 of 2003* 2004: para 46). These two cases were then explored again in *HKSAR v Tsang Yam Kuen Donald* (2019), where

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<sup>7</sup> See eg *Dr Yeung, Sau Shing Albert v Google Inc* 2014: para 54 (regarding the novel issue of libel by search engine).

<sup>8</sup> See eg *Dr Kwok-Hay Kwong v The Medical Council of Hong Kong* 2006: para 50 (where there is no domestic case law on whether certain restrictions against practice promotion imposed on doctors by the Medical Council contravene the freedom of expression).

<sup>9</sup> For the contrary view which argues 'dialogue' is not a good metaphor and it should be better described as a 'monologue' in the constitutional law context, see Law & Chang 2011: 529.

the CFA utilized all factors for determining the adequacy of judicial directions to the jury on this offence (Kwan 2019: 313).

Moreover, the foreign experience of picking a particular path of legal development provides valuable empirical insights for avoiding undesirable consequences or unsuitable paths (Scalia 2004: 306; Benvenuto 2006: 2727). In other words, foreign cases can be used as counter-arguments when evaluating potential lines of reasoning (Lefler 2001: 171). They help enrich and refine courts' reasoning (Lefler 2001: 166).

Besides, foreign authorities can offer refreshing perspectives (LaForest 1994: 220; Rajah 2010: 827). These assist judges to refine and reflect on *existing* principles or domestic solutions.

Finally, it also helps upgrading HK laws to prevailing standards in the common law world, especially in relation to commercial laws in order to maintain HK's reputation as an international financial centre (Mason 2007: 302).

The defamation case of *Jigme Tsewang Athoup v Brightec Ltd* (2015) demonstrates how the development of private law in HK is fostered by this practice. The HK court was able to adopt *swiftly*—at the stage of First Instance—the English defence of reportage as formulated in *Roberts v Gable* (2007: para 53). The defence of reportage is basically a defence based on neutral reporting by journalists of 'defamatory allegations which are neither adopted nor embellished' (Armstrong 2009: 441; *Jigme Tsewang Athoup v Brightec* 2015: para 78).

It actually took English law a long period of time of around eight years and a number of litigations to come up with this defence. It originated from the 1999 English case of *Reynolds v Times Newspapers Ltd* (2001), which provided for the defence of qualified privilege. The *Reynolds* defence of qualified privilege then continued to develop incrementally through *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* (2002) and *Galloway v Telegraph Group Ltd* (2006). It ultimately became the defence of reportage in *Roberts v Gable* (2007) (Armstrong 2009: 446-447). By contrast, HK had not encountered as many disputes as the United Kingdom, and the HK court was able to harvest the end product of this string of cases.

The HK court notably remarked that it had 'no reservation in accepting that such kind of defence is available in the Hong Kong courts' because 'the human rights considerations taken into account by the English courts are also applicable here' (*Jigme Tsewang Athoup v Brightec* 2015: paras 64-65). The court further observed the relevance of foreign insights:

Like the United Kingdom, the freedom of expression and the freedom to receive information are rights guaranteed in the constitutional legislations in Hong Kong, and so the courts in both jurisdictions should likewise adopt a liberal approach in the development of the law relating to the doctrine of *Reynolds* privilege (*Jigme Tsewang Athoup v Brightec* 2015: para 71).

Apart from Litton's view on 'the Eurocentric leaning of the judgments' (Litton 2020), some have further contended English cases are more preferable to HK courts due to the historical connection (Lau & Young 2009: 190; Jiang 2013: 41). However, this is not true (*Secretary for Justice v Wong Ho Ming* 2018: para 56). Such a limited view fails to capture HK's position as an internationally open (financial) city. It is common for HK courts to refer to cases from other common law jurisdictions such as Australia, New Zealand,<sup>10</sup> Canada<sup>11</sup> and Singapore.<sup>12</sup>

## How does the doctrine of precedent practically affect the citation of foreign authorities?

The trite doctrine of *stare decisis* needs no repetition here. There is the theoretical issue as to whether the doctrine will limit such practice to only dispositions involving novel legal issues when no binding precedent exists. Otherwise, the HK courts will have to apply domestic binding precedents. In other words, the doctrine functions like the English and Singaporean Practice Directions, thereby limiting the actual flexibility afforded by the constitutional assurance.

Obviously, the doctrine has no bearing on the appellate courts' discretion because the CFA can depart from its previous decisions (Lo & Ors 2019: 166); whilst the Court of Appeal can do so when its previous decision is plainly wrong (Lo & Ors 2019: 169). How about situations where the courts cannot depart from a binding precedent?

Contrary to the above *theoretical* view, there are—in *practice*—broadly three other situations where the courts refer to foreign authorities, despite the fact that they are not dealing with cases of first impression. Overall, the HK courts have maintained a very high degree of flexibility, sometimes as if the doctrine has been subdued.

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<sup>10</sup> See eg *Secretary for Justice v The Oriental Press Group Ltd* 1998: para 48, applying *Solicitor-General v Radio Avon Ltd* 1978 on contempt of court.

<sup>11</sup> See eg *Chan Ching Yuk v Otis Elevator Co (HK) Ltd* 2007: paras 38-39, citing Canadian cases regarding negligence involving lifts; *HKSAR v Tam Lap Fai* 2005: paras 17-18 on the issue of obstruction of police officer.

<sup>12</sup> See eg *Akai Holdings Ltd v Ernest & Young* 2009, where the court referred to *Skandinaviska Epskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* 2007.

First, foreign precedents have been used to *legally* supplement existing binding authorities. The HK courts in effect add a gloss derived from the foreign insights. This is best illustrated with an example.

In company law, directors' duties are owed to the company during normal times. However, 'where a company is insolvent the interests of the creditors intrude' (*West Mercia Safetywear Ltd v Dodd* 1988). This rule has become binding law in HK, and the CFA very clearly stated that the principle will apply where 'the company is insolvent, or near insolvent, or of *doubtful solvency*, or if a contemplated payment or other course of action would jeopardise its solvency' (*Tradepower v Tradepower* 2009: para 130, emphasis added).<sup>13</sup>

Subsequently in *Remedy Asia Ltd v Patrick Tong Hing Chi* (2020: paras 68, 71), the highly reputable judge Coleman J, with the assistance of leading commercial law counsels, did not let go of the opportunity to consider the latest English law development. Coleman J applied *BTI 2014 LLC v Sequana SA* (2019: para 220), which clarified that the trigger point of creditors' interests duty—namely 'doubtful insolvency'—should be understood as 'when the directors know or should know that the company is or is likely to become insolvent'.

The primitive view is that Coleman J did not adhere to the doctrine of precedent because his Honour based the decision on the English case *Sequana SA* (2019), rather than the HK case *Tradepower* (2009) which was not mentioned in the judgment. However, the better view is that this is consistent with the doctrine of precedent because the legal disposition was still centred on the notion of 'doubtful insolvency'—namely, the binding principle established in *Tradepower* (2009). The new English case assists the application of existing legal principles.

The practice of supplementing binding HK law with foreign precedents is common. The *Sequana SA* (2009) case was also applied by another HK judge as the 'leading authority' (*Wing Hong Construction Ltd v Hui Chi Yung* 2020: para 158). This practice is also observable in relation to other areas of law, such as tort law.<sup>14</sup>

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<sup>13</sup> See also *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* (2014: paras 35, 41).

<sup>14</sup> The non-binding Australian case of *Wyong Shire Council v Shirt* (1980) on the tortious standard of care has been cited by at least three HK cases for the proposition of what a reasonable man would do in response to the risk of harm taking into account factors like probability of its occurrence (*Cheng Loon Yin v Secretary for Justice* 2006: para 55; *Wai Yip Hin v Wong Po Kit* 2008: para 63; *Ma Yong Mei v Cheng Muk Lam* 2015: para 46). The HK courts did not cite the existing binding authorities such as *Wong Wai Ming v Hospital Authority* (2001: para 8), which adopted *The Wagon Mound (No 2)* (1966: 642-43); *Cathay Pacific Airways Ltd v Wong Sau Lai* (2006: para 37), which adopted *Bolton v Stone* (1951). Yet, *Wyong* (1980) is just a supplementary gloss building on the same legal basis.

Second, the doctrine of precedent does not prevent judges from using foreign court's *factual* dispositions for reference. For instance, the HK court in *Ma Shun Hung v Chun Wai HK Holdings Ltd and Another* (2009: paras 16-22) referred to the Australian case of *Mugford v Ames* (2000) for (1) determining the factual causation of consecutive car collisions when more than one driver was negligent and (2) apportioning blameworthiness between the drivers. Whilst there are already authoritative guidelines raised by previous cases (eg *Rouse v Squires* 1973: 898; *Lau Shun Hing v Ng Ching Hung* 1991), the reference to the foreign case law instead did not infringe the doctrine of precedent as it was done for mere comparison.

Finally, the third situation is controversial, but is evidently a practice adopted by some judges. Whilst the first situation above involves applying *supplementary* foreign authorities, the third situation concerns the application of foreign authorities that are *inconsistent* with the binding precedents.

Under English law, the *Ghosh* (1982) two-stage test for dishonesty was replaced by *Ivey v Genting Casinos (UK) Ltd* (2017) with only the objective test left. The justification is that *Ivey* eliminates the loophole of *Ghosh*'s subjective limb which 'effectively allowed an ignorance-of-morality answer to liability' (Simester 2021: 47).

Not surprisingly, some judges at the first instance level took the bold step to rely on *Ivey*. It was applied in *Remedy Asia Ltd v Patrick Tong Hing Chi* (2020: paras 82, 282-284). Another judge—again with the assistance from leading senior counsels from both parties—applied the same in *Hing Yip Holdings (Hong Kong) Ltd v Cellmark China Ltd* (2021: para 102). It was also applied in *Americhip Inc v Zhu Hongling* (2021: paras 61, 67, 74, 82). Very importantly, there was no dispute as to the applicability and application of *Ivey* in those cases.

Strictly speaking, *Ivey*, which is in direct conflict with *Ghosh*, has not yet been adopted by HK appellate courts (*Re John David Meredith Wardell* QC 2020: para 11). On the one hand, this practice does not seem to sit well with the doctrine of precedent. On the other hand, the newest foreign authority was applied not because of the judge's personal or arbitrary preference. Rather, it is arguably done based on the understanding that the latest authority is more compelling and has resolved the flaws of the old precedent. This is arguably upholding the *gist* of the common law precedential system, which constantly evolves and improves. After all, 'the great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions' (*A Solicitor v Law Society of Hong Kong* 2004: para 19). Moreover, the swift

adaptation to new legal thoughts also conforms with HK's international standing. Notably, there was no appeal in all of the quoted cases applying *Ivey*, despite the obvious inconsistency with the doctrine of precedent. Very likely, this indicates the pragmatic appropriateness, cogency and acceptance of this less-spoken judicial practice.

Therefore, from the practical perspective, foreign precedents assist judges on both *legal* and *factual* dispositions. It also promptly connects HK with the pioneering legal developments overseas. It can be seen that HK judges are very keen on utilizing foreign authorities.

## [E] CONCLUSION

This article affirms the court's ability to refer to foreign authorities for three main reasons. *Constitutionally*, this article is the first to raise that HK courts have a unique 'constitutional assurance' of their ability to refer to foreign cases. By comparison, other jurisdictions, like England & Wales and Singapore which do not share the same assurance, have even further restrained their power with Practice Directions.

*Professionally*, the courts are keenly aware of the jurisdictional differences, and will not blindly rely on them. This ensures the power to refer to foreign authority will not be exercised arbitrarily or capriciously. Whilst judicial errors sometimes inevitably occur, this should not be overstated as an objection against referring to foreign authorities. *Practically*, given HK has a relatively smaller case pool, the insights from the foreign authorities are very useful, if not essential.

### **About the author**

**Martin Kwan** is a member of the OBOR Legal Research Centre and the Asian Academy of International Law. His research interests lie in comparative legal systems. He is affiliated with Harvard University's Fairbank Center for Chinese Studies as an Associate in Research.

Email: [martinresearch11@gmail.com](mailto:martinresearch11@gmail.com).

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## **MANDATORY MEDIATION IN ENGLAND AND WALES: MUCH ADO ABOUT NOTHING?**

BRYAN CLARK\*

Newcastle Law School, University of Newcastle

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### **Abstract**

This article is concerned with the thorny issue of mandatory mediation. In so doing, the piece charts the development of court-linked mediation in England and Wales from the days of the Woolf reforms and examines the growing clamour from judges, policymakers, commentators and, more recently, mediators for a shift from a mere cajoling of parties to mediate to outright compulsion. The article examines recent proposals for the introduction of mandatory mediation in English civil justice and sets out the view that, while mandatory mediation is inevitable and not *per se* objectionable on legal or policy grounds, care must be taken to ensure that it is implemented in such a way as to balance up different important policy drivers including efficiency, preserving the qualitative goals of mediation and filling the ‘justice gap’ that mediating in the shadow of the court can leave.

**Keywords:** mediation; mandatory mediation; access to justice; court-based mediation; mediation policy; litigants in person.

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### [A] INTRODUCTION

There have been few issues as controversial within English civil justice as mandatory mediation. The practice has become common in other jurisdictions but here on these shores we have grappled with the notion over the past few decades. The debate has been hotly contested. On the one side, proponents have pointed to the slow growth of voluntary mediation and the benefits for parties and the state that may accrue from mandating use. On the other, critics have argued that compelling parties to mediate is anathema to the grass-roots ethos of the process,

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\* Professor of Law and Civil Justice, Newcastle Law School.

that it is of questionable legality and, more fundamentally, that dragging recalcitrant parties kicking and screaming into mediation will simply not work.

While the issue has hung in the balance over the last couple of decades, it now seems that we stand ready to fully embrace mandatory mediation within the English civil justice system. That bulwark against compulsion to mediate, the Court of Appeal's decision in *Halsey v Milton Keynes NHS Trust* (2004), has seen increasing attacks by judges on and off the bench. The new Master of the Rolls, Sir Geoffrey Vos, has also spoken out in favour of the practice (Vos 2021a; 2021b), his views echoed in a recent Civil Justice Council ADR Committee report (Civil Justice Council 2021a) which declared that mandatory mediation was lawful and, moreover, should be introduced into the justice system. In a similar vein, the interim report of the Pre-action Protocol Working Group (Civil Justice Council 2021b) has recently proposed introducing compulsory, good faith dispute settlement measures for prospective litigants, the Department of Education has signalled a desire to implement mandatory mediation in special educational needs and disability (SEND) disputes (Secretary of State for Education 2022) and, most eye-catchingly perhaps, the Ministry of Justice has issued a consultation over its plans to introduce mandatory telephone mediation for all small claims with indications that such developments could in future be extended to all county court cases (Ministry of Justice 2022).

The writing is hence on the wall. Mandatory mediation seems inevitable. Against this backdrop, this article charts the development of mediation within the English civil justice system, the motives behind the drive to compel litigants to mediate and reviews some of the debates around the practice of compulsion. I offer the view that it is time to move on from the debate over the desirability of mandatory mediation. It is important now to map how mediation, mandatory or otherwise, might be developed appropriately in the English civil justice system, charting a balance between necessary efficiency drivers, litigants' quests for justice and making the best of the potential, qualitative benefits of mediation.

## [B] THE JOURNEY TOWARDS MANDATORY MEDIATION IN ENGLAND AND WALES

Since the advent of the Civil Procedure Rules 1998 (hereinafter CPR), as part of the overriding objective to deal with cases 'justly and proportionately' (section 1.1), settlement has been promoted in different ways through the justice system, including through pre-action protocols, a reformed

part 36 offers regime and also through promotion of alternative dispute resolution (ADR)—chiefly mediation—by the courts bolstered by the use of cost penalties for unreasonable refusals to mediate (*Halsey v Milton Keynes NHS Trust* 2004). Although mediation was already practised in England and Wales at this stage (for example, in community and family contexts), the CPR had a catalytic impact on developing the process as an adjunct to court proceedings. It should be recalled that the Woolf Reforms (Lord Woolf 1995; 1996) that led to the CPR’s enthusiastic embracement of ADR arose from a perception of crisis in the incumbent civil justice system. The drive to court-sponsored settlement and greater use of ADR was seen as an antidote to this malaise. The measures introduced thus mirror their emergence in other jurisdictions including the United States and are tied largely to the agenda of ‘efficiency proponents’.<sup>1</sup> Chiefly then, ADR was promoted in the English justice system to render courts more efficient and save the state time and money by diverting cases into non-judicial forms of dispute resolution.

Despite this push towards mediation and other settlement practices in the system, mandatory mediation, however, has largely been formally eschewed. Indeed, Lord Woolf (1996: lxi, para 18) was at pains to point out that ADR should be encouraged but not mandated. Although some courts did flirt with the notion of mandatory mediation in early, post-CPR decisions (eg *Shokusan v Danovo* 2004), the Court of Appeal judgment in *Halsey* stopped those developments in their tracks. In short, the view expressed by Lord Dyson in the leading judgment was that to compel litigants to mediate would amount to an unacceptable obstruction of their right to access courts under article 6 of the European Convention on Human Rights (ECHR). While isolated incidents of rogue judicial compulsion did arise from time to time (for example, in *C v RHL* 2005), a distinction has since been drawn between the legitimate practice of pressuring parties to mediate and the illegitimate practice of compulsion.

But the line in the sand between compulsion and mere pressure has begun to wash away and can be detected in different ways. Although not mandating participation in mediation itself, compulsory mediation information and assessment meetings (MIAMs) have become an established feature of English family justice (Children and Families Act 2014, section 10). In a similar fashion, ACAS early conciliation is a mandatory requirement in the Employment Tribunal setting, by dint of which all parties seeking to access the tribunal must discuss the possibility of conciliated settlement with an ACAS conciliator as a precondition (Employment Tribunals Act 1996, section 18A).

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<sup>1</sup> To borrow the language of Silbey & Sarat (1989).



As noted in the recent Civil Justice Council report on compulsory ADR, courts have sailed very close to the wind of compulsion in making mediation orders which draw the distinction between mandatory mediation and ordering parties to *attempt* mediation (Civil Justice Council 2021a: para 29, citing *Uren v Corporate Leisure (UK) Ltd* 2011 and *Mann v Mann* 2014). The new edition of the Chancery Guide 2022 on ADR (para 10.8) conveys a similar sentiment:

the court may ... stay the case or adjourn a hearing of its own motion to encourage and enable the parties to use ADR. The stay will be for a specified period and may include a date by which representatives of the parties with authority to settle and their legal advisers are required to meet, or a requirement for parties to exchange lists of neutral individuals who are available to carry out ADR and seek to agree on one ... Although the court may strongly recommend mediation, it cannot order that a mediation takes place and will not recommend an individual or body to facilitate ADR.<sup>2</sup>

Equally, although not formally concerned with compulsion, some arm-twisting initiatives may have that effect in practice. For instance, it has been argued that the cost-sanction rules for unreasonable refusals to mediate became so robustly enforced as to amount to compulsion by the back door (Ahmed 2012). There is also some evidence of *de facto* compulsion—or at least a perception of such within litigants—in pilot court mediation programmes in England and Scotland (Reid & Doyle 2007; Boyack 2017).

## [C] THE RATIONALE BEHIND SHIFTING TO MANDATORY MEDIATION

The pressure to move to formal acceptance of compulsion into mediation has been growing in recent times. This has occurred, not least on the basis that holding the line between compulsion and pressure was not sustainable. De Girolamo pointed to a ‘schizophrenia’ between a formal rejection of compulsion on the one hand and the rolling-out of heavy arm-twisting on the other (De Girolamo 2016). More specifically, there has been a burgeoning disquiet and adverse commentary in respect of the cost sanctions regime for unreasonable refusals to mediate (Ahmed 2012; De Girolamo 2016; Civil Justice Council 2018: para 8.29). This has arisen because of the contradictions and uncertainty manifest in the case law, the inadequacy of requiring parties and their lawyers to have to judge *ex ante* if a refusal to mediate would be seen as reasonable or not, and the

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<sup>2</sup> See also the pro-ENE judgment of Master Victoria McCloud in *Telecom Centre (UK) Ltd v Thomas Sanderson Ltd* (2020). See also McCloud (2020).

principled opposition to the legitimacy of punishing a party in costs when they have been vindicated in court. This latter point was emphasized by Patten LJ in the controversial Court of Appeal decision in *Gore v Naheed* (2017: para 49): ‘I have some difficulty in accepting that the desire for a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct, particularly when, as here, those rights are ultimately vindicated.’ More recent case law emphasizing the fact that unreasonable refusals to mediate are but one factor to balance up in determining whether to impose cost sanctions on parties have exacerbated the uncertainty in this area.<sup>3</sup>

Turning to lower-value disputes such as small claims, an increasing view has emerged that existing court-based mediation schemes, including those with default or opt-out approaches to mediation, are simply not doing enough to draw parties into the process and are ineffective in the face of well-cemented client and lawyer reluctance to mediate (Ministry of Justice 2022: 8). Mindful of the fundamental ethos of mediation, mediation providers have on balance not been in favour of mandatory mediation over the years, but that sentiment appears to be shifting of late.<sup>4</sup>

## [D] STAGING POSTS TO MANDATORY MEDIATION

Two significant recent developments have paved the way for the shift towards formal mandatory mediation: first, the Court of Appeal decision in *Lomax v Lomax* (2019a) and, secondly, the recent Civil Justice Council’s report on compulsory ADR (Civil Justice Council 2021a).

### *Lomax v Lomax*

Although not concerned with mediation but rather judge-led early neutral evaluation (ENE), *Lomax* can be seen as a significant milestone on the journey to mandatory mediation. The case involved a dispute under the Inheritance (Family and Dependents Act) 1975 arising between the spouse of the deceased and her stepson. The claimant (the spouse) favoured ENE to aid settlement but this was resisted by the defendant. At first instance, despite viewing that the case was one that ‘cries out, indeed screams out’ for judge-led evaluation, after reviewing the relevant rules and relevant guidance in the ‘White Book’ and Chancery Guide on Chancery Financial

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<sup>3</sup> For a recent review of case law in this area, see Allen 2022.

<sup>4</sup> See, for example, the views of CEDR, expressed recently in South 2022.

Dispute Resolution, Mrs Justice Parker determined that ENE could not be ordered without both parties' consent (*Lomax v Lomax* 2019b: para 123). On appeal, the decision was overturned with the Court of Appeal holding that parties' consent for recourse to ENE under rule 3.1(2)(m) of the CPR was not required. LJ Moylan took the view (at para 32) that if the need for consent had been required it would have been expressly written into the rules and that anything contrary to this in guidance could not lead to a departure from the legal position. Significant emphasis in this regard was placed on the 'overriding objective' and the court's duty to deal proportionately with individual cases for the greater good. In terms of the rule against compulsory mediation in *Halsey*, the court (at para 25) was keen to point out that ENE could be distinguished from mediation. Nonetheless, the court hinted that a departure from the current approach to compulsory mediation could be justified in noting (at para 27) that, 'the courts have gone a long way since *Halsey*'. Furthermore, the court's pro-mediation sentiment (at 29) can be seen in its referral to the words of Norris J in *Bradley v Heslin* (2014): 'it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken ... [T]he warnings are not being heeded, and those embroiled in them need saving from themselves.'

## The Civil Justice Council Report on compulsory alternative dispute resolution

While *Lomax* pushed at the gate, it was arguably wrought asunder by the recent Civil Justice Council report on compulsory ADR (Civil Justice Council 2021a). The principal focus of this report was the issue of legality of the practice of compelling parties to undertake ADR. On reviewing the relevant authorities, the report authors produced a clear view that compulsory ADR (including mediation) does not, in principle, contravene the right to fair access under article 6 ECHR. Rather, the view was taken that mandatory ADR may represent a proportionate response to the need to ration delivery of civil justice and in principle does not amount to an absolute bar on accessing justice through the courts. In arriving at this conclusion, the report reviewed the decision in *Halsey* as well as commentary and judicial developments since.<sup>5</sup> The conclusions were supported by an examination of the elements of compulsion that already exist in the English system and the practice of mandatory mediation in other jurisdictions. The European Court of Justice decisions in *Rosalba Alassini* (2010) and *Menini v Banco Popolare Società Cooperativ* (2018)

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<sup>5</sup> Including the views of judges made extrajudicially such as (at para 41) Mr Justice Lightman (2007) and (at para 46) Lord Dyson's own amended views of the rule in *Halsey* (Dyson 2010).

were seen as especially instructive in supporting the view that mandatory mediation would not contravene article 6 in so far as any scheme did not compel parties to settle or lead to significant costs and delay (Civil Justice Council 2021a: paras 37-41). The report did, however, identify a range of issues that would require further thinking if ADR processes were to be rolled out in a compulsory fashion across the English civil justice system (paras 90-113). These included issues of costs and timing of referral to ADR, the quality of third-party neutrals and provision of legal advice in and around ADR processes. We shall examine these issues below (at pages 100-104)

## [E] CURRENT PROPOSALS FOR MANDATORY MEDIATION

One significant manifestation of this new thinking can be found in the Ministry of Justice's proposed mandatory telephone mediation scheme for small claims in the county courts (Ministry of Justice 2022). Expanding the current opt-out service, the proposals would introduce a mandatory, post-filing mediation scheme (subject to yet to be determined exceptions) which would apply to all small claims in the county courts (generally cases below £10,000 in value). All cases would be stayed for a period of 28 days to allow the mediation to take place, with the process conducted by Ministry of Justice-employed mediators. Mediations would be (as is normally the case in the current voluntary scheme) held over the telephone and be scheduled for one hour. The consultation also sought views on the penalties to be imposed on parties for non-compliance with mediation orders. Signalling a future intention to expand mandatory mediation to all county court cases, responses were also sought about the need for further regulation of the mediation profession in England and Wales

Proposals have also been made to introduce mandatory mediation into the realm of SEND disputes (Secretary of State for Education 2022). Elements of compulsion are already present in the system. Parents seeking access to the First-tier Tribunal require a mediation certificate which warrants that they have consulted an adviser as to the possible use of mediation to resolve their dispute (Children and Families Act 2014, section 55). Additionally, where a parent requests mediation, then the local authority must make this available (section 52). The new proposals, however, would require families and local authorities to attempt mediation prior to registering an appeal to the tribunal (Secretary of State for Education 2022: para 31). The new measures would be undergirded by

clear expectations of how different parties should engage in mediation, including timescales for mediation to take place and ensuring that local authority decision-makers attend meetings [and] ... appropriate support available to parents to help them understand the mediation process and how best to engage with it (para 31).

## [F] MOVING THE DEBATE ALONG

While compelling parties to mediate is always going to sow division, it is perhaps time to stop the debate over the merits or otherwise of the practice. First, it is important to distinguish compulsion *into* mediation from compulsion *within* mediation.<sup>6</sup> Secondly, although from a theoretical perspective, mandatory mediation can be seen as conceptually quite different to voluntary species of the process, with the informed consent of parties to engage in the process removed, the practice is far more consonant theoretically to the court-linked models that have developed over the last couple of decades. Driven as they are by pressure to take part, participants' informed consent into the mediation process in these settings is already heavily compromised. Thirdly, from a practical perspective, court-sponsored settlement is well embedded in our system of civil justice, and the pressure to best save public funds in the administration of civil justice will continue unabated. Equally, mediation and other such settlement-based practices offer the *possibility* of effective dispute resolution for many litigants, and thus it is legitimate to encourage their use in the most effective ways.

But *how* mediation is implemented within the justice system raises a number of important concerns that may be brought more sharply into focus by the introduction of mandatory schemes. These will be discussed under the following three interlinked themes: the need to improve efficiency in the administration of civil justice; maximizing the qualitative benefits of mediation; and dealing with the 'justice' gap in mediation.

### Efficiency drivers

In the Ministry of Justice's consultation paper on the introduction of mandatory mediation in small claims, although there is some reference to the qualitative benefits of mediation, the main rationale behind the shift to compulsion is clear: the superiority of compulsion over voluntary approaches in improving uptake and the resultant impact on cost savings in the system. The consultation paper notes that the new scheme is

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<sup>6</sup> Although, as discussed below at page 104, it is important to ensure that the way schemes are implemented ensures that the former does not bleed into the latter.

‘expected to divert up to 20,000 cases each year from the court system, freeing up judicial resources to be used for complex cases’ (Ministry of Justice 2022: 5) and that, despite the current opt-out, free small claims scheme,

in only 21% of small claims do both parties agree to attend a mediation session ... This means that ... judicial time and expertise is being utilized on cases where it may not be required, as parties have not attempted to resolve their case consensually. As a result, court resources are drawn away from more complex cases; it takes longer for everyone to access the justice they deserve; and the courts function less efficiently than they might (Ministry of Justice 2022: 8, internal citations omitted).

It may be contended that compelling parties into mediation is counterproductive as parties are less likely within which to reach agreements. Evidence on settlements rates in mandatory mediation is patchy and much of it is context-specific. In reviewing evidence from Australia and the United States, however, the Civil Justice Council report on compulsory ADR notes that settlement rates in mandatory programmes do not always vary significantly from their voluntary counterparts (Civil Justice Council 2021a: para 7.21). Even if settlement rates fall when mediation shifts to a mandatory form, given the potentially large rise in cases diverted into mediation, if mediation is significantly cheaper for the state than the alternative of those cases proceeding through the court system then large efficiency gains can still be made. There has also been a significant debate around the best timing for mediation. This is a finely balanced issue. In terms of efficiency for both the state and the parties, pre-action referral seems most appropriate, limiting the sunk costs run up in ongoing litigation. It has also been recognized, however, that parties may require time to bottom out their case before it is ripe for negotiation or mediation and so later referral may be more effective in practice (Civil Justice Council 2021a: paras 106-111).

## Retaining the qualitative benefits of mediation

While the emphasis on efficiency is understandable and historically consonant with attempts across the globe to embed mediation within formal justice processes, there are well-documented dangers of prioritizing efficiency at the expense of other qualitative benefits of mediation. Efficiency drivers can lead to underfunding, poor quality of service and a compromising of participants’ self-determination in the mediation process (Welsh 2001). Efficiency-driven species of mediation may become very settlement-focused and unlikely to engage with the qualitative benefits that might arise from a proper exchange of disputants’ views, efforts to build

mutual understanding, the seeking out of creative solutions to best meet parties' interests and forging the repairing of relationships (Lande 2022).

In the context of the proposed SEND mediation reforms, Doyle has lambasted the increasing perceptions of mediation as 'cheap and fast settlement based on compromise' (Doyle 2022). She also recounts her experience of the negative consequences of the growing institutionalization of the mediation process in this context:

when I started in SEND mediation, 20 years ago, the norm was preparatory calls with every attendee and a 3-4-hour in-person meeting: long, yes, but also an indication of the commitment required and the time needed to allow for constructive and collaborative working. Today, the norm is little or no pre-discussion and a 1½-hour meeting ... and often there is pressure from LAs to squeeze mediation into the margins of a busy day.

In a similar vein, the proposed roll-out of one-hour, time-limited telephone mediation in small claims does smack of the cheapest possible offering, with the shuttle-based nature of the process mitigating the opportunity for exploration of all relevant issues required to provide meaningful and high-quality settlements.

Ensuring adequate quality of mediators is also important. In higher-value disputes in which sophisticated parties aided by their lawyers can choose from established ADR providers, there may be no need for any new measures beyond the current market and self-regulatory regimes<sup>7</sup> that exist in the English mediation field. In lower-value disputes, however, where mediation may be made available at free or at low cost, and particularly when it is compulsory, some additional level of quality assurance is required. In these settings mediators may be drawn from court staff (as in the current Ministry of Justice opt-out scheme in small claims) or external, rostered mediators who have been vetted as meeting certain required industry standards. But there are no universally mandated standards in England and Wales for civil mediators. The authors of the Civil Justice Council's report on compulsory ADR hence state that 'more systematic regulation is required' (Civil Justice Council 2021a: para 103). A co-regulation model in which a professional body is empowered by the state to set minimum standards and oversee the profession may in the longer term be the most appropriate way to proceed,

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<sup>7</sup> Through for example, the Civil Mediation Council.

balancing up the desire for responsiveness and flexibility in the field with the need for assured quality of practice.<sup>8</sup>

Efficiency also demands that measures to compel participation are backed up with teeth. Obvious ways in which to censure non-compliance may include cost sanctions or the striking-out of claims. While such measures can be seen as proportionate in the face of the legitimate aims to promote mediation in this context, the Ministry of Justice in its small claims mediation consultation poses the more general question as to how to gauge whether a party has ‘adequately engaged with the mediation process’ (Ministry of Justice 2022: question 13). In terms of what this might entail, Lande (2022) points to the fact that efficiency-driven court-based mediation<sup>9</sup> is often subject to significant oversight by the court in terms of whether parties in mediation have met ‘good faith participation’ requirements. In the event that a case does not settle, the mediator may be requested to report back on the conduct of the parties in the mediation to the court which may then apply appropriate sanctions.

Reference to such ‘good faith’ obligations has begun to be seen in the context of English civil justice. For example, the Civil Justice Council’s interim report on pre-action protocol reform (Civil Justice Council 2021b) calls for the parties to be placed under a ‘good faith obligation to resolve or narrow the dispute’ (paras 2.08-2.14). In the recent case of *Hertsmere Borough Council v Watret & Co Ltd* 2020, Master Davidson (with the parties’ consent) issued an order which required that the parties: ‘meaningfully engage in the mediation process in a genuine attempt to reach settlement of these proceedings’. The order continued:

either party shall be at liberty to make an application relying on evidence as to the conduct of the parties at the mediation ... with regards to the costs consequences of that conduct or with regards to the Court deciding whether or not either party has failed to engage with the mediation process (paras 4b and 4c).

Such obligations hold an appeal. Parties in dispute often suffer a lack of trust in one another. An assurance that one’s opponent must act in good faith in a mediation may persuade a reluctant participant that the process may be meaningful and that their opponent will not simply deploy it as a time-wasting exercise or fishing expedition. These measures are problematic, however, in terms of determining objectively

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<sup>8</sup> The Irish Mediation Act 2017, section 12, anticipates this kind of model developing in the future through the establishment of a Mediation Council that would promote mediation, develop standards in the provision of mediation, issue codes of practice and maintain a register of approved mediators.

<sup>9</sup> What he terms ‘litimediation’.



what this kind of behaviour amounts to. Staying for a period of time? Making an offer? Being receptive to reasonable demands of the other side? More importantly, any 'good faith' participation requirements that call for the mediator to report on the conduct of parties in the process may undermine some of the key, qualitative benefits of mediation. Parties' knowing that a mediator may report back on their behaviour and exercise some kind of judgement upon them may damage the candour of exchanges in mediation, negatively impact on perceptions of mediator neutrality and pose significant challenges to the confidential and without-prejudice nature of the process.

### The 'justice gap'

As discussed above (see 97-98) for mandatory mediation to represent a proportionate measure limiting the right of litigants to access a judicial determination, it cannot operate as a *de facto* bar to the same. So, the mediation process cannot compel settlement, nor be prohibitively expensive or lead to excessive delays. The mooted Ministry of Justice small claims service shall be free to users and offers the promise of a swift reference to mediation. In higher-value claims, the not insignificant fees for external mediation services may be seen as proportionate given the potentially heavy cost of litigation, but the middle ground—a significant roll-out of mandatory mediation across the county courts for example—would require planning to ensure that a cost-effective and timely mediation service could be offered for users in a manner consonant with the requirements of article 6.<sup>10</sup>

The more fundamental objection voiced about court-based mediation is that it may not provide justice to those who are seeking a court outcome. As a process centred on identifying parties' interests and finding common ground upon which an agreement can be built, the mediation process is not fundamentally concerned with giving effect to the legal rights of litigants. There has been significant critique of this blending of non-legal processes within formal justice (Genn 2009). Others have argued cogently that justice is not just the preserve of law. Law is only one barometer of fairness. Parties in dispute may hold a variety of extrajudicial needs beyond legal remedies that they may seek to prioritize (Relis 2009) which may be achieved within mediation. Equally, recent research suggests that

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<sup>10</sup> It is notable that the authors of the Civil Justice Council's interim report on pre-action protocols plumped for the broader notion of compulsory, good faith endeavours to settle claims rather than ADR as such on the basis that the limited availability of well-regulated, free or low-cost and timely ADR may raise concerns under article 6 ECHR (Civil Justice Council 2021b: para 2.10).

lay participants in mediation may be able to determine their own sense of justice in outcomes rendered in the process (Irvine 2020).

Nonetheless, in the context of court referral it seems important that, if parties seek to sacrifice their potential rights in favour of a negotiated outcome and give their informed consent to the same, some appreciation of their legal position (a sense of what they may be giving up when determining to settle) would be helpful. Given their neutrality, it is ethically difficult (and depending on the experience of the mediator, not always possible) for a mediator to fill that gap in knowledge. On that basis, providing some access to legal advice and assistance in and around mediation seems necessary. The authors of the Civil Justice Council report on compulsory ADR seem to accept this point (Civil Justice Council 2021a: paras 104-105) and Sir Geoffrey Vos recently noted that ‘for formal mediation to work well, the parties require to ... have their rights properly explained to them and ... [be] in receipt of independent legal advice’ (Vos 2021b: para 32). Given the difficulty resourcing legal assistance in lower-value claims where parties will often enter court proceedings without lawyers, I have previously advocated the use of lay advisers as a proportionate way to tackle this problem (Clark 2020). Lawyers and other party advocates play a range of other important roles beyond tendering legal advice in supporting clients in mediation. For example, they can help clients plan strategy, better articulate their position and uncover their interests, as well as act as a bulwark against overly pushy mediators. This is important in the court-based setting where there is some evidence of parties feeling that they were under excessive pressure from mediators to settle (Reid & Doyle 2007: 4-5). In efficiency-driven environments mediators may seek to prove their financial worth to those holding the purse strings, with the resultant danger that they become overly incentivized to broker settlements at all costs (Brazil 2006: 266).

## [G] CONCLUSION

It seems that the ghost of *Halsey* will finally be put to rest. After decades of resistance the dam has burst and the rivers of enthusiasm for mandatory mediation have begun to run. In a sense this was rendered inevitable by the chain of events that set court-sponsored mediation in motion in England and Wales at the time of Woolf. Mediation’s journey from outside the court system to its linking with courts and formal justice systems, to judicial encouragement and arm-twisting and finally to compulsion is a pattern that can be found in many other jurisdictions. It has just taken that bit longer to reach this destination on these shores.

This is just the beginning of the journey rather than the end, and we need to plan those next steps carefully. While arguably the Court of Appeal's view on mandatory mediation in *Halsey* is merely *obiter*, a definitive judicial Court of Appeal ruling on the legality of the practice would help to settle the issue. Equally, while it seems that courts are already empowered to refer parties to mediation under the current provisions of the CPR,<sup>11</sup> an amendment to the rules to specifically set out court powers in respect of mandatory mediation may be preferable for clarity and to ensure that court-ordered mediation retains some consistency.

There remain many choices to be made with respect to the how and when to compel parties to mediate in different settings. In some areas there may be blanket, 'automatic referral' rules (as in the Ministry of Justice small claims proposals) or discretionary powers for judges to order the parties to mediate. We may also see the further development of pre-filing mandatory requirements to mediate including within online dispute resolution portals (eg the Small Claims Portal for Accidents).<sup>12</sup>

In all of this, as noted in this article, we need to find some way to balance the different policy drivers that might take mediation in different directions. First, care must be taken to stay within the confines of acceptable limitations on litigants' rights to access court as articulated by the European Court of Justice in *Rosalba Alassini* and *Menini*. Equally, the priority of efficiency may result in a focus on speed, economy, real or perceived pressure to settle within mediations and perhaps judicial scrutiny of participants' conduct to aid effective enforcement. Such measures, however, can also lead to compromising the qualitative benefits of mediation, providing scant opportunities for proper inter-party dialogue and exploration of interests while also rendering parties at the whim of poor quality mediators with a 'thinning' of their self-determination within the process. 'Justice gaps' that may arise, particularly when participants attend mediation without lawyers, also need to be recognized and addressed if the process is not to avoid characterization as providing second-class justice.

In charting this future course, taking a leaf out of mediation's book, it is essential that there is proper dialogue and exchange between a range of stakeholders including policymakers, mediators, judges, lawyers, academics and end-user groups. Future developments also need piloting, coupled with proper and sustained funding for independent evaluation.

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<sup>11</sup> CPR rule 1.4(2)(e) requires courts to actively manage cases by 'encouraging parties to use an alternative dispute resolution procedure if the court considers that appropriate ...'.

<sup>12</sup> Official Injury Claim Homepage.

### About the author

**Bryan Clark** is Professor of Law and Civil Justice, Newcastle Law School, where he is currently Deputy Head of Department (Academic Affairs). He is a socio-legal scholar with interests in mediation and alternative dispute resolution and, in particular, how these processes interact with formal civil justice and the workings of lawyers and judges. He also has interests in aspects of commercial law and access to justice more broadly. He is dedicated about teaching, aiding students to become reflective learners and an advocate of widening access to legal education and the legal profession.

Email: [bryan.clark@newcastle.ac.uk](mailto:bryan.clark@newcastle.ac.uk).

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## DEVELOPMENTS IN THE HISTORY OF ARBITRATION: A PAST FOR THE PRESENT?

FRANCIS CALVERT BOORMAN

Institute of Advanced Legal Studies, University of London

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### Abstract

It is not always easy to see the relevance of history to current practice, a complaint that might be levelled at the history of arbitration. Yet the uses made of history in work about the present state of arbitration show that some fascinating interventions have been made by both eminent academics and practitioners, with some important differences emerging in their interpretations. This article gives a brief overview of the history of legislation relating to arbitration, which predominantly relates to the relationship of arbitration with commerce and the courts. It also suggests that recent developments in studies of the history of arbitration challenge some of the assumptions made by those using it to illuminate the present. One particular difficulty with the way history has been used is the tendency to focus exclusively on commercial arbitration. Two detailed examples are given of areas that have received less attention; arbitration in the early railway industry and its use settling disputes for working-class friendly societies. These point the way to exploring a more diverse history, that looks beyond London, lawyers and commerce.

**Keywords:** arbitration; dispute resolution; history; Georgian; Victorian; railways; friendly societies; legislation.

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### [A] INTRODUCTION

What is the place of history in a discussion about current developments in arbitration? Don't ask a historian. The leap of faith needed to turn historical understanding into pithy advice will have to be taken by those with the necessary expertise; by practitioners, arbitrators and lawyers, if at all. But what the historian can (I hope) do is to show how some lawyers and arbitrators have indeed introduced history into their debates.

I will then chart how our understanding of the history of arbitration is developing, at a very exciting time for the field, which might necessitate some rethinking of how the history of arbitration is deployed. We can also point to some areas of the history of arbitration that have thus far been neglected, which could provide new perspectives on the present. The outcome will hopefully encourage use of the latest research and interest in the broadest perspectives.

Most scholarship concerning the history of arbitration focuses on its relationship with two communities: lawyers and merchants. Past legislators also appeared to share that approach, speaking largely of the effect new arbitration laws would have on commerce and the courts. I will describe the major legislation that was specifically targeted at the practice of arbitration during the two centuries following the Arbitration Act of 1698 and the ways that modern commentators have come to understand that legislation and its legacy. I will then go on to discuss a wider ecosystem of legislation that utilized arbitration, as clauses buried within laws pertaining to areas like the railway industry. This profusion of administrative law, which burgeoned in the 19th century, was not much commented on at the time by politicians and journalists who were convinced of the supremacy of *laissez-faire* government. Lawyers were not much involved in its administration, which fell to a new army of bureaucrats (Atiyah 2012: 233-236). This perhaps goes some way to explaining why much of the legal community has only shown a passing interest. I will go on to suggest that a working-class culture of using arbitration to resolve disputes also existed that had a rather uneasy relationship with state control and the legal system.

One way to illustrate how arbitration changed over the course of 200 years is via a five-minute walk down Fleet Street and the Strand on the edge of the City of London. We're going to start in the pub, specifically Ye Olde Cheshire Cheese, rebuilt shortly after the Great Fire of London and still serving today. In the latter part of the 17th century an arbitration might take place in just such a pub or tavern. The basic structure was for parties in dispute to agree to arbitration, instead of the costly and slow process of litigation. The parties might well be two merchants. One had sent the other a shipment of wine on credit, but they disagreed about the quality and therefore the price. They would begin by drawing up an indenture that set out the terms and remit of the arbitration. Each merchant chose an arbitrator, who might be a friend or colleague. In our case, they would naturally appoint other merchants with experience in the wine trade. The parties then generally signed arbitration bonds, which obliged them to forfeit a sum of money if they did not comply



with the award of the arbitrators, typically double the amount in dispute (a 'penal' sum), so that refusing to perform the award was not a viable option. The two arbitrators then attempted to come to an agreement over all matters in dispute. They would hear any relevant evidence from witnesses, examine accounts, and would no doubt have the arduous task of tasting the wine. They then made their award or, if they still couldn't agree, they would have nominated another merchant as umpire and his decision was final. For our merchants, he ordered a price for the wine and said when the money should be paid, perhaps in instalments.

Five minutes' walk to the west lets us simultaneously leap forward 200 years, to the building of the Royal Courts of Justice, that Victorian Gothic edifice still overlooking the Strand. As part of the design for the building, the architect George Edmund Street included detailed features for an arbitration room, where, when it opened in 1882, two parties might have their reference heard by an official referee, a barrister appointed by the Lord Chancellor. The symbolism is significant, the arbitration process finding a space in the very heart of the legal system.

## [B] LEGISLATION

Returning to the mid-17th century, the court of King's Bench provided another method for enforcing agreements to arbitrate. They could be entered as a rule of court, which made the failure to perform an award a contempt of court, resulting in attachment, or imprisonment. The procedure to register could either begin with the submission to the court of an existing agreement to arbitrate, or as a reference to arbitration from the court, where an action had already been initiated. The first legislation relating to arbitration was the Arbitration Act of 1698, which was set in motion by the newly established Board of Trade and drawn up by the philosopher John Locke to legislate for the existing rule of court procedure (Arbitration Act 1698). Locke explicitly stated that the Arbitration Act was intended to aid the smooth functioning of trade, although it was not much called upon for over half a century. Court-backed arbitrations became more popular from the 1750s. It is worth noting that significant legalization of the arbitration process took place via its increasing interaction with the courts, without further intervention from Parliament (Horwitz & Oldham 1993).

The next general Act pertaining to arbitration was not passed until William IV was on the throne, in 1833. Much of the impetus for reforming arbitration law during the mid-19th century came from Henry Brougham, Baron Brougham from 1830 and Lord Chancellor between 1830 and 1834

(Lobban 2021). However, his vision of a comprehensive system of public arbitration, including a court of arbitration as some other European countries had, was never realized. An Arbitration Bill introduced by Lord Chief Justice Tenterden in 1832 also promised several changes that were not enacted until much later, but he died soon afterwards and the bill was lost with him (A bill, intituled, an act for settling controversies by arbitration, 1831-1832).

Instead, limited new provisions for arbitration were rolled into Brougham's single Civil Procedure Act 1833, notably losing a clause compelling reference to arbitration in matters of account.<sup>1</sup> Submissions to arbitration registered as a rule of court were made irrevocable unless by consent of the court, and arbitrators appointed by rule or order of court could compel the attendance of witnesses and administer oaths, meaning false testimony before an arbitrator would be perjury (Civil Procedure Act 1833, sections 39-41). The application of these provisions was slightly uncertain and seemed limited to references from the common law courts. When a reference was made from Chancery, the arbitrator could not, in the eyes of some at least, compel witnesses to attend (Russell 1853: 8). Further reform would take another two decades.

Lord Brougham introduced another bill to overhaul the law relating to arbitration in 1852, but it was overtaken by wider legal reforms and again more limited provisions were passed. The arbitration clauses in the Common Law Procedure Act 1854 allowed the court or judge to refer cases relating wholly or partly to matters of account to arbitration before they came to trial, with the option to appoint a County Court judge, at that time only recently created, as arbitrator. If the parties to an arbitration required it, a question of law or fact from an arbitration could be decided in court. Arbitrators could issue an award in whole or part as a special case to be decided by the court. An arbitration agreement was made sufficient cause to stay proceedings. If the parties failed to appoint arbitrators or an umpire then a judge could do so on their behalf and if one party failed to appoint an arbitrator then the arbitrator appointed by the other party could act alone. All awards could be made a rule of court unless explicit provision was made to the contrary. Finally, the ambiguity surrounding awards which ordered the transfer of land was removed. Henceforth, a rule of court registering an award ordering the transfer of land would have the effect of a judgment in ejectment (Common Law Procedure Act 1854, sections 3 to 17).

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<sup>1</sup> *Hansard House of Lords Debates* 3rd ser, vol 16 (1833) col 336.

The Judicature Commission acknowledged the ongoing popularity of arbitration in the 1860s, but also identified ongoing problems. It found that arbitrations were generally referred to a barrister or an expert. Barristers were likely to have other commitments and might repeatedly adjourn hearings causing long delays. Experts lacked enough knowledge of legal proceedings and rules of evidence. The arbitrator set his own charges making arbitration expensive. Finally, there was no appeal or remedy unless the arbitrator acted particularly egregiously (Judicature Commission 1868-1869: 12-13).

The Judicature Act 1873 set up government officers called official referees, who were appointed by the Lord Chancellor, a system of patronage which the barrister and Member of Parliament Henry Matthews 'looked upon with the greatest dread and dislike'.<sup>2</sup> The newly established High Court, Court of Appeal or any Divisional Court could refer causes to them for inquiry and report, then accept this in part or whole and enforce it as a judgment. Matters requiring 'prolonged examination of documents or accounts, or any scientific or local investigation' could be referred to an official referee, or a special referee chosen by the parties (Judicature Act 1873: sections 56-59). The set cost of official referees was £5 for a reference, with further charges for every hour above two days' work and for every night spent away from London (Judicature Act 1873: section 83; Foulks Lynch 1902: 73-74). Several minor adjustments were also made to arbitration in the Judicature Act 1884 (sections 8-11).

The complete codification of law relating to arbitration was then attempted in the 1880s; Lord Bramwell introduced a bill with the backing of the Council of the London Chamber of Commerce in 1884, who saw it as a precondition to establishing the London Court of International Arbitration, which was eventually founded in 1892. Like Brougham's earlier efforts, Bramwell's bill was overtaken by an alternative, drafted by Parliamentary Counsel, and with the more modest aim of consolidating existing legislation, despite opposition amongst the business community (Veeder & Dye 1992: 330, 341, 343-347). The Arbitration Act 1889 repealed the relevant clauses from the five previous Acts that made general amendments to the law relating to arbitration, passed in 1698, 1833, 1854, 1873 and 1884. Rather than providing much that was innovative, the 1889 Act is perhaps more notable for offering consistency, certainty and even decisiveness that neither legislators nor the judiciary had quite managed to provide previously. The jurisdiction of courts to review awards, either on the merits or on a point of law, was ambiguous

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<sup>2</sup> *Hansard House of Commons Debates* 3rd ser vol 216 (1873) cols 679-680.

at best for much of the 19th century, but there was an increasing use of judicial review and confidence in setting aside awards on procedural grounds, particularly after 1854 (Arthurs 1985: 73-74). Following the 1889 Act, judicial review of awards was entrenched, registration with the courts presumed and even a complete process provided, unless it was explicitly rejected in the arbitration agreement. The standard was for a single arbitrator to make an award within three months. The ability to compel arbitrators to state a case swept aside the persistent confusion about whether an award could be reviewed at all, but especially on a point of law (Arthurs 1985: 73-75).

## [C] INTERPRETATIONS

Stavros Brekoulakis has fairly recently summarized this legislation and usefully relates the overturning of a myth that the judiciary were hostile to arbitration, which has been an important development in the historiography. Brekoulakis sees each stage of legislation as an improvement, although this is not his main focus, his ultimate aim being to argue against a view of arbitration as a relatively recent neoliberal project. He states that:

Despite the remarkable success of the Locke Act, a large number of arbitration agreements, namely agreements under the common law, were not protected against revocation. This was corrected later in the 19th century, when the Common Law Procedure Act 1854 was enacted (Brekoulakis 2019: 134).

In Brekoulakis' telling, legislation had finally given proper protection to arbitration agreements and each stage of legislation improved the overall process.

The Chief Justice of New South Wales, Hon T F Bathurst, has also used the history of commercial arbitration to reframe current debates, similarly keen to dispel its reputation as a novel threat to the rule of law. However, he sees a more problematic relationship with court oversight, stating that the usual question asked is: 'How far ought we to permit private parties to exclude determination of their dispute by a court?' However, in his opinion, a reading of the history of the law relating to arbitration suggests that the question should really be: 'How far ought courts be willing to intervene in arbitrations between private parties?' (Bathurst 2018: 3-4). His approach produces a particular difference with Brekoulakis on their attitudes to *Scott v Avery*, a case decided by the House of Lords in 1856, in which Lord Campbell denied the hostility of the courts to arbitration, but in doing so reaffirmed the doctrine that the courts could not have

their jurisdiction ousted by an agreement to arbitrate, which had the consequence that agreements to arbitrate were revocable. Brekoulakis describes *Scott v Avery* as a ‘distinct advance’, Bathurst as ‘a dead end’ (Brekoulakis 2019: 138; Bathurst 2018: 27).<sup>3</sup>

One new study challenges the assumptions of both Brekoulakis and Bathurst with regard to the Arbitration Act 1698 and demonstrates our need for a dynamic relationship with the past. In a reassessment of the 1698 Act, questioning its necessity and legacy, Julia Kelsoe has shown in her recent dissertation that that legislation was not introduced to solve a problem relating to enforcement of awards using penal bonds as previous legal historians had presumed. It was not in fact a response that had been sought by merchants and did not really answer any legal need. Instead it was most likely considered a simpler alternative to creating a merchant court and an attempt by members of the Board of Trade, including John Locke, to secure the very existence of the newly created board. This helps to explain why merchants were continuing to call for such a court nearly a century later and also why the enforcement procedure of the Arbitration Act 1698 was not much used, only becoming widespread in the King’s Bench in the 1770s under Lord Mansfield (Kelsoe 2021: 144-154). Kelsoe’s work strengthens the view that the legalization of arbitration was not a teleological process, but often somewhat incidental.

The motivations of later legislators were also complex and tactical, involving party politics and personal animosity. Procedural considerations in Parliament were sometimes vital and, above all, legislators were generally trying to catch up with trends that were already underway. We have already seen that attempts to codify arbitration law by Lords Brougham and Bramwell were rejected in favour of introducing changes that were mostly grouped with other legal reforms. So not only had legal professionals become the prime movers in reforming arbitration, that reform became entangled with changes to the courts and legal system. Johnny Veeder and Brian Dye have written about how both courts and Parliament took a ‘piecemeal pragmatic approach’ to arbitration, resulting in statutes that ‘were mainly concerned with the relationship between the English courts and the arbitral process’ (Veeder & Dye 1992: 333).

Douglas Yarn suggests a more forceful critique of the narrative of improvement arguing that strengthening the enforcement of arbitrations by the courts came at the cost of any independence from the legal system and much of the flexibility that had been a dwindling advantage of arbitration for centuries. Yarn describes this process of ‘isomorphism

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<sup>3</sup> Developments in the common law really warrant an article of their own.

through institutionalization' as the death of alternative dispute resolution. His concern is for the loss of the conciliatory elements of arbitration, replacing them with an adversarial process in the image of the legal system. The aspects of arbitration identified by lawyers at the time (and some legal historians) as problems of enforcement, Yarn instead describes as the very basis of a consensual process, with a conciliatory approach. These three aspects were voluntary submission to arbitration, the ability of parties to revoke an agreement to arbitrate, and the control of parties over the proceedings. Revocation in particular came to be seen as a problem that needed to be fixed, rather than the right of a consenting party and was incrementally eliminated in the 19th century. Yarn also identifies the move from having to opt in to registering an arbitration with the courts to having to opt out as another erosion of consent. The Arbitration Act 1889 made the rule of court procedure universal, completing the transformation of arbitration into an adjudicative and coercive process. The institutionalization of arbitration by commercial organizations compounded these legal reforms, adding further inflexibility through the control they had over their members and their use of form contracts (Yarn 2004: 990-1011).

Although private commercial tribunals became increasingly popular, they never received legislative backing, a point of contention that had long been tangled with political issues (Burset 2016). In contrast to Yarn, Harry Arthurs has identified a separate worldview in the commercial community to the legal profession, which they used as the basis for arbitration tribunals, maintaining *de facto* independence from the law. He identifies this as both an economic and ideological threat to the legal profession. He contrasts the settled and universal justice of lawyers with the discretionary and particular justice favoured by commerce, which valued results over process (Arthurs 1985: 71).

The range of interpretations of arbitration legislation, from strengthening and improving arbitration, to its destruction as a true alternative to the courts, gives a flavour of the vitality of historical argument. Yet this focus on general Arbitration Acts and commercial arbitration is also reductive and I think encourages an excessive focus on London, on activities and institutions within an area not much greater than that covered by our five-minute walk. Arthurs identifies provisions for arbitration in regulatory legislation as increasing rapidly during the 19th century and Chantal Stebbings has noted the influence of arbitration on the proliferation of statutory tribunals in the same period (Arthurs 1985: 100-103; Stebbings 2006: 280-281). What then were these other areas in which arbitration was sanctioned by legislation which did not necessarily concern the

courts or merchants, but were vitally important to structural changes in the economy?

There were many, but space confines us to two examples. First is the transfer of land. It was a legal commonplace that it was not possible to make an award transferring title to land, but this was not observed in practice; arbitrators often made awards deciding ownership of land without difficulty in enforcement, but the land still had to be conveyed between parties. Private arbitrations involving land, including questions regarding boundaries, title, value and proper use were routine (Roebuck & Ors 2019: chapter 13). Arbitration became a matter of public policy for legislators from the 17th century, as arbitration clauses were inserted in private Acts of Parliament sanctioning the enclosure of common land. This practice became systematic in the 18th century and reached its apogee in the late 18th and early 19th centuries, continuing to the end of the 19th century (Roebuck & Ors 2019: 171-176).<sup>4</sup>

Enclosure was a legislative precedent, though not acknowledged at the time, of other major transfers of land that relied on arbitration as a mechanism for solving disputes, including construction of the canal network from the late 18th century. Construction of a canal required a private Act of Parliament and these often included arbitration clauses, relating to compensation for compulsory land purchases, or damage done to land by works surrounding the canal such as drainage, and disputes over water usage with other businesses that relied on local waterways (Roebuck & Ors 2019: 177-178). Arbitration clauses inserted in private Acts continued to represent a method by which the competing interests affected by canal construction could be kept at arm's length from the state if disputes arose. For instance, an Act of 1825 which sanctioned construction of a canal in Cornwall allowed for the appointment of arbitrators by the canal company and the Mayor and Corporation of Lostwithiel in case of injury to the navigation or other use of the river Fowey. If the company failed to appoint an arbitrator or umpire within 20 days, then the Sherriff of Cornwall could do so on their behalf (An Act for making and maintaining a navigable Canal from Tarras Pill in the Parish of Duloe in the County of Cornwall, to or near Moors Water in the Parish of Liskeard in the said County 1825: section 8).

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<sup>4</sup> For late 19th-century arbitrations, see, for instance, Kresen Kernow (Cornwall Archives), TF/2642/1-3.

## [D] RAILWAYS

The area of land needed for the railways was of another order. A railway historian, Mark Casson, is perhaps ideally situated to see the importance of land in the Victorian economy, but also the role that government played in deciding its distribution:

many of the major industrial projects in Victorian Britain involved the compulsory acquisition of land. Far from defending individual property rights unequivocally, government presided over a system in which large amounts of private land were acquired, subject to arbitration, by the authority of the state (Casson 2009: 37) .

As with canals, from the very early years of steam railway construction in England, arbitration clauses were included in Acts to settle disputes related to purchases of land, construction and operation of the railways, particularly relating to their status as a public utility, including their role carrying the mail and in maintaining telegraph lines. Land acquisition was the most aggravated aspect of the growth of railway companies, as it placed railway capitalists in conflict with the wealth and political influence of the landed aristocracy and gentry. The passage of several pieces of consolidating legislation in 1845 saw representatives of the railway interest and the landed classes clash in Parliament over the legal form their future relationship would take (Sharman 1986: 18). This is a key date in the history of arbitration legislation often ignored. The Land Clauses Consolidation Act was passed in 1845 and presented by Peel's Government as a compromise between the needs of the landowners and the railway companies (Kostal 2012: 162-164).

The Act did allow railway companies to expropriate land, but, in cases where the offer or claim of compensation exceeded £50, the landowner could choose to settle their claim by jury, special jury or arbitration. The arbitration could not be avoided by inaction; if either party failed to appoint an arbitrator within 14 days, the single arbitrator could proceed *ex parte*, and if an umpire was not appointed then the Board of Trade could make the selection. Awards could not be set aside 'for irregularity or error in matter of form'. Costs would be paid entirely by the railway company unless the price decided was the same or less than the initial offer (Land Clauses Consolidation Act 1845: sections 22-37). While the Land Clauses Consolidation Act related to land taken for any undertaking of a public nature, the arbitration provisions were extended further in the special case of railway companies. The Railways Clauses Consolidation Act 1845 also stipulated the process to be followed if any disputes were determined by arbitration, either under its own provisions or any special



Act pertaining to the railways (Railways Clauses Consolidation Act 1845: sections 126-137). One eventuality specifically provided for was arbitration to settle compensation for injury done to mining operations on land needed for the railways (Railways Clauses Consolidation Act 1845: section 81). The Companies Clauses Consolidation Act 1845 also contained very similar provisions for a full arbitration process (Companies Clauses Consolidation Act 1845: sections 128-134).

Following the Land Clauses Consolidation Act 1845, the *Law Review* lauded what it thought to be the first provision for ‘compulsory arbitration’ (*Law Review* 1845: 366). The railway press, previously favourable towards arbitration, was complaining of widespread extortion, supported by the confidential reports of the London and North Western Railway’s purchases, which expose a litany of overpayment for land (Kostal 2012: 170-171). Statutory arbitration of land prices may have proved expensive for railway companies, but private arbitration of other disputes still had strong advocates who remained sceptical of turning to the courts. At the end of 1845 *The Times* saw railway legislation as ‘a mass of confusion and trash’ and to avoid ‘unascertained and conflicting law’ parties were advised to

resort to arbitration instead. If their agents cannot bring the matter to a satisfactory termination, two mutual friends and an umpire is a cheaper, and we feel disposed to believe, a more competent tribunal, than the law courts administering most expensively a confussed [sic] mass of stuff called railway laws. By all means avoid, by arbitration, the glorious uncertainty and the inglorious ruin of law proceedings (*The Times*, 2 December 1845).

Railway companies did indeed seek out privately arranged arbitration in other disputes. Another point of contention between the landed interest and the railway companies was the payment of rates. Local taxes, rates were collected by parishes on the rental value of properties. Upkeep of the local poor was by far the largest burden upon the rates. Railways passed through many rural parishes each of which levied taxes upon the entire railway company, shifting the burden of taxation from landowners. The companies challenged this practice in the courts with little effect, and Parliament had little appetite for wholesale reform. The intransigence of courts and Parliament led railway companies to seek long-term negotiated settlements with parishes from around 1855, bolstered by teams of local valuers and solicitors. If agreement could not be reached, arbitration was preferred to litigation by both sides (Kostal 2012: chapter 6).

Arbitration of disputes between railway companies was increasingly included in legislation, strengthening the role of the Board of Trade as

regulator, which in 1842 was authorized to arbitrate disputes between connecting railways regarding their joint traffic, upon the application of either party, but only to decide the apportionment of expenses (An Act for the Better Regulation of Railways and for the Conveyance of Troops 1842: section 11; Cleveland-Stevens 1915: 78-79). In 1859 the Railway Companies Arbitration Act was passed, with the major innovation that if any company failed to appoint an arbitrator within 14 days of a written request, the Board of Trade would appoint one for them (An Act to enable Railway Companies to settle their Differences with other Companies by Arbitration 1859). The Regulation of Railways Act 1868 allowed the Board of Trade to call upon an arbitrator in any dispute involving a railway company that it was required to decide and could also appoint an arbitrator to decide compensation if someone was injured or killed in an accident on the railway (Regulation of Railways Act 1868: section 25; Daunton 2001: 267).

The Regulation of Railways Act 1873 set up the new positions of up to three Railway Commissioners, one a legal professional and the other two lay members, as well as two Assistant Commissioners. Henceforth any difference involving a railway company that might have been referred to arbitration could be referred to the Commissioners as arbitrator or umpire and they could rescind, vary or add to the award of a previous arbitrator (An Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to amend the Regulation of Railways Act, 1873, so far as regards the reference of differences to the Railway Commissioners in lieu of Arbitrators 1874). The Commissioners formed a 'court', which attracted unfavourable commentary in an anonymous pamphlet when they were due for reappointment. The pamphlet claimed that from their appointment in 1873 until the end of 1877 the Commissioners had settled an average of only 18 disputes annually, while costing nearly £10,000 in salaries. The Commissioners had also sat as arbitrators in 29 cases in that time (Anon 1878).

The sheer size, complexity, widespread ownership and public utility of railway companies continued to pose a problem to legislators and the courts that warranted one-off interventions, and a particularly powerful example was the insolvency of the London, Chatham and Dover Railway in 1866 (Lobban 2013). It resulted in a high-profile arbitration, which was a quintessential example of legislators' need for out-of-court dispute resolution in cases of such novelty and complexity; there was no legal provision for winding up railway companies and separating competing claims on their assets until after the case of the London, Chatham

and Dover Railway. Instead, the London Chatham and Dover Railway (Arbitration) Act 1869 was passed, appointing the Marquis of Salisbury and Lord Cairns as arbitrators for their respective knowledge of the railway business and the law. The arbitrators were enabled to determine the rights of the various creditors and restructure the company as they thought fit (London Chatham and Dover Railway (Arbitration) Act 1869: sections 16-17, 21-22). Their awards of 1870 and 1871 were successful at reconstituting the insolvent company as a going concern, receiving widespread plaudits for their approach, but without forming any particular precedent for future practice.

## [E] FRIENDLY SOCIETIES

That kind of interventionism was welcomed in some aspects of railway regulation, but suffered a negative response when turned on working-class organizations such as the friendly society. Friendly societies were possibly first established as early as the 16th century, spreading widely during the 18th century, and were recognized as national organizations by law in 1793 (Cordery 2003: 20-24, 45-46). They offered members a financial safety net in case of infirmity or ill health, as well as opportunities for sociability. Their importance in working-class life is undeniable, as by the middle of the 19th century their membership outstripped those of the trade unions, cooperatives and Methodist societies combined (Ismay 2018: 3). The societies defended ‘the philosophy of voluntarism, the principle that people’s needs are best met by self-help without state intervention’ (Cordery 2003: 5). The avoidance of conflict within societies was a vital aspiration, to the extent that name-calling and controversial topics of discussion were banned by some societies (Cordery 2003: 27-28).

The 1793 Act recognized friendly societies as corporate bodies and required them to verify their rules with justices of the peace, although this stipulation was not enforced (Cordery 2003: 46, 85). The Act approved the resolution of disputes between members and a society by arbitration, and the inclusion of this mechanism in societies’ rules (Friendly Societies Act 1793: section 16). In accordance with the Act, some societies included an arbitration clause in their rules that allowed members to refer to arbitration any dispute over fines, expulsion or any other matter (Scarth 1798: 35-36). Although their legal status changed little following the 1793 Act, rules for the societies became increasingly standardized in the 19th century (Friendly Societies Act 1809: section 3).

Many cases came before magistrates, often because an agreement to arbitrate had not been honoured. In a cause at the Guildhall in 1826, Jane Roberts challenged her removal from the membership of the Sisters of Friendship, a benefit society for women. She had been 'scratched' from the membership for being 'most shameful intoxicated' and talking over other members. However, the magistrate found that a stewardess of the society had taken the decision with no recourse to arbitration, despite a clause in the society's rules. The magistrate thus ordered that Roberts be reinstated (*The Times*, 30 August 1826).

The Friendly Societies Act 1829 appointed a barrister as registrar to certify the rules of societies, although registration was also made entirely voluntary. Societies that registered had to have rules in place to decide disputes, whether by reference to a magistrate or arbitrators. If arbitration was chosen then a panel of arbitrators with no personal interest in the institution had to be elected, with no fewer than three chosen by ballot to dispose of a dispute. If any party did not conform with the arbitrators' award, complaint could be made to a magistrate and if the amount owed went unpaid and was less than 10 shillings, the magistrate could levy the sum and costs by distress (Friendly Societies Act 1829: section 27).

Another Friendly Societies Act of 1846 created the new national position of Registrar of Friendly Societies and abolished local oversight. Disputes between society trustees and managers or members could henceforth be referred to the Registrar, with disputes over sums below £20 automatically referred (Friendly Societies Act 1846: sections 15-16). From 1855 if disputes were supposed to be heard by an arbitrator, but none was appointed or no decision was made within 40 days of an appointment, the dispute would be taken to the County Court, which would also enforce the decisions of arbitrators (Friendly Societies Act 1855: section 40-41).

The Odd Fellows provide a case study of dispute resolution in friendly societies; they were 'the quintessential convivial society' in their early iteration, and they developed to become one of the largest friendly societies (Ismay 2018:123-125). A lodge of Odd Fellows was started in Manchester in 1810 and by 1814 there were six, which met together that year to form a Grand Lodge Committee and eventually became the Independent Order of Oddfellows, Manchester Unity. This became the blueprint for a network of lodges that provided travel relief to members (Ismay 2018: 128-139). The Odd Fellows tried to prevent disputes between members through rules that set out proper forms of address, also banning behaviour ranging from swearing or fighting to talking about religion or politics. Lectures were

given at regular meetings that outlined how members ought to behave, illustrated with relevant stories from the Bible. When these measures failed to prevent dispute, a group of Odd Fellows would try to settle their differences with a drinking session, a practice known as 'proceeding to harmony' (Ismay 2018: 144-148). From around the 1820s, more formal dispute resolution mechanisms also became necessary, particularly as the organization grew in size and drinking culture fell out of favour. One of these mechanisms was to give members the right to present their case to the Grand Master of the Order as the final stage of their dispute settlement process (Ismay 2018: 153-157).

The Odd Fellows had developed a complete formal dispute resolution process by the late 1840s. If a dispute arose it was initially referred to a 'jury' elected by the lodge where the dispute originated. If their award was disputed, the case could be taken to a Committee, formed of deputies elected by each lodge in that district. A final right of appeal was to the Board of Directors, made up of 12 directors elected at the annual moveable committee, together with the Grand Master, Deputy Grand Master and ex-Grand Master. This system actually precluded them from registering under the Friendly Societies Act 1846, as it did not conform with the Act's regulations, a fact testified to by the Registrar (Select Committee of House of Lords 1847-1848: 542).

A Royal Commission that investigated friendly societies in 1871-1874 heard evidence that arbitration was supported by the vast majority of members and managers of the societies, though objected to by a few members of affiliated societies. It was in the burial societies that major objections emerged as the sums in dispute tended to be small, the managers of one society tended to arbitrate the disputes of another and there were difficulties related to the actual member being, by the nature of claims made on this type of society, deceased (Commissioners Appointed to Inquire into Friendly and Benefit Building Societies 1874: 23). Ensuing legislation in 1875 allowed consensual references to the Registrar to arbitrate (Friendly Societies Act 1875: section 22).

It is not difficult to see why arbitration with strong elements of mediation and negotiation remained widely accepted as the form of dispute resolution for members of friendly societies. Their belief in the principles of brotherhood and mutual aid did not encourage strict observance of a rigid set of rules to the detriment of the society's wider aims of assisting and improving its members, making the equitable outcomes of an arbitration well suited to their purpose. The spirit of self-help and independence made recourse to external interference of any kind unpalatable. Politicians had

to balance their desire to oversee the workings of friendly societies with the strong possibility of regulating them out of existence and prompting a turn to more overtly political organizations.

## [F] CONCLUSION

I hope this discussion has given some insight into the way that the history of arbitration has been used to inform current debates and that new developments in the history of arbitration are important to consider. While its relationship with law and commerce was the focus of the major legislation relating to the arbitration process, it was much more widely applied by legislators to administrative functions. A more developed understanding of that wider application of arbitration amongst legal historians and perhaps even policymakers is made more important by the fact that it was not much remarked upon as it happened.

The examples I have taken here—of arbitration facilitating large transfers of land, arbitration being used to navigate novel and complex disputes concerning railway companies, and arbitration deciding disputes in working-class organizations—give just a taste of the wide range of historical applications in which legislators intervened, although often after the fact. One common thread is the creation of officials and commissioners who could act as arbitrators, some developing directly from the role of arbitrator. From official referees to the registrar of friendly societies, their arbitration services were generally offered and rarely imposed.

I hope that the wider ecosystem I have described is proof enough that the form and practice of arbitration has not just been a matter of contention between London lawyers and commercial men. It was certainly a concern for the barrister presiding over arbitration proceedings in the Royal Courts of Justice, but also the group of Odd Fellows, proceeding to harmony in a Manchester tavern.

### ***About the Author***

**Dr Francis Boorman's** profile is available on the website of the [Institute of Advanced Legal Studies](#). Research for this article was made possible by the *History of Arbitration* project, based at IALS. It is based on a talk for the IALS Director's Seminar, available on Youtube.

Email: [francisboorman@hotmail.com](mailto:francisboorman@hotmail.com).

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Civil Procedure Act 1833, 3 & 4 Will IV c42

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# ALTERNATIVE DISPUTE RESOLUTION AND THE CIVIL COURTS: A VERY BRITISH TYPE OF JUSTICE—THE LEGACY OF THE WOOLF REFORMS IN 2022

DEBBIE DE GIROLAMO\*  
Queen Mary University of London

DOMINIC SPENSER UNDERHILL  
Solicitor & School of Law, Queen Mary University of London

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## **Abstract**

In 1996, Lord Woolf described a vision for civil English and Welsh justice, culminating in his culture-changing reforms (the Woolf Reforms) and the Civil Procedure Rules of April 1999. These impose a continuing duty on litigants to consider alternative dispute resolution (ADR) in preference to litigation, even after it has commenced, and on the courts, to encourage ADR. These duties are a central method for the delivery of justice. They required a radical new way of thinking about disputes from litigants, their advisors and the courts.

This article focuses on Lord Woolf's vision and his Reforms, and their impact on the approach to ADR taken by the courts since 1999. It seeks to identify how that approach informs a concept of justice within the practice of modern litigation. The approach, supported by relevant case law, presents a broader and arguably more sophisticated view of justice that involves party autonomy, dialogue, settlement, creativity, flexibility of outcome, compromise, satisfaction and saving costs, as well as the more conventional approach to determining rights at trial after due process.

**Keywords:** ADR; mediation; justice; civil justice; court reforms; overriding objective; *Halsey*.

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\* Debbie De Girolamo is Reader in Law, School of Law, QMUL, and Dominic Spenser Underhill is a Solicitor and Associate Senior Lecturer, School of Law, QMUL. The authors wish to thank their student, Marah Badran, for her excellent research assistance, and Professor Michael Palmer for his continuing and valuable support. Any errors belong to the authors.

## [A] INTRODUCTION

In 1996, Lord Woolf described a vision for civil English and Welsh justice (civil justice), culminating in his reforms (the Woolf Reforms) and the Civil Procedure Rules of April 1999 (the CPR).<sup>1</sup> It made a duty to consider alternative dispute resolution (ADR) and the active encouragement of settlement of disputes in preference to litigation wherever possible a central method for the delivery of justice. It required a new way of thinking about disputes from litigants, their advisors and the courts.

There has been a rich seam of case law since then. Commentary about ADR in civil justice has also been well-considered. Issues such as whether cost sanctions should be applied for the refusal to consider an ADR process (including what amounts to ‘reasonable refusal’), whether litigants can be compelled to engage in ADR and whether a court has the power to order such engagement despite the lack of consent of the parties, have all dominated the ADR discourse almost since the CPR’s inception (eg Spenser Underhill 2003; 2005; Shipman 2011; De Girolamo 2016; Clark 2019; Ahmed 2019, 2020). This article’s valuable contribution to this commentary is in its focus on Lord Woolf’s vision and the Woolf Reforms, and their impact on the approach to ADR taken by the courts since 1999. It seeks to identify how that approach informs a concept of justice within the practice of modern litigation.

The article will examine: Lord Woolf’s *Interim* and *Final Reports* (Woolf 1995, 1996); the CPR requirements in relation to ADR; the development of the case law in relation to ADR and the CPR; and conceptions of justice arising therefrom. It will conclude that, as a collective, this illustrates a propensity to view justice as something beyond the traditional view of substantive justice as espoused by Abel, Fiss and Genn in their critiques of ADR (eg Abel 1982; Fiss 1984; Genn 2012). Rather, it creates a broader and arguably more sophisticated view of justice that involves party autonomy, dialogue, settlement, creativity, flexibility of outcome, compromise, satisfaction and saving costs, as well as the more conventional approach to determining rights at trial after due process.

## [B] THE INTERIM AND FINAL REPORTS OF LORD WOOLF

In his *Final Report*, Lord Woolf recited from his *Interim Report* eight principles that he considered the civil justice system should meet to ensure access to justice (1996: section I, para 1). The first principle

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<sup>1</sup> The CPR is under constant review and a revision and is published annually.

was that it is ‘just in the results it delivers’ (section I, para 1(a)). He considered the civil justice system he had reviewed to be too expensive, slow, adversarial, fragmented and uncertain. He was concerned about the inequality between the better-resourced and the under-resourced litigant. He was also concerned that the litigation process was incomprehensible to many who used it (section I, para 2). He made proposals for an enhanced role for ADR (eg section II, paras 7(d), 16), which he considered important to tackle the inadequacies of the litigation process, while acknowledging that litigants could not be compelled to engage in ADR.

Lord Woolf hoped to create a ‘new landscape’ of civil litigation underpinned by an obligation on the courts and the parties to further what he called the overriding objective, which was to deal with cases ‘justly’ (section I, para 8) and which embodied principles of equality, economy, proportionality and expedition. The new landscape would have several features. This article focuses on two, found at section I, para 9 of the *Final Report*.

The first feature is that ‘Litigation will be avoided wherever possible.’ About that, the *Final Report* states (section I para 9):

- (a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.
- (b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.
- (c) Legal aid funding will be available for pre litigation resolution and ADR.
- (d) Protocols in relation to medical negligence, housing and personal injury and additional powers for the court in relation to pre litigation disclosure, will enable the parties to obtain information earlier and promote settlement.
- (e) Before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute supported by a special regime as to costs and higher rates of interest if not accepted.

This feature remains as important today as it was in 1996. In the CPR themselves, paragraphs 8 and 9 (Settlement and ADR) of the Practice Direction—Pre-Action Conduct and Protocols (2022) (the Practice Direction) state in part:

- 8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started  
...

The second new landscape feature is that 'Litigation will be less adversarial and more co-operative.' About that, the *Final Report* states (section I para 9):

- (a) There will be an expectation of openness and co-operation between parties from the outset, supported by pre litigation protocols on disclosure and experts. The courts will be able to give effect to their disapproval of a lack of cooperation prior to litigation.
- (b) The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.

## [C] THE CIVIL PROCEDURE RULES AND THE OVERRIDING OBJECTIVE

In speaking to the courts' approach to ADR through the CPR, it is necessary to have regard, albeit briefly, to certain provisions. Part 1.1.1 (CPR 2022 edition) explains that the rules are a 'procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost'. Part 1.1.2 sets out a non-prescriptive list of what those words mean or comprise, including reference to parties being treated equally and participating fully in proceedings, the saving of expense, consideration of the value of the case both monetarily and non-monetarily, ensuring a proper allocation of court resources, and dealing with cases quickly and fairly.

Furthering the overriding objective includes determining whether time and costs can be saved and, as importantly, whether court resources should be allocated to particular cases. While Lord Woolf states in both his *Interim* and *Final Reports* that the civil justice system should be just in the results it delivers, they are nevertheless achieved within the constraint of what is financially proportionate (Woolf 1995; 1996: *passim*).

In 2009, Jackson LJ reviewed civil litigation costs, reporting on the high costs of litigation in his *Review of Civil Litigation Costs: Final Report*, stating it to be 'a matter of building upon Lord Woolf's work and proposing reforms' (2009: chapter 1 para 6.2). For both Lord Woolf and Jackson LJ the need to deal with costs was imperative to further the overriding objective (eg Woolf 1996: section II chapter 1 para 7(d); Jackson 2009: part 6, para 36, 355ff). It is therefore not surprising that

fiscal discipline, both from litigant (the personal costs of litigation for the parties) and state perspectives (appropriate use and allocation of limited court resources) would become a guiding principle within civil justice (eg Higgins & Zuckerman 2007; Ahmed 2021; *DSN v Blackpool Football Club 2020*: para 28). Since the Woolf Reforms, ADR, with its potential to reduce costs, has been regarded as a primary way to keep costs proportionate: it is relatively fast as the parties can agree on a process and execute it promptly; and it is economical as it requires less input from lawyers and court resources than does litigation (Jackson 2009: *passim* esp chapter 36, 355-363). The relevance of ADR as a means to achieve fiscal discipline underpins Lord Woolf's vision of his Reforms and the resulting CPR provisions, further emphasized by Jackson LJ's review (2009).

The Woolf Reforms have had a greater impact on the evolution of justice than simply how to spend money better. Lord Woolf's support for ADR processes also ensures their role in civil justice through the CPR's direct reference to the obligation on litigants, their advisors and the courts to consider using ADR to achieve the overriding objective: for example, part 1.4.1 imposes a duty on the court to further the overriding objective by 'actively managing cases'; part 1.3 imposes a duty on the parties to help the court further the overriding objective; and part 1.4.2 sets out a non-prescriptive list of 12 acts which that task includes. Three are particularly relevant:

- (a) encouraging the parties to cooperate with each other in the conduct of the proceedings
- ...
- (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.
- (f) helping the parties to settle the whole or part of the case

The CPR defines ADR as a 'collective description of methods of resolving disputes otherwise than through the normal trial process' (2.2).

ADR in the CPR underlies Lord Woolf's aim that 'litigation will be avoided wherever possible' (1996: section I para 8). This combination of the need for proportionate fiscal discipline and the acknowledged benefits of ADR is part of Lord Woolf's vision of a certain primacy of settlement in civil justice, which expands the conception of justice that is delivered in England and Wales.

## Pre-action protocols

The new landscape focused on what was perceived to be the profound desirability to avoid litigation entirely by requiring the parties to exchange information and, in effect, to commence a dialogue with a view to settlement. The point for our purposes is that civil justice is intended to be accessible (in the sense Lord Woolf used the term) *before* litigation commences, as well as afterwards. To empower the parties to settle their cases before proceedings commence (using ADR if needs be) by requiring the exchange of information is a fundamental part of that.

The Woolf Reforms introduced pre-action written protocols (PAPs) (1996: section III, chapter 10 *passim*). The Practice Direction states that they ‘explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims’ (CPR Practice Direction 2022: para 1). Originally only three, there are now many that cover a range of disputes such as personal injury, professional negligence, debt claims and construction disputes.

The principal dynamic of the PAPs is the exchange of information between the prospective litigants. There are several purposes of exchange. Two of them are (i) to try to settle issues without proceedings and (ii) to enable the parties to ‘consider a form of [ADR] to assist with settlement’ (CPR Practice Direction 2022: para 3; Woolf 1996: section III, chapter 10, paras 1-6). PAPs offer a non-descriptive typology of ADR, including mediation, arbitration, early neutral evaluation and any ombudsmen schemes (CPR Practice Direction 2022: para 10). They are part of the CPR’s procedural code that enables ‘the court to deal with cases justly and at a proportionate cost’ (part 1.1.1), even though the conduct with which they are concerned occurs before litigation commences.

Not every case reaches pre-action settlement, however. When litigation does commence, the court must further the overriding objective which includes helping the parties to settle their cases and encouraging the use of ADR. This leads us to the case law.

## [D] THE CASE LAW AND OTHER SOURCES

### Early case law

In what appears to be the first reported case on the subject after the CPR came into force in 1999, the Court of Appeal in *Sat Pal Muman v Bhikku Nagasena* (1999: 4), troubled by the large costs incurred in litigation



that was achieving nothing, refused to lift a stay on proceedings until the parties had attempted to resolve the dispute by mediation. Mummery LJ stated in paragraph 5 of his Order that ‘No more money should be spent from the assets of this charity until ... all efforts have been made to secure mediation of this dispute in the manner suggested.’

In *Kinstreet v Balmargo Corporation* (1999), the court directed that mediation should be attempted notwithstanding one party’s concerns that the other would not conduct it in good faith and would misuse the confidential information exchanged in the process. The court was particularly concerned about the disproportionate amount of legal costs the parties were incurring. Arden J (as she then was) stated (13):

CPR rule 1.1 provides that the overriding objective of the new procedural code is to deal with cases justly and this includes, so far as is practicable, dealing with the case in ways which are proportionate to the financial position of each party.

The claimant in *Paul Thomas Construction v Damian Hyland* (2000) was ordered to pay indemnity costs where it was found by HHJ Wilcox to have been ‘exceedingly heavy-handed’, ‘wholly unreasonable’, ‘unco-operative’ and in breach of the relevant PAP (1, 2). The judge stated (at 2) that: ‘The CPR pre-action protocol did apply and the strong imperative put upon both parties to negotiate, to be frank in disclosing documentation and to talk and discuss was upon them.’

Tuckey LJ in *Tarajan Overseas v Donald Lee Kaye* (2001: para 11) explained that one reason for personal attendance at a case management conference was to facilitate settlement if the court were to consider ADR should be used.

*R (Frank Cowl) v Plymouth City Council* (2001) warrants particular attention because of the tone it set. It provides useful, contemporaneous insight into how Lord Woolf himself envisaged how the parties should conduct the resolution of their disputes.

In this public law case, the claimant/applicants were residents of a residential care home who applied for judicial review of a decision by their local authority to close their home. Lord Woolf CJ said this (*R (Frank Cowl)* 2001: paras 1-3):

The importance of this appeal is that it illustrates that, even in disputes between public authorities and the member of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must now be acutely conscious of the contribution alternative dispute resolution

can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves times, expense and stress. ...

The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts ...

To achieve this objective the court may have to hold, on its own initiative, an inter parties hearing at which the parties can explain what steps they have taken to resolve the dispute without involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties adopting an unnecessarily confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.

He identified ‘the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved’. If the parties could not come to a sensible way to resolve the matter ‘then an independent mediator should have been recruited to assist’. In his view, ‘Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible’ (ibid: para 25).

In this case, the parties had access to a pre-action complaints procedure that they insufficiently explored. In an interesting passage about the ensuing judicial review litigation, Woolf CJ stated (*R (Frank Cowl) 2001*: para 14):

The parties *do not today, under the CPR, have a right* to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. *The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process* (emphasis added).

This statement might be confined to judicial review cases. However, it would resonate the following year in *Cable & Wireless plc v IBM UK* (2002) when the court held that parties, who had agreed a tiered disputes resolution clause in their contract that included embarking on a specified mediation process, should keep to their bargain before litigating. In that case, the claimant skipped over the mediation phase and commenced proceedings. The court stayed those proceedings.

These early judgments reveal by their tone and content an almost passionate embrace of the two features of the new landscape described

above. It might fairly be supposed that, in that new landscape, the litigants and those advising them (believing they cannot be forced to negotiate, let alone compromise) were unclear about what was, precisely, a reasonable and unreasonable approach to ADR during litigation, and what the consequences of any unreasonable approach might be. These considerations dominate later cases.

Picking up on the sentiments of Lord Woolf in *Frank Cowl, Susan Dunnett v Railtrack* (2002) was a significant response to the new landscape because costs of an appeal did not 'follow the event' where one party refused to engage in ADR when the court suggested it, even when it had the better case and had already made an offer to settle. (It is difficult after 20 years to appreciate how truly revolutionary this decision was as the old orthodoxy of loser pays was emphatically rejected in the new landscape of the CPR.)

Mrs Dunnett had unsuccessfully sued Railtrack because she alleged it was responsible for the deaths of her horses. She asked for permission to appeal the decision. The court suggested to the parties they consider ADR to avoid the need for an appeal. Mrs Dunnett was open to the idea. Railtrack refused on the basis that it had already made an offer to settle and would not make a further one. Also, it considered it had a strong case. In the view of the Court of Appeal, Railtrack did not have a good reason to refuse the court's suggestion. Railtrack's refusal resulted in it not recovering its costs of appeal which had not, but normally would have, followed the event.

Brooke LJ made a direct connection between the duty of the parties to further the overriding objective and the duty on litigants to consider ADR. He quoted the notes to CPR 1.4 (2001) which stated (para 12):

The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have *a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues* within it when encouraged by the court to do so (emphasis added)

He said:

the parties themselves have a duty to further the overriding objective. That is said in terms in CPR r.1.3. What is set out in CPR r.1.4 is the duty of the court to further the overriding objective by active case management (para 13)

Acknowledging the usefulness of mediation, Brooke LJ said (para 14):

Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite *beyond the power of lawyers and courts to achieve* ... A mediator may be able to provide solutions which are *beyond the powers of the court to provide* (emphasis added).

In the same year as *Dunnett*, another court considered the question of when it was reasonable to say no to ADR. In *Hurst v Leeming* (2002), a client sued his barrister but then withdrew his claim, an action usually triggering an entitlement to costs. The client argued that he should not have to pay any costs because the barrister had previously refused mediation. The barrister admitted he had refused, but argued that ADR is not compulsory, and he had several reasons to refuse. Although the judge rejected most of them, he accepted one of them (the likelihood that negotiation would fail). Lightman J stated (12):

Mediation in law is not compulsory and [the professional negligence pre-action protocol] spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of success of resolution of the dispute, there must be anticipated as a real possibility that adverse consequences may be attracted ...

Unreasonable conduct was scrutinized a year later in *Leicester Circuits v Coates Brothers* (2003). A party that had agreed to mediation changed its mind two days before the mediation was about to take place because it considered the mediation had no reasonable prospect of success. The court applying *Dunnett* considered this was not a good reason: that having agreed to mediate, it was inherently unreasonable for a party to withdraw. There was a prospect that the mediation *could* have succeeded, and it was not necessary for the court to assume it *would* have succeeded (para 18). The party was allowed its costs up to the point it had agreed to mediate but disallowed them after that.

## The *Halsey* impact

In only four years after 1999, case law was developing the appropriate way for parties to behave to fulfil their duties of furthering the overriding objective (Spenser Underhill 2003; 2005). ADR is central to this. How to behave was not straightforward. Matters came to a head in 2004 with the leading case of *Halsey v Milton Keynes General NHS Trust* (2004).

Mrs Halsey sued the hospital charged with the care of her late husband. She failed but was denied costs liabilities because she had invited the hospital to mediate but it had refused. Very briefly, the hospital had considered it had been reasonable to refuse to engage in ADR because it had a strong case and there was no reasonable prospect of mediation success. The court accepted the hospital's position and Mrs Halsey appealed.

Upholding the court's decision, the Court of Appeal found that Mrs Halsey had failed to prove that the hospital had acted unreasonably when it refused to mediate, although it accepted that the case was suitable for mediation. She also failed to prove that the mediation would have had a reasonable prospect of success. The Court of Appeal stated that a court cannot compel a party to engage in ADR, including attending a mediation, because to do so would be to infringe their rights under article 6 of the European Convention on Human Rights 1950 (ECHR). Instead, it can only (robustly) encourage. As Dyson LJ (as he then was) of that court said, it would be 'an unacceptable constraint on the right of access to the court' (*Halsey v Milton Keynes General NHS Trust* 2004: para 9) to make mediation compulsory to those who did not want it.

While not supporting compulsion, the Court of Appeal recognized the value of mediation (ibid para 15). It offered 'some guidance as to the general approach that should be adopted when dealing with the costs issue' (para 13). This (non-exhaustive) guidance became the Halsey Guidelines (paras 17-32), which are a list of factors for a party to consider when deciding whether it is reasonable to refuse ADR. In summary, they are: (i) the nature of the dispute/intrinsic suitability for ADR; (ii) the merits of the case; (iii) the extent to which other settlement offers have been made; (iv) whether the costs of ADR are disproportionately high; (v) whether setting up and conducting an ADR process would cause prejudicial delay; and (vi) whether there is a reasonable prospect of ADR succeeding.

It is important to emphasize that the court accepted mediation was not a panacea (*Halsey v Milton Keynes General NHS Trust* 2004: para 16) and did not consider that there should, in every case, be a 'presumption in favour of mediation' (ibid). It further acknowledged that not every case was suitable for ADR (paras 16, 35). It considered, however, that many disputes are suitable for mediation (para 6).

## Halsey applied—some examples

Overnight, *Halsey* became the benchmark against which a litigant's obligations *vis-à-vis* ADR under the overriding objective must be considered. Ward LJ, dealing with a small home-building dispute in *Burchell v Bullard* (2005: para 43) speaks of the importance of *Halsey* in the support for ADR:

*Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to *a just result, running parallel to that of the court system*. Both have a proper part to play in the administration of justice (emphasis added).

These statements are notable in that they refer to the place of ADR within civil justice and also suggest that settlement results in a just outcome.

By way of further examples, the Halsey Guidelines were applied in *P4 v United Integrated Solutions* (2006) where a defendant had rejected several offers by the claimant to mediate. They were also applied in *Hickman v Blake Laphorn* (2006) where mediation was not the ADR method in issue, but simple negotiation.

In 2007, the Halsey Guidelines were applied in *Jarrom v Sellars* (2007) where a prospective defendant refused to attend a pre-litigation settlement meeting on the grounds (amongst others) it was, in its opinion, not worth the cost as no detailed proposals had been put forward to make it worthwhile; there was not even an agenda to the meeting. The court held this was not reasonable. While it accepted the meeting would not have settled the whole case, it would have provided the opportunity to narrow the issues and the possibility of exploring how to avoid litigation.

The court in *Rolf v de Guerin* (2011) also applied the Halsey Guidelines in examining whether a refusal to engage in negotiation or mediation was unreasonable, finding that trial should be a last resort in view of the nature of the case (here again, a small building dispute), with Rix J (as he then was) stating at paras 41 and 44 that a litigant's desire for trial 'does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle'.

*Northrop Grumman v BAE Systems (Al Diriyah C41)* (2014) was another unreasonable conduct case that widened the Halsey Guidelines. The unsuccessful claimant asked for a 50% reduction in the costs it would have to pay to the defendant because the defendant had failed to take part in a mediation. The defendant had, however, made an offer to settle that the claimant had rejected, and it also considered it had a strong

case. The judge held that the defendant had unreasonably failed to explore mediation whereas the claimant had failed to accept an offer to settle. The costs sanction which would have followed the former was cancelled out by the latter. In other words, were it not for the defendant making an offer to settle, the court would have reduced the defendant's recoverable costs because it refused to explore mediation *even though* it considered (reasonably and rightly as it turned out) it had a strong (and winning) case.

As to the defendant's belief that it had a strong case and mediation had no prospect of success, and while acknowledging that *Halsey* stated that a reasonable belief in a watertight case 'may well be sufficient justification for a refusal to mediate' (para 58), the judge went on to state (*Northrop Grumman v BAE Systems* 2014: paras 59-60):

The authors of the Jackson ADR Handbook properly, in my view, draw attention at paragraph 11.13 to the fact that this seems to ignore the positive effect that mediation can have in resolving disputes even if the claims have no merit. As they state, a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in a payment to a claimant.

However, on the merits of the case, I consider that BAE's reasonable view that it had a strong case is a factor which provides some but limited justification for not mediating.

A party's belief in the strength of its case was considered more recently in *DSN v Blackpool Football Club* (2020). The defendant repeatedly refused to engage in ADR because it thought it had a strong case. However, it was wrong and lost at trial. The court held (para 28):

The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant 'continues to believe that it has a strong defence.' No defence however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require admission of liability, or even payment of money.

Deliberate refusal was not the only way to garner cost sanctions. Silence in the face of a request to mediate is *prima facie* an unreasonable refusal to engage in ADR. The Court of Appeal in *PGF II SA v OMFS Co 1* (2013) held that a defendant's silence in the face of two offers to mediate

constituted an unreasonable refusal to consider ADR and warranted a costs sanction. Briggs LJ said (at para 34):

In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.

*Thakkar v Patel* (2017) approved *PGF*, characterising that case's 'message' to be (para 31):

to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this [present] case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.

This small sample of cases after *Halsey* (by no means a complete list) shows that the Halsey Guidelines have not only been carefully applied but appear to have been widened over time. It is now beyond reasonable argument that litigants cannot escape their obligation at least to consider the suitability of ADR and be seen to take a position on it (eg whether they refuse or accept to engage in it and why) without the risk of adverse costs consequences.<sup>2</sup> Such an obligation is part of a litigant's duty to further the overriding objective. Lord Woolf's original landscape has been kept in focus, although the cases tend mainly to be concerned with the singular issue of when a party can escape costs sanctions when it (for whatever reason) has avoided ADR. What is important to note is that, in coming to these decisions, the courts have made significant comment on the value of ADR and the importance of its process and outcomes to the delivery of justice in England and Wales.

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<sup>2</sup> It would, however, be misleading to suggest that a litigant has no right to refuse ADR or that a refusal will always be punished. For example, in *Hurst v Leeming* (2004), the barrister was found to have acted reasonably in refusing mediation. In *Mason & Others v Mills & Reeve* (2012) the Court of Appeal stressed that parties cannot be compelled to mediate and acknowledged that ADR was not appropriate in every case. It applied the *Halsey* 'merits' Guideline and found that the defendant had acted reasonably in refusing ADR. What is clear from all the authorities, however, is that a refusing party will need to stand on very strong ground to avoid sanction.



## Beyond the original landscape—compulsory ADR?

Constraints prevent us from discussing this important area of law fully. We raise it to express the view that apparent recent interest in compulsory ADR may broaden and bring into sharper focus Lord Woolf's landscape.

As we have seen, 2013 was notable because by then even silence in the face of an invitation to consider ADR was deemed to be unreasonable. Also, in 2013, compulsion in ADR re-emerged in *Wright v Michael Wright (Supplies)* (2013). The parties had ignored all encouragement by the court to mediate. Ward LJ (para 3), exasperated at the behaviour of the litigants, suggested that it was perhaps time for the courts to 'have another look at *Halsey* in the light of the past 10 years of development in this field'. He questioned whether it really was an 'unacceptable obstruction' to justice, or a breach of human rights to a fair trial to stay litigation for mediation to be considered and occur.

A year later, in *Bradley v Heslin* (2014), the judge was vexed that a dispute between neighbours about the use of a shared private gateway had consumed a three-day trial in the High Court. Norris J said this (para 24):

I think it is no longer enough to leave the parties the opportunity to mediate and warn of costs consequences if the opportunity is not taken ... The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for trial should be regarded as an unacceptable obstruction on the right of access to justice.

These decisions reflect a barely concealed desire by some courts to compel parties at the very least to consider mediation for appropriate cases, to impose a stay on litigation while they do so, and highlight the importance that ADR had acquired in civil justice, but they fall short of compelling the process itself.

In 2015 (*Interim*) and 2016 (*Final*), Briggs LJ (as he then was) published two reports on his review of the Civil Courts. His *Interim Report* appeared to support non-compulsory ADR and the existing approach of imposing sanctions where conduct had been unreasonable (2015: 28, paras 2.86-2.87).

Shortly afterwards, the ADR working party of the Civil Justice Council reported (2017 (*Interim*); 2018 (*Final*)). Broadly, compulsory ADR or automatic referral by a court to mediation was not recommended (Civil Justice Council 2018: para 8.23(1)). Instead, there should be stronger

encouragement by the Government and courts on parties to use ADR, which includes the use of costs sanctions (2018: section 8 *passim*, paras 9.19-9.24). Greater public awareness about ADR was recommended (2018: section 6 *passim*, paras 9.2-9.11). How the parties behaved both before and during the litigation process should be the subject of more stringent judicial review (2018: paras 8.5-8.8, 8.20). It recommended the Halsey Guidelines be made tighter (they were too generous to the refusing party) (2018: paras 4.26, 8.23(2), 8.27-8.28, 9.21-9.23). The clear direction of the report was in favour of a greater role of ADR in civil justice, falling short of compulsion (2018 *passim*).

In 2019, the Court of Appeal, however, in *Lomax v Lomax* (2019), considered the issue of compulsion. Distinguishing *Halsey* (which only dealt with compulsory mediation), it held that the court has power under CPR 3.1(2)(m) *to order* the parties to attend an early neutral evaluation, in appropriate cases, and thus introducing the possibility of compulsion being extended to other forms of ADR.<sup>3</sup>

In *McParland v Whitehead* (2020), with *Lomax* in mind, Vos LC (as he then was) raised the possibility that a court may order compulsory mediation (but he did not do so in that case) (para 42).

In January 2021, further consideration of the compulsion issue was requested by the Master of the Rolls, Vos MR. He asked the Civil Justice Council to report on the legality and desirability of compulsory ADR. Its report was published in July 2021. While the courts' 'existing nudges and prompts' that lead the parties to ADR will still have a 'significant role to play' (115), the report concluded that mandatory ADR is compatible with article 6 ECHR and would be both lawful and desirable, subject to certain safeguards. It concluded:

We think that introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development ... .

Above all, as long as all of these techniques [listed above] leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then we think that the greater use of compulsion is justified and should be considered. (Civil Justice Council 2021: 118, 119)

The courts have applied the Halsey Guidelines for about 18 years. For half that time, some courts have expressed some frustration that they do not go far enough, and the frustration becomes most apparent around

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<sup>3</sup> Family court procedures in England & Wales (which are not considered in this article) already have compulsory financial dispute resolution appointments that the parties must attend unless the court directs otherwise.

the subject of whether the courts should compel ADR. The question is, far enough for what? The answer, we suggest, is found in Lord Woolf's original vision of litigation (let alone a trial) truly being a thing of last resort, and the parties trying really hard to settle their cases rather than litigating them to trial. His vision was uncompromising—it required litigants to litigate only if they had run out of all other options. The apparently insurmountable obstacle he faced (and the courts subsequently) was that the courts were powerless to compel the parties to exhaust those options before and even after litigation had begun.

We have seen that the early cases from 1999 to *Halsey* in 2004 were characterized by their evident zeal for the Woolf Reforms, expressing visions of the new landscape where settlement and ADR were dominant features. *Halsey* (responding to perceived uncertainty about what was a reasonable refusal to engage in ADR) in effect (but perhaps not with intention) codified the approach to ADR that the parties should adopt, while acknowledging that compulsory ADR was not appropriate. Case law that followed has been mainly concerned, on a fact-sensitive and case-by-case basis (as *Halsey* anticipated, at para 16), with what amounts to reasonable or unreasonable approaches to ADR, with frequent *obiter dicta* about the character and benefits of ADR and its broader application.

The courts have never lost sight of the central importance of ADR. Yet, there appears in recent years to be a rediscovery of the original zeal immediately following the Woolf Reforms which set out the new landscape in which settlement plays a very important role. Part of this zealous return appears to involve the one area where even Lord Woolf, as well as Jackson and Briggs LJJ, would not stray, which is compulsory ADR. Support for some form of compulsory ADR, whether through court orders or mandated legislation, seems to be gaining traction. Compulsory ADR is not yet part of English and Welsh law and practice. However, the Master of the Rolls has recently been advised, albeit in theoretical terms, that it is not unlawful where the compulsion is exercised properly in appropriate cases, and that it should be considered.

This growing case for and renewed interest in some form of compulsory ADR further supports the increasing relevance of settlement in the delivery of justice, as will be explored below.

## [E] JUSTICE, ALTERNATIVE DISPUTE RESOLUTION AND THE CIVIL PROCEDURE RULES

Scholars within the ADR literature have considered more broadly the nature of the justice that is or can be delivered by ADR processes. Genn and Fiss lead the discussion with their critiques about the ability of ADR to provide substantive justice, arguing that there is no justice in private dispute resolution processes such as mediation (Fiss 1984; Genn 2012). Others have, for example, considered the ability of ADR processes to deliver substantive justice despite operating outside a legal framework (De Girolamo 2018), its delivery of a Rawlsian procedural justice (Ojelabi 2012) or procedural justice generally (MacDermott & Meyerson 2018; Ojelabi 2019) or justice as compromise (Shipman 2011) and its delivery of access to justice (Ahmed & Quek Anderson 2019; Quek Anderson 2020). These reflect a varied approach to the delivery of justice through ADR and illustrate the extent to which the issue appears unsettled.<sup>4</sup>

Whatever may be said elsewhere about ADR in and of itself being effective to administer justice to litigants, we consider that the decisions coming out of the Woolf Reforms indicate the nature of the relationship between ADR and justice. For Lord Woolf, as suggested in his reports, access to justice is more readily (or at least, preferably) achieved by bestowing on litigants greater autonomy and agency in the dispute resolution process. Such autonomy (as well as financial agency) is necessarily compromised when the parties delegate final resolution to a court and, to an extent, the sometimes complex and detailed procedures leading to trial which the parties must obey.

The Woolf Reforms, as applied subsequently by the courts over the years, strongly suggest that the delivery of justice is achieved not only by the adjudication of a claim pursuant to state laws by a state-appointed judicial decision-maker; it is also achieved by a settlement of the dispute by the parties directly, without state adjudication, whenever possible.

Lord Woolf introduced the importance of ADR within civil justice in his two reports, but he emphasized its relevance in *Frank Cowl* with his comment that it was critical that litigation be avoided if at all possible and that ADR can do so while meeting the needs of both the litigants and the public (2001: para 1). He noted that costs, time and stress would be

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<sup>4</sup> There is also commentary in the literature about the impact of the proportionality requirement, more generally, on the nature of justice delivered by the CPR: see, for example, Ahmed 2016, 2018, 2019, 2020, 2021; Shipman 2006, 2011; Meggitt 2014; Sime 2021; Zuckerman 2015.

lessened at the same time (para 1). This extraordinary comment might appear to seek to dissuade parties from accessing the civil justice system for an adjudication of their claims. Courts, he says, should have minimal involvement in the resolution of their disputes. He also appeared to state (at least for judicial review cases) that there was no right to litigate where there were facilities elsewhere that could resolve the matters before the court but that had not been used (para 14). Not only are efforts required before litigation commences to avoid litigation through the various PAPs, but effort is required to avoid trial even after litigation begins. Rix J's (as he then was) comment in *Rolf* that a desire for one's day in court is insufficient reason to refuse an invitation to mediate a dispute resonates with this suggested devaluation of a litigant's right to trial (para 41).

Sir Geoffrey Vos as Chancellor of the High Court in *OMV Petrom SA v Glencore International AG* (2017), while considering the issue of settlement offers under part 36, also seems to underscore the primacy of settlement over litigation when he refers to a shift in the culture of litigation which includes an obligation to engage actively with settlement (para 39):

The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. ... The parties are obliged to make reasonable efforts to settle ... The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process.

Private resolution of a dispute through settlement achieved between the parties appears to become an objective in itself. For example, Ramsay J in *Northrop Grumman* considers that resolution can be obtained through ADR even if a case has no merit (2014: para 59); Lightman J in *Hurst v Leeming* considered that a satisfactory resolution can be had from mediation that may elicit from the parties 'a more sensible and more conciliatory attitude' (2002: 15); for Sir Geoffrey Vos in *OMV Petrom SA*, parties are obliged to engage in constructive settlement discussions and engage in litigation collaboratively (2017: para 39); Brooke LJ in *Dunnett* refers to the ability to reach a settlement that the parties could be happy to live with, with ADR offering an opportunity to reach a more satisfactory solution than is within the power of lawyers or the court to deliver (2002: para 14); Moylan LJ in *Lomax* states that a fair and sensible resolution can be reached through (compulsory) early neutral evaluation, a form of alternative dispute resolution process (2019: paras 26, 29); and the court in *DSN* emphasizes that no defence, however strong, justifies a refusal to mediate as satisfactory solutions can be obtained which litigants may feel are not meritorious (2020: para 28). Merely the prospect of achieving a settlement through

mediation is sufficient to require a litigant to agree to a mediation process as we have seen in *Leicester Circuits* (2003: para 18); *Thakkar* takes this one step further when stating that silence is an inappropriate response to an invitation to mediate, even if mediation is unlikely to succeed (2017: para 31).<sup>5</sup> Note too the importance of the outcome that is achieved through the settlement suggested by these cases—it can be fair, sensible, satisfactory or one that parties would be happy to live with.

Moreover, the benefits purported to be offered by mediation further support the pre-eminence of settlement and value of outcome to be achieved. For example, as stated above, Lord Woolf in *Frank Cowl* cites saving time and the avoidance of cost and stress (para 1); *Northrop Grumman* (relying on the highly influential *Jackson ADR Handbook* (Blake & Ors 2021)) points to the benefit of an independent perspective brought to claims through mediation (2014: para 59); *Wright* speaks to being able to help parties move beyond feelings of betrayal arising from a breakdown of particular relationships (2013: para 31); *Dunnett* (2002: para 14) and *Halsey* (2004: para 15) (just two examples) point to the opportunity for ingenuity and flexibility of solutions that a court cannot provide.

The sample of decisions discussed in this article illustrates a focus on resolution and suggests that justice can be delivered through collaborative, consensual ADR processes, which are private processes. They were made by judges seized of the duty to further the overriding objective. They appear to support a view of justice that includes and promotes a non-adjudicative outcome for litigants. Justice is not confined to the vindication of the legal merits of a claim; it is also found in settlement reachable by the parties through an active engagement with each other. Civil justice seems to imply compromise (suggestive of receiving less than one's perceived or even actual entitlement), as well as obtaining consensual outcomes that courts cannot give.<sup>6</sup> For agreement, compromise may be needed, and even such compromise can be satisfactory. Settlement, whether or not a compromise, can be a just outcome as is an adjudicated outcome, as Lord Woolf envisioned, and subsequently endorsed by judges such as Ward LJ in *Burchell* when he stated that mediation can lead to a just result (para 43).

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<sup>5</sup> In contrast, for the court in *Gore v Naheed*, a litigant desiring to have his rights adjudicated by a court was not unreasonable in his refusal to attend mediation given that 'those rights are ultimately vindicated' (2017: para 49) suggesting that the right to litigate, for Patten LJ, continues to figure prominently in civil justice.

<sup>6</sup> *Halsey* (para 26) values the willingness of parties to compromise when assessing whether a mediation has a reasonable prospect of success.

## [F] CONCLUSION

The issue at the heart of this article is the use of ADR to further the overriding objective, and how it forms part of Lord Woolf's 'new landscape' in which judicial support for ADR in lieu of litigation and settlement in lieu of an adjudicated outcome suggests a broadened notion of justice and the just outcome. This is important because it affects how litigants experience justice within the context of the encouragement of ADR as required by the legal framework of the CPR. Recall Lightman J's statement in *Hurst v Leeming* that 'alternative dispute resolution is at the heart of today's civil justice system' (2002: 12) and Ward LJ's comment in *Wright* that mediation and litigation 'are intended to meet the modern day demands of civil justice' (2013: para 3). The CPR, in its encouragement and support for ADR, impacts the delivery of justice within civil justice: conceptions of justice are expanded as a result.

There seems to be no controversy that the administration of justice partly entails fiscal discipline and management of limited resources by all concerned, including the courts. It is also clearly more than that. Lord Woolf was concerned about the barriers facing litigants who want to access justice but cannot, for various reasons, and saw a need for far-reaching reforms.

For us, perhaps Lord Woolf's most profound insight was that an amicable resolution of a dispute with minimal intervention by a court (even without a court ruling) can deliver a just outcome, and this is to be desired and pursued, arguably above all else. Ideally, if disputes could be compromised before litigation began, so much the better. If they could not, the court would encourage settlement. He recognized the benefits of alternative processes for resolution of disputes to achieve this.

As a result of his reforms, with the development of the CPR and their application by the courts, justice in the modern practice of litigation includes settlement and compromise: it has become much more than a consideration of the merits of a claim and the delivery of a legally correct outcome. Although it appears to be accepted that some cases are not suitable for ADR, these appear to be vanishingly small. To deal with cases justly is actively to encourage settlement and at the very least to consider ADR. To go further, these cases suggest that the just outcome may be achieved by encouraging parties not to start proceedings or, if they have already started, not to go to trial. This is the consequence of Lord Woolf's vision of justice.

The overriding objective has expanded the conception of justice that is delivered by the CPR. The premise is that justice may be obtained without taking a matter to trial. Moreover, it must follow that, where two alternative ways are set out to achieve a resolution of a dispute (one through ADR/settlement and the other by court determination), it would be perverse if one route was perceived to be just and the other not. The ADR/settlement route places high regard on the autonomy of the parties, their powers of self-determination and their ability to discover for themselves pragmatic and acceptable outcomes to disputes that adjudicated justice may not be able to produce. It is evident from the cases that have emerged since 1999 that the courts have been striving to realize Lord Woolf's vision of justice being delivered at proportionate cost both in and out of the courtroom. However, it is equally evident that the courts have not finished this task and the situation remains as dynamic now as it was in 1999.

### **About the Authors**

**Debbie De Girolamo's** profile is available on the [QMUL website](#).

Email: [d.degirolamo@qmul.ac.uk](mailto:d.degirolamo@qmul.ac.uk).

**Dominic Spenser Underhill's** profile is available on the [Spenser Underhill Newmark website](#).

Email: [dspenserunderhill@sunlaw.co.uk](mailto:dspenserunderhill@sunlaw.co.uk).

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# CONFLICT AVOIDANCE AND ALTERNATIVE DISPUTE RESOLUTION IN THE UK CONSTRUCTION INDUSTRY

NICHOLAS GOULD & OLIVIA LIANG

Fenwick Elliott LLP

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## **Abstract**

This article focuses on conflict avoidance and alternative dispute resolution (ADR) in the United Kingdom (UK) construction industry. It seeks to place the use of ADR in the UK in context and to analyse the dispute prevention techniques in standard form contracts. The article also considers the importance of, and processes involved in, mediation and statutory adjudication in construction disputes. It also discusses the key feature of dispute boards and their use in the UK.

**Keywords:** United Kingdom; conflict avoidance; ADR; adjudication; mediation; dispute boards; DABs; Construction Act; HGRA; HGCRA; NEC3; NEC4; BE Collaborative Contract; PPC2000.

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## [A] INTRODUCTION

This article focuses on conflict avoidance and alternative dispute resolution (ADR) in the UK construction industry. Under the Civil Procedure Rules (CPR), the Pre-Action Conduct and Protocol for Construction and Engineering Disputes requires parties to consider the use of ADR processes. These rules apply to all construction and engineering disputes (Pre-Action Protocol for Construction and Engineering Disputes (the PAP): para 9.5.5.). The article will analyse ADR techniques deployed in the United Kingdom (UK) such as mediation and conciliation as well as adjudication and the concept of dispute boards.

The article is divided into five parts. Part B places the use of ADR in the UK in context. Part C, 'Dispute prevention', will analyse the dispute prevention techniques in standard form contracts. Part D, 'Mediation and conciliation', will consider the growth in importance of mediation, the mediation process and its use in construction disputes. Part D,

‘Adjudication’, will introduce adjudication in the construction industry and consider the importance of adjudication in the UK construction industry. Finally, Part F, ‘Dispute boards’, will set out the key features of dispute boards and their use in dispute resolution in the UK. Part G offers some reflections.

## [B] CONTEXT

The construction sector is one of the largest in the UK economy. In 2019, it employed 3.1 million people, or over 9% of the UK workforce (BEIS 2019). The size and importance of the sector is also reflected in the average value of construction disputes which in 2021 was reported in an industry-wide survey to be £38.8 million (Arcadis 2022).

Notably, however, the length of construction disputes in the UK is significantly shorter on average than other regions. In 2021, the average length of disputes was reported to be 11.8 months, compared to a global average of 15.4 months (Arcadis 2022).

One explanation for this is the relatively widespread adoption of ADR, which is (in most cases) cheaper and quicker than formal dispute resolution processes such as litigation and arbitration. In the Technology and Construction Court (TCC), cases typically take 12 to 18 months to come to trial, and the costs of this are significant, not least due to the costs associated with disclosure and the engagement of independent experts. ADR in the UK can take several forms. In the UK, the most popular processes are mediation and statutory adjudication, and both are discussed below. Part of the push towards ADR can be attributed to the PAP, which parties in England and Wales are required by default<sup>1</sup> to consider adopting before commencing court proceedings under the CPR.

The PAP applies to all construction and engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors. Its express objectives are to place parties in a position where they can make informed decisions about settlement, and to ensure that parties ‘make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR in order to do so’.

To that end, the PAP requires the claimant to serve a pre-action protocol letter of claim and for the parties to attend a pre-action meeting where

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<sup>1</sup> Subject to some exceptions, including instances where the claim is for injunctive interim relief or summary judgment, or if the dispute was the subject of a recent adjudication.

the substance of the discussion is treated as being without prejudice.<sup>2</sup> The overall aims of the meeting are for the parties to:

- ◇ identify the main issues in the case and the root cause of disagreement;
- ◇ consider whether, and if so how, the case might be resolved without resource to litigation, and, if litigation is unavoidable, what steps can be taken to ensure that the case is dealt with justly and at proportionate cost; and
- ◇ in circumstances where the parties are unable to agree on a means of resolving the dispute other by litigation, agree on key issues such as areas where expert evidence is likely to be required, the extent and nature of disclosure, and the conduct of the litigation with the aim of minimizing cost and delay.

The PAP process ends at the conclusion of the pre-action meeting or, if a meeting does not take place, 14 days after it should have.

The PAP underscores the importance of ADR in the construction disputes toolbox in England and Wales. However, it is accompanied by other mechanisms which complement and facilitate ADR, including the adoption of standard form contracts that emphasize dispute prevention through provisions which, among other things, place an emphasis on partnership and collaboration.

## [C] DISPUTE PREVENTION

In the UK, there is widespread use of standard form contracts with detailed mechanisms for dispute avoidance and prevention, including through partnering arrangements. Broadly described, partnering is an approach to working which is intended to ensure collaboration and openness between parties in the course of achieving a common goal and which may or may not be legally binding. The theory behind partnering arrangements is that disputes may be avoided or mitigated by creating incentives and, in some instances, binding obligations for parties on a project team to communicate and work together to achieve joint objectives. This is in contrast to the usual approach on infrastructure projects whereby parties only have bilateral relationships up and down the contractual chain.

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<sup>2</sup> Subject to exceptions relating to matters such as when the meeting took place, and who attended, the agreements between the parties, and whether ADR was considered or agreed. These matters may be disclosed to the court.

## NEC3 and NEC4

The New Engineering Contract (NEC) suite of contracts is published by the Institution of Civil Engineers. It is one of the most widely used standard forms in the UK on major infrastructure projects, particularly on public sector construction projects, where NEC3 has been endorsed by the Construction Client's Board (formerly the Public Sector Construction Client's Forum). NEC3 was used on the London 2012 Olympics and Crossrail.

The underlying philosophy of the NEC suite of contracts is set out in parties' obligation to 'act in a spirit of mutual trust and co-operation'. Consistently with this spirit, the NEC contracts encourage a proactive approach to monitoring and managing risks. The Risk Register under the NEC3 contract—and the Early Warning Risk Register in NEC4—has the purpose of enabling parties to identify and list the risks which they intend to be managed at the outset of the contract. In NEC3, core clause 11.2(14) the Risk Register is defined as 'a register of the risks listed in the Contract Data and the risks which the Project Manager or the Contractor has notified as early warning matters'.

The Risk Register should:

- ◇ describe the project's associated risks;
- ◇ state the required actions to avoid or minimize the risks; and
- ◇ state which party is responsible for carrying out each action.

Importantly, the register is not intended to alter the contractual allocation of risk. The time and costs consequences of any risks which eventually materialize are addressed under the separate compensation events mechanism in the contract. The register is instead meant to be a practical administrative tool to enable parties to manage risks in a collaborative fashion so as to minimize the possibility of disputes developing later down the line.

The NEC contracts also include an early warning process to deal with risks. Under core clause 16 of NEC 3, the contractor and project manager are required to provide an early warning by notifying each other as soon as they become aware of any matter which could increase prices, delay completion, delay meeting a key date, or impair the performance of the works in use. If the contractor fails to give an early warning notice which an experienced contractor could have given, the project manager assesses any compensation event (for time or money) as if the contractor had given the early warning notice which an experienced contractor would have given under core clause 63.5.



In addition to the mechanisms described above, NEC3 and NEC4 both provide for a partnering option X12, which is used to promote partnering between more than two parties working on the same project who are not parties to the same construction contract. In NEC3 option X12.2(1), the goal of the partnering option is for 'Each partner [to] work with the other Partners to achieve the [Employer's] objective stated in the Contract Data'. If option X12 is selected, each partner must work together in a spirit of mutual trust and cooperation and provide an early warning to other partners when they become aware of any matter which could affect the achievement of another partner's objectives. There is also an incentives mechanism, whereby a bonus may be paid if a target stated for a key performance indicator is improved upon or achieved.

## PPC2000

The Association of Consultant Architects has published the PPC2000 project partnering contract. The PPC2000 takes a more legally radical approach to partnering by requiring the various parties in the project team to sign up to one multiparty contract (rather than separate bilateral contracts).

The PPC2000 integrates the design, supply and construction processes, from inception to completion and aims to create an integrated set of terms of conditions for all those involved to work together, according to agreed timetables, from early design right through to commissioning and handover. In doing so, it is intended to prevent any of the inconsistencies or gaps which may arise through the usual system of bilateral contracts and avoids any issues stemming from the employer having to act as the intermediary point of contact for all communication and trouble-shooting between members of the project team. Parties are required to work together and individually in the spirit of trust, fairness and mutual cooperation.

The PPC2000 incorporates the following processes:

- ◇ an early warning system;
- ◇ a core group of key individuals who are the representatives of the members of the partnering team—they operate the early warning system and review progress and performance;
- ◇ a binding project timetable which governs the interfaces between members of the partnering team; and
- ◇ agreed financial incentives tied to achievement or non-achievement of key performance indicator targets.

## BE Collaborative Contract

The BE Collaborative Contract is another standard form partnering agreement, initially developed by the Reading Construction Forum. However, by contrast to the PPC2000, it is a bilateral contract, rather than a multiparty one. The Be Collaborative Contract comprises a set of standard conditions and a purchase order. A set of conditions and a purchase order is produced for a party that supplies and constructs and another for a party that merely acts as a supplier.

Similar to the NEC standard forms and the PPC2000, the BE Collaborative Contract provides that the parties are to 'To work together with each other and all other project participants in a cooperative and collaborative manner in good faith and in the spirit of mutual trust and respect.'

Further features of the BE Collaborative Contract are:

- ◇ an open book accounting procedure;
- ◇ a project protocol, which sets out what the parties hope to gain from their collaboration and how those goals might be achieved; and
- ◇ the preparation of a risk register.

## [D] MEDIATION AND CONCILIATION

Mediation and conciliation is a private, informal process in which disputants are assisted in their efforts towards settlement by one or more neutral third parties. The mediator or conciliator re-opens or facilitates communications between the parties, with a view to resolving the dispute. However, the involvement of this independent third party does not change the position that settlement lies ultimately with the parties themselves.

The process can be facilitative, where the third party merely tries to aid the settlement process, or evaluative, where the third party comments on the subject matter or makes recommendations as to the outcome (either as an integral part of their role, or if called on to do so by the parties).

The terminology is not the same everywhere: in some parts of the world, mediation refers to a more interventionist evaluative approach. In the UK, the facilitative style of third-party intervention is most frequently referred to as mediation; the term conciliation is usually reserved for the evaluative process.

## The rise of mediation in the UK

Uptake of mediation in the UK has increased in recent years. Mediation is a significantly quicker and cheaper procedure than either commencing litigation or taking a court proceeding all the way to a final hearing and judgment. In addition to these benefits, they are conducted ‘without prejudice’, such that parties are not able to refer to or rely on any of the content in, for example, a subsequent litigation or arbitration. This enables parties to have frank discussions about commercial settlement options without the threat of any concessions or compromises being used against them later down the line.

In May 2021, the Centre for Effective Dispute Resolution (CEDR) published its *Ninth Mediation Audit* on growths and trends in mediation based on a survey of civil and commercial mediators in the UK.

CEDR reported a 38% increase in the annual number of cases mediated since the CEDR 2018 audit and estimated that cases valued at £17.5 billion in total were mediated every year (CEDR 2021: 31). CEDR also suggested that mediation is now more likely to result in settlements, with respondents to the survey reporting a success rate of 93% (comprised of 72% settling on the day and 21% settling shortly thereafter) (CEDR 2021: 16).

## Process of mediation

Loosely described, there are three main phases to mediation in the UK.

During the pre-mediation phase, parties attempt to agree the terms on which the mediation will take place. This will include items such as costs, confidentiality, the without-prejudice nature of the mediation, authority to settle and the timetable, as well as the identify and qualifications of the mediator. In most cases, the parties will exchange position papers setting out their view of the dispute. From the mediator’s perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties will depend on their objectives and the perceived strength of their positions—they may spend the time preparing the best case, or considering their ‘best alternative to a negotiated agreement’ in the event that negotiations fail.

The second phase is the mediation itself. Most commercial mediations are conducted over the course of one day, although there is no hard and fast rule. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make an opening statement.

The mediation process is flexible, and once the parties have made their opening statements the mediator may decide to discuss some issues in the joint meeting or a 'caucus'. A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn to explore in confidence the issues in the dispute and the options for settlement.

The third phase is the post-mediation stage, which will either involve execution of the settlement agreement, or a continuation towards the trial or arbitration hearing. The mediator may still be involved as a settlement supervisor, or perhaps to arrange further mediations. If a settlement is not reached this does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

## Benefits of mediation in the construction industry

There is some useful data in respect of the use and effectiveness of mediation in the construction industry and court-annexed mediation services. Between 1 June 2006 and 31 May 2008, an evidence-based survey was developed between King's College London and the TCC (Gould & Ors 2009).

Working together, it was possible to survey representatives of parties to litigation in that court. Three TCC courts participated: London, Birmingham and Bristol. All respondents were issued questionnaire survey forms. Form 1 was issued where a case had settled, and Form 2 was issued where judgment had been given. Both forms asked about the nature of the issues in dispute, whether mediation had been used, the form that mediation took and the stage in the litigation process at which mediation occurred.

Respondents reported substantial cost savings arising from mediation. Around 9% of respondents estimated that they had saved over £300,000 in costs (Gould & Ors 2009: 17); 12% of respondents estimated that they had saved between £200,000 to £300,000; and 15% estimated that they had saved between £150,000 to £200,000 (Gould & Ors 2009: 17).

Respondents were also asked to comment on what would have happened if the mediation had not taken place. Many respondents (around 72%) believed that their cases would have settled at a later stage (Gould & 2009: 16). However, 19% of respondents believed that their cases would have been fully contested all the way up to judgment (Gould & 2009: 16).

## The future of mediation in the UK

On 3 August 2021, the UK Ministry of Justice issued a call for evidence on dispute resolution from all interested parties—the judiciary, legal professionals, mediators, academics, the advice sector, and court users—on how mediation can be more fully integrated into the court system.

The consultation follows the Civil Justice Council (CJC) report on compulsory mediation (CJC 2021), which found that mandatory mediation would be compatible with UK law and would also be desirable in suitable areas of the justice system. The CJC report concluded that mandatory ADR is lawful as it is compatible with article 6 of the European Convention on Human Rights. This conclusion is a significant deviation from the current legal position taken in England and Wales in which parties cannot be compelled to pursue their matters through mediation (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576). The CJC report suggests that mandatory mediation may be considered, provided that it is sufficiently regulated and made available where appropriate in ‘short, affordable formats’. It remains to be seen how any movement toward mandatory mediation would operate in the context of the UK construction sector, where (as described below) parties already have access to a quick form of decision-making in the form of adjudication, and there may not be much appetite for an additional layer.

## [E] ADJUDICATION

Broadly defined, adjudication is a process where a neutral third party hands down a decision, which is binding on the parties in dispute until it is revised in arbitration or litigation.

### General rules

Before they can decide the dispute referred to them, an adjudicator must consider whether they have jurisdiction to determine the dispute at the outset (threshold jurisdiction). This will require them to consider matters such as whether there is a conflict of interest, whether there is a contract and if the adjudication has been brought under a statutory scheme, which complies with the mandatory requirements of the relevant Act, such as whether a dispute has crystallized.

After the adjudicator has accepted any appointment, the adjudicator must consider any jurisdictional challenges raised by the parties. If the challenge is well founded, the adjudicator must refuse to act. If the

challenge is weak, the adjudicator must continue with the substance of the adjudication.

Adjudicators are under a duty to comply with the rules of natural justice and to abide by procedural fairness. Breaches of justice may include bias, a failure to act impartially, or any procedural irregularities. In the event of any such breach, the adjudicator's decision will not be enforced.

## Housing Grants Construction and Regeneration Act 1996

Construction adjudication in England, Wales and Scotland usually refers to statutory adjudication under section 108 of the Housing Grants Construction and Regeneration Act 1996 (Construction Act).<sup>3</sup> The rationale behind the introduction of statutory adjudication was to provide a mechanism to ensure certainty and regular cash-flow during the course of a construction project through a 'quick-fire' scheme for resolving disputes. The Construction Act sets out a framework for a system of adjudication which applies only to 'construction contracts' that fall within the detailed definition of section 102. Construction contracts include agreements for architectural design or surveying work, or which provide advice on building, engineering, interior or exterior decoration or the laying-out of landscape in relation to construction operations. The Act requires construction contracts to include a right for a party to a construction contract to refer a dispute to adjudication for determination of the issue (sections 108 and 108A) and a mechanism for payments within the course of the construction contract (sections 109 to 113). If a construction contract does not contain these provisions, then the relevant provisions of the Scheme for Construction Contracts, as amended, apply by default (noting, however, that there is a separate Scheme for Scotland and Northern Ireland).<sup>4</sup>

Section 108 of the Construction Act sets out the minimum requirements for an adjudication procedure in a construction contract. These requirements are summarized as follows:

- ◇ notice: a party to a construction contract must have the unilateral right to give a notice 'at any time' of their intention to refer a particular dispute to the adjudicator;

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<sup>3</sup> Also known as the HGRA, or the HGCRA. Northern Ireland is covered by the Construction Contracts (Northern Ireland) Order 1997.

<sup>4</sup> The [Scheme for Construction Contracts \(England and Wales\) Regulations](#) provides back-up payment and adjudication provisions where these are not included in the contract. A similar Scheme exists in Scotland through the [Scheme for Construction Contracts \(Scotland\) Regulations](#).

- ◇ appointment: there must be a method to secure the appointment of the adjudicator and to provide them with the details of the dispute within seven days of the notice;
- ◇ time scale: the adjudicator must be required to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.
- ◇ extension: the adjudicator must be able to extend the 28-day period by up to 14 days, with the consent of the party by whom the dispute was referred;
- ◇ impartiality: the adjudicator must have a duty to act impartially;
- ◇ initiative: the adjudicator must be able to take the initiative in ascertaining the facts and the law;
- ◇ binding nature: the adjudicator's decision must be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement;
- ◇ corrections: it must be possible for the adjudicator to be permitted to correct any decision so as to remove a clerical or typographical error arising by accident or omission;
- ◇ immunity: the adjudicator cannot be liable for anything done or omitted in the discharge of their duties unless they are acting in bad faith.

## Effect of adjudication on other forms of dispute resolution in the UK

The speed of statutory adjudication means that it is now the mainstay form of dispute resolution in the UK construction industry. This has had a serious impact on the popularity of domestic arbitration. Although statistics are hard to find owing to the confidential nature of arbitrations, it has been reported that some arbitration institutions have experienced a significant decline in appointments for arbitrators (Reynolds 2014: 20). It is also worth noting that adjudication has also had a substantial effect on the workload of the TCC. Prior to the introduction of statutory adjudication in the Construction Act, it was possible for a case to take three to five years to reach a hearing in the TCC, whereas now it is possible for cases to be heard within 12 months.

## [F] DISPUTE BOARDS

Dispute boards are used on project-specific dispute resolution procedures, which are normally established at the outset of a project and remain in place throughout the project's duration. Dispute boards may consist of

one or three members who become acquainted with the contract, the project and the individuals involved. They will typically fall into one of three broad categories:

- ◇ a dispute review board (DRB) that provides non-binding and informal advice;
- ◇ a dispute adjudication board (DAB) that issues binding decisions and;
- ◇ hybrid dispute avoidance/adjudication boards (DAAB) that carry out both functions.

DRB and DAAB board members are required to regularly attend site visits. They should be provided with access to progress reports and other key project documentation so that they can identify, discuss and hopefully resolve any differences between the parties before these solidify into disputes. If that is not achieved, a DAAB will determine disputes on an interim but binding basis. This dispute adjudication function will also be carried out by DABs. Under the FIDIC (International Federation of Consulting Engineers) standard forms, a referral to a dispute board is a mandatory precondition before a party can go to arbitration.

At present, dispute boards are not commonly used in the UK construction industry. This is partly because the FIDIC form of contract is not widely used on domestic projects compared to other standard forms such as the Joint Contracts Tribunal (JCT) and NEC forms. However, the (relative) unpopularity of dispute boards also reflects the availability of statutory adjudication, which provides parties with a fast-track, binding and enforceable decision within a 28-day period. This is significantly faster than the 84-day time period required under the default FIDIC DAB process.

However, the launch of new dispute board rules in standard forms that are more commonly used in the UK may prompt a change in the popularity of dispute boards on domestic projects. In this context, it is worth noting that the new rules specifically provide for dispute boards to be involved in the avoidance of disputes, which is not currently possible under the model for statutory adjudication.

## JCT Dispute Adjudication Board Rules 2021

In May 2021, the JCT launched its 2021 DAB document which is designed to work with two of the JCT's main contract forms, being the JCT 2016 Design and Build Contract and JCT Major Project Construction Contract. The JCT's aim is for the amendment to 'provide a framework for parties to identify and resolve potential disputes early on and to avoid costly litigation and damaging of project relationships'.



The JCT's new DAB Rules attempt to comply with the 28-day timeframe prescribed for statutory adjudication, while providing that the DAB should be regularly updated and involved in the meetings and site visits so that it can understand how the project is going and, ideally, assist the parties to avoid disputes. The DAB can also be asked to provide an informal opinion.

## NEC4 DAB—Option W3

Option W3 under NEC4 can be used to establish a dispute avoidance board on projects that are not subject to the Construction Act. Often, such projects will be international in nature, rather than UK-based. However, Option W3 could nevertheless encourage UK-based NEC users to familiarize themselves with the concept of dispute avoidance boards.

Under Option W3, the dispute avoidance board is appointed at the start of the project and regularly attends site and receives updates from the parties on the progress of the works. Board members are empowered to act proactively to identify potential disputes and to raise these with the parties before they develop into actual disputes. Notably, however, the dispute avoidance board makes recommendations only. This may limit update of Option W3 on the basis that parties will not be able to enforce any 'decisions' made by the dispute avoidance board.

## 2012 London Olympics

There is precedent for the use of dispute boards on major infrastructure projects in the UK. During the 2012 Olympics, the Olympic Delivery Authority decided to establish two independent dispute avoidance panels to avoid delays. The first panel provided dispute avoidance, while the second provided an adjudication panel. This arrangement was widely recognized as being a success in terms of dispute avoidance and ensuring that the project infrastructure was delivered on time.

Examples of dispute boards—or analogous arrangements—on other domestic projects include:

- ◇ Transport for London's conflict avoidance panel on the Victoria Station upgrade;
- ◇ Transport for London's conflict avoidance panel on the Crossrail project; and
- ◇ Network Rail's system of dispute avoidance panels.

## [G] CONCLUSION

The scale and complexity of the issues which commonly arise on construction projects require parties to take proactive steps to avoid conflict and, in instances where disputes have arisen, to ensure that these are resolved quickly and in proportion to the sums at stake.

The widespread use of ADR in the UK construction industry is reflected in the relative speed with which construction disputes are resolved compared to other economic sectors of a comparable size. The ADR landscape in the UK is currently dominated by mediation and adjudication. In particular, statutory adjudication is a mainstay of the UK construction sector. Its popularity has arguably had an impact on final forms of 'formal' dispute resolution and, in particular, domestic arbitration, which has become increasingly uncommon. It is suggested that, notwithstanding the 'quick and dirty nature' of the rapid-fire adjudication process, few claims progress beyond adjudication into litigation or arbitration. At present, it remains to be seen whether the dispute boards will become a common feature of domestic projects. However, the provision of new dispute avoidance and adjudication options within commonly used standard forms (such as the JCT DAB rules) at least provides parties on UK projects with a workable alternative to statutory adjudication.

### **About the authors**

**Nicholas Gould** is a Partner at Fenwick Elliott LLP, where he conducts a mix of international dispute resolution and projects work. He is a dual qualified solicitor-advocate and chartered surveyor, and a specialist mediator in the construction sector.

Email: [ngould@fenwickelliott.com](mailto:ngould@fenwickelliott.com).

**Olivia Liang** is a Senior Associate at Fenwick Elliott LLP. She has experience advising employers, contractors and subcontractors on construction and engineering disputes across a range of industry sectors, including power and process plants, renewable energy, and transport.

Email: [oliang@fenwickelliott.com](mailto:oliang@fenwickelliott.com).

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## CIVIL JUSTICE REFORM: AN OMBUDSMAN PERSPECTIVE

MATTHEW VICKERS

CEO and Chief Ombudsman, Ombudsman Services

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### **Abstract**

Ombudsman schemes have been viewed with interest for their efficiency, speed, cost and use of technology. As Sir Geoffrey Vos seeks to integrate alternative dispute resolution as part of a civil justice funnel, it is important to recognize that ombudsman schemes fulfil different functions than the courts. This paper suggests that dispute resolution is only one of the functions of a civil justice system. Court efficiency should not be the predominant organizing principle. Recognizing the variety of functions and legitimate interests contained within the civil justice system rather than conceiving a hierarchical structure presided over by courts could offer an outcome-based perspective on reform.

**Keywords:** ombudsman; dispute resolution; technology; justice systems; prevention.

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### [A] CIVIL JUSTICE REFORM

As a recent publication by the Social Market Foundation noted: the civil courts of England and Wales have been inefficient and ineffective for a long time, especially for those who tend to have relatively low value 'civil legal problems'. The failure of the courts to serve the majority of the population sufficiently well contributes to a substantial 'civil justice gap' across England and Wales (Hyde 2022: 14).

Such observations, while current, are not new. In 2014, a report commissioned by the Legal Services Board concluded:

while there are evident obstacles to accessing advice and the courts, for the most part the law and traditional legal professions are simply peripheral to much everyday justice. While the public facing practice of traditional legal professionals extends to a largely unchanged (over

the past half-century) and relatively narrow range of legal problems, the public's experience is centred on a far broader range of welfare and consumer related issues that have become fundamental to civil justice (Pleasence & Balmer 2014: 99).

The Interim Report of the Civil Court Structure Review by Lord Briggs in 2015 agreed that 'most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system'. Briggs characterized civil courts as 'places designed by lawyers for use by lawyers' (Briggs 2015: 51). He proposed a digital solution with the establishment of the Online Court, 'a court for the resolution of appropriate civil disputes without recourse to lawyers' (Briggs 2015: 68).

The Interim Report conceded that, 'A very large number of disputes about civil rights are resolved by a range of ombudsman services' but analysis of such services was scant and confined to a section dealing with the boundaries of the court system. Briggs noted that the relationship between courts and alternative dispute resolution (ADR) was 'semi-detached'. He continued:

This is, in many ways, both understandable and as it should be ... the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service .... Save when occasionally ruling upon the legality of the processes of various ombudsmen, by way of judicial review, the civil courts have no formal link with ombudsmen services. But they remain, for the reasons already given, a vital last resort and upholder of the rule of law, without which those services would be deprived of at last [sic] part of their effectiveness (Briggs 2015: 28-29).

Since his appointment as Master of the Rolls in January 2021, Sir Geoffrey Vos has made a series of speeches on civil justice reform. There are many areas where he continues Briggs' line of thought but some substantive departures too.

Vos argues that the civil justice system should be 'devoted towards resolving disputes at the earliest possible stage ... because of the huge economic and psychological disadvantages of continuing disputes' (Vos 17 March 2022). To achieve this aim, Vos imagines 'a cohesive online funnel with a large number of cases starting online and being resolved by integrated ADR mechanisms leaving a few to enter the court system—also online—and ultimate judicial resolution where necessary' (Vos June 2022).

In contrast to Briggs, he redraws the relationship between the courts and ADR, commenting:

Historically, we have always allowed our thinking to concentrate on the very small number of cases at that high end extreme. That is letting the tail wag the dog. It is necessary in thinking about the future to consider the entire picture (Vos June 2021).

Vos intends to:

take the ‘alternative’ out of ADR, to focus on hard data and make sure that every dispute is tackled at every stage with the intention of bringing about its compromise. This can be done very effectively online and I believe that the onset of online dispute resolution in most bulk areas will allow far more cases to be resolved far earlier and far more cheaply (Vos March 2021).

The Legal Services Board report found that consumer disputes accounted for the largest proportion of legal need at 17.5% (Pleasence & Balmer 2014: 19). Vos recognizes that ‘Ombuds processes are ... extremely successful for disputes between consumers and utilities and public and other authorities .... Vast numbers of claims are settled by these processes without the need for legal proceedings’ (Vos March 2021).

He conceives of this as a fundamental change in approach:

Lord Woolf shifted the paradigm of the courts from seeing their role as searching for perfect justice, to one where they had to seek expedient and proportionate justice. I hope to shift the paradigm again towards a focus on resolution rather than dispute (Vos 30 March 2022).

Vos’ thinking on the relationship between the courts and ADR and ombudsman schemes replaces Briggs’ boundaries and partial detachment with a more cohesive and integrated view of the civil justice landscape. However, the hegemony of the court at the apex of Vos’ funnel remains intact and apparent. In addition, the attraction of a more integrated system is couched in terms of efficiency, speed and cost.

These benefits are evident. The Social Market Foundation report noted how “user-friendly” (especially for those with no representation), low-cost, and efficient the best ombudsman services can be’ (Hyde 2022: 62). At the expert roundtable which informed the report, I commented on the progress made by Ombudsman Services in resolving energy and telecoms disputes:

everyone is self-represented, none of it’s done face-to-face, about 90% is done digitally, although ... some are still done by mail ... but predominantly it’s done through ... portal(s) ... unit costs have halved and are about £250 a case.

The speed of resolution ... is dealing with about 95% of cases inside of twelve weeks (Hyde 2022: 62).

Although unit costs and resolution times vary across ombudsman schemes, the overall comparison with the civil courts remains favourable as a review conducted into the rail ombudsman scheme indicated (Lucerna Partners 2022: 34-35). However, the value of the ombudsman approach is not solely in more effective dispute resolution as this paper will argue.

Section [B] examines ombudsman dispute resolution practices and section [C] draws parallels between these developments and some of the ambitions for the online court which have yet to be realized. Sections [D] and [E] contend that the value of ombudsman schemes is wider than dispute resolution because of a broader range of functions which are fulfilled. Section [F] draws some conclusions on the distinct functions of ombudsman schemes and courts and suggests some provocations around the underlying philosophy of civil justice reform.

## [B] OMBUDSMAN SCHEMES AND DISPUTE RESOLUTION

There are 19 ombudsman schemes operating in the United Kingdom according to the latest Annual Report of the Ombudsman Association (Ombudsman Association 2022: 10). In order to use the term ombudsman, an organization must be approved by the Ombudsman Association and meet its criteria of independence; fairness; effectiveness, openness and transparency; and accountability.

In general, there are three routes by which ombudsman schemes have been established. Some have been set up by Parliament as statutory bodies with mandatory jurisdiction in an area (eg the Parliamentary and Health Services Ombudsman and the Legal Ombudsman (LeO)). In other cases, there is a requirement in legislation for a sector to be covered by an ombudsman, but the organization providing the ombudsman service is a private not-for-profit business and not a statutory body (eg Ombudsman Service in Energy). Finally, some voluntary ombudsman schemes have been set up, sometimes with support from a trade association or industry body (eg the Motor Ombudsman and the Furniture and Home Improvement Ombudsman: see [Ombudsman Association website](#)).

The recommendations made by schemes covering public services are usually accepted, although it is not common for them to be legally binding. The decisions made by ombudsman schemes in complaints about private businesses are legally binding if the complainant accepts the ombudsman's decision. If they do not, then the dispute can be pursued in court. Compliance with ombudsman decisions is generally

high, especially in those schemes in regulated industries where a failure to comply can be a cause for regulatory enforcement action.

The term ombudsman covers a range of organizations whose mandates may be voluntary or compulsory, whose powers may be legally binding or not and which may be statutory bodies or private not-for-profit businesses. There are some significant differences between schemes which are often obscured by the use of ombudsman as a category of catch-all term (see All Party Parliamentary Group on Consumer Protection 2019).

This paper focuses predominantly on the ombudsman schemes operating in regulated sectors (financial services, legal services, energy, telecoms and rail). While these schemes account for the majority of consumer disputes resolved by ombudsman organizations, the workload of other consumer schemes remains considerable. They too make innovative use of technology and informal dispute resolution techniques. However, the regulatory context of the schemes explored below has distinctive implications for Vos' integrated funnel.

The Financial Ombudsman Service (FOS), LeO and the energy and telecoms ombudsman schemes (both provided by Ombudsman Services) were set up in the span of a decade around the millennium. They were designed to be informal and accessible to consumers with no legal knowledge or representation. In their most recent annual reports, the four schemes stated that they had received 700,000 enquiries (Ombudsman Services 2021; Financial Ombudsman Service 2022; LeO 2022). Consumers can approach the schemes via email, online portals, white mail and phone and are able to speak directly to advisers who will help to formulate and submit complaints. Where the scheme in question does not have jurisdiction over the complaint, the complainant is given assistance in identifying the competent organization to receive the complaint and in reaching other sources of advice and advocacy support (for example, Citizens Advice or charities who give specialist support around areas such as mental welfare, debt or social services).

There is no charge for consumers to make enquiries or to raise complaints, regardless of the outcome of the dispute. Where a complaint meets the criteria for acceptance by the scheme, the complainant must also show that the business being complained about has had sufficient time to resolve the complaint (typically eight weeks) or has reached deadlock. Ombudsman processes and practice are designed to encourage businesses to resolve disputes in the first instance rather than to abdicate this responsibility to the scheme. A case fee is usually payable by the business when the scheme accepts a case.



In comparison with both the civil court process and other consumer adjudication and arbitration approaches, the ombudsman schemes in regulated sectors invest more resources into encouraging first-tier resolution. Both the FOS and LeO have technical help desks where businesses can ask for advice on the approach which the ombudsman is likely to take on a complaint before it escalates. Ombudsman Services has run some trials with algorithms to help businesses predict which complaints are most likely to escalate so that more effective and tailored resolution efforts can be made at the first tier. These form part of the wider preventative functions which will be discussed at greater length in section [E].

The resolution techniques used by ombudsman schemes are diverse, including conciliation, mediation and adjudication. The investigative approach is inquisitorial and informal rather than adversarial. Although ombudsman schemes take into account consumer law, regulations and industry codes and standards, decisions are reached by applying a fair and reasonable test. This is significant because the trend in regulation has been away from detailed prescription and towards principles and outcomes.

For example, the Financial Conduct Authority's policy statement on the introduction of a new consumer duty states:

Outcomes-based regulation can be applied more easily to technological change and market developments than detailed and prescriptive rules. This means consumers are better protected from new and emerging harms. Firms can also innovate to find new ways of serving their customers with certainty of our regulatory expectations (Financial Conduct Authority 2022: 3).

In 2019 Ofcom (Office of Communications) published a set of fairness commitments to 'complement our rules and voluntary schemes, to encourage signatories to embed fairness more deeply across their businesses—from the boardroom to customer service teams—and to go beyond compliance with regulatory minimums' (Ofcom 2021: 3).

This broader perspective on outcomes and cultural change rather than tightly defined rules and compliance aligns more closely with the flexibility of a fair and reasonable test. This raises the question of how to harmonize the philosophies and tests which regulators, ombudsman schemes and the civil courts might rely on within a single funnel. Since each can claim institutional legitimacy, none ought to claim a monopoly of civil justice.

Perhaps rather than a single funnel, an alternative is a people-centred

civil justice system collaborating to deliver a suite of functions and outcomes. Rather than a neatly designed, hierarchical structure which serves our need for order, a curated and connected system of distributed and decentralized justice might better serve end users—the businesses and people in the civil justice gap. As Dame Hazel Genn observed:

Put simply, people want different things depending on their problem and we need a system that is sensitive to that .... In terms of objectives and resolution preference, what research tells us is that what people want is not to have the problem. They do not crave involvement with legal processes (Genn 2017: 7-8).

## [C] AMBULANCES AND FENCES

Efficient resolution and technological gains are of course of interest in civil justice systems, but there are other opportunities suggested by ombudsman schemes. The Social Market Foundation report reflected:

considerable concern that the current modernisation programme had become too narrowly focussed on technology as the ‘silver bullet’ and ignored the more ambitious possibilities offered by more ambitious plans to close the civil justice gap (Hyde 2022: 38).

It related an expert contributor’s comment that ‘All transformation projects end up as efficiency projects’ and noted that this was an apposite reflection on the programme of civil court reform (Hyde 2022: 51-52).

Yet ambitious possibilities were part of Briggs’ vision of the online court. It had been informed by the work of Richard Susskind and colleagues on the Civil Justice Council Online in 2015. The Council’s report conceived of access to justice under the three headings of dispute resolution, dispute containment and dispute avoidance. Dispute containment would ‘prevent disagreements that have arisen from escalating excessively’. Dispute avoidance would involve finding ways of ‘preventing legal problems from arising in the first place (putting a fence at the top of a cliff rather than an ambulance at the bottom)’.

The report argued that justice services were disproportionately weighted to resolution through the courts (Civil Justice Council 2015: 17). It proposed that:

the courts extend their scope—beyond dispute resolution to include both dispute containment and dispute avoidance. Our assumption is that better containment and avoidance of disputes will greatly reduce the number of disputes that need to be resolved by judges.

This would involve efforts ‘not just to streamline conventional courts

to save costs and increase access’ but ‘to embrace a more preventative philosophy’ (Civil Justice Council 2015: 18).

A pyramid of three tiers was recommended to fulfil these additional functions. At the first tier there would be a free of charge ‘information and diagnostic service’ which would work ‘alongside the many other valuable online legal services that are currently available to help users with their legal problems’. A second tier would employ ‘a mix of ADR and advisory techniques ... in a, broadly speaking, inquisitorial rather than adversarial manner’. The third tier would provide ‘a new and more efficient way for judges to work ... on an online basis, largely on the basis of papers submitted to them electronically, as part of a structured but still adversarial system of online pleading and argument’ (Civil Justice Council 2015: 18-20).

There is much in common between the Civil Justice Council’s approach and ombudsman practice, especially in the use of digitization, connection to other sources of advice and the use of a range of informal dispute techniques. The Online Court would not merely be a dispute resolution service. Nevertheless, adversarial processes were reasserted at the final tier. Fundamentally the Online Court remained a system designed to manage flows of case volumes through a pyramid (or funnel) to the court at the top. The primacy of court efficiency as the organizing design principle would be left largely undisturbed. Civil justice would remain recognizably designed for lawyers and by lawyers.

The Social Market Foundation noted that the experience of ombudsman schemes pointed to:

more than achieving marginal improvements in efficiency through the application of technology to speed up processes. The biggest gains came through identifying ways of adding value for users and re-engineering the entire process (Hyde 2022: 38).

As a contributor to the Foundation’s report, I suggested that tackling the civil justice gap would involve thinking ‘more widely about how you build capability, how you build intelligence, how you build resilience in the system. Technology is part of that but it’s as much about mindset’ (Hyde 2022: 38).

## [D] CONSUMER REDRESS FUNCTIONS

Attending to the functions required of the civil justice system as a whole, beyond the need for efficient and swift resolution, helps to liberate the mindset behind design. In their work on consumer redress mechanisms, Christopher Hodges and Stefaan Voet commented that ‘the ombudsman model and the regulatory model, especially where they operate in a parallel coordinated fashion, deliver significantly more functions than just dispute resolution’ (Hodges & Voet 2018: 300).

Hodges’ previous research comprehensively explored the limitations of law in affecting corporate behaviour and in stimulating cultural change (see Hodges 2015). Central to the thesis he advanced with Voet was the need for redress to ‘affect the future behaviour of a defendant and of the market generally .... The empirical evidence for deterrence as a means of regulating individual or corporate behaviour is limited’ (Hodges & Voet 2018: 8). Instead, they suggested that 11 objectives are encompassed within the most effective regulatory systems. These included identifying individual and systemic problems and their root causes; identifying actions to prevent reoccurrence or mitigate risk; disseminating information to firms, consumers and other markets; and ongoing monitoring, oversight and amendment of the rules governing market activity. Of the 11 objectives ‘litigation primarily addresses redress alone, whereas the integrated co- and public-regulatory systems and ombudsman systems in some countries are able to address all items’ (Hodges & Voet 2018: 8-9).

We have already noted Dame Hazel Genn’s argument that end users have diverse needs from civil justice. Similarly, the Social Market Foundation observed:

Institutions such as the civil and criminal justice systems are made up of a number of components and are linked into a web of stakeholders that have an effect on the operation of (at least parts of) the system, each with their own interests and constraints (that influence how they act) (Hyde 2022: 48).

For legal problems relating to regulated consumer industries, there is a range of industry, consumer and regulatory stakeholder interests and constraints which should legitimately influence the design and delivery of redress and dispute resolution. It is in response to these functions and this environment that ombudsman practice has developed, as the next section of the paper demonstrates.

## [E] THE FOUR BOX MODEL

At Ombudsman Services, Lewis Shand Smith and I developed the four box model as a framework for the functions and activities which ombudsman schemes can fulfil in support of their role as part of a regulatory landscape. Under the model, capabilities around access, resolution, insight and engagement are combined to meet legal need in the wider sense expressed by Genn and to deliver systemic and preventative impact.

The first box, which has been discussed earlier in this paper, centres on *access*. Ombudsman schemes are designed to be inclusive and offer additional support to more vulnerable consumers in formulating their complaints. They are free to use, there is no requirement for legal knowledge or representation and there are developed processes and partnerships facilitating signposting to wider or alternative support.

On a complaint being accepted by the scheme, *resolution* techniques seek early resolution and, where required, investigations are informal and inquisitorial and use a 'fair and reasonable test'. At the root of many of the upheld complaints are issues around execution and operational delivery rather than intentional or wilful wrongdoing (an instructive comparison is with the traditional locus of public services ombudsman schemes in maladministration).

Consequently, it is important for the ombudsman scheme to collate qualitative and quantitative data on the complaints received to identify where there are systemic issues around policy, process and culture which lie at the root of consumer detriment. Alongside the role of dispute resolution, an ombudsman scheme can be a source of preventative *insight*.

Lastly, an ombudsman scheme should have effective channels of *engagement* so that the insights drawn from the data can be deployed across the ecosystem for preventative impact. For regulators and government, insights expand regulatory intelligence and facilitate the identification of risk (cf Hodges & Voet's regulatory framework in section [D] above). For consumer bodies, ombudsman schemes can be a valuable channel in providing advice and in building an evidence base to inform advocacy. For businesses, the insights can be used to strengthen capability, by promoting operational alignment and by suggesting where corporate cultures may be weak or misaligned.

The remit of an ombudsman scheme is therefore wider than the resolution of disaggregated individual complaints. Feedback can form part

of a reflective-leaning system generating suggestions for improvement and identifying the risks of systemic consumer detriment at an earlier stage.

The opportunities around insight and engagement, in particular, equip ombudsman schemes to make a more far-reaching, systemic and preventative impact than the Civil Justice Council's vision of dispute avoidance and dispute containment. Sector ombudsman schemes are much better equipped than the courts to capture and deploy meaningful and actionable data and insights, not least since the investigators and adjudicators have deeper expertise and experience around the sectoral context and the executional issues involved, as well as the relevant consumer law and codes.

In 2015, Ofgem (Office of Gas and Electricity Markets) commissioned a review of the Energy Ombudsman scheme by Lucerna Partners which endorsed the value of such systemic and preventative work. The report suggested that ombudsman schemes address consumer detriment not only by resolving large volumes of individual cases, but by fulfilling two further roles. Schemes provide companies and regulators with insights around systemic issues at both the company and the industry level. The use of insights can effectively address legal need and expand and tackle the civil justice gap. This is because insights inform steps to build capability and secure compliance which benefit 'everyone, those who do complain, those who complain initially but do not pursue their claim further with the ombudsman, and the millions of people who do not' (Lucerna Partners 2015: 18-20).

The Wider Implications Framework which the FOS and others established in 2021 illustrates this point. Members of the financial services' 'regulatory family work with each other and other parties as appropriate on issues that could have a wider impact across the financial services industry' ([Financial Ombudsman website](#)). Ombudsman schemes are large second-tier dispute resolution mechanisms which meet legal need at a transactional level. They also integrate data, intelligence and engagement to inform regulatory practice and to shape execution and business culture in sectors. This position in the redress landscape is not one inhabited or coveted by courts, but it is important that it is valued, reflected on and preserved in the course of civil justice reform.

## [F] CONCLUSIONS

Consumer Dispute Resolution is distinct from civil litigation, and each should be valued for itself and not as substitutes for each other. Courts measure up well on quality criteria but poorly on other consumer principles of access, information, and value for money. In an expanding innovative universe, debate is to be expected, but a binary juxtaposition of courts and ADR is fallacious and polarizing (Hodges & Ors 2016: 5).

This paper does not argue that ombudsman schemes (or indeed Ombudsman Services) are more valuable than courts or are immune to challenges of costs, delays and operational pressures. Nor are ombudsman practice and powers monolithic (see Which? 2021). There are significant volumes of disputes covered by ombudsman schemes operating in regulated sectors, but mandatory coverage by such schemes is far from universal across the consumer landscape. Although consumer disputes represent the largest single category of legal problems, there are many other types of civil claims with their own context and dynamics.

Sir Geoffrey Vos has moved from Lord Briggs' semi-detached view of ADR. He is clear on the value of ADR and consequently seeks to integrate it into his vision of civil justice. Such integration will need to be approached carefully to avoid unintended consequences.

For consumers, the risk of adding further steps or complexity to their journey to the ombudsman must be considered. As Genn noted above, many do not wish to engage with legal processes; they simply want their problem resolved. For businesses, the adversarial and formal shadow of the court could invoke patterns of deterrence and defensiveness. This is less likely to deliver the desired outcomes around future behaviour from individuals and businesses. It could compromise regulatory intelligence and attenuate the influence which ombudsman schemes can have in affecting culture and capability. The ethos and design of ombudsman schemes are integral to the delivery of a broader system and market functions.

Courts and ombudsman schemes can learn from each other's use of techniques and technologies, but their functions are distinct. Having claimed one paradigm shift, Vos may contemplate another. His reflections 'with a large dollop of hindsight' on previous reforms are instructive:

At the time, I, like many of my colleagues, wondered whether 'Woolf would work', and whether we were potentially throwing the baby out with the bath water. As it turned out we were not. To take the analogy too far: there was plenty of bath water that we could have thrown out, but that was in fact left behind (Vos October 2019).

Vos' efforts to discern the contours of the landscape of blockchain, smart contracts and bitcoin ahead show no lack of foresight (Vos May 2021). And, in making the case for reform, Vos recognizes that outcomes and the needs of those people and businesses left in the civil justice gap should be pre-eminent:

many have asked the simple question: why? .... Surely, there is nothing wrong with the way we do things even if we do want to move on from sending things by post .... The underlying answer to all these questions is business and consumer confidence (Vos May 2022).

In an age where so much will be distributed and decentralized, pyramids and funnels may run the risk of being impossibly geometric. Designing civil justice from the edge, around the needs of users and outcomes rather than from a centre that will not hold, could bring fresh impetus and legitimacy to reform. It suggests an enterprise which is more collaborative and, at times, messier than an exercise in effective central planning. Reshaping civil justice will be as much about reassessing teleology as about harnessing technology.

### **About the Author**

**Matthew Vickers** is the CEO and Chief Ombudsman of Ombudsman Services, the UK's energy and telecoms ombudsman. He is also a Director of the Ombudsman Association and the President of the National European Energy Ombudsman Network (NEON). He was previously CEO of the Scottish Legal Complaints Commission and a Trustee of the Scottish Mediation Network.

Email: [mvickers@ombudsman-services.org](mailto:mvickers@ombudsman-services.org).

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**JUDGES IN THE DOCK**

BARRIE LAWRENCE NATHAN

School of Law, SOAS University of London<sup>1</sup>

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**Abstract**

This article refers to judges, in the UK and elsewhere, who have themselves been convicted of or accused of a crime, whether while still officiating as a judge, before their appointment, or after their retirement. The most obvious criminal offence of which judges are guilty is bribery. This is considered in this article, but there is a wide range of offences from smuggling to murder, including, along the way, perjury, perverting the course of justice, two judges sent to prison for passing sentences which were much too heavy and one judge imprisoned for passing a sentence which was much too light. It examines the ways in which such judges have been dealt with and disparities of sentence.

**Keywords:** perjury; perverting the course of justice; points-swapping; sentencing.

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[A] INTRODUCTION

When one thinks of judges and criminals, it is usual to think of two discrete groups, but there are occasions when they overlap. There are many reasons for this. This note looks at some instances and also at the different ways in which the judges have been punished.

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<sup>1</sup> For this article I have had to rely overwhelmingly on online newspaper reports. Some of these were clearly wrong, and I have not used them. Some reports from reputable sources conflicted with each other. Sometimes I have referred to the discrepancy. More often in these instances I have chosen the source which seemed more plausible or reliable. I have also, reluctantly, had to rely for some information on Wikipedia where the points have not been covered in newspapers or the newspaper sources are no longer available. I have, I hope, included all my sources so readers can follow up if they wish. I owe a large debt of gratitude to Mr H Louis Sirkin, an eminent member of the Ohio bar. He became counsel for Tracie Hunter before her proposed retrial and remains so to this day. He has given me great help in explaining the case with care and patience. The views on that case and other cases are my own, unless otherwise stated.

## [B] KEITH BRUCE CAMPBELL: THE JUDGE AS SMUGGLER

Keith Bruce Campbell was born in New Zealand in 1916. He moved to London in the late 1930s. After the Second World War he was called to the bar and built up a practice specializing in divorce law. At that time many barristers were specialists in defended divorces, an area of law which has almost completely disappeared now. He became a QC in 1964. In 1968 he was elected to Parliament as a Conservative Member of Parliament (MP). His stint as an MP was short; he lost his seat in 1970. In 1976 he was appointed a circuit judge. He was known as HH Judge Bruce Campbell, presumably because there was or might be another Judge Campbell.

Apparently he had a friend who was a second-hand car salesman. Together they bought a yacht, *Papyrus*. On a trip to Guernsey in 1983 Campbell and his friend stocked up with 10 cases of whisky, 9460 cigarettes and 500 grams of tobacco. They then attempted to smuggle these into England, but were caught at Ramsgate. When interrogated Campbell initially alleged the items seized were for his own use. At his trial Campbell pleaded guilty and was fined £2,000. This sentence seems light for a judge. In his favour he pleaded guilty and was of previous good character. The sentence may have been in line with sentencing guidelines obtaining at that time. Nevertheless, this criminality by a judge was very serious and obviously an aggravating feature. In fairness, he was clearly ruined. Lord Hailsham LC removed him from office, although he was allowed to keep his judge's pension (Blom-Cooper 2006).

It is not known what possessed the judge to commit this act of folly. Was he persuaded to do it by his friend? Was he greedy or just short of money? Were the goods really for his own use?

## [C] CONSTANCE BRISCOE: PERVERTING THE COURSE OF JUSTICE

Constance Briscoe was an achiever. Born in England in 1957, of Jamaican parents, Briscoe was the third of a family of 11 children. Her mother had seven children, including Constance, by her husband and four children by a second relationship with Garfield Eastman. Briscoe worked her way through university, supporting herself by undertaking various menial jobs, and in 1983 she was called to the bar. Over time she built a successful and distinguished career, practising mainly in criminal law, although in 2007 her application to become a QC was rejected (Davies

2014). In 1996 she was appointed a recorder (a part-time judge) and was one of England's first black women judges.

Briscoe first came to the attention of the public in 2006 when her autobiography, *Ugly*, a 'misery memoir', was published. In the book Briscoe claimed that during her childhood she had suffered constant physical and emotional abuse from her mother, who had beaten and starved her, and subjected her to a commentary of disparaging and belittling remarks (Weathers 2008). The book was a huge success; nearly a million copies were sold and it featured for 20 weeks on the *Sunday Times* hardback bestseller list. It was translated into 16 languages (Cheston 2014). In 2006 Briscoe was nominated for a Woman of the Year award (Darley Anderson 2022). She became something of a celebrity, appearing on television and radio (Davies 2014).

Her mother strongly denied the accusations in the book, which she described as 'a piece of fiction' (*The Guardian* 2008) and sued her daughter and the publishers, Hodder & Stoughton, for libel. The trial took place in 2008. (By that time Briscoe had written a sequel, *Beyond Ugly*. It appears that that did not feature in the libel trial.) Four sisters and a brother gave evidence for their mother at the trial (*Evening Standard* 2012). Briscoe's older sister, Patsy, said 'I actually couldn't believe what I was reading' (Clare 2014). None of Briscoe's siblings supported Briscoe. After the trial she said, 'I can quite understand why my family went into collective denial' (*The Guardian* 2008). Notwithstanding that, Briscoe won the case by a unanimous verdict of the jury. They found that the allegations in the book were substantially true.

Briscoe next came to prominence as a result of a case in which she had been neither judge nor party. It involved Chris Huhne and his wife, Vicky Pryce. Huhne was an MP and a rising star in the Liberal Democrat Party. He had twice stood as a candidate in elections for leadership of the party, being a runner-up each time. He became a cabinet minister in the Coalition Government following the 2010 election.

In 2003 he had been guilty of a speeding offence. He already had points on his licence and the points for speeding would have led to his being disqualified from driving. He asked his wife to say that she had been driving the car at the time of the offence. The points would not have led to her being disqualified. She agreed to this and the deceit was successful.

So far so good. Things took a turn for the worse in June 2010 when Huhne left his wife, Pryce, and three children after 25 years of marriage (Pidd 2010). Shortly afterwards in September 2010 Briscoe's partner of 12

years, Anthony Arlidge QC, left her for a woman aged 25 (*The Telegraph* 2012). Pryce and Briscoe were friends and neighbours. According to Huhne they suddenly became firm friends at that time and began plotting Pryce's revenge against him (Huhne 2014). Briscoe had had dealings with the media following the publication of her autobiographies, and she offered to help Pryce get her story about swapping points into the newspapers (Bowcott & Davies 2014).

They approached a freelance journalist, Andrew Alderson, and told him about the points-swapping. However, they falsely told him that Huhne had swapped the points not with Pryce, but with Jo White, who worked for Huhne in his constituency (PA Media Lawyer 2013). Presumably, this was done to protect Pryce. Why Jo White was picked on is a mystery. The allegation was a complete lie and obviously defamatory, as well as possibly exposing White to the risk of prosecution. It was an unfortunate choice because White had not had a driving licence at the time.

Alderson approached the *Mail on Sunday's* news editor, David Dillon, in an attempt to sell the story. Pryce said that she believed about the swap with White because it was what Huhne had told her. She said that Huhne had bullied White into accepting it (Davies 2014). Before the *Mail on Sunday* published the story, it was published by the *Sunday Times* in May 2011. Pryce had confessed her part in the matter to the political editor of the *Sunday Times*, Isabel Oakeshott, in March 2011. Oakeshott knew that the *Mail on Sunday* had been informed about the swap, but did not know that Briscoe was acting as an intermediary for Pryce with the *Mail on Sunday* (PA Media Lawyer 2013).

Briscoe apparently went on purportedly acting for Pryce with the *Mail on Sunday* without keeping her informed, and it appears that it was Briscoe who first spilled the beans to the *Mail on Sunday* that it was Pryce and not White who had taken the points. Briscoe told the *Mail on Sunday* that Pryce had told her about the swap in 2003. The object of this appears to have been to bolster Pryce's story and to counter a suspicion of recent fabrication due to the marriage breakup. It was untrue and Pryce claimed not to know about this conversation. At her trial Pryce said that she had no recollection of the 2003 conversation and had been 'really shocked' when she was told about it during a police interview.

'I got so upset when they started reading [Briscoe's] statement that I had to stop the interview and go outside.' She had turned to Briscoe for legal advice, to sit in on meetings with the *Mail on Sunday* and check contracts. But Briscoe was working 'behind my back' to 'her own agenda' in giving details to the press and police – including

private and embarrassing texts between Huhne and their youngest son, Peter.

‘Certainly I was not expecting a judge and a lawyer, someone who was supposed to be my friend, to go out of her way to tell people, without my consent, that I had taken the points ...

I was having friendly conversations with her, telling her about these issues, and it seems they were being given directly to the press’ (Davies 2014).

Until Briscoe told the *Mail on Sunday* about her alleged conversation with Pryce in 2003, the paper had been treating the story as a marital tiff, of little importance (Huhne 2014).

The allegations about the driver-swap were investigated by the police. Briscoe was interviewed and repeated her story that Pryce had told her about the swap as far back as 2003. She told them that Vicky Pryce had confided that her husband coerced her into accepting the punishment that should have been his. Briscoe also told them that she had had no contact with the newspapers, that she was not close to Pryce, and that she was acting as a simple witness to fact (Dalrymple 2014). In due course she provided two witness statements to the police.

Eventually, Huhne and Pryce were brought to trial. Briscoe was to have been a star witness at their trial. She had been regarded as independent and unimpeachable.<sup>2</sup> However, when the trial began, in February 2013, the jurors were told by the prosecution that they would not be calling her as she could not be regarded as a ‘witness of truth’ (Davies 2013). This is an extraordinary statement by a prosecutor. Her statement must have been in front of the jury because, as stated above, Pryce referred to it at her trial. The prosecution counsel told the jury in opening that Pryce and Briscoe ‘appear to have cooked up a plan to go and see the press about Huhne taking the points’ (Davies 2013).

In fact Briscoe had been arrested in October 2012. At the time of Pryce’s trial Briscoe had not been charged, but was on bail. It had transpired that Briscoe had lied to the police. In her witness statement to the police she had lied about her relationship with Pryce and about acting as an agent for her with newspapers. She had attempted to present herself as an independent witness. Between June 2010, when Huhne left Pryce, and Briscoe’s arrest, Briscoe rang or texted Pryce 848 times, and Pryce rang or texted Briscoe 822 times. She had altered her witness statement by

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<sup>2</sup> It is not clear what evidence Briscoe would have given. Her evidence of what Pryce had told her would be hearsay against Huhne. It may have been admitted under section 120 of the Criminal Justice Act 2003 as evidence of a previous consistent statement by Pryce.

adding a letter 'T', thereby changing its meaning to suggest that she had refused to speak to journalists, and she thereafter delivered a false copy of the altered statement to an expert so that he could support her claim that the alteration was due to a printer fault (Davies 2014). The police proved her lies about contact with journalists '[a]fter a long legal tussle with the newspapers to get them to disgorge their sources' (Dalrymple 2014).

She was charged with three counts of perverting the course of justice. She pleaded not guilty. Her first trial, in January 2014, resulted in a hung jury (Hartley-Parkinson 2014). At her retrial in May 2014, she was convicted by the jury and sentenced to 16 months' imprisonment made up of four, five and seven months for the three counts (Best 2014). In the event she obtained early release from prison in November 2014, when she had served less than half of her sentence (Davies 2015).

## [D] MARCUS EINFELD: PERVERTING THE COURSE OF JUSTICE, PERJURY AND TRAFFIC OFFENCES

Constance Brice was not the only judge to get into trouble in connection with points-swapping. Marcus Einfeld had had a very distinguished career in Australia. Born in 1938, he was called to the bar in 1962, appointed a QC in 1977 and appointed a judge of the Federal Court in 1986. Among many other posts he served as the inaugural President of the Human Rights and Equal Opportunity Commission, the inaugural President of the Australian Paralympic Committee, an executive member of the New South Wales Jewish Board of Deputies and founder and first chairman of the Australian Campaign for the Rescue of Soviet Jewry. Despite his Jewish background, and the fact that he had been a frequent spokesman for Israeli causes, in 1997 Yasser Arafat, President of the Palestinian National Authority, chose him to assist in overhauling the National Authority's legal system (*The Sydney Morning Herald* 2006a)

Einfeld retired from the bench in 2001. Five years later, in 2006, he received an A\$77 speeding ticket for driving at 6.2 mph above the limit. The offence was alleged to have taken place on 8 January 2006 in MacPherson Street, Mosman, a suburb of Sydney. His speed was hardly that of a reckless driver, and the fine should not have posed any great problem for him, but he was determined to be acquitted. The prosecution alleged his main motive was to avoid losing demerit points on his driver's licence (Hall 2012). He already had eight demerit points on his licence. The fine would have left him with one point on his licence (*The Sydney*



*Morning Herald* 2006b). Presumably, he would still have been allowed to drive so long as there was one point left.

His defence would be to deny that he was driving, not to challenge the speed. He chose to put the blame on an old friend, Professor Teresa Brennan. She now lived in the United States of America (USA) and had been visiting him at the time of the offence. In response to the speeding ticket he made a false statutory declaration, nominating Professor Brewer as the person ‘in control’ of the vehicle at the relevant time. He elected to have the matter tried by a local court. He attached a letter to his written plea notice, addressed to the presiding magistrate, stating: ‘My plea of not guilty is because I was not the driver of the car at the time and place stated ... I am happy to come to court on a convenient day to swear to these facts if required’ (Ackland 2009).

The case came on for hearing on 7 August 2006. By then, presumably, Professor Brennan had long since returned to the USA. Einfeld gave sworn evidence. He appears to have felt that his story needed embellishing. Not only was he not driving the car; he wasn’t even in it. He had lent it to Professor Brennan. Not only was he not in the car; he wasn’t even in Sydney. He had gone to Forster, a coastal town nearly 200 miles from Sydney, on 6 January 2006. To top it all, he did not even know MacPherson Street, the site of the alleged offence. He was successful and the case was dismissed (Ackland 2009).

It is not known why he chose to blame Professor Brennan. However much of a friend she had been, he had not been in touch with her for a long time. He probably thought she would never hear about the case; she never did. When Vicky Pryce and Constance Briscoe originally approached Alderson, the journalist, they falsely accused Jo White of being party to the points swap, an unfortunate choice since she did not even have a driving licence. Einfeld’s choice of Professor Brennan was an even more unfortunate choice. He clearly hadn’t consulted her—he couldn’t have: she was dead. She had been killed in a car crash three years before Einfeld’s speeding offence (Ackland 2009).

He might have got away with this had it not been for some enterprising journalists from *The Daily Telegraph*.<sup>3</sup> They investigated and discovered the truth. One of them, Viva Goldner, questioned Einfeld about this. One might have thought that this was a good time for Einfeld to recognize that the game was up, to confess his guilt and throw himself on the mercy of the court. But no, he wished to dig himself into a deeper hole. At this

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<sup>3</sup> A local Australian tabloid, not to be confused with the English national broadsheet.

stage the story becomes pure farce. Unfazed by the journalists' discovery, Einfeld told Goldner that there were in fact two Professor Teresa Brennans, both of them Australians living in the USA, where both of them had died in car accidents. He had not been referring in court to the one who had died in 2003 (Ackland 2009).

On 9 August 2006 Einfeld gave a television interview in which he re-asserted his innocence. The next day the police began an investigation into whether he had committed perjury. Later he produced a 22-page statement describing the events of that day (Hall 2012).

On 29 March 2007 Einfeld was arrested and charged with a number of offences. The history of what happened thereafter is convoluted. Einfeld was originally charged with 13 offences, but by the time of the trial he was left facing one charge of perjury and one of perverting the course of justice (McClymont 2007).

Einfeld's proposed defence had changed. He still claimed that the fictitious second Professor Brennan had been driving his car. He no longer claimed to have been nearly 200 miles away in Forster. On the day in question he had 'suddenly remembered' that he had a lunch appointment with a journalist, Vivian Schenker, in Freshwater, a suburb of Sydney. Because he had lent his car to Professor Brennan, he had had to borrow the car of his 94-year-old mother to get to the lunch appointment (Ackland 2009).

In the end Einfeld did not go through with this. When the case finally came on for hearing on 31 October 2008, he pleaded guilty to the charges of perjury and perverting the course of justice. He was sentenced to three years in prison, with no opportunity for parole before the end of two years. In the event he was paroled after two years.

The sentence was regarded by many as a harsh one. In the two years since his lies had been exposed, he had been pilloried in the press, with accusations of falsifying his curriculum vitae, including PhDs which had been purchased from US diploma mills.<sup>4</sup> This seems to have influenced even senior lawyers. There was a call to strip Einfeld of his pension, which Chief Justice Spigelman of New South Wales refused. Pointing out that for retired judges their pensions were a deferred part of their salary, he went on to say that:

[C]riminal law was sufficient punishment, and that it would be even more unusual if the offence 'bears no relationship' to the judge's former duties. Spigelman continued that then-federal Attorney

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<sup>4</sup> See eg *The Sydney Morning Herald* (2006b).

General Robert McClelland and state attorneys-general should ‘impose a cooling off period on themselves’ for reacting to vehement short-term ad hoc media campaigns (Lion 2012).

Sydney barrister, Charles Waterstreet, commented that the maximum fine for making a false declaration about the driver was A\$1,000 (Waterstreet 2009)

It was even thought that there was a whiff of antisemitism in the sentence. Barry Cohen, a former Australian Minister for Home Affairs, observed:

many journalists ... feel it is beholden upon them to mention that a person is Jewish, particularly if they have been naughty ... [Einfeld] received three years in custody ... By comparison ... a young lady living in Canberra got four years for killing her boyfriend. Shortly after Marcus Einfeld was sentenced, Stephen Linnell, one of the top advisers to Victoria police commissioner Christine Nixon, pleaded guilty to three counts of perjury and disclosing confidential information of the Office of Police Integrity. He received an eight-month suspended sentence and a \$5,000 fine. The glaring difference between these crimes and the punishments incurred is extraordinary.

## [E] RICHARD GEE: CROOKED CONVEYANCING?

Fortunately, Bruce Campbell and Constance Brice are the only English judges in modern times to have been convicted of any serious crimes. There was a prosecution against another circuit judge, Richard Gee.<sup>5</sup> He was a former solicitor who was appointed to the circuit bench in 1991. He was clearly a wealthy man. He owned homes in Belgravia, the USA and Portugal; he drove a Mercedes car with personalized number plates (Buncombe 1998). In 1992 suspicions were aroused about his possible involvement in a mortgage fraud (The Free Library 1998). In 1995 he was arrested and charged with conspiring to defraud banks and building societies. The case did not reach trial until 1998.

The allegations were that, while he was still a solicitor, he had carried out conveyancing for a group, led by a woman, in a string of ‘utterly bogus’ transactions (Dyer 1999). The trial lasted 76 days (Dyer 1999); the jury deliberated for a record 13 days (Buncombe 1998); the result was a hung jury. It was planned to hold a retrial, but in a very unusual intervention the Attorney-General issued a *nolle prosequi*, which prevented any retrial. He did this after Gee had produced medical evidence from psychiatrists that he would be a suicide risk if he were to be retried.

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<sup>5</sup> So far as is known, not related to an Australian judge of the same name.

The Lord Chancellor was left with a difficult decision of whether he could rely on a civil standard of proof (balance of probabilities) to dismiss a judge for alleged criminal misbehaviour (proof beyond a reasonable doubt). Judge Gee relieved him of this quandary by resigning in December 1999. It turned out that he was being further investigated by the police for legal aid fraud (Dyer 1999). Apparently nothing came of this. Like Bruce Campbell he was able to keep his pension.

## [F] SIR ROBERT MEGARRY: TAX TROUBLE

Bruce Campbell, Constance Brice and Richard Gee were all circuit judges. So far as the High Court is concerned, only one judge has ever stood trial in the dock of the Old Bailey and that was before his appointment to the bench. Robert Megarry was born in 1910, the son of a solicitor. He did not spend much of his time studying as a Cambridge undergraduate and came out with a third-class degree. He then qualified and practised as a solicitor for several years before becoming a barrister in 1944. He went on to develop a successful practice at the bar. At the same time, notwithstanding his poor degree, he also built a career as a lecturer and writer.

He kept his income from the bar and his income from lecturing separate. His clerk looked after the former and his wife looked after the latter. In 1954 he was prosecuted for submitting false tax returns, having omitted to declare certain items of income. It transpired that his clerk had assumed that Megarry's wife was dealing with these and his wife had assumed that his clerk was. He was represented at trial by Frederick Lawton, later to become an eminent Court of Appeal judge. Megarry was acquitted. The trial judge directed the jury that there had been a genuine mistake and Megarry had had no intention to defraud the revenue.

In 1967 he was appointed a Judge of the High Court, Chancery Division. He became an extremely distinguished judge. In addition to his judicial career he was an exceptional academic lawyer, the author of many textbooks, including co-authorship of *Megarry and Wade*, a leading textbook on land law (Blom-Cooper 2006).

## [G] MARK CIAVARELLA JR AND MICHAEL CONAHAN: KIDS FOR CASH

In the UK in modern times there have only been the two cases referred to above (Bruce Campbell and Constance Brice) where judges have been convicted of serious crimes. In the USA one is almost spoiled for choice

(see eg Berens & Shiffman 2020). This must be due in part to the fact that there are a vast number of judges in the USA, getting on for about 50,000 (Statista 2022). Another reason is probably the fact that some judges are still elected rather than appointed (Nathan 2012: 433-441). Unfortunately, their behaviour can sometimes be found as part of a general aura of corruption.

By far the most egregious crimes in the USA committed by a judge acting in his judicial capacity were those of Mark Ciavarella, closely followed by his co-defendant, Michael Conahan. It is no exaggeration to characterize Ciavarella's behaviour as wicked.

Ciavarella was born in 1950 and Conahan in 1952. After several years of practising law both were elected as judges on a Democratic ticket in Luzerne County, Pennsylvania. Ciavarella was elected for a ten-year term in 1995, and re-elected for a further ten-year term in 2005. Conahan served as a judge from 1994 till 2007. In the last four years of his tenure, he was President Judge of the County. This post gave him a discretion with the county budget (Urbina & Hamill 2009). Conahan was the presiding judge of the juvenile court (Pilkington 2009); Ciavarella also presided over a juvenile court (Pavlo 2011).

Many judges with a criminal jurisdiction quickly build up a reputation as harsh sentencers, and, less commonly, as lenient sentencers. Ciavarella's sentencing went beyond the bounds of ordinary harshness. Some examples of offences for which he ordered juveniles to be held in a juvenile detention centre were:

- ◇ stealing a \$4 jar of nutmeg;
- ◇ a girl throwing a sandal at her mother;
- ◇ slapping a friend at school, an offence for which a 14-year-old child was held for six months (Pilkington 2009);
- ◇ trespassing in a vacant building;
- ◇ helping a friend shoplift DVDs from Wal-Mart (Chen 2009).

Kevin Mishanski, aged 17 and of previous good character, was facing an assault charge. He had hit a boy causing him to have a black eye. Kevin's mother had been told that he would be put on probation. Ciavarella sentenced him to 90 days in detention. He was taken away in shackles, in front of his mother (Urbina & Hamill 2009).

Edward Fonzo, a promising young athlete in high school and of previous good character, was arrested for possession of 'drug paraphernalia', at

the age of 17. Ciavarella sentenced him to months in private prisons and a wilderness camp (Pavlo 2011).

Hillary Transue was a star student at her high school, who had never been in any kind of trouble. She thought the vice-principal of the school was overly strict. At the age of 14 Hillary carried out a prank. She published a spoof page on MySpace<sup>6</sup> in which she pretended to be the vice-principal and made fun of her strictness. She made it clear that this was a joke; at the bottom of the page she wrote, 'When you find this, I hope you have a sense of humour.' She was charged with harassment. When she appeared before Ciavarella she thought she might get a stern ticking-off. He did not even allow her to put her case. Less than a minute into the hearing he banged his gavel and said 'Adjudicated delinquent'. He sentenced her to three months in a juvenile detention centre. She was handcuffed and led away in front of her shocked parents (Pilkington 2009; Urbina & Hamill 2009).

Reports differ as to the youngest children sentenced to detention by Ciavarella. One report says they were as young as 12 (Clarke 2021), and others that they were as young as ten (Newman 2011; Rubinkam 2020). Ciavarella 'often ordered youths he had found to be delinquent to be immediately shackled, handcuffed and taken away without giving them a chance to say goodbye to their families' (Rubinkam 2020).

In 1967 the United States Supreme Court had ruled that children had a constitutional right to be advised and represented by counsel. But in Pennsylvania, as in many other states, children could waive that right. About half the children sentenced by Ciavarella had waived that right (Urbina & Hamill 2009). Many of them had been advised by the probation service that they did not need a lawyer because their offences were so minor (Hurdle 2009). Not only did Ciavarella pay little attention to pleas in mitigation by the defendants, 'he also routinely ignored requests for leniency made by prosecutors and probation officers' (Urbina & Hamill 2009). Many of the juveniles were first-time offenders (Clarke 2021).

It may be that Ciavarella was naturally severe, but in order to understand his motivation properly it is necessary to be familiar with the system of private prisons in the USA. The American criminal justice system relies in part on private prisons.

A public prison is not a profit-generating entity. The end goal is to house incarcerated individuals in an attempt to rehabilitate them or remove them from the streets. A private prison, on the other hand,

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<sup>6</sup> An American social network.

is run by a corporation. That corporation's end goal is to profit from anything they deal in.

In order to make money as a private prison, the corporation enters into a contract with the government. This contract should state the basis for payment to the corporation. It can be based on the size of the prison, based on a monthly or yearly set amount, or in most cases, it is paid based on the number of inmates that the prison houses.

Let's suppose that it costs \$100 per day to incarcerate someone (assuming full capacity, including all administration costs), and the prison building can hold 1,000 inmates. A private prison can offer its services to the government and charge \$150 per day per inmate. Generally speaking, the government will agree to these terms if the \$150 is less than if the prison was publicly run. That difference is where the private prison makes its money (Bryant & Brown 2021).

In about 2002, soon after becoming President Judge of the County, Conahan used the discretion he had in fixing the county budget to cease government funding of the county's public juvenile detention centre. He argued that it was in a poor condition and that the county had no choice other than to turn to private detention centres (Urbina & Hamill 2009). Thus he entered into a contract whereby juvenile defenders who were sentenced to be detained would be sent to a private detention centre, which had recently been built. At some time later Conahan entered into a further contract in respect of another private prison. Both private prisons were built by Robert Mericle and co-owned by property developer Robert Powell, an attorney.

The basis of payment under the contracts was that the Government would make payments based on the number of inmates in the prison. Obviously, in order to maximize the profit of these facilities it was important that they should be kept full. Conahan and Ciavarella were bribed to set up these arrangements under a secret agreement that they would ensure that the prisons would be kept full. For this they received kickbacks amounting to \$2.6 million. Conahan was responsible for securing the contracts, and Ciavarella was responsible for the sentencing (Urbina & Hamill 2009), although Conahan did some sentencing as well (Moran 2011).

Apparently the corruption did not come to light publicly until early 2007 (Urbina & Hamill 2009)<sup>7</sup> when it became known as the 'Kids for Cash' scandal. In January 2009 the judges were indicted and in February 2009 the two judges pleaded guilty to the charges then facing them

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<sup>7</sup> The exact sequence of events is unclear. An investigation into the judges was made by the FBI and the IRS but the exact dates of these investigations were not made public.

(Urbina & Hamill 2009).<sup>8</sup> It is not clear what finally led to any action being taken against the judges. Laurene Transue, the mother of Hillary (the author of the spoof MySpace page), protested to the local Juvenile Law Center. This '[set] in train a process' which led to the uncovering of the scandal (Pilkington 2009). It has been suggested that, among other information, the scheme was 'undone by a tip from a reputed underworld friend of Conahan's' (Geden 2014). Conahan had a friend, William D'Elia, whom he often met for breakfast. D'Elia was reputed to be the boss of a Pennsylvania mafia family. In 2006 he was arrested on charges of witness tampering and conspiracy to launder drug money. After his arrest he turned informant and gave investigators information that led them to the judges (Moran 2011). Further information was provided to the Federal Bureau of Investigation (FBI) by a fellow judge, Anne Lokuta, who was herself facing disciplinary charges (McAuley 2013).

It was a disgrace that the misconduct of Conahan and Ciavarella went on for so long. For years youth advocacy groups complained about the harsh sentences, to no avail (Urbina & Hamill 2009).

The regulatory authorities had a lot to answer for. The Pennsylvania Judicial Conduct Board was fairly useless. From 2004 to 2008 it received four complaints about Conahan.<sup>9</sup> It did not investigate any of them, nor even request any documentation. As late as April 2008 when the Juvenile Law Center, based in Philadelphia, petitioned the Pennsylvania Supreme Court for relief for the breach of civil rights of several hundreds of teenagers who had been tried without adequate assistance of counsel, the petition was refused. It was only reconsidered in January 2009 when Ciavarella and Conahan had been charged with corruption (Vadala 2022)

The juvenile hearings were held in private. This was done to protect the privacy of the children. It had the unhappy effect that the public at large were unaware of what was going on, but Bob Yeager, a former director of the Office of Juvenile Justice in Pennsylvania, points out that the juvenile proceedings 'are kept open to probation officers, district attorneys, and public defenders, all of whom are sworn to protect the interests of children ... It's pretty clear those people didn't do their jobs' (Urbina & Hamill 2009).

It does seem that this was a situation where there was an aura of corruption. Marsha Levick, a lawyer with the Juvenile Law Center, said, 'There was a culture of intimidation surrounding [Ciavarella] and no

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<sup>8</sup> The history of the charges facing the judges is quite complicated and will be referred to in more detail below.

<sup>9</sup> It is not known whether these complaints related to sentencing.



one was willing to speak up about the sentences he was handing down' (Urbina & Hamill 2009). The judge who finally sentenced Conahan in 2011 referred to 'the deep-rooted political culture that produced him, one in which corruption is tacitly accepted' (Moran 2011). Also in 2011 the Federal Government concluded a four-year investigation of public corruption in Luzerne and Lackawanna counties. It implicated 'more than 30 people, including state lawmakers, county officials, school board members and others' (Moran 2011).

Charges against the judges were made public in January 2009. It was at this point that the Pennsylvania Supreme Court decided to reconsider the petition from the Juvenile Law Center that it had previously rejected (Vadala 2022). The charges included conspiracy to deprive the public of the 'intangible right of honest services' (ie corruption) and conspiracy to defraud the USA by failing to report income to the Internal Revenue Service (IRS) (ie the kickbacks) (Urbina & Hamill 2009). The charges also described actions by the judges to assist in the construction and population of juvenile detention centres.

The prosecutors and the judges reached a plea deal whereby in return for pleading guilty, paying fines and restitution, and accepting responsibility for their crimes they would receive prison sentences of 87 months (Urbina & Hamill 2009 and Moran 2011). These sentences were far below federal sentencing guidelines.

In February 2009 the judges entered pleas of guilty on the basis of the plea deal. They were released on bail awaiting sentencing. Ciavarella remained remarkably relaxed. He invited into his home a journalist from the English *Guardian* newspaper for an interview. He hoped that with good behaviour he would spend only six years in prison. Despite his pleas he strongly denied that he had accepted any money in exchange for sentencing juveniles to detention centre. He claimed that the money that had been paid to him was a 'finder's fee', a sort of legitimate commission for help in building the detention centre. Indeed, his motives in sentencing were positively altruistic. He said 'that he regarded his court as a place of treatment for troubled adolescents, not of punishment. "I wanted these children to avoid becoming statistics in an adult world. That's all it was, trying to help these kids straighten out their lives"'. He further alleged that the percentage of children he sentenced to custody had remained steady from his appointment in 1996 till he stood down in 2008. In fact in the first two years of his term he sentenced 4.5% of defendants to custody: by 2004 he was sentencing 26% (Pilkington 2009).

In July 2009 the judges came back to court when they appeared before Judge Kosik, a judge who showed independence and integrity. He rejected the plea deal, not least because of Ciavarella's continued refusal to accept that the payments had been a *quid pro quo* for his sentencing, despite overwhelming evidence to the contrary. At that time Conahan too was not accepting full responsibility for his actions. The men's attitude did not justify an exceptionally lenient sentence.<sup>10</sup> In August 2009, after an unsuccessful attempt to appeal Kosik's ruling, both judges changed their pleas to not guilty. In September 2009 a grand jury returned an indictment against both judges containing 48 counts. These included racketeering, fraud, money laundering, extortion, bribery and federal tax violations (Ralston 2020). In 2010 Conahan changed his plea back to guilty (Moran 2011). On 23 September 2011 he was sentenced to 17.5 years in prison (Moran 2011). At the hearing he had shown remorse. He said: 'The system is not corrupt. I was corrupt. My actions undermined your faith in the system and contributed to the difficulty in your lives. I am sorry you were victimised.' He was bitterly disappointed by the sentence, but decided not to appeal (Moran 2011).

Meanwhile Ciavarella's case had come on for hearing before a jury. He was now facing 39 counts. He still denied any *quid pro quo* for the payments to him. On 8 February 2011 the jury found him guilty on 12 of the 39 counts, including racketeering related to his accepting the illegal payments. Apparently, he had been unable to convince them that by ordering children, many of them first offenders and some innocent, to be put in handcuffs, shackled and led out of court without being allowed to speak to their parents, he had been trying to help them straighten out their lives.

On 11 August 2011 Judge Kosik sentenced Ciavarella to 28 years in prison (Pavlo 2011). The sentence has justifiably been described as a life sentence (Pavlo 2011); he was 61 when the sentence was passed; if he serves it in full, he will remain incarcerated until he is 89. The good news is that with good behaviour he could be released in fewer than 24 years (aged a mere 85).

The harm done by Ciavarella and Conahan is incalculable. In August 2009 Ed Rendell, the Governor of Pennsylvania, said that 'The lives of these young people and their families were changed forever.' Reports vary widely as to how many juveniles were affected. Eventually the

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<sup>10</sup> In attempting to justify the plea deal one of the prosecutors said that it had been made because the case involved 'complex charges that could have resulted in years of litigation'. A man sitting in the audience was heard to say 'bull' (Urbina & Hamill 2009).

Pennsylvania Supreme Court overturned some 4,000 (Rubinkam 2020) or 5,000 (Newman 2011) convictions.

Edward Fonzo, the 17-year-old athlete of previous good character, sentenced for possession of ‘drug paraphernalia’, spent months in private prisons and a wilderness camp. He missed his entire senior year in high school. According to his mother he never recovered from the experience. In June 2010 he took his own life at the age of 23 (Pavlo 2011).

It has been alleged that for many months after she came out of detention, Hillary Transue (the MySpace spoofer) was ostracized by friends and neighbours, labelled a delinquent (Pilkington 2009), but this does not seem entirely accurate. Hillary has recently written about her experience:

Ciavarella didn’t care what you did, or why you did it; nothing would prevent him from sending you away if you ended up in his courtroom. My mother screamed as I was shackled and taken away in a daze. I wasn’t even out of the room before the next child was brought before the court. The wheels of justice felt more like a conveyor belt. ... When I returned from my time in placement, I was angry, obstinate, defiant and searching for opportunities to challenge authority. It was only because of my support system—my family, friends and community—that I was able to reestablish any sort of faith in people who claimed to be acting in my best interests. ... Many of [my peers] are gone, many are struggling, only a few of us have been able to move forward (Transue 2021).<sup>11</sup>

Ciavarella made multiple appeals with varying degrees of success. In January 2018 an appeal against three of his 12 convictions was allowed, not on the basis that he was innocent, but on the basis that his lawyers should have raised a defence of statutory limitation.<sup>12</sup> As a result he claimed to be entitled to a reduction in his sentence on the remaining counts. The District Judge ruled that he had no jurisdiction to alter the sentences and went on to say that, even if he had had jurisdiction, he would not have made any reduction. He referred to Ciavarella’s ‘abuse of public trust and the harm to juveniles’ and also the fact that he ‘refuses to acknowledge the scope of his remaining crimes’. Even at this late stage Ciavarella still denied that there had been any *quid pro quo* for the money he had received (Rubinkam 2020). At the time of my writing

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<sup>11</sup> Lauren Ciavarella Stahl, a lawyer and one of Mark Ciavarella’s three children, now works helping distressed youths, including some who were victims of her father. She is helped in her work by Hillary Transue, the MySpace prankster (Stephanie (nd)).

<sup>12</sup> He was clearly unfortunate in his choice of lawyers. The judge ordered a retrial on the three counts; the prosecution later stated that they did not intend to have a retrial. I am unable to understand this. Whether the charges were statute barred must have been decided by the court. If they were statute barred, a retrial made no sense. If they were not statute barred, why were the convictions overturned?

this, he languishes in Ashland, the Federal Correctional Institution in eastern Kentucky, with an expected release date of 18 June 2035 (Kalinowski 2021).

Conahan has been a little more lucky. In June 2020 he was released from prison and confined to his home. Anonymous prison officials revealed that this was, at least in part, because he was particularly vulnerable to coronavirus. Initially this was to be for 30 days. It appears, though, that he may now be left on home confinement for the rest of his sentence (Sisak & Balsamo 2020). This should not be too much of a hardship. He and his wife live in a \$1.05 million home in a private, gated community, known as The Estuary, along the waterfront in Delray Beach, Florida.

Many of the former defendant children pursued a civil claim against Ciavarella and Conahan. In August 2022 the two former judges were ordered to pay over \$200 million to nearly 300 plaintiffs. This was made up of \$106 million in compensatory damages and \$100 million in punitive damages. The plaintiffs' lawyers recognized that in reality it was unlikely that the plaintiffs would recover anything or anything substantial, but one of the lawyers, Marsha Levick, said:

To have an order from a federal court that recognizes the gravity of what the judges did to these children in the midst of some of the most critical years of their childhood and development matters enormously, whether or not the money gets paid (National Public Radio 2022).

## [H] KUPLASH OTEMISOVA: THE QUALITY OF MERCY<sup>13</sup>

Kuplash Otemisova, a judge in Kazakhstan, was a polar opposite to Ciavarella. She got into trouble for being too lenient. In August 2013 a man called Aleksandr Sutyaginsky appeared before her. He was a Russian businessman, who had built up a high profile in Kazakhstan and was very well connected there. He was often to be seen at important events with high-ranking Kazakh and Russian officials, and not only in the company of the President of Kazakhstan, Nursultan Nazarbaev, but also in the company of the President of Russia, Vladimir Putin.

Notwithstanding this, in March 2013 he had been convicted of ordering a murder. The order was in fact not carried out. Sutyaginsky was sentenced to serve 12 years in prison.

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<sup>13</sup> There is very little information in English about this lady. I have only found two short articles, from the same source and which contain much the same information. Consequently, this case raises a lot of questions which I am unable to answer.

It is not clear why he was appearing in front of Otemisova. She took the view that, because the murder never took place, the sentence was excessive. She reduced the sentence to six years' imprisonment. Amazingly even that was too much; she ordered the sentence to be suspended. It is also not clear what power she, apparently a judge of first instance, had to alter the sentence. Evidently she did have the power, since Sutyaginsky was released. Sutyaginsky (no fool he) promptly decamped to Russia and his whereabouts became unknown.

The next month Otemisova was herself arrested. On the known facts it might be suspected that she had been bribed or intimidated, yet it does not appear that either of these offences were alleged against her.<sup>14</sup> The charge was 'making a wrong court ruling that led to an aggravated situation', in other words, incompetence. The details of the charge are based on an English translation. It may be that 'a wrong court ruling' encompasses 'wrong because of bribery' in the Kazakh language. However, her lawyer said that the charges<sup>15</sup> against Otemisova violated her rights as a judge. Such rights cannot have included the right to be bribed, so it seems that the charge was indeed based on incompetence.

In March 2014 Otemisova was convicted in the District Court of Almaty, Kazakhstan's largest city, and sentenced to four-and-a-half years in prison (RFE/RLs Kazakh Service 2014a & 2014b).

## [I] TRACIE HUNTER: AN UNDIGNIFIED EXIT

On 22 July 2019 a sentence of six months' imprisonment was activated against former Ohio Juvenile Court judge, Tracie Hunter, causing uproar in court. The story of how Hunter got to this point is full of twists and turns.

In November 2010 Tracie Hunter was elected a judge for the Hamilton County Juvenile Court on a Democratic ticket. She was due to take office in January 2011. She was the first African-American, Democrat judge in that court (Tracie Hunter Ballotpedia nd; Odrama 2019). In fact there was a dispute about the election result. Hunter lost initially. She sued on the basis that certain ballots had not been counted. There was eventually a recount, which she won. As a result of this dispute, she was not sworn in until 25 May 2012.

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<sup>14</sup> In view of recent developments, one may wonder whether Sutyaginski's friendship with Vladimir Putin was in any way a factor.

<sup>15</sup> I know of only one charge.

In January 2014 a grand jury indicted her on nine felony charges. These included two counts of tampering with evidence, two counts of forgery, two counts of theft in office and two counts of having an unlawful interest in a public contract (Tracie Hunter Ballotpedia nd). Among the charges it was alleged that she had backdated documents to thwart prosecutors appealing against her decisions (*The Enquirer* 2019). She pleaded not guilty. She was disqualified as a judge while the charges were pending, but still able to collect her salary of \$121,350 (Tracie Hunter Ballotpedia nd).

One charge related to her brother, Steven Hunter. He was variously described as a Juvenile Court worker (Perry 2014a), a police officer and a juvenile correctional officer (Odrama 2019). It was alleged that he had punched a teenage inmate in the face. He was facing disciplinary proceedings. His boss had recommended that he should be dismissed (Odrama 2019). Hunter ordered certain documents to be given to her. It has been alleged that they involved the teenager, including his medical and mental evaluations, documents which were protected by privacy law (Perry 2014a). It has also been alleged that she obtained documents from her brother's personnel file (Tracie Hunter Ballotpedia nd). However, it appears that at her trial no evidence was given of what the documents contained (Sirkin 2022). She then gave them to her brother, who, in turn, gave them to his attorney. The attorney refused to accept some of them, saying it would be unethical for her to do so (Perry 2014a). Some of the documents were, nevertheless, used the next day at the disciplinary hearing (Perry 2014b). Tracie Hunter did not deny getting the documents and passing them to her brother. Her defence was that she gave her brother nothing that was not a public record (Perry 2014b). If that was so, it is strange that she needed to procure the documents, which would have been readily available to her brother's attorney, and strange that her brother's attorney refused to look at some of them.

In September 2014 jury selection for Hunter's trial on nine counts began. At the beginning Hunter asked Judge Norbert A Nadel to recuse himself on the grounds that he could not be impartial. She made the motion herself, although she was represented by counsel. The motion was denied (Video 1). The trial then took place before Judge Nadel. On 14 October 2014, after a five-week trial (Perry 2014b), the jury found Hunter guilty on one count, that relating to her giving documents to her brother. There was a hung jury on the other eight counts (Tracie Hunter Ballotpedia nd). The special prosecutors said that they might seek a retrial on the other counts (Perry 2014b).

There had been nine white jurors and three black jurors. Shortly after the verdict the three black jurors filed sworn statements saying that they did not think Hunter was guilty. One of them, Kimberly Whitehead, said that the jury forewoman and the other white jurors were to blame for her verdict. All three black jurors had signed a verdict form finding Hunter guilty, and Judge Nadel had asked each juror individually to confirm that the guilty verdict was their verdict. “I did so because I was pressured into doing so, particularly by the jury foreman,”<sup>16</sup> Whitehead wrote in her sworn statement. “I did not believe the evidence presented at trial had anything to do with the charge in count six of the indictment” (Perry 2014a). Evidently the black jurors were able to resist pressure on the other eight counts. The verdicts were upheld.

Sentencing was deferred until 5 December 2014, when Judge Nadel imposed a sentence of six months’ imprisonment. He said, ‘The evidence showed that the criminal conduct of Tracie Hunter has dealt a very serious blow to the public confidence of our judicial system and there’s no question about that.’ The prosecutors had asked for a prison sentence. A string of character witnesses had been called on behalf of Hunter, asking for probation. Nadel said that ordinarily a sentence of probation would be appropriate, but because of the ‘double whammy’ he felt he must impose a prison sentence. The double whammy was that as a public official and a judge herself a higher standard must be expected of Hunter than of a normal defendant (Video 3). On 26 December the Ohio Supreme Court issued a stay of the sentence pending the retrial of the other eight counts (Tracie Hunter Ballotpedia nd).

Judge Nadel retired and was replaced by Judge Patrick Dinkelacker for the retrial. When Nadel had retired Dinkelacker had stood for election to Nadel’s judgeship, although Dinkelacker had served for many years on the appeals court (Perry 2015). In April 2015 Hunter requested the Ohio Supreme Court to remove Judge Dinkelacker from the case, claiming he could not be impartial. It does appear that he had sat on appeals hearings by her and had decided against her. However, a poll of the judges at the trial court found that all of them would recuse themselves if asked to preside over Hunter’s retrial (Tracie Hunter Ballotpedia nd). They gave no reasons for this, although Hunter had said that no Hamilton County judge could be fair to her. This could only be resolved by appointing a retired judge (perhaps Judge Nadal, but she had already objected to him at the original trial), or a judge from outside Hamilton County (Perry 2015). The request was refused in April 2015 (*The Enquirer* 2019).

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<sup>16</sup> I have set out the quotes as they are reported. I do not know the sex of the jury foreman/forewoman.

In September 2015 there was a hearing before Dinkelacker.<sup>17</sup> Hunter's attorney at that time, Clyde Bennett II, said he could no longer represent her. Apparently no reason was given. Hunter then proceeded to address Dinkelacker herself, listing the reasons why he should recuse himself. One of the reasons related to a fatal car accident in which Dinkelacker had been involved. It had happened in 2013 (*The Enquirer* 2019). Dinkelacker's car was one of two vehicles that struck and killed a woman who was walking in the middle of Central Parkway. She was found to have high levels of cocaine in her system. No charges were brought against Dinkelacker or the other driver (Williams 2019). In what way this should have disqualified him from presiding at Hunter's retrial is not clear. She was certainly doing herself no favours by bringing this up. Dinkelacker characterized her remarks as spiteful (Williams 2019).

The date for the retrial was set for 19 January 2016. Then something strange happened. On the day the trial was due to begin special prosecutors dropped the remaining eight charges. 'Special Prosecutor Scott Crosswell said they had made their point', and that, 'Whether Tracie Hunter is convicted of one felony or nine felonies makes little or no difference' (Tracie Hunter Ballotpedia nd). To this writer that excuse seems extraordinary in the extreme. Was it really believed that it made no difference whether a judge faces one charge or nine? Would the sentence have been no more severe? Was it not relevant that the charge for which Hunter had been convicted amounted, at the end of the day, to misuse of her judicial authority not relating to any case she was hearing, whereas other charges (forgery and theft) involved dishonesty? Hunter's co-counsel, Jennifer Branch, 'said she believed the charges were dropped because the prosecution knew it couldn't win' (Tracie Hunter Ballotpedia nd). There seems to be force in that.

Hunter made several unsuccessful appeals to state and federal courts, which delayed the implementation of the sentence until 22 July 2019. On that date, nearly five years after the sentence was originally imposed, she appeared in front of Judge Dinkelacker. The hearing was termed an 'execution of sentence' hearing (*The Enquirer* 2019).<sup>18</sup> It was in many ways an extraordinary hearing.<sup>19</sup> It began with Dinkelacker reading out a letter that had been sent to him that morning by one of the prosecutors, who was not present in court. The prosecutor stated his view that Hunter might be suffering mental problems and the judge might wish this to be

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<sup>17</sup> The purpose of this hearing is not stated.

<sup>18</sup> Hunter's conviction was strictly for 180 days' imprisonment, probation and costs. The judge at the execution of sentence hearing had power to reduce those (Sirkin 2022).

<sup>19</sup> The whole hearing may be viewed on YouTube. See Video 2.



investigated. The co-prosecutor, who was present in court, endorsed that view. Miss Hunter's co-counsel, David Singleton, emphatically denied any necessity for this and stated his personal experience with Hunter showed there was no need. No action was taken. The judge then began by saying:

On behalf of the justice system, preservation of the independence of the judiciary and spirit of transparency and to comply with the dictates of Ohio code of judicial conduct, I'm going to state the following. In no way, shape or form is this to be held against Miss Hunter...For the last several weeks I have received at my home [*'at my home'* emphatically repeated] ... 45 postcards from people, some of them signed—a few; some of them with return addresses—a few; but most of them anonymous. ... No other judge should go through what I've gone through with these, Facebook postings by certain people, whatever (Video 2).

He also referred to the concern caused to his wife by the postcards. He then proceeds to read out 18 of them. They nearly all state that the writer is a taxpayer or voter and ask or demand that the charges against Hunter be dropped. Several of them refer to the fatal car accident involving Dinkelacker. He made it clear that he would not be intimidated by any threats nor would he bow to any pressure. It was clear that the postcards were part of an organized campaign; they all bore the same address label.

Hunter's attorney, David Singleton, then made a plea in mitigation on her behalf, criticizing the six months' sentence. He also asked the judge to delay sentencing so that a motion could be filed to dismiss the case. This was refused.

Judge Dinkelacker offers Hunter the opportunity to address him. She declines through her lawyers. The judge then sets out in detail the history of the case, referring to the many appeals and applications made by Hunter, all of them resulting in findings that she had received a fair trial. After he has been speaking for some time and is coming to the end of his recital, David Singleton interrupts him and he and his co-counsel, Jennifer Branch<sup>20</sup> confer with Hunter for several minutes. She then stands up and walks to the podium, seeking to address the judge. He declines to hear her, pointing out that he had given her an opportunity to speak and it had been turned down. He then orders the execution of the sentence imposed by Judge Nadel, including one year's community control and an order to pay the costs of the proceedings.

The judge then ordered a court deputy to take her away. At that point uproar broke out in the court, led by Miss Hunter's supporters, who were shouting and screaming. One of them rushed over to Hunter. It seems

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<sup>20</sup> Ms Branch has now herself been elected a judge of the court.

she was trying to prevent her being taken into custody. The supporter was arrested and handcuffed. As this was happening one of the court deputies tried to take hold of Hunter. Yet another extraordinary thing takes place, leading to an undignified exit by Hunter. She goes limp and the deputy takes underarm hold of her from behind. She is then quite literally dragged from the court. She is passive, her high heels trailing along the floor. She claimed that she was injured when she was taken into custody, and on arrival at the prison she was initially placed in the medical unit (Odruma 2019). It appears that nothing came of this complaint.<sup>21</sup>

Tracie Hunter was the pastor at Western Hills Brethren in Christ Church (Tracie Hunter Ballotpedia nd). When she was in prison she agreed to a court-authorized work detail, whereby she would minister to fellow inmates. The detail enabled Hunter to have three days deducted from her sentence for every day she served as a minister (Brunsman 2019). As a result she earned early release and was released in October 2019, after serving 75 days of her sentence (Grasha 2020).

## [J] LANCE MASON: THE JUDGE AS MURDERER

Lance Timothy Mason was born in 1967. His early career was mainly as a prosecutor (Goist 2018). In his mid-thirties he turned to politics. From 2002 to 2008 he was a member of the Ohio General Assembly, first as a state representative, then as a state senator. In 2008 he was appointed a judge of the Cuyahoga County Court of Common Pleas. He served there until August 2014, when he was arrested and charged with assault on his wife, who had been separated from him since the previous March.

He had attacked her while he was driving and while their two young daughters, aged six and four (Goist 2018), were seated in the back of the car. The police report showed that he had punched her 20 times with his fist, smashed her head five times against the car's centre console, breaking an orbital bone (Goist 2018) and continued to beat her, bite her and threaten her after he threw her out of the car. She needed facial reconstructive surgery as a result of the assault (Goist 2018).

When the police searched his home they found ammunition and weapons, including shotguns, semi-automatic rifles, handguns, smoke grenades, a bulletproof vest, a sword, and over 2500 rounds of ammunition. He pleaded guilty in August 2015 to assault, a second

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<sup>21</sup> An entry on Google, [www.guampdn.com](http://www.guampdn.com) > story > news, said that Hunter spent the first seven weeks of her sentence in the medical unit, but a link to the article says the page cannot be found.

degree felony. For this vicious assault he was sentenced to only two years in prison. He was released after serving only nine months. Their divorce was finalized in November 2015.

In 2017 Mason was suspended indefinitely from practising law. In autumn that year a post became vacant as Cleveland's director of minority business development. The Mayor of Cleveland hired Mason from among 13 applicants. A city official said that Mason was the most qualified applicant.

On 17 November 2018, police were called to Mason's home. He had stabbed his ex-wife to death in front of their two children. A much-loved elementary school teacher, she had been dropping off the children as agreed when she had been attacked (Hlavaty & Bash 2018). Mason tried to flee the scene in his car, but crashed into a police car and a police officer standing in front of it. The officer suffered serious injuries to his lower legs and ribs (Donatelli 2019).

On 20 August 2019 Mason pleaded guilty to aggravated murder. He was sentenced to life in prison with the possibility of parole after 35 years. He was sentenced concurrently to five years' imprisonment for assaulting the police officer, 24 months for violating a protection order and 12 months for stealing a car (Ryan 2019).

## [K] REFLECTIONS

In a democracy where judges are appointed, steps will usually be taken to ensure that they are of high integrity. It can be seen, though, that judges, like the police, form a cross-section of the society from which they come. It is, perhaps, noteworthy that the cash-for-kids judges and Tracie Hunter were elected by the public, not appointed by any judicial selection process. In an advertisement inviting voters to meet Ciavarella for his initial election in 1995, he described himself as 'A judge to protect us all' (Freeview 1995).

There is some similarity between the cases of Constance Brice and Tracie Hunter. Both were regarded as role models for the black community. Brice was one of the first black judges (albeit part-time) in the UK. Hunter was the first black Democrat judge in the Hamilton County Juvenile Court. Both of them pleaded not guilty to the charges against them. Brice's first trial resulted in a hung jury. Hunter's trial resulted in a hung jury on eight of the nine charges, and three black jurors later sought to recant their guilty verdicts.

It is clear that even in common law countries there is no consistency in sentencing. The cash-for-kids case was in a league of its own. One of Ciavarella's lawyers, William Ruzzo, said that the sentence was 'much too harsh ... This was a nonviolent offense ... I've had people convicted of murder who received as little as a 6-to-12 year sentence' (Newman 2011). But that is not to compare like with like. Ciavarella's gross misconduct continued repeatedly on a daily basis for years and traumatized literally thousands of children. This writer finds it hard to feel any sympathy for him.

By contrast, the sentence on Marcus Einfeld does seem much too harsh, especially when compared with the sentence on Constance Brice.

Einfeld faced two counts: Brice faced three.

Einfeld pleaded guilty: Brice pleaded not guilty.

Einfeld had been retired for five years at the time of the offences: Brice was still sitting as a recorder.

Einfeld's crimes were motivated to get himself out of trouble: Brice was motivated to get someone else into trouble, and not just Huhne; she initially was planning to get Jo White in trouble as well.

Einfeld was sentenced to three years' imprisonment, with no parole before serving two years. Brice was sentenced to 16 months' imprisonment and was released after about seven months. Huhne and Pryce had each been sentenced to eight months' imprisonment.

Einfeld's sentence falls into even starker contrast when compared with the sentence on Lance Mason for an extremely brutal assault on his wife, while still sitting as a judge, in front of their two very young children. He was sentenced to two years' imprisonment and released after nine months.

While there is no necessity for the sentencing in different countries to be consistent, the disparity between these sentences does seem a cause for raised eyebrows.

Tracie Hunter's case also leaves some room for disquiet. Her behaviour in court was bizarre and lacking in dignity. She was disrespectful to the judge. Nevertheless, the offence for which she was convicted was not a particularly serious one. The judge said that normally it would not attract a prison sentence. The documents that she procured and passed on did not involve any national security. There was no allegation that

she interfered with the hearing against her brother. The other charges against her were much more serious. As stated above, they included:

- ◇ two counts of tampering with evidence;
- ◇ two counts of forgery;
- ◇ two counts of having an unlawful interest in a public contract; and
- ◇ two counts of theft in office (Tracie Hunter Ballotpedia nd).

The nine felonies that she was charged with carried a maximum sentence of 13 years' imprisonment (Perry 2014b). A commentator, Jason Williams, has expressed the view that the real reason she was given a prison sentence was her arrogance and general unseemly behaviour (Williams 2019). For this offence it is arguable that a reprimand, suspension or dismissal from office might have sufficed, rather than a criminal prosecution. Hunter appealed to the United States Court of Appeals for the Sixth Circuit claiming that her prosecution was political and the prosecutors had behaved unfairly. Her appeal was dismissed, yet it appears that it was not without basis. The court said her trial was fair 'Although some of the statements in Hunter's trial might have pushed the bounds of professionalism' (McAfee 2022).

The behaviour of the prosecution was certainly reprehensible in relation to the retrial. They did not notify the defence of their decision to drop the remaining eight charges until the day fixed for the retrial (Sirkin 2002). They should have considered their position carefully before asking for a retrial, and they must have decided to drop the remaining charges well before the date set for the retrial. By leaving it till the very last minute to notify the defendant, they had ensured that she incurred high costs in relation to the retrial in addition to the costs incurred in the original trial in relation to the eight counts which resulted in a hung jury. None of these costs would be recoverable against the prosecution. More important, the prospect of a retrial and preparation for it must have caused tremendous stress to Hunter. The prosecution must have been aware of these factors.

The prosecution could have given a neutral reason for not proceeding, for example, saying it was not in the public interest. By saying that it would not add anything to Hunter's sentence, they left a smear hanging over her in respect of charges which the prosecution had been unable to prove. In a later appeal Hunter alleged unsuccessfully that she had been prosecuted because of politics (McAfee 2022). If she had been convicted of the other eight charges, a sentence of six months' imprisonment might have been considered light by way of retribution and vindication of the law.

On the other hand, if the motive for the prosecution had been political, to get rid of a troublesome judge,<sup>22</sup> any prison sentence would do.

There clearly was a difficulty in choosing a judge for the retrial. Hunter objected to all the local judges and all of them would have recused themselves from sitting in any event. Nevertheless, to select a judge in a sensitive trial who had several times sat on and dismissed appeals by Hunter does not seem an obvious way of showing justice to be done. Dinkelacker had been asked by the Ohio Supreme Court to explain his answer to Hunter's allegations that he could not be fair. In his response Dinkelacker referred to a decision he had made against Hunter, finding her in contempt of court. He wrote, '(Quite) frankly, it was the right decision ... Hunter committed contemptible acts and the Court of Appeals did its duty in finding such' (Perry 2015). He may well have been right, but it is not likely to have inspired Hunter's confidence in his judicial impartiality. At an appeal against Dinkelacker's costs orders on 16 July 2021, the Appeal Court said he had 'abused (his) discretion' in awarding prosecution costs for transcripts incurred after Hunter had been sentenced. Moreover, in 2019 her counsel had issued a motion to reduce the costs award. The prosecutors had filed no response, and Dinkelacker had made a decision on the motion without holding a hearing. 'The court also said it had "serious questions" about whether it was proper to assess nearly \$15,800 in transcript costs between the verdict and the sentencing two months later' (Grasha 2021).

At the Appeal hearing to the US Court of Appeals for the Sixth Circuit, Hunter's counsel had tried to raise objections to over 50 improper remarks by the prosecution in rebuttal. Since her counsel at the trial had failed to object to nearly all of these, there was a procedural default; the court would only consider the four or five objections that had been raised. It found that these remarks by the prosecution had been improper, but did not affect the overall fairness of the trial (Sirkin 2022).

It would not be right to conclude this article without a reference to Judge Linda R Reade, the chief judge of the Northern District of Iowa. She has not been mentioned above, nor will her behaviour be examined in detail now, because she was never charged with any criminal offence, yet her case has shades of both the cash-for-kids scandal and Tracie Hunter's crime. Reade, a former federal prosecutor, was appointed a judge of the federal district court in 2003. At that time her husband owned stock in the two biggest private prison companies in the country.

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<sup>22</sup> Various complaints had been made against her other than those that resulted in charges.

In 2008 a raid was being planned on the largest kosher slaughterhouse in the USA to catch illegal immigrant workers. In the months before the raid Reade had repeated meetings with immigration officials and federal prosecutors. In March 2008 she met officials from the United States Attorney's Office where they discussed an overview of charging strategies.

Following these meetings Reade and other court officials:

created 'scripts' for the post-raid hearings that included model plea bargains for the as-yet uncharged defendants. 'What I found most astonishing,' one defense attorney later wrote to a member of the House Judiciary Committee, 'is that apparently Chief Judge Reade had already ratified these deals prior to one lawyer even talking to his or her client. Camayd-Freixas<sup>23</sup> says that although there were several judges at the hearings, 'The entire proceedings were scripted' by Reade and court clerks (Michaels 2017).

The raid took place on 12 May 2008. Nearly 400 workers were arrested. At that time it was the biggest raid on a workplace that had ever taken place in the USA. The usual practice in such raids was to charge the illegal immigrants with civil violations and then deport them.

But most of these defendants, shackled and dragging chains behind them, were charged with criminal fraud for using falsified work documents or Social Security numbers. About 270 people were sentenced to five months in federal prison, in a process that one witness described as a judicial assembly line (Michaels 2017).

It is not clear how many defendants were sent to private prisons. Reade did not have control over this. Many of them were first sent to government-run prisons, but many of them were transferred to other prisons several times.

Five days before the raid Reade's husband bought between \$30,000 and \$100,000 worth of additional stock in the two private prison companies. About five months later he sold (apparently all) his prison stocks; they were collectively worth between \$65,000 and \$150,000.<sup>24</sup>

Federal judges may invest in stocks, but to guard against conflicts of interest, they are subject to a code of conduct<sup>25</sup> overseen by the Judicial Conference, a policymaking body for the federal courts. Its code, mirrored in federal law,<sup>26</sup> says judges should avoid 'impropriety and the appearance of impropriety in all activities,' and should disqualify themselves from cases where their 'impartiality might

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<sup>23</sup> An interpreter at the proceedings after the raid.

<sup>24</sup> Precise figures are not available.

<sup>25</sup> [Code of Conduct for United States Judges](#).

<sup>26</sup> [28 US Code § 455—Disqualification of justice, judge, or magistrate judge](#).

reasonably be questioned.’ This includes situations where the judge or the judge’s spouse or dependent child ‘has a financial interest in the subject matter in controversy ... or any other interest that could be affected substantially by the outcome of the proceeding.’ The code states that judges ‘should refrain from financial and business dealings that exploit the judicial position.’ ... While Reade’s husband held stock [in the two private companies], Reade did not rule on cases directly involving the companies. Nevertheless, ethics experts say the prison investments raise the appearance of impropriety because they might cause a reasonable person to question whether her judgment was affected by her personal interests. ‘I am uneasy about the perception problem created when a judge may be financially vested in more people going to prison when she has defendants coming before her for sentencing every week,’ says Charles Gardner Geyh, a professor at the Indiana University Maurer School of Law. ‘The judge shouldn’t have any significant financial incentives for a longer sentence or a shorter sentence, or financial incentives to approve a very large raid or to disapprove a very large raid,’ says former Deputy Attorney General Heymann, now a professor emeritus at Harvard Law School. ‘A judge is supposed to have no financial incentives that could affect or might appear to affect her actions in any substantial way’ (Michaels 2017).

There is no direct evidence that Reade told her husband about the raid, yet it seems an almost inescapable inference. Her disclosure of confidential material bears similarity to Tracie Hunter’s crime:

Flamm<sup>27</sup> was also troubled by Reade’s husband’s purchase of prison stocks just before the Postville raid. ‘A reasonable person might question whether or not the judge’s husband was essentially trying to benefit the judge and himself financially by virtue of knowledge the judge acquired in her judicial administrative position,’ he says. The Judicial Conference code of conduct states that judges may not use ‘nonpublic information acquired in a judicial capacity’ to inform their business dealings (Michaels 2017).

Reade’s unusual imposition of prison sentences has echoes of the cash-for-kids scandal. Not only was no disciplinary action taken against Reade for conflict of interest or otherwise, she was later honoured at a ceremony for her decade of service as the top federal judge in Iowa’s Northern District. She continues to sit and has lifetime tenure (Michaels 2017).

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<sup>27</sup> An American ethics expert and the author of a book on judicial disqualification.



## [L] CONCLUSION

What is noticeable from this disparate collection is the remarkably uneven manner in which punishment has been imposed.

Finally, what was the motivation of the judges convicted of crimes? With one exception, they have ruined their careers (if still sitting at the time of the crime) and their reputations. The exception is Lance Mason, who, in the year following his release from prison for beating up his wife, was appointed Cleveland's director of minority business development. Amazingly, both at the trial for assault and at the trial for murder, he received many letters of support, including letters from former fellow judges. After the assault one of the letters was from an Ohio congresswoman, Marcia Fudge. In it one of the things she said was that the assault was 'out of character'. One would hardly expect a judge beating up his wife in front of his children to be in character! In fact it was not out of character, as the subsequent murder showed (Goldenberg 2018).

It looks as if Bruce Campbell really was involved in smuggling for profit. Why Einfeld should have risked all to avoid traffic points is a mystery. Brice seems to have been motivated by spite; the cash-for-kids judges by greed; Hunter by concern for her brother; Mason by rage. At the end of the day, judges have shown that they can be as lacking in judgment as anyone else.

### **About the Author**

*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 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 programme 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.*

*Email: [barrie@barrienathen.net](mailto:barrie@barrienathen.net).*

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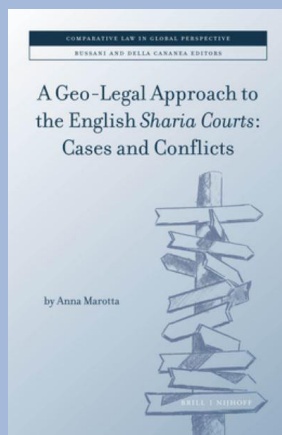
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**A GEO-LEGAL APPROACH TO THE ENGLISH SHARIA  
COURTS: CASES AND CONFLICTS  
BY ANNA MAROTTA**

SAMIA BANO

SOAS, University of London

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Anna Marotta (2021) *A Geo-Legal Approach to the English Sharia Courts: Cases and Conflicts* is published by Brill Nijhoff in hardback priced at €165 ISBN: 97890073906.

**H**ow do Muslim religious systems of dispute resolution operate in Europe and Britain as part of western legal orders? How do we capture the lived experience of Muslims and their experience of Islamic family law as part of minority diasporic British communities? How do western legal systems accommodate religious and cultural difference? While these questions are neither new nor previously unexplored, Anna Marotta synthesizes a wide range of existing literature, case law and new empirical data to provide an interesting comparative focus and important insights into the ways in which Muslim family law operates in Britain.

This book draws upon a wide set of socio-legal and historical literature to chart the emergence and development of Muslim communities in Britain and draws upon wider debates on identity formation in relation to legal and non-legal Muslim family law decision-making. As a comparative law study (with a focus on Britain) it seeks to transcend formalist interpretations of law with a focus on a 'law in context' approach while building upon existing literature and contributing to the incremental contribution of

knowledge in this field of study. It is described as a 'geo-political study' (a term defined as a 'methodological function') where the notion of 'geo-legal' aims to further enhance an international dimension to the practice of Islam, and as a part of diverse minority Muslim communities with a focus on areas of conflict, contestation and overlap between state law and privatized systems of dispute resolution.

Each of the two parts of the book addresses different dimensions of British Muslim legal pluralism. The introductory chapter, 'All eyes on Sharia' charts South Asian commonwealth migration into Europe to illustrate and demonstrate the complex ways upon which migration and settlement eventually took shape, culminating in the emergence of Muslim communities.

Part 1, 'Islam as a new European reality: from Sharia to Sharia courts' engages with the challenge of Sharia practised in a western context. The author provides an overview of the different levels of applications of Islamic rules in European countries. The focus is on Islamic law and the emergence of 'Sharia courts' with the contested application of Islamic family rules within Sharia councils as alternative dispute resolution (ADR) mechanisms. The focus on divorce and ADR processes provides interesting insights via an in-depth descriptive and analytical examination and the ways in which these bodies operate across several British cities. Building on existing literature, with a focus on mediation and arbitration, the author describes and analyses the institutionalization of Islam in Europe. It is fascinating to learn of both the diverse and common approaches adopted across several European countries from Austria, Belgium, France, Denmark, Portugal to Britain and the conditions in which the practice of Muslim family law is permitted under the governance of state-law control and power. This part of the book also provides interesting insights with regard to the conceptualization and practice of Sharia within Muslim communities and conflicts with the case law of the European Court of Human Rights.

Part 2, 'From judicial interactions to the explosion of geopolitical antagonisms', examines the interactions between Islamic law, conceptions of justice and English courts. This is the most interesting part of the book as it charts the wide areas of conflict and contestation underpinned with the question of '*what* is the role of the law?' at its core. A wide array of scholarship is engaged with, together with a critique focusing on the problems of a deterministic approach to law and the importance of understanding the ways in which law is engaged as part of governance in relation to the arenas of home, family and community. The author



convincingly provides an in-depth insight into the ways in which case law has emerged and been interpreted in English courts with a particular focus on conflicts in relation to outcomes. One especially interesting aspect of the book is the critique of human rights law as embodying a universalist approach and the question of ‘rights’, one that fails to encapsulate Muslim identity. Further, using concrete examples from different Muslim communities and the nature of state engagement, this part of the book considers issues of conflicts and points of convergence. The final part of this section outlines some of the wider debates on the accommodation and recognition of Muslim family law in Britain with the conclusion providing a useful overview.

Overall, this volume is a concise, synthesized contribution to existing scholarship demonstrating an impressive interdisciplinary approach to the study of law and Muslim legal pluralism in Britain.

***About the Author***

*Dr Samia Bano’s profile is available on the [SOAS website](#).*

*Email: [sb169@soas.ac.uk](mailto:sb169@soas.ac.uk).*

## PUTTING A SOCIAL AND CULTURAL FRAMEWORK ON THE EVIDENCE ACT: RECENT NEW ZEALAND SUPREME COURT GUIDANCE

DAVID GODDARD J  
Court of Appeal, New Zealand

MAI CHEN  
Superdiversity Institute for Law, Policy and Business,  
Barrister Public Law Toolbox Chambers

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### Abstract

What follows are presentations to a seminar on the Supreme Court decision in *Deng v Zheng* (2022): guidance on bringing relevant social and cultural information to the court's attention. The case concerned whether, despite a lack of formal documentation, the parties had entered into a legal partnership, of which they would be jointly responsible for the debts of the partnership. Two issues arose relating to the culture of the parties: namely, whether the meaning to be ascribed to 公司 (*gongsì*) went beyond 'company' and could extend to 'firm' or 'enterprise' and the significance of 关系 (*guanxi*). Both parties are Chinese and their business relationship appeared to have been conducted in Mandarin. Justice Goddard was the presiding judge in *Zheng v Deng* (2020), the Court of Appeal judgment appealed to the Supreme Court. Mai Chen appeared with two other lawyers on behalf of the intervenor, the New Zealand Law Society.

**Keywords:** social and cultural framework; Evidence Act; expert evidence; translations; interpreters; adjudicative facts; social facts; legislative facts; stereotyping; subconscious bias; judicial notice; reliable published documents.

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### [A] CASE SUMMARY

This case summary<sup>1</sup> provides context for the article below, which encapsulates a seminar in August 2022 where the authors spoke and reflected on the Supreme Court's recent decision.

Mr Lu Zheng and Mr Donglin Deng are first generation Mainland Chinese immigrants who first met in Auckland, New Zealand in 1998

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<sup>1</sup> This is a summary of extracts from the decisions in the High Court, Court of Appeal and the leave decision in the Supreme Court.

and began working together. Mr Deng was initially Mr Zheng's employee (along with several others). In 2004, Mr Zheng, Mr Deng and another incorporated a company, which developed property and built houses. Business grew and many more participants joined. Mr Zheng, Mr Deng and those others later incorporated more companies under 'the Orient Group' banner. The group conducted local business projects, sometimes in conjunction with others outside the group. Members of Mr Zheng's and Mr Deng's families were also involved in the running of the business and the keeping of accounts. The business of the group was conducted predominantly in Mandarin Chinese.

By 2015, the business relationship between Mr Zheng and Mr Deng was under strain. Accounts differ as to what went wrong. Mr Deng decided, with his wife's encouragement, that he and Mr Zheng should separate their Orient Group interests. Mr Deng told Mr Zheng he wanted to end their business relationship in May 2015, and it was common ground that separation occurred on 31 May 2015.

Negotiations followed about the financial consequences of this separation, and how it should be implemented. The parties had a number of discussions in June 2015 and exchanged correspondence including an annotated document headed 'principles in separation'. This document was not signed. Mr Deng contended that most of the terms in this document have since been implemented. Mr Zheng disagreed.

By December 2017, Mr Zheng and his company sued Mr Deng and other defendants in the High Court of New Zealand. No fewer than eight causes of action were pursued. The primary actions alleged the existence of partnerships between the two men; alternatively, joint ventures attracting fiduciary duties. A final account was sought as the main remedy.

## The High Court

The High Court heard the trial over 10 days in November 2019 (*Zheng v Deng* 2019). A total of nine witnesses gave evidence including two forensic accounting experts. Seven of the nine witnesses were native Mandarin speakers and gave their oral evidence with the assistance of an interpreter. This included individuals who had a business and/or family relationship with Mr Zheng and/or Mr Deng.

The evidence traversed an array of factual disputes including a dispute over the parties' internal business accounts. Much time was spent on what the accounts meant, how the figures were calculated, and whom the accounts revealed as overall debtor to the other: Mr Zheng or Mr Deng?

The parties' records and correspondence were largely in Mandarin Chinese, and much of this material was translated into English by registered translators commissioned by each party prior to trial. The terminology and business structures the parties adopted reflected linguistic and cultural frameworks that do not always align neatly with English language terminology, or with New Zealand legal concepts and accounting conventions. However, this was not raised as an issue during trial, as no cultural or linguistic expert evidence was adduced, and the trial judge received no assistance from the parties or counsel on these matters.

The High Court was confronted with a case in which the familiar language and trappings of partnership—for example, a written partnership agreement, partnership financial statements prepared in accordance with relevant accounting standards and conventions, and a partnership bank account—were absent. That absence, coupled with the existence of a number of corporate vehicles through which their projects were carried out, led the trial judge to the conclusion that there was no partnership (*Zheng v Deng* 2019: 89). In December 2019 the High Court dismissed all eight causes of action (*ibid* 146).

## The Court of Appeal

The Court of Appeal (consisting of three judges) was unanimous in the view that there was in this case an overarching business carried on by the two men in common with a view to profit: that is, a partnership (*Zheng v Deng* 2020: 136). The court held Mr Zheng and Mr Deng were equal partners in that partnership, and the assets of that partnership included shares held by one or both of them in a number of the companies that undertook particular projects (*ibid*: 4). The projects were, as the trial judge found, carried out through those companies. Relevant assets were held by those companies, by one or other of the partners and (at times) by friends and relatives acting as nominees.

Notwithstanding the disparate shareholdings in the relevant companies, and the other asset-holding arrangements, the court considered that it was clear from the parties' dealings that they carried on a joint business in relation to which they had agreed to share equal responsibility for providing capital, and to share profits and losses equally. The 'principles in separation' document was in the court's view an important guide to drawing this conclusion on the nature of the parties' relationship (*Zheng v Deng* 2020: 18).

The Court of Appeal raised a note of caution about the absence of any evidence that would assist in interpreting the cultural and linguistic dimension of the parties' dealings. It identified that almost all primary records and parties' correspondence were in Mandarin, and the English translations relied upon were prepared by different translators, at different times, putting forward different translations of the same terms. In particular, different translators used different terms in their English translations of the term 公司 (*gongsi*), which could be translated as either 'firm', 'company' or 'enterprise' (*Zheng v Deng* 2020: 64). Furthermore, none of the translators gave evidence about why they used certain terms rather than others in particular documents. Accordingly, there was a real risk of nuances in expression and context being lost in translation (*ibid*: 86).

In reaching its decision, the court was conscious that language is used in a broader linguistic and cultural setting, by reference to background assumptions about personal and business relationships and the ways in which dealings are normally structured, that were shared by the parties, but which the court may not be aware of or understand. The court referred to the need to be sensitive to the social and cultural context and to be cautious about drawing inferences based on preconceptions about business dealings (*Zheng v Deng* 2020: 88).

The appeal was allowed in December 2020. A declaratory order was made that there was a partnership. On the basis of this finding, an account should be taken of the partners' mutual dealings, and any balance payable by one partner to the other should be ascertained and paid. The proceeding was remitted to the High Court to enable this to take place (*Zheng v Deng* 2020: 5).

## Supreme Court

Mr Deng sought leave to appeal to the Supreme Court of New Zealand. In his application, Mr Deng expressed concern over the Court of Appeal's approach and emphasis on the linguistic and cultural matters in its decision. None of these issues had been addressed at all during the High Court trial, nor in the written and oral submissions before the Court of Appeal.

The Supreme Court granted leave to appeal in June 2021 (*Deng v Zheng* 2021). In its leave decision, the Supreme Court held it may be necessary to explore these cultural and linguistic matters to resolve the appeal and invited the New Zealand Law Society (NZLS) to consider intervening in the appeal, after consultation with New Zealand Asian Lawyers (*ibid*: 2).

The NZLS duly intervened and the appeal was heard in August 2021 before five judges, which culminated in the Supreme Court’s decision of 20 June 2022 discussed in this article (*Deng v Zheng* 2022). The Supreme Court found that it was clear that a partnership between the parties existed. The Supreme Court reached this conclusion by reference to contemporaneous documents that reflected a shared understanding as to the nature of the business relationship (ibid: 68). While the court found that the cultural considerations were not of critical importance to the matter at hand, the court offered brief comments as to how the social and cultural framework within which one or more of the protagonists may operate can be brought to the attention of the court when it is of significance. The court said that ‘[t]hese comments were influenced and in part derived from the very helpful submissions made to us by the Law Society’ (ibid: 77).

## [B] THE HONOURABLE JUSTICE GODDARD

*E ngā mana, e ngā reo, e rau rangatira mā* (The powers and the languages of the hundred leaders)

*Tēnā koutou, tēnā koutou, tēnā tatou katoa* (Thank you, thank you, thank you all).

I’m flattered, and slightly surprised, to be asked to speak this evening. I don’t claim any particular expertise in relation to the cultural dimension of judging. Rather, I’m just a new-ish judge trying to do the work as well as I can. I had been in the role a little over one year at the time the Court of Appeal heard *Zheng v Deng*. My judicial colleagues and I tried to determine it in a manner consistent with the oath every judge takes when they first become a judge: to do right to *all manner of people* after the laws and usages of New Zealand, without fear or favour, affection or ill will.

Fortunately, Mai Chen—who is an expert in this space—has helpfully identified a number of questions that she says she is curious to hear the answer to. Here are my attempts to satisfy that curiosity.

*a. In the Court of Appeal Judgment, you write ‘[a] note of caution.’ What led you to write that? Was it more awkward as those issues hadn’t been raised at first instance and were being raised for the first time at the appellate level?*

This was one of ten or so cases heard over four very full days in Auckland in a pretty typical Divisional Court list.<sup>2</sup> I had read the High Court decision

<sup>2</sup> Where the Court of Appeal sits with one permanent court member and two High Court Judges. See Senior Courts Act 2016, section 48(2).

a few weeks earlier in preparation for the week's hearings. I elected to write this judgment myself for a number of reasons. First, because it was a longer hearing (a full day) and it was a civil case in a field where I had some expertise. Second, after reading the High Court judgment, I was left uneasy about the picture it painted of the parties' dealings and the framework through which those dealings had been analysed. Third, I suspected that quite a bit of work would be required to understand the relevant background material for whoever was writing the judgment.

As I reread the High Court judgment the weekend before the hearing and the submissions for the hearing, my concerns intensified. I spent some time reading into the evidence, particularly the documentary evidence.

The hearing was somewhat helpful—it was a chance to explore some issues with counsel, and with my colleagues in the court. But there were many red herrings. For example, the question of whether a document entitled 'Principles in Separation'—which shed pretty clear light on the nature of the parties' relationship—had been discovered. That was the subject of an application to adduce further evidence and separate submissions from each party, an issue that should have been, and ultimately was, capable of being resolved direct by discussion between counsel. Both counsel spent a lot of time on details, which in essence re-litigated most aspects of the (ten-day) High Court case. Less time than desirable was spent on the central issues in the case. (Incidentally, I find that it is a common problem in my court: too many counsel do not appreciate the key difference between trials and appeals, and do not reframe their cases appropriately for the appellate context.)

Of particular concern during the hearing was that counsel said little about language issues, and nothing about cultural context.

Afterwards, I spent quite a bit of time worrying away at the case and trying to find the best way to think about it—to bring the issues into focus. What became ever clearer is that two, maybe three, things had gone wrong at first instance.

First, the evidence had been assessed through the lens of usual New Zealand (Anglophone) commercial practices. The oral evidence and the documentary record had been tested against expectations about a typical New Zealand English-speaking business partnership. For example, the Judge saw as counting against the existence of a partnership the absence of: a written partnership agreement; a partnership bank account; a GST number; and partnership accounts prepared in accordance with generally accepted accounting practice.

The law is actually pretty clear that partnerships can take many forms, and the presence or absence of particular factual patterns is not decisive. But here there were additional reasons why an assumption should not be made that an absence of incidental trappings and other formalities, systems, and terminology that are familiar to New Zealand-English speaking lawyers did not show that the parties did not intend to embark on a business venture in which profits would be shared.

Second, there was every reason to think that two men with a different shared language and different shared cultural background might ‘carry on a business in common with a view to profit’ (the test in the Partnership Act 1908) using *different* formalities, *fewer* formalities or *different* systems and *different* terminology to describe their agreement.

This meant it was especially important to look beyond those superficial trappings to the substance of their agreement, and to remain open to the possibility that important clues to the substance of their agreement would come in unfamiliar forms. Those unfamiliar records could not be put to one side on the basis that they were ‘idiosyncratic’, ‘enigmatic’, or unreliable. The courts needed to ask: ‘Why were these accounts prepared? What did the parties intend to achieve when they put all this time and effort into this exercise? What can we learn from this about their relationship?’

The third point, relevant to both of the points above, is that all the relevant communications and all the contemporaneous documents were in Mandarin Chinese. What the High Court had read and analysed, and what we were reading and analysing, were merely translations. As anyone who speaks more than one language knows, and as anyone who has studied languages and prepared translations knows, translation is an art that requires careful attention to context. Literal translations are often unsatisfactory. More nuanced translations require a deep understanding of context, and the exercise of judgement — it is not a mechanical task.

We don’t need to go as far as Umberto Eco, to say that ‘translation is the art of failure’. It’s enough to say, as the great French writer and philosopher Voltaire is reported to have said: ‘Woe to the makers of literal translations, who by rendering every word weaken the meaning!’

The key point for tonight’s purposes was well made by the British writer Anthony Burgess, who said: ‘Translation is not a matter of words only: it is a matter of making intelligible a whole culture.’

In this case, none of the translators gave evidence. None of them explained why they had chosen one English version of certain key words



rather than another. We didn't know if the translators understood the context of the work they were doing, or the potential legal significance of different choices about how to render the original Mandarin into English. We did not have the benefit of any commentary from the translators on their translation choices, or submissions from counsel on these important issues.

There was, however, a helpful reference during the hearing by counsel for Mr Zheng to the term translated as 'company' not being what the original documents really meant. That sent me off after the hearing to dictionaries and discussions with my then clerk, Xin Lau Yee. It became apparent that, where the English translations of some documents described the parties' business as a 'company', with all the legal baggage that term entails, the originals used the term *gongsi* (公司). Our research confirmed that this term does not necessarily imply separate legal personality. Instead, it could simply mean business, firm, enterprise or company, depending on context. As we said in our judgment, 'It would be wrong to attribute any legal significance to translations of this term without evidence specifically addressed to whether the term has, in its original language and original context, a corresponding significance' (*Zheng v Deng* 2020: 87).

We went on to say that we were also conscious that language is used in a broader linguistic and cultural setting. This meant the court may not be aware of or understand the background assumptions about personal and business relationships and the ways in which dealings are normally structured that the parties will have shared.

I referred in the judgment to Mai Chen's recent, excellent, report on *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (Chen 2019). The report explains, among other things, that *guanxi* often governs the Chinese way of doing business and is one reason why Chinese people are less likely to conduct business by using a formal contract and more likely to do so via a 'handshake'. Mai refers in that paper to another helpful source—a recent article by Dr Ruiping Ye (2019) on 'Chinese in New Zealand: Contract, Property and Litigation'. That article made similar points about high trust dealings taking place without detailed written agreements, or any formal record of agreement.

Why, then, my 'note of caution'? Because we had looked at the case through a rather different lens, and I felt the need to explain why we had done so in order to be transparent in our reasoning. It also seemed helpful to be explicit about this given the increasing frequency with which issues of this kind arise before New Zealand courts.

I acknowledge that it was much harder to do this on appeal rather than at first instance. It was also much harder without the benefit of evidence directed to the issue or submissions that squarely addressed this issue—it was a subtext, but was not tackled head on.

*b. Justice Emilios Kyrou of the Court of Appeal, Supreme Court of Victoria, Australia observed that ‘to conduct a fair trial’ whose outcome depends on an assessment of the evidence that is impartial and free from prejudgment, judges need to develop ‘a mental red flag cultural alert system, which gives them a sense of when a cultural dimension may be present so they can consider what, if anything, is to be done about it’ (Kyrou 2015: 226). How did you develop your mental red flag cultural alert system?*

It helps, I think, to be a child of a culturally and linguistically diverse family. My father was born in Poland; he and his parents came to Australia, then to New Zealand, after the war in the 1940s. They didn’t speak English when they arrived. At my grandparents’ house Polish was spoken as well as English. The books were different, the food was different, world views were different. Other languages and cultures were also in evidence in my own home. My mother was a language teacher, and my father had studied languages before turning to law. Our bookshelves contained books in half a dozen different languages. Understanding the existence and importance of cultural diversity was easy for me, because it was the water in which I swam as a child.

I went on to study French language and literature, to speak French reasonably fluently, and to spend time in France. Again, this brings home—literally—the need to be conscious of the cultural and linguistic framework that applies as you move between households, between contexts.

I am inclined to think my professional background also helped to underscore the need for cultural and linguistic awareness.

While in practice, my work included representing New Zealand in multilateral treaty negotiations and, most recently, chairing meetings in The Hague working in English and French, with more than 80 states in attendance. Doing this work required me to be sensitive to the very different approaches of delegations from different countries and different cultures.

My research on how legislation fails to achieve its policy goals—summarized in my book *Making Laws that Work: How Laws Fail, and How We Can Do Better* recently published by Hart Publishing—also drove

this home (Goddard 2022). In the book, I look at some of the flaws in human decision-making that affect legislative design, including the many rules of thumb or heuristics that we use to make quick decisions. In his book *Thinking, Fast and Slow* the brilliant psychologist Daniel Kahneman describes ‘system 1’ and ‘system 2’ modes of thinking—system 1 is quick and intuitive, system 2 slow and effortful (Kahneman 2011). His book explains that we often answer complex questions by substituting easier questions and using system 1 to answer those questions, or to provide the starting point for system 2—which then tends not to go much beyond that. We are very bad at paying proper attention to what we don’t know. Instead, we find it much easier to assume that others think more or less as we do, live more or less as we do, and behave more or less as we do. We draw inferences on that basis. We dismiss the unfamiliar as irrelevant noise, rather than putting in the work to try to understand it.

For the way in which these heuristics operate in the context of racial and cultural stereotypes, I strongly recommend the superb book *Biased* by Jennifer Eberhardt, a Stanford professor and MacArthur ‘Genius’ grant recipient (Eberhardt 2019).

Our reliance on system 1 repeatedly leads to design errors when it comes to law-making. And it can lead to errors in judicial decision-making also.

In all of these contexts, it seems to me that there are two basic things you need to do. First, to put aside your own preconceptions about ‘how things are done’. And second, to have the curiosity and patience to put in the time and effort to gain some level of understanding of how others do those same things. Or why they don’t do those things at all!

We need to think slowly and deliberately, and question the answers delivered by our system 1 heuristics. We need to pay attention to the unfamiliar. To what we do not know.

*c. How could counsel have assisted the court to determine what the two Chinese parties were really saying and doing, to reach the correct legal decision?*

Evidence from the parties and the translators would have been enormously helpful.

And submissions, of course! The kind which made reference to the underlying culture, and reference to alternative translations. If counsel had been alive to the need to help the court to see the case through a

culturally and linguistically sensitive lens, we would have been much better placed to do our work.

*d. Have you seen counsel handle cases well when, as the Supreme Court said at paragraph 77 of its judgment, ‘the social and cultural framework within which one or more of the protagonists operated’ was of significance, and what did good look like in that context?*

Not as a judge, no. And I have heard other cases that also called for this.

One significant exception has been where the relevant framework is *te Ao Māori*. I have seen excellent evidence about the Māori world view, and the implications of that worldview, for how people act and what people do. I saw this as counsel in *Proprietors of Wakatū v Attorney-General* (2017, 2015, 2012). I have also benefited from it in some cases before the Court of Appeal where Māori counsel appeared who understood that cultural context, and understood the need to explain it. It makes a big difference, and judges are always grateful for this assistance.

*e. Are you experiencing an increase in social and cultural issues at your judicial coalface as the superdiversity of NZ grows? Māori, Pasifika and Asian ethnicities comprising 39.7% of New Zealand’s population. (StatsNZ 2020). Presently, individuals of Asian ethnicity make up 15.1% of the New Zealand population. However, this group is projected to grow to 26% by 2043 (StatsNZ 2022).*

Yes. Especially, but not only, in Auckland.

*f. What do you think the impact will be on courts and on counsel of the Supreme Court’s guidance in Deng v Zheng ‘as to how the relevant information [on social and cultural framework] can be brought to the attention of the Court’?*

It will be very helpful. The Court of Appeal went out on a bit of a limb, in circumstances where we didn’t have much help from the parties or the lawyers. The Supreme Court had the opportunity to hear argument squarely directed to this practical question, and did an excellent job (if I may say so) of providing practical guidance on how this can be done without increasing the cost and length of proceedings, and thus without creating additional barriers to access to justice for culturally and linguistically diverse parties.

*g. What is needed to better equip courts and counsel to know when ‘the social and cultural framework within which one or more of the protagonists operated’ is of significance and to know what to do about it?*

Awareness that this matters—a lot. Attention. Curiosity. And a willingness to slow down, question our initial reactions, do the additional work required to understand a world view different from your own. To see the world through a different lens.

The judiciary are firmly committed to working to ensure widespread awareness of cultural and linguistic diversity, and to reflect this in the work of judges. Te Kura Kaiwhakawā/Institute of Judicial Studies has run a number of seminars on diversity, including seminars in 2020 and 2021. The Bench Book now includes a diversity handbook, added just last year, entitled ‘*Kia Mana te Tangata—Judging in Context*’. The handbook includes general material about barriers to participation in the courtroom, the importance of good communication, implicit or unconscious bias, and ways to disrupt that bias.

Counsel can also assist by alerting judges to the relevance of cultural and language issues—and should do so wherever possible. This is an essential part of their role.

And it is then up to us—up to the judges—to pay close attention, and do the necessary work to make sure that every participant is seen, heard and understood, and that the parties know they have been seen and heard and understood, and to ensure they know that they had a fair and unbiased hearing.

That is not always an easy thing to do—it requires constant effort. But it is what we promise to do when we take office. It is what we must strive to do, in each and every case, in order to keep that promise.

## [C] MAI CHEN

Courts are an adversarial and not an inquisitorial process, so it is for counsel to raise issues of social and cultural framework where they consider them to be relevant. As a last resort, the Supreme Court in *Deng v Zheng* said (2022: para 84) that:

judges can, of course, inquire of the parties if they consider that they would be assisted by additional information as to social and cultural context. In many instances, such information will be able to be supplied by submission, relying, if necessary, on s 129 [of the Evidence Act 2006].

In *Deng*, the social and cultural framework issues were raised at appellate level, as no social and cultural framework issues were raised by counsel. The Court of Appeal said:

One important feature of the case is that almost all the primary records, and the parties' correspondence, are in Mandarin. Mr Deng and a number of other witnesses gave their evidence in Mandarin, with the assistance of an interpreter. We are conscious that when referring to relevant documents, it is necessary to bear in mind that the Court is referring to English translations prepared by different people at different times, who may or may not have understood and taken into account the legal nuances of particular words and phrases that they have used. In some cases—for example, the Bella Vista Agreement referred to above—*different translators used different terms in their English translations of the same Mandarin terms. None of the translators gave evidence about why they used certain terms rather than others in particular documents. In these circumstances, a high degree of caution is required before attributing any significance to the precise terms that appear in the various English translations. There is a real risk of nuances in expression and context being lost in translation (Zheng v Deng 2020: para 86, emphasis added).*

The Supreme Court found that the Court of Appeal was right to reverse the High Court decision, saying that:

At trial there was very little, if any, evidence about *guanxi* and it was not referred to by the High Court Judge in his judgment. In terms of what we must determine, this is not of critical importance as we consider that the nature of the relationship between Messrs Zheng and Deng emerges with sufficient clarity from the contemporaneous documents. In other cases, however, the social and cultural framework within which one or more of the protagonists operated may be of greater significance. For this reason, we offer brief comments as to how the relevant information can be brought to the attention of the court. (*Deng v Zheng 2022: para 77*)

Failure to call such evidence when the social and cultural framework is 'of greater significance' can be fatal to a party's case (*Mian Shan Holdings Ltd v Ma and Zhang 2008; Zhang v Li 2017; Li v Wu 2019; Zeng v Cai 2018*). As Toogood J stated in *Tian v Zhang*:

[The plaintiff provided] no independent evidence that there was any customary practice in Chinese culture for the payment of a dowry by an internet husband to his intended wife or family ... The dispute about the existence of such a custom as is alleged might have been easily resolved by evidence from an independent expert, but there was none. Ms Tian suggested in evidence that evidence of the custom would be found on the internet, but the court is not disposed to 'Google' its way past the inadequacies of the plaintiff's proof to find the answer (2019: para 56).

Being able to put a social and cultural framework on the Evidence Act 2006 (the Evidence Act) is increasingly relevant for counsel acting for culturally and linguistically diverse parties as New Zealand's population becomes more superdiverse; there are more parties from very distant

cultures on both sides of a case, speaking little or no English and dealing with each other orally and in documentation in their home language.<sup>3</sup> A recent example is the case of *Huang v Huang*, where the High Court said:

All of the witnesses to these matters speak Mandarin; it seems only one or two also speak English. Quite apart from language, an appreciation of Chinese family and business culture will be important to understanding what people said, wrote and did (2021: para 99).

That is why the Supreme Court's systematic guidance in *Deng* is so valuable, as was their previous guidance in *Abdula v R* (2012), concerning when a litigant requires interpretation assistance. The guidance on how relevant information on the social and cultural framework within which one or more of the protagonists operated should be brought to the court's attention will ensure that a fair trial is conducted where the outcome depends on an assessment of the evidence that is impartial and free from prejudice to reach the correct decision.

The Supreme Court expressly stated (*Deng v Zheng* 2022: para 77) that their comments did not address *tikanga* (Māori customary practices and behaviours) which they saw as raising special historical and legal issues.

Where the meaning of words written or said is in dispute, any translation or interpretation of those words must be proven by expert evidence.<sup>4</sup> In the absence of a reasoned opinion, it may not be open to the court to determine the meaning of the disputed words based only on the technically available translations or interpretations. Linguistic evidence is not a simple translation or interpretation of foreign words *per se*, but assistance with determining the meaning/s of the words as they would be understood in context.<sup>5</sup> A cultural dimension may also

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<sup>3</sup> The 2018 Census showed that 27.4% of people counted were not born in New Zealand, up from 25.2% in 2013. The People's Republic of China was the third most common birthplace for those usually resident in New Zealand. The Asian ethnic group (707,598) remained third largest, with 15.1% identifying with at least one Asian ethnicity, up from 11.8% in 2013. The largest Asian ethnic groups were Chinese not further defined (231,387). Over 1 in 5 who identified with at least one Asian ethnic group were born in New Zealand. Statistics NZ predict that by 2043, the Asian ethnic group will make up around 26% of the New Zealand population, while the Māori ethnic group will make up 21% and the Pasifika ethnic group 11%: see StatsNZ 2021.

<sup>4</sup> *Sobrinho v Impresa Publishing* (2015: para 24) (libel action): 'The issue, whether it is described as one of fact or opinion, is one the court is not equipped to decide without help from a person skilled in the process of translation, that is to say, in both languages and the way in which they interrelate.' In *Tang v The Queen* (2017) TCC 168; *XY Inv v International Newtech Development* (2015: para 55), it was also held expert evidence was required in order to challenge translations. Section 135 of the Evidence Act provides that the translation of documents offered by a party where the requirements of the section are met is 'presumed to be an accurate translation, in the absence of evidence to the contrary'.

<sup>5</sup> See, for example, *Lee v Lee* (2018: para 83). Van Bohemen J accepted expert evidence that a particular phrase carried the negative connotations alleged after analysing each of 15 English meanings.

inform the intended meaning of the *English* words used by culturally and linguistically diverse (CALD) parties.

There is a lack of consistency as to when expert evidence is required on the cultural dimension and how culture may have affected the nature of transactions in issue.<sup>6</sup> The cases I analysed, together with Jane Anderson QC and Yvonne Mortimer-Wang, on behalf of the NZLS, for legal submissions for the Supreme Court in *Deng* (2022) in New Zealand and other Commonwealth countries are inconsistent on when expert evidence on the cultural dimension is required. The approach on adjudicative facts is consistent, but not on legislative or social facts.<sup>7</sup>

Adjudicative facts are the facts in issue. They concern the immediate parties—who did what, where, when, how and with what motive or intent. They have a ‘tendency to prove or disprove anything that is of consequence to the determination of the proceeding’. Legislative facts are material going to the determination of law and policy. Social facts are material relevant to social, economic and cultural context. The boundaries between these different types of facts (adjudicative/legislative/social) are not always precise. There is generally more flexibility to take judicial notice of legislative and social facts.

On adjudicative facts, evidence from an expert is required and the relevant threshold for admissibility must be met.<sup>8</sup> For legislative and social facts, it appears that, in Canada, these either need to be sufficiently uncontroversial for judicial notice to be taken or require an evidential basis, with the court applying a stricter approach to proof by evidence as the facts get progressively closer to the dispositive issues (*R v Spence* 2005: 61). In Australia, there appears to be a clear division between legislative facts and adjudicative facts,<sup>9</sup> with legislative facts often being accepted as

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<sup>6</sup> The court is asked to determine the character of funds advanced as a gift, loan or resulting trust, compare: *Speller v Chong* (2003: para 8); *Zhang v Li* (2017); *Zhou v Ling Yu* (2016); *Chang v Lee* (2016), reversed on appeal *Chang v Lee* [2017] NZCA 30. See also NZLS (2021).

<sup>7</sup> The source of this distinction is Davis (1955: 948) cited in Paciocco (2005). See *Comptroller of Customs v Gordon & Gotch (NZ) Ltd* (1987).

<sup>8</sup> In Australia (as in New Zealand), expert anthropological evidence is particularly used in litigation concerning aboriginal rights and customs. This is also the case in Canada, see, for example, *Vautour v R* (2015).

<sup>9</sup> For the leading approach for the admission of general facts (in a non-cultural context), see *Aytugrul v R* (2012). The majority of the High Court found that articles on the impact of statistical DNA evidence on a jury were inadmissible under section 144 of the Evidence Act 1995 (NSW) as they were neither ‘common knowledge’ nor ‘not reasonably open to question’. See also the analysis of Heydon J at paras 71-72.



a matter of judicial notice (although this is not fully settled).<sup>10</sup> In the UK, it appears evidence of a general social (which includes cultural) nature can be admitted through the use of official reports and articles (Malek & Howard 2018). In New Zealand, the cases in which expert evidence is needed are variable.<sup>11</sup>

## Applying the social and cultural framework to the Evidence Act

The Evidence Act applies unless other specific legislative provisions override.<sup>12</sup> The Supreme Court recently emphasized the centrality of the Evidence Act framework in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* (2021: para 60) in the context of contractual interpretation. The issues raised by CALD parties do not create a section 12 Evidence Act situation, which regulates the admission of evidence where no provision is made. Although cultural and linguistic evidence presents unique challenges, it does not form a separate category and should not be analysed in a silo. Challenges include, for example, the need for interpreters usually making it more difficult for the court to assess the quality of *viva voce* evidence and the weight to be given to witness demeanour (*Jinhong Design and Constructions Pty Ltd v Xu* 2010: para 10; France 2021).

Sections 10 and 6(c) and (e) of the Evidence Act require access to justice concerns to be balanced against the need to ensure the other party is aware of, and can test, material upon which the court makes a decision, its reliability, and its application or otherwise to their particular circumstances. This is about enhancing access to justice for all parties and not advantaging a CALD party at the expense of the other.

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<sup>10</sup> See, for example, Burns (2012: 317).

<sup>11</sup> See note 6 above and NZLS (2021).

<sup>12</sup> See for example, sections 26 and 27 of the Sentencing Act 2002, which explicitly permit consideration of the cultural background of the offender at sentencing, not analysed under the Evidence Act. Cultural reports are made by writers who are not formally qualified as experts in the traditional sense. Some first instance tribunals, such as the Immigration and Protection Tribunal, are authorized to seek information from any source, and 'receive as evidence any statement, document, information, or matter': Immigration Act 2009, section 228 and clause 8 of schedule 2.

## Striking the right balance

On the one hand, is, as the Supreme Court said (*Deng v Zheng* 2022: para 78(b)):

[Justice] Emiliios Kyrou, writing extra-judicially, in his advice to judges [is] to develop:

... a mental red-flag cultural alert system<sup>13</sup> which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it.

On the other hand, the Supreme Court also said (*Deng v Zheng* 2022: para 78(d)) that:

It is critical that judges and counsel maintain a sense of proportionality and recognise that many, perhaps most, cases, in which the parties operate within a social and cultural framework that differs from that of the judge, can be dealt with in the manner just outlined. As Emiliios Kyrou has put it: '[i]n many cases, managing a cultural dimension in evidence may require no more than the most basic of all tools in a judge's toolkit, namely, context and common sense.' For this reason, we do not wish to be taken as suggesting that in all cases with a 'cultural dimension', the parties should feel obliged to call social and cultural framework evidence (and incur the costs of doing so).

Such cost (in providing the necessary evidential basis as well as funding their own interpreter in civil proceedings) could create a barrier to equal access to justice for all regardless of culture and language.

Where judicial common sense can be exercised, counsel would only introduce evidence of cultural and linguistic context to inform the court why the implicit or explicit assumptions a judge might make about behaviour do not apply in the court's assessment of the evidence. There is writing about the need for caution and awareness of subconscious bias coming through judicial common sense (Burns 2012).

The NZLC's discussion paper on *Evidence Law: Documentary Evidence and Judicial Notice* (1994) decided that the introduction of expert evidence was a better way of controlling the use of unreliable or questionable common sense, including challenging changes in thinking over time, rather than 'including any provision in the code regulating the use of common sense and experience to assess the evidence in a proceeding' (1994).

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<sup>13</sup> In referring to such a mental red flag cultural alert system, one writer has noted the reality that 'just as it is important to be aware of how culture might have an impact on the way in which somebody behaves or communicates, it is equally important to be aware that culture may not have any impact at all' Godwin: (2020: 199).

The Supreme Court said (*Deng v Zheng* 2022: para 78(c)):

A key to dealing with such cases successfully is for the judge to recognise that some of the usual rules of thumb they use for assessing credibility may have no or limited utility. For instance, assessing credibility and plausibility on the basis of judicial assumptions as to normal practice will be unsafe, if that practice is specific to a culture that is not shared by the parties.

This underscores the importance of cultural capability (CQ) for judges and the priority that the Chief Justice, the Rt Hon Helen Winkelmann, gave to legal education for judges, including in CQ, in her recent address to NZ Asian Lawyers (Chen 2022). This also underscores why the Superdiversity Institute and New Zealand Asian Lawyers have elected to hold this seminar in conjunction with the New Zealand Law Society and the New Zealand Bar Association (with grateful thanks to both), to explain to practitioners why CQ is critical and what the Supreme Court's guidance means for their advocacy for CALD clients.

## When do you need expert evidence under sections 23-25 of the Evidence Act?

Expert evidence is required to introduce a social and cultural framework to explain the conduct of another party to establish an adjudicative fact. Even then, expert or other evidence that is too general (essentially stereotyping) will not be admissible as it is not relevant. As the Supreme Court said (*Deng v Zheng* 2022: paras 80-81, footnotes excluded):

In all of this, judges need to take care to employ general evidence about social and cultural framework to assist in, rather than replace, a careful assessment of the case specific evidence. Assuming, without case-specific evidence that the parties have behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.

When a witness explains their own or joint conduct by reference to their cultural background, there will be little risk of stereotyping; this is because the evidence is necessarily specific to that witness. Where, however, the evidence comes from an expert or there is reliance on s 129, some care is required. There are two aspects to this:

- (a) First, people who share a particular ethnic or cultural background should not be treated as a homogeneous group. By way of example, that *guānxi* is important for some people of Chinese ethnicity does not mean that it is important for everyone of Chinese ethnicity and, still less, that it was necessarily of controlling significance to the conduct of the parties in relation to the issue in dispute. The more generalised

the evidence or information, and the less it is tied to the details of what happened, the greater the risk of stereotyping.

- (b) Secondly, and with particular reference to *guānxi*, it will not be safe to conclude that its importance to litigants means that a relationship between them was necessarily one of partnership or a joint venture or had fiduciary elements. For instance, *guānxi* may have been a factor in two people engaging together in a business, but if they have chosen to do so through a company, *guanxi* is not in itself a reason for concluding that they were in fact partners. Still less should *guanxi* be treated as imposing a fiduciary or similar overlay in relation to arms-length transactions such as contracts for the supply of goods and services.

As the NZLS submitted to the Supreme Court:<sup>14</sup>

attributing tendencies to a very broad class of persons ('Chinese') may have little evidential value (or as a tool to evaluate adjudicative facts) in determining whether a partnership was more probable or less probable between the parties in this appeal. Of more 'substantial help', but not adduced in the High Court, is expert evidence that a particular custom of verbal agreements existed in the culture of the parties, and that it was likely that both parties were aware of the existence of that custom due to their cultural background. Such evidence, together with witness cross examination, could assist the Court in assessing whether these particular parties may have adopted a mutual assumption based on those customs, and/or how plausible it is that a reasonable person in the party's shoes, with knowledge of those customs, acted in a certain way in a given situation.

Furthermore, as Judge Dr Victoria McCloud said in a presentation to the Superdiversity Institute in 2021:<sup>15</sup>

It is also important not to stigmatize communities, by stereotyping all members of that group as 'other' from the outside looking in, as if they need help. Some members of these communities, such as myself, will themselves be (or should be) judges. To presume them to be outsiders is both unreliable and excluding.

## Judicial notice and reliable published documents

The starting point should be, as the Supreme Court said (*Deng v Zheng* 2022: paras 79(a) and (b)) that parties can explain their own actions

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<sup>14</sup> NZLS Submissions (2021) n 6 above, para 55.

<sup>15</sup> Judge Victoria McCloud is one of the judges on the committee in the UK who produced the most recent substantive edition of the *Equal Treatment Bench Book*, which the judiciary publishes in an effort to set out best practice on any aspect of a judge's running of the court so as to ensure as far as possible that justice is felt to be fair, not merely legally correct. A guiding principle is that 'Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage' (2021: para 4).

and how they relate to the other party. Such cultural and linguistic evidence is more likely to be *prima facie* admissible under section 7 of the Evidence Act—it has ‘a tendency to prove or disprove anything that is of consequence to the determination of the proceeding’. And the probative value of such evidence is likely to outweigh the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding, thereby avoiding the general exclusion factor in section 8 of the Evidence Act.

Such evidence can then be supported by expert evidence or by resort to sections 128 and 129 of the Evidence Act. Section 128 of the Evidence Act concerns judicial notice of uncontroverted facts. To be introduced under section 128(1), cultural and linguistic facts must be ‘facts so known and accepted either generally or in the locality’, or under section 128(2) ‘facts capable of accurate and ready determination by reference to sources whose accuracy cannot reasonably be questioned’. Specific cultural material relied upon to displace the fact-finder’s assumption of commonly accepted social and cultural norms is unlikely to meet the test in section 128(1). The premise for submitting such material is that the fact is *not* generally known or understood (Downs 2020).

As New Zealand becomes a culturally pluralistic society (beyond Pakeha and Māori culture), what are commonly accepted social and cultural facts in New Zealand will increasingly be defined by the practices of those first and subsequent generations of ethnic groups in New Zealand. Accordingly, increased scope for judicial notice to be taken of such facts may emerge over time.

Judicial notice has been taken of the meaning of text in a foreign language (Downs 2020). In *Fothergill v Monarch Airlines Ltd* (1981), Lord Wilberforce emphasised that: ‘the process of ascertaining the meaning [of a word or expression in a foreign language] must vary according to the subject matter’ but could include reference to a dictionary. Lord Wilberforce goes on to say:

An English court will construe the word damage as it will construe any other word which it is required to interpret according to the context in which the word is used but it’s likely that the Court will require extrinsic help in construing the French word, like my noble and learned friend Lord Wilberforce I decline to lay down any precise rules whence that help should come. If the Judge concerned is possessed of some knowledge of the French language it will be pedantic and perhaps also intellectually impossible to deny him or her the right to use that which he knows perfectly well. Once both French and Latin were languages in current use in our courts. Latin phrases still make a frequent appearance in our jurisprudence and a judge is

perfectly free to use such knowledge of Latin as he may still possess in order to interpret and apply such a phrase. Why then should a different rule be applied in the case of a modern as opposed to an ancient language? Of course the same problem could arise hereafter with authentic texts of conventions in languages in less frequent use and therefore less well known in Western Europe than for example French or German. In such a case a judge will be likely to require more help than in the case of those two languages. But a judge will usually be unlikely to be willing to rely solely on his own knowledge of the relevant language even if he be so well versed in that language as the learned trial Judge concerned in the present case. Such a judge can always have recourse to dictionaries. He can have regard to the writings of learned writers on the relevant topic. He can have regard to judicial decisions of the courts of other countries concerned with the same problem. Such sources are clearly not exhaustive. I doubt whether in a case such as the present the evidence of an ordinary interpreter would greatly assist *though such evidence might be essential if the language were unknown or little known to the Judge* (1981: 277 emphasis added).

An expansive interpretation of section 128(2) could enable the court to inform itself of cultural material from reference books, to ensure that judges are not deprived of authoritative and mainstream research and insights, but subject to the considerations in section 6 of the Evidence Act (Gobbo 1999) and the fresh evidence rule if received on appeal. Otherwise, sections 144 to 146 of the Evidence Act govern the admission of evidence relating to foreign law.

Section 129 of the Evidence Act concerns the admission of reliable published documents. Sections 128 and 129 were found to be relevant in *Deng* (2022), the Supreme Court saying at paragraph 82 that:

It is well-known that guanxi often governs the way Chinese people do business and that there is an associated tendency for Chinese people to rely on personal relationships, mutual trust and honour more than on written contracts. There is for example much literature as to Chinese communication in negotiations, almost all of which refer to guanxi. We have no doubt that the Court of Appeal was entitled to refer to guanxi in the way in which it did.

There is relatively little case law on section 129, which may indicate the admission of material without explicit reference to the section. In *Ye v Minister of Immigration* (2009: 262-263), Glazebrook J referred to several reports and articles as to the general effect of the one-child policy in China. It is unclear whether this material had been admitted at first instance. The court also considered evidence on different Chinese dialects and the impact it may have on the children if they were forced to be formally educated in another Chinese dialect (2009: 249-255). There was no explicit reference to sections 128 and 129 of the Evidence Act

or (if necessary) fresh evidence rules on appeal. Nonetheless, reference to the reports may well have been justified pursuant to section 129. Separately, the reference to the different types of dialects in China, and the phonological difference (2009: 250) between them, may be a suitable subject for judicial notice under section 128.

## Court-appointed experts

The Supreme Court said in *Deng* (2022: para 83) that:

We note the ability of courts to appoint an expert under r 9.36 of the High Court Rules 2016 and r 9.27 of the District Court Rules 2014, a mechanism which may, in some circumstances, be helpful in relation to cultural context.

The Superdiversity Institute will be running a symposium, entitled ‘Global Cultural Experts in Courts, at the Sorbonne from 6-7 April 2023 in conjunction with the Institute of Advanced Legal Studies, London University, and Professor Livia Holden’s EUROEXPERT EU-funded research project (about the use of cultural expertise in courts). Professor Holden defines cultural expertise as:<sup>16</sup>

the special knowledge of experts in laws and cultures, who provide evidence in court and out-of-court dispute resolution and the claim of rights, for the use of the decision-making authority. Cultural expertise must be independent and procedurally neutral: experts must not advocate explicitly or implicitly for a specific legal outcome but can critically affirm their expert opinions.

Recommendation (j)(vi) of the High Court Rules Committee report on ‘Improving Access to Civil Justice’ refers to ‘greater controls being imposed on court evidence’. The report elaborates that this includes ‘making greater use of single Court appointed experts paid for by both parties (the appointment of which would be addressed at the issues conference or conferences)’ (High Court Rules Committee 2021: 25).

Using the mechanism of a court-appointed expert to assist the judge is not, however, a silver bullet. Judges may not have enough information to select the right expert, if the parties are unable to agree,<sup>17</sup> even if an expert with the requisite expertise is available. Often very little factual detail about the parties’ backgrounds, culture and dialects is provided by the parties’ counsel, or the parties, if self-represented. It is very seldom

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<sup>16</sup> Holden (2022). Professor Holden also has the following forthcoming publication with Taylor & Francis: ‘Cultural Expertise, Law, and Rights: A Comprehensive Guide’ which introduces readers to the theory and practice of cultural expertise in the resolution of conflicts and the claim of rights in diverse societies and cross-cultural disputes.

<sup>17</sup> See High Court Rules, rule 9.36.

that you see the degree of detail about different types of dialect and phonology, as in *Ye v Minister of Immigration* (2009) (and see High Court Rules Committee 2021: 646, paras 249-250).

There may be very rare dialects and cultures where it would be difficult to source an expert in New Zealand. Also if both sides call experts, it still leaves the judge having to decide which expert is right—through a cultural lens—which underscores the need again for judges to have a certain level of CQ.

### **About the authors**

**Justice Goddard** was the presiding judge in *Zheng v Deng* (2020) NZCA 614, the Court of Appeal judgment appealed to the Supreme Court.

**Mai Chen** appeared with two other lawyers on behalf of the intervenor, the NZLS, after the Supreme Court invited the NZLS to intervene after consultation with New Zealand Asian Lawyers. She is the President of New Zealand Asian Lawyers.

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# **PROFESSOR OF PRACTICE: A NOTE ON HOW TO MAKE THE ROLE WORK, AND HOW PRACTITIONERS AND ACADEMICS CAN WORK TOGETHER IN A BETTER WAY**

BARNABY HONE

5 St Andrew's Hill Chambers; IALS

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## **[A] INTRODUCTION**

**I**n October 2020 I was appointed the Visiting Professor of Practice for the Centre for Financial Law, Regulation and Compliance (FinReg) at the Institute of Advanced Legal Studies (IALS). The role was originally planned to be for a year, with an aim of appointing another practitioner the following year. Due to the pandemic, it was extended for a further year until September 2022. The following is a note on my thoughts about the role and how it can be used in other institutions.

The aim of the role is to bring a practitioner's perspective and practical experience into an academic setting. By doing so, to develop closer links between practitioners and academics. This is very much meant to be a two-way process and, even in the short time I have held the role, I have seen my understanding of academia increase, my appreciation of how academia can help my practice increase, and, I hope, how my experiences in practice help those in academia, both students and academics.

## **[B] THE ISSUE**

The problem is a straightforward one, though not necessarily a simple one. Students study intensively in an academic setting until they have their qualifications. They then use that qualification to get into practice and then fall out of touch with academia. They might look at some work in practice, but they will not have a direct link. Any connection they have to a university is usually on the basis that they carry out a couple of talks to students, maybe undertake some mentorship, or to receive a number of good-natured pleas for funding from time to time. The engagement is rarely about academia and research.

Some lawyers engage in postgraduate degrees or diplomas during their practice, but rarely does this involve research or the exchange of their experience from practice. It is usually in an effort to learn more and expand the lawyer's knowledge of an area. It is an echo of their earlier interaction with academia rather than an evolution where they look at academia as an evolving source for their work and academia looks upon them as a resource of experience. The vast majority of those who undertake research appear to be destined for a career as an academic or do so before they practise in law.

This means that the link between active research during the early and mid-careers is lacking. There is often a larger amount of interaction at the very higher ends of the legal career. This might be through academic members of chambers or visiting lectureships. These are very useful links but very limited.

The Law Commission also forms a useful bridge. Encouraging consultations on pieces of its work, both through written materials and, more importantly, thorough seminars, which allows interactive exchanges.

Some academics try to bridge the gap through consultations. Indeed, that is how I was asked to carry out the role by taking part in Doctor Colin King's (IALS) research into the use of civil recovery under the Proceeds of Crime Act 2002. This sparked my interest in academia, a dormant feeling until then as I had not seen any opportunity to be involved outside being enrolled in a course of study.

## [C] THE ROLE

As explained to me, the purpose of the Professor of Practice role at IALS is to promote the work of IALS, and academia in general; to act as an ambassador for the institution; and to provide insight from practice through research and through teaching. My practice is in white-collar crime with a focus on asset recovery work and money laundering. Therefore, working with the FinReg centre was a natural fit.

During that time, I hosted a number of talks, gave a number of lectures, participated in panels, including hosting some for the Law Commission, and gave a number of lectures to postgraduate students. The latter included a memorable lecture which set out how money laundering works in practice. I also interviewed Professor King, during a Middle Temple Lecture night, on the work of academics, which highlighted to a large audience what academics do. This was part of my role in promoting the work of IALS.

Though what I was able to do was limited by the pandemic, the experience has had a profound impact on me. It has increased my understanding of academia, how research works and the extent that academia can help my practice. My understanding of my area has increased exponentially as I have had to look at it, albeit to a limited extent, through academic eyes. It has also opened my eyes to how I can use academia in future work, particularly appellate work and legal development work, where I work with jurisdictions to develop their laws and processes in different areas.

The experience has also highlighted a number of lessons, which I will now endeavour to highlight, on what I think is best practice and some of the pitfalls which can easily appear.

## [D] REFLECTIONS

Reflecting on what I did in the role, there are three points which I think are key. First the interaction has to be between a practitioner who specializes in a certain area and a department or research centre in that area. There has to be a meeting of specialties. The fundamental exchange is about details and approaches. It is not for generalists. For me it was an in-depth look at asset recovery and money laundering. Being able to teach it made me question fundamental assertions I had, and being able to discuss matters with academics informally allowed me to clarify arguments, expand on them, and reframe my view of certain subjects. This would not have been possible if I was in a general department or not working with an academic in my area.

Second, this has to be an interactive role and well planned. The incumbent cannot be doing it for the title, or without a clear commitment. This commitment should be agreed beforehand. A year will be the classic time for this role, and ideally a plan would be in place before the year starts. This could be coordinated with the previous incumbent. It will set out what both parties expect to get out of the role and how many events and of what type are envisaged. As I found, the difficulty of organizing events meant that they should be done early. With busy practitioners' diaries, commitments should be worked out as soon as possible. Also, connections with members of faculty need to be made in a timely fashion so that the process of writing articles, or preparing lectures, has an appropriate timescale.

Third, the person appointed should attempt to immerse themselves in the academic world they have joined. This is something I did not do, partly due to time constraints but largely due to the pandemic. I would recommend this in future as my interaction was limited mainly to one

person rather than the team, again due to the pandemic. I learnt a lot through that, but if I had been part of the department, on the basis the department was wholly focused on my area, I would have got more perspectives. I would also have had increased interactions with students in person—not only teaching them but also being available to them for informal discussions, to help with their research and also to grow their network of contacts. Ideally this would be a two-way street and would provide opportunities for some students to shadow my work on relevant cases where appropriate. This type of immersion might not be possible in every case but it does appear to me to be the ideal.

## [E] FUTURE

Overall, this experience has made me want to be in academia more. I have seen how it gives me a different perspective on my career. I also hope that the model will be adopted in a wider context by many more universities to encourage easy interaction between them and practitioners. It does not have to be limited to practitioners with over 10 years' experience, and not just to members of the bar.

In fact, I would encourage universities to look at a variety of candidates, and not make it just a prestige role. If it is, the interactions will become predictable, and also not much different from the current position. All established practitioners (those with over five years' experience) will have something to give in my view. There is an opportunity for practitioners to also take roles in other jurisdictions. The key to a Professor of Practice role is to give relatable insight and take away the same. So, if there are similarities in the law and practice this can be achieved in similar jurisdictions. For me I hope that the end of this role will be the beginning of my interaction with academia, and I hope this article will encourage further roles which link academia with practice.

### *About the author*

**Barnaby Hone** is a barrister with specialist expertise in all types of asset recovery and financial crime. Further details can be found on the [5 St Andrew's Hill Chambers website](#).

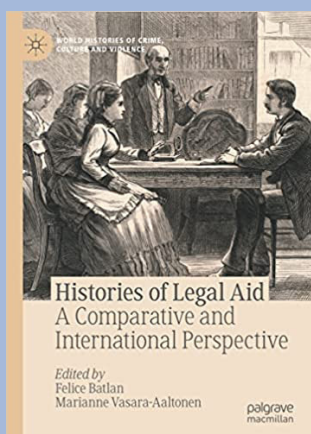
## Legislation, Regulations and Rules

Proceeds of Crime Act 2002

***HISTORIES OF LEGAL AID: A COMPARATIVE AND  
INTERNATIONAL PERSPECTIVE***  
**EDITED BY FELICE BATLAN AND  
MARIANNE VASARA-AALTONEN**

DANIEL NEWMAN

School of Law and Politics, University of Cardiff



Felice Batlan & Marianne Vasara-Aaltonen (eds) (2021) *Histories of Legal Aid: A Comparative and International Perspective* is published by Palgrave Macmillan in hardback priced at £109.99 ISBN: 978-3030802707.

The notion of offering legal assistance to the needy—what we can understand as legal aid—has a centuries-long history. In most countries, though, the second half of the 19th century saw this practice of legal aid take hold. That is where this book comes in to provide an original and compelling collection on legal aid that considers how modern systems of legal aid came to be. The book is the first to bring together a variety of countries in a historical work on legal aid. This mission carries within it two major fresh contributions to the growing scholarship on legal aid.

The first novelty is its choice of case studies. On first picking up this book, I was immediately excited that here was a comparative work on legal aid that did not focus on comparing England and Wales, Australia and New Zealand. There is stellar work comparing such jurisdictions although, at this point, such comparisons can be recognized as the most common that might be taken by an English-language text in the field. Instead, I was delighted that this book had a far wider span with



a focus across the Americas, Asia and Europe. As a scholar of legal aid, working in the Anglosphere, I am aware that I have many blind spots for the history of legal aid in other nations. I am likely not alone in that. Joyfully, *Histories of Legal Aid* provided me with the opportunity to start addressing some of the gaps in my knowledge. And I am sure it will for many others as well. The book looks at legal aid in eight countries. It explores legal aid in Belgium, Chile, China, Finland, France, Germany, Russia and the United States of America. The legal aid situation in these countries may not be widely known to many scholars working in the English language, highlighting something of the new contribution made by the editors of this collection by bringing these contributions together into one accessible compendium.

A second innovative aspect of *Histories of Legal Aid* can be found in its focus on the 19th and 20th centuries. While other works may examine legal aid from a comparative standpoint, the typical approach would be to consider the contemporary state of legal aid—important and useful for debates around policy and practice. In contrast to the standard approach, this book looks at the historical development of legal aid and thus goes further into the foundations of legal aid. What we get is an insight into the cultural and political forces that have shaped the legal aid system in each of the eight countries. We are offered a series of complex narratives wherein varying economic systems or contrasting social movements have led to legal aid taking on differing forms. Chapters approach their historiography from different modes and perspectives, which adds to the variety. The legal history provided offers such a fresh contrast to the more typical contemporary comparisons. The chapters provide a richness and a depth that left me with a stronger sense of what legal aid constituted in each country than I might otherwise have developed from reading the current situation of each jurisdiction set out side by side. By tracing the histories, the uniqueness of each example can be fully drawn out—the reality of the context and conditions that shaped the development of legal aid becomes apparent and comprehensible for each of the countries.

Creutzfeldt & Ors (2016) have noted the increasing calls for scholars of comparative law to pay attention to the social contexts of the laws they consider. A key element here is the need to study diversity as well as similarity. They suggest the question of *how* to do such comparative study in situations of different legal cultures and traditions is inherently complex and wrought with difficulty. Indeed, Creutzfeldt et al (2016: 379) explain that:

The issue that concerns scholars contemplating forms of comparison that go beyond doctrinal issues and span very different cultural contexts is the assumption of sufficient similarity in order to make the identification of difference meaningful. We need some way of speaking about the diversity of the human world without losing our grounding, to keep something firm in order to evaluate the significance of difference. This is particularly problematic when the subject matter is law in society or other socio-legal phenomena, which vary considerably and are found in different configurations, performing very different roles, across social contexts.

The unifying motif of *legal aid* helps the editors of *Histories of Legal Aid* bring these different examples together. They achieve this through their broad understanding of what constitutes legal aid, which is expressed early in their introduction:

Although the practice of providing some sort of broadly defined legal assistance to the poor has existed since the Middle Ages, legal aid gained new importance and was refashioned in the second half of the nineteenth century. Many countries reorganised what we would now recognise to be legal aid, and in other countries some form of legal assistance to the poor was first formally organised (1-2).

Looking at how this cord of legal aid is experienced across widely diverse national contexts, especially considering the varying trajectories of historical development, allows the editors to pursue their ambition of comparing legal aid in terms of, both, similarities and differences. As a result it is not only tight enough to allow coherence, but also flexible enough to work across contexts.

The book originated from a conference on the history of legal aid, which was held at the University of Turku, Finland. Here, scholars from across the globe came together to discuss the history of legal aid. We are told in the introduction how, at first, many of the attendees were surprised at the similarity of their national stories concerning the historical development of legal aid. However, as they worked through their examples, important differences also appeared—differences that became more pronounced as the chapters of the book were written. In the finished product, the individual chapters focus on their particular examples in and of themselves, which gives the reader space to focus on understanding each specific narrative. The introduction picks out some of the similarities and differences, but the editors ultimately opt to let the reader draw their own conclusions on the histories and make the connections themselves. So, for questions such as who funds legal aid or what that legal aid provides, the reader is invited to engage with the scholarship on display in the book. This works well in this instance as an approach to comparative study because

it allows the reader to consider the collection and the chapters however they want rather than being forced into a rigid, prescriptive structure that focuses as much on making the links as telling the story. Comparisons are allowed to emerge and evolve organically as the reader works their way through the examples, learning enough about each to make relevant links themselves. As a reader, I was certainly more interested in understanding these different histories in their own rights—whatever I choose to do with them next, I now have a good grounding from which to work.

On reading, I did note that there are trends that appear across different chapters. One of the most common threads that appears throughout the book is the social changes brought about by industrialization across the 19th and 20th centuries in different countries. This helps us to look across places but also to think across time as well—we can see, both patterns and divergences, as industrialization exerts its impacts across the world in, for example, urbanization and the growth of working classes. Legal aid arises as part of the sovereign state and whatever form modernity takes in any particular country with its inherent socio-economic challenges for many. It is this context specifically addressed by Vasara-Aaltonen's chapter on Finland wherein we see the beginnings of the system emerge amongst all the tensions of industrialization. What we see time and again in this book is an increasing need to tackle the problems faced by poor people in rapidly changing societies—which includes the role of philanthropy to fill the gaps in the state. Debaenst also grounds the chapter on Belgium in the charitable, and religious, origins of legal aid. We see the growth of the state, and consideration of the wellbeing of those facing poverty. However, there are contrasting decisions made about whether, how and whom to help—and thus also decisions about which people are left without help. There is a political dimension to all of this, and this affects the stories that are told about the history of legal aid. In Schafer's chapter on France, we see a writing and rewriting of the narrative about the role legal aid plays in society to meet the differing needs of the Second and Third Republics as it moves away from the revolutionary period. In Dong's chapter on China, we see legal aid through a lens of globalization as the country sought to show itself as a world legal player through a particular socialist framing. The distinctive political considerations of countries are important, and we see that across the book, rooted in developments worldwide since the Industrial Revolution.

Whatever the narrative of legal aid, the role of the legal profession is crucial, albeit looking at how this plays out across different countries takes us along varying paths. The manner in which the legal profession

has grown in various countries and regions can, in part, also explain why legal aid took a particular form. In Batlan's chapter on the United States, we are provided with a revisionist history that challenges the ideas that the legal profession was at the forefront of promoting legal aid and, instead, we see the role of women's movements and activism in helping the needy when elite lawyers may have been resistant. Pomeranz's chapter on Russia unpicks the way the legal profession became implicated in a process whereby the state considers how many civil and social rights it is willing to allow its citizens under varying regimes because this dictates what the legal profession can do. In Le Saux's chapter on Chile we are shown how legal professional organizations make keen use of legal aid as a means of establishing hierarchy and control amongst young lawyers. There are many ways in which the development of legal aid is entwined with the legal profession. Meanwhile, legal aid could exist beyond the legal profession. In Kawamura's chapter on Germany, we see the development of legal aid outside of the traditional legal profession as it grows amongst a diverse variety of sources. Korpiola's chapter on Finland explores legal advice provided in newspapers before the widespread development of legal aid.

Overall, what we get are breadth and depth of understanding about legal aid, and the role that legal aid can play in helping the disadvantaged in society. The international scope will be enlightening for many and makes this a distinctive, important contribution to the literature on legal aid. There is no need to see yourself as an explicitly comparative researcher to engage with or feel the benefit from engaging with the nine authors brought together here. But bringing these stories together allows us to get a firmer grasp than we might otherwise have on what legal aid is and what it can be, what it means to us and what it might mean to others. The variety can help focus our thinking. What the book does is put a range of national histories into an international context and this comparative method can help us look for common traits and local distinction which we can use to ground discussions on legal aid. One theme that emerges in the book is how ideas travel—those working on legal aid in one country might be influenced by another and embrace it or might be worried by what they have seen develop elsewhere and work to resist it. Seeing legal aid in all its shapes and forms, and the range of ways legal advice and assistance can be provided to those in need, can be inspiring. The book should interest anyone who works on legal aid specifically or access to justice more broadly because it gives an insight into the ideas that underpin this crucial point of interaction between citizen and state. I know it will inform my research on legal aid, even that

which does not consider any of the countries on display here. I am sure it will form a part of my teaching, as I show students the role legal aid plays in access to justice. Even those who consider themselves to have a firm, national focus on legal aid and access to justice should consider reading this book because we all have much to learn from it.

### **About the author**

**Dr Daniel Newman** is a senior lecturer in law at Cardiff University with extensive research expertise on access to justice, legal aid and the legal profession. He writes on both criminal justice and social welfare law. His books have included *Legal Aid Lawyers and the Quest for Justice* (Hart 2013), *Justice in a Time of Austerity* (Bristol University Press 2021) with Jon Robins, and *Experiences of Criminal Justice* (Bristol University Press 2022) with Roxanna Dehaghani. He edits the book series, *Perspectives on Law and Access to Justice* for Bristol University Press with Jess Mant.

Email: [newmandc@cardiff.ac.uk](mailto:newmandc@cardiff.ac.uk)

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# **SLEEP-FACILITATED SEXUAL ASSAULT: AN ANALYSIS OF CASE DATA FEATURING FEMALE AND MALE VICTIMS OF RAPE**

PHILIP N S RUMNEY\*

De Montfort University School of Law

DUNCAN MCPHEE

University of the West of England

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## **Abstract**

This note addresses a form of rape that is neglected in the scholarly literature. This form of offending occurs when a male uses his penis to vaginally, orally or anally penetrate a female or male who is sleeping at the time of the penetration. The data on which this note is based is gathered from a total sample of 441 police rape investigation case files, from which 39 of these sleep cases are identified. The note examines some of the characteristics of these cases, investigative trajectories through the criminal justice process and the behaviour of suspects. Given the neglect with which this issue has been treated, it is argued that further research would be beneficial so as to improve our understanding of the rape of those who are sleeping and the criminal justice and police response to this problem.

**Keywords:** rape; victims; suspects; sleep; police investigations.

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## [A] INTRODUCTION

This note addresses a form of rape that is neglected in the scholarly literature. This form of offending occurs when a male uses his penis to vaginally, orally or anally penetrate a female or male who is sleeping at the time of the penetration. This is a form of sleep-facilitated sexual victimization that has received only limited previous attention (Moore 2021). To some, it might seem impossible that such rapes could occur without waking the victim, but the filming of such attacks by offenders means such denials lack credibility. Further, recognition of the rape of sleeping women dates back to the 17th century (Chapman 1991: 137)

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\* Professor Phil Rumney sadly passed away on 4 September 2022. Phil was a dedicated academic who made significant contributions to the study of sexual violence and victimization over the course of his life and career. He will be very much missed by his family, friends and colleagues.

and recent research confirms the existence of this form of sexual violence (Taylor & Shrive 2021). This note uses police case file data to further the understanding of this form of sexual offending and its treatment within the criminal justice system. It examines case characteristics, police investigation strategies and the behaviour of suspects. Given the neglect with which this issue has been treated, it is argued that further research would be beneficial so as to improve our understanding of the rape of sleeping victims and the police response to this problem. The note proceeds by explaining the study methodology.

## [B] STUDY METHODOLOGY

This note provides new data based on a study of 441 police case files involving rape investigations that occurred over a two-year period in two policing areas featuring male and female complainants who were 14 years' and older at the time of reporting. Studies featuring data that is derived from police records have the potential to reveal vital information about many elements of criminal offences, investigative approaches and criminal justice outcomes, though are reliant upon good initial record-keeping and are subject to imperfections (McPhee & Ors 2021). The project received university ethical approval and all data has been anonymized. For this note, a case file data search was conducted to find cases where complainants alleged they were asleep when being vaginally, anally, or orally penetrated by a male using his penis. A search was also conducted of the data to uncover cases in which knowledge of such attacks was found in some other way, for example, by a third-party disclosure or an admission by the suspect. In addition, the data was searched for references to 'sleep', 'woken', 'incapacitated', 'unconscious'. Some cases resulted in multiple convictions and, to avoid double counting cases in which there was more than one conviction, the most serious crime in terms of maximum sentence was counted. This search for sleep cases produced 39 'crimed' cases and one that is not included in the list of recorded (crimed) offences because under the Home Office counting rules 'additional verifiable information (AVI) is available that *determines* that no notifiable offence has occurred' (emphasis in original) (Home Office 2021: C2). In order to avoid the inclusion of other types of case, such as those involving drug-facilitated sexual assault, a separate search was conducted using terms, including: 'spiking', 'needle', 'alcohol', 'drink', 'drug' and a range of so-called 'date rape' drugs, including Rohypnol and gamma-Hydroxybutyric acid (GHB). A small number of such cases were

found in the complete sample of cases (9).<sup>1</sup> Separating out these cases increases confidence that the 39 crimed sleep cases were not spiking cases. Further, the complainants themselves raised no suspicions that they had been the victims of spiking, and there was an absence of such evidence in the available data. As such, the following analysis is based on data yielded from the 39 crimed sleep cases and 1 cancelled sleep case.

## [C] SLEEP CASES

The medical literature has recognized the possibility of a woman being raped while asleep, as early as 1669 (Chapman 1991: 137). Indeed, there is long-standing evidence of bodily penetration or sexual assault occurring while a victim is sleeping in the research literature on male sexual violence against women (Roberts 1989: 78; Russell 1990: 45, 111, 238; Lees 2002: 54-55; Taylor & Shrive 2021), woman-to-woman sexual violence (Girshick 2002: 78, 81) and the rape and sexual assault of males (O'Brian 2011: 95; Cunningham 2021). This literature makes brief reference to the experience of victims with few studies examining larger sample sizes (Taylor & Shrive 2021). We have been unable to find any previous research that has examined sleep-facilitated rape cases through the criminal justice process.

Table 1 indicates that in this sample most suspects were identified, which is perhaps unsurprising given that most sleep cases involved people known to each other (see Table 2). From the sample of 39 crimed cases, 4 complainants were male (10.2%) and 35 were female (89.7%). A large proportion of the suspects in the sample of cases were arrested and denied the allegations when questioned by the police.

In 35 of these cases complainants were woken by the suspect penetrating them with his penis and sometimes touching them in other ways. In the remaining four cases the complainants were entirely unaware that they had been vaginally, anally or orally penetrated by the suspect, with these cases coming to light via suspect disclosures to third parties, the police and/or electronic device searches. The examination of suspect electronic devices, previous criminal history, complainant and witness interviews, CCTV and toxicology evidence were all pursued by officers. A large proportion of suspects were arrested (82.5%), 3 suspects fled the country and in the remaining 3 cases the complainants did not support

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<sup>1</sup> Of the 9 spiking cases, 8 were crimed and one case was removed from the list of recorded offences on the ground that under the Home Office counting rules 'additional verifiable information (AVI) is available that *determines* that no notifiable offence has occurred' (emphasis in original) (Home Office 2021: C2).



**Table 1**  
**Sleep case attrition (n=40)**

<b>Stage</b>	<b>Number</b>	<b>Percentage</b>
Reports to police	40	100
Crimed	39	97.5
Suspect identified	37	92.5
Arrest	33	82.5
Charge	18	45.0
Reached court	17*	42.5
Guilty of any offence	8	20.0
Guilty of rape	4	10.0

\* Of these cases, one was re-tried after the first jury could not reach a verdict. The prosecution was later discontinued after the complainant withdrew co-operation. The second case involved a prosecution for rape that had not reached trial at the time the case file data was collected.

**Table 2**  
**Relationship between suspect and complainant (n=39)**

<b>Suspect</b>	<b>Number</b>	<b>Percentage</b>
Stranger†	13	33.3
Husband/partner	11	28.2
Acquaintance	7	17.9
Friend	4	10.2
Family	4	10.2

† In this note a stranger is defined as a suspect who met the complainant within 24 hours of the alleged rape.

a police investigation and no arrest was made. In 4 of the 8 cases that resulted in conviction for rape or another offence, electronic evidence assisted the police in a variety of ways. This included a case in which the use of photos posted on social media following a party enabled police to identify a suspect who was subsequently convicted and a case in which photos found on the suspect’s phone featured a sleeping complainant being penetrated by the suspect. The use of electronic data in this way fits the idea of the ‘offender-centric policing’ model in which the behaviour of suspects before, during and after the alleged offence is scrutinized by the police and Crown Prosecution Service (CPS) (Rumney & McPhee 2021).

The focus on suspect behaviour emphasizes the importance of identifying predatory or opportunistic conduct, including the timing and location of the alleged offence. In this context, the targeting of sleeping victims strengthens the legal case that the complainant did not consent to penetration and that there is an absence of a reasonable belief in consent. Indeed, section 1(1) (3) of the Sexual Offences Act 2003 makes reference to ‘any steps’ taken by the suspect to ‘ascertain’ whether the complainant has consented. In sleep cases, no such steps have been taken and complainants have no opportunity to actively consent and exercise their autonomy to indicate agreement or refusal (Rumney & McPhee 2021: 427). Male entitlement has been identified as an important concept in understanding many forms of sexual aggression, including rape (Bouffard 2010). The sense of entitlement demonstrated by suspects in sleep cases is palpable, with complete disregard being shown for the interests of victims and their welfare.

As indicated in Table 2, most suspects were known to the complainants (66.6%) and included husbands, family members, boyfriends and acquaintances. Ten of the crimed sleep cases (25.6%) involved a complainant and suspect in a marriage or relationship that included a history of domestic violence and/or sexual violence involving the same suspect.<sup>2</sup> This is of importance because evidence suggests that when marital rape occurs it commonly occurs more than once (Painter 1991). Recent research involving the male partners of women has come to a similar conclusion (Taylor & Shrive 2001: 24). Given that such attacks can occur without a victim’s knowledge, this enables an offender to rape many times. In one case for example, reported by *The Independent*, a woman was woken by her husband as he raped her and a subsequent police search uncovered 316 videos featuring rapes and other acts of sexual violence that he had previously committed against her without her knowledge (Buchanan 2015). In the current study, of those cases in which there was a previous history of domestic violence there were six cases involving a total of 19 rape allegations. The remaining cases involved single rape allegations. In one of these cases, the police examined the suspect’s phone that had been used to send an apology to the complainant after she had been woken while he penetrated her. The suspect admitted sending the text but claimed he had mistyped the message. During the investigation, a relative of the complainant came forward and accused the suspect of rape. He was subsequently convicted of rape in the first case and sexual assault in the other.

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<sup>2</sup> The police case files contained previous allegations made by the complainant against the suspect, as well as intelligence reports suggesting a history of physical and/or sexual violence. In only one case was such a history absent.

The sleep cases are illustrative of the importance of an offender-centric investigative approach that considers suspect behaviour in the context of victim vulnerability, including the timing of the offence (eg targeting a sleeping victim), location of the alleged offence (eg a private location in which the suspect's behaviour is unlikely to be seen) and 'use of drugs and alcohol to disarm the victim' (CPS Toolkit 2015: 1). The CPS Toolkit on Vulnerable Victims notes that complainant 'vulnerabilities might support rather than detract from an allegation' (ibid). Sleep is an important factor to take into account when considering the idea of victim vulnerability to male violence and as a means of strengthening an allegation. Section 74 of the Sexual Offences 2003 states that a 'person consents if he or she agrees by choice, and has the freedom and capacity to make that choice'. There can be few better examples of the absence of choice and the freedom and capacity to make such a choice than when a victim is sleeping. Rook and Ward note that the 2003 Act represented a 'step backwards' in that under the prior common law 'if a complainant was asleep or unconscious for any reason at the time of penetration, she was incapable of consenting' (Rook & Ward 2021: para 1.327). This statutory arrangement further hinders the ability of the police and prosecution to build a case strong enough to present to a jury. In many instances suspects and defendants will dispute the complainant's claim that they were sleeping or that sex took place at all. However, with a focus on how a suspect may 'disarm' a victim when sleeping, an offender-centric approach may shift attention to the actions and *mens rea* of the suspect.

One case from the files with a history of domestic and sexual violence revealed an example of poor reasoning by an officer in stating that it would be:

difficult to secure a prosecution as the victim states she woke up (several times with her partner penetrating her). However, at no point does she call the police immediately nor does she ask him to leave or leave herself.

The comments of the officer are little more than victim-blaming and, as such, are irrelevant to the credibility of the complainant's allegation. Victims of sexual violence are often reluctant to disclose abuse to anyone, including the police. Further, there is abundant evidence that victims of rape delay reporting (Kelly & Ors 2005: 43; Feist & Ors 2007: 25) and failing to leave can be for a wide range of reasons, including: fear of the suspect, economic dependency, lack of alternative housing or childcare concerns.

There was some evidence from the data that suspect behaviour differed based on the relationship with the complainant. For example, there was a

group of 12 cases (30.0%) that involved a pattern of behaviour by strangers and acquaintances. In this group of cases the complainant would agree to share a room, flat or house for the night—usually because of the lateness of the hour—but sex was not part of the arrangement, yet during the night the complainant would wake to find the suspect touching and penetrating them. It is unclear whether this behaviour was opportunistic or pre-planned, but does fit with our growing understanding that sex offender behaviour is influenced by situational factors that sex offenders may exploit in order to offend (Rebocho & Gonçalves 2012). Research has found that '[s]exually aggressive men have higher levels of general and sexual entitlement' than men who are not sexually aggressive (Beech & Ors 2006: 1642; Bouffard 2010). In a broad sense, of course, all of the behaviours discussed in this paper can be described as entitled—the use of sleep is a means by which an offender can exercise control and penetrate the bodies of others. Some of the suspects in the sample were opportunistic in their behaviour with little or no pre-planning, others, however, penetrated their victims as part of a pattern of controlling behaviour and long-standing domestic abuse. In terms of other underlying motivations for this type of offending, these behaviours 'are sometimes discussed in the context of somnophilia; a paraphilia which involves the wish to have sex with 'an unconscious, sleeping or comatose person who is unable to respond' (Pettigrew 2018: 302). Research suggests that somnophilia takes different forms, including consensual and non-consensual somnophilia (Deehan & Bartells 2019), though it should be acknowledged that there is much less research available on this sexual paraphilia compared to others.

## [D] CONCLUSION

The rape cases discussed in this note point to a form of sleep-facilitated victimization that involves the targeting of predominantly female victims. This is a new, small-scale study and, as with all police case file data studies, the findings cannot be assumed to apply to all police force areas generally. The note does, however, raise a number of important issues for further exploration, including the prevalence of this form of offending and its treatment by criminal justice professionals, particularly in cases in which there has been a previous history of domestic violence. The data suggests that such cases may involve complainants where there is a history of repeat offending. Further, the data suggests that suspects may be targeting vulnerable complainants by offering to share accommodation. The data suggests also that it is not only drugs and alcohol that are utilized to 'disarm' victims and facilitate abuse (CPS Toolkit 2015: Table 1).

Sleep is also a means of targeting vulnerable victims and survivors. As such, it is an issue that requires further attention from policymakers and criminal justice professionals. It is hoped that scholars will, in turn, examine the way sex offenders target sleeping victims, irrespective of sex, and consider their history and the means by which they perpetrate their crimes.

### **About the authors**

**Philip N S Rumney** was a retired Professor of Criminal Justice at De Montfort University School of Law. Much of his research focused on the treatment of rape cases within the criminal justice system and areas for future improvement.

**Duncan McPhee** is a Senior Lecturer in Law based at the University of the West of England. Duncan's research and publications are focused around policing responses to rape and domestic violence with an emphasis on case attrition from the criminal justice system.

Email: [duncan.mcphee@uwe.ac.uk](mailto:duncan.mcphee@uwe.ac.uk).

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## Legislation

Sexual Offences Act 2003

Obituaries, pages 270-278

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**IN MEMORY OF JAMES CRAWFORD:  
JUDGE, JURIST AND SCHOLAR (1948-2021)**

AMY KELLAM

Institute of Advanced Legal Studies

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The publication of this issue of *Amicus Curiae* coincides with the opening of the 77th session of the UN General Assembly (UNGA 77). During the 77th session, the Sixth Committee is scheduled to meet from 3 October to 18 November 2022 where it will consider, amongst other issues, the possibility of an international convention on the Responsibility of States for Internationally Wrongful Acts. This item has been on the Assembly's agenda triennially since its 59th session (resolutions 59/35, 62/61, 65/19, 68/104, 71/133 and 74/180), but after nearly two decades of inactivity the prospect of a multilateral treaty on state responsibility is open to renewed debate.

It is, then, a fitting moment to honour the memory of James Crawford (1948-2021) who, in his role as Special Rapporteur, was responsible for the final text of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter the Articles). Crawford was appointed to the role in 1996, some 40 years after the UN International Law Commission (ILC) had begun the task of codifying the rules on the wrongdoing of states. His appointment marked the close of the first phase of the ILC's work on state responsibility from 1955 to 1996 under the successive supervision of special rapporteurs Roberto Ago, Willem Riphagen, and Gaetano Arangio-Ruiz. Five years after his appointment, the Draft Articles were submitted for their second reading and subsequently adopted by the General Assembly in resolution 56/83 of 12 December 2001.

Crawford's work at the helm of the ILC was but one part of his highly influential career as an international jurist, academic and judge.

Born in Sydney, Australia, in 1948 he was educated at the University of Sydney and at Balliol College, Oxford. From 1977, he lectured in international law and constitutional law at the University of Adelaide,



where he was awarded a personal chair in 1983. In 1985, Crawford was elected an associate of the Institut de Droit International, at the notably young age of 37, attaining full membership in 1991. In 1986, he became the Challis Chair of International Law at the University of Sydney. During this period, he completed several significant reports for the Australian Law Reform Commission on subjects such as foreign state immunity, admiralty law and the recognition of aboriginal customary law, the latter of which was to have an enduring impact upon Crawford's approach to international law.

This is evident in specific publications, such as *The Rights of Peoples* (Crawford 1988), as well as in a wider commitment to the concept of a right to self-determination that underpinned this work (Crawford 2001). It is also possible to see a reflection of this early work in Crawford's later professional practice. Over the course of his career, he advised on Quebec's secession from Canada (Crawford 1997) and Scottish independence (Boyle & Crawford 2013). On several occasions he served as counsel for small island states, representing Mauritius against the United Kingdom in *Case concerning a Marine Protected Area around the Chagos Archipelago* (2015) before the Permanent Court of Arbitration, and the Solomon Islands on the *Legality of the Threat or Use of Nuclear Weapons* (1996) before the International Court of Justice (ICJ).

His first case before the ICJ was *Certain Phosphate Lands in Nauru (Nauru v Australia)* (1992), in which he acted as Counsel for Nauru. The case raised the prospect of an array of issues being brought directly before the court in a manner previously unwitnessed, not only issues arising from the postcolonial context but also issues such as permanent sovereignty of natural resources and responsibility for environmental damage. Whilst the ICJ did not reach the merits of the case on account of the parties reaching settlement, its judgment on Australia's preliminary objections clarified important issues regarding jurisdiction and established, for the first time, the court's capacity to consider a breach of trusteeship obligations.

It is not necessary to speculate on what judgment the court might have reached in order to recognize the continued significance of the issues raised by the case, particularly in relation to matters concerning environmental protection. Seen from the context of the Trusteeship system, these issues have been framed as international fiduciary duties. However, Crawford's legacy in international legal scholarship and practice has established broader grounds for state responsibility to the international community

as a whole. Indeed, drawing analogy between the common law and international law is something that Crawford (2002: 876) resisted:

Whether the original imperative was natural law or the sanctity of promises, there seems to be no trace of a formulaic approach to responsibility in early international law. Neither natural law nor treaty practice distinguished some specific domain where responsibility for breach applied, as compared with others where it did not. Rather, there emerged a general conception of the rights and duties of states, and of the consequences of breaches of those rights.

This is not to suggest that Crawford promoted a normative vision of international law, for he took care to make a distinction on this point: 'I don't think it's possible to say there is such a thing as an immanent and categorical conception of any particular right. If that makes me a positivist then I'm a positivist' (Dingle & Bates 2013b: Q119). Rather, it points to a particular characteristic of Crawford's work, which is a focus on historical contingency. Over the course of his career, he argued that the law is not an immutable set of rules but is instead the product of human action and interaction. This means that the law is always open to change, and that its development is contingent on the course of history. This characteristic is evident in Crawford's early work on the rights of peoples and is also visible in his work on the Articles of State Responsibility. Throughout, he gave weight to how the law has evolved over time, and how it has been shaped by the changing needs of states and other actors (see also Crawford 2013). This appreciation for history was fused with a commitment to maintaining the integrity of the textual modalities of international law. Thus, in Crawford's view

sovereignty, as applied to treaty-making, allows states to come up with different formulations. They may be good formulations, they may be bad formulations, but they are what we have and if your function as an adjudicator is to apply those treaties then you start with a text and you are constrained by the text. I'm very strongly opposed to the view which you get in some versions of critical legal studies, and some versions of realism, that texts are not a constraint. If texts are not a constraint then we are out of business (Dingle & Bates 2018b: Q119).

The Articles on State Responsibility were the product of a larger undertaking to codify international law that predated Crawford and remains ongoing under the oversight of the ILC. Given the scope of the project it is, perhaps, not surprising that the undertaking encountered some controversy. It is testament to Crawford's pragmatic approach that, in their final form, the Articles met with general acceptance from states, and that the principles therein have subsequently been applied

in the actual decision-making process of states and in the judgments of international courts and tribunals.<sup>1</sup>

The Commission's final decision to recommend that the Articles *not* be made into a treaty was in keeping with Crawford's own pragmatism and paved the way for the text to be referenced in processes and procedures as a summation of general principles of international law. Crawford (2002: 889) saw the ILC's work in this regard as 'part of a process of customary law articulation' and pointed to a lack of appetite amongst governments for legislative implementation of the Articles which, as secondary rules of state responsibility, are only indirectly applicable in national courts and which, in the form of a binding instrument, would raise inevitable objections from individual governments seeking to protect self-interest in relation to substantive issues.

In the work of drafting the text, Crawford expressed a specific attachment to article 48, which addresses the 'invocation of responsibility by a State other than an injured State'.<sup>2</sup> The distinction established the principle that states may have a legal interest in compliance with an obligation irrespective of whether or not they have been individually harmed by a breach (Crawford 2002: 881). The manner in which article 48 formulates concepts of peremptory norms, obligations *erga omnes* and obligations *erga omnes partes* marked a progressive development in the law of state responsibility. It was also an explicit rejection of the position adopted by the ICJ in *South West Africa* (1966), which asserted a famously narrow definition of rightful legal interests.

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<sup>1</sup> Article 48 was explicitly referred to by the International Tribunal for the Law of the Sea (ITLOS) in *Responsibilities in the Area* (2011: para 180). In the ICJ, the principle of article 48 has been maintained: *Whaling in the Antarctic* (2014: paras 30-50); *Questions Relating to the Obligation to Prosecute or Extradite* (2012: paras 64-70); *The Gambia v Myanmar, Provisional Measures* (2020: paras 39-42).

<sup>2</sup> Article 48—Invocation of responsibility by a State other than an injured State.

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
  - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
  - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
  - (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
  - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Crawford stated that article 48 ‘was approaching the margins of acceptability for some influential states’. In particular, he spoke of how the ILC defended the article’s reference to obligations ‘owed to the international community as a whole’ and how it opposed demands from states to amend the wording to ‘the international community of States as a whole’ (2002: 888). The more inclusive phrase allows for a broader interpretation of how international responsibility can arise. This carries practical implications for issues where a precise pinpointing of damage is impossible, but where a breach may contribute to a general degradation of the collective wellbeing.

The outcome of the Sixth Committee’s deliberations on the possibility of transforming the non-binding text of the Articles into a binding legal instrument remains to be seen, and it is not the purpose here to consider the ways in which the form might alter the function of international state responsibility. It is, perhaps, enough to note that the principles expressed in the Articles have retained their authority in subsequent years. Arguably, regardless of the conclusion, article 48 will continue to play a significant role in defining the parameters of state responsibility going forwards, particularly in relation to issues such as climate change, pollution and biodiversity.<sup>3</sup>

Alongside his work for the ILC, Crawford fulfilled other academic and professional roles. In 1992, Crawford was elected Whewell Professor of International Law at the University of Cambridge, and a Fellow of Trinity College, Cambridge. In 1996, Crawford was appointed director of the Lauterpacht Centre for International Law at Cambridge, a role he assumed twice from 1997–2003 and 2006–2010. He was admitted to the English bar in 1999 as a member of Gray’s Inn, and co-founded Matrix Chambers. From 2015, he served as a judge on the ICJ. It would, then, be a disservice to Crawford’s prolific corpus of juristic work to imply that his legacy can be wholly characterized by his work on the Articles on State Responsibility. Nonetheless, the Articles’ significance is inescapable, not least because they are, alongside their associated work and commentaries, what Crawford himself saw to be his ‘greatest single achievement as an international lawyer’ (Dingle & Bates 2018a: Q39).

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<sup>3</sup> Of interest here is the initiative led by Vanuatu to request an advisory opinion from the ICJ on the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change. The resolution will be tabled during the current UNGA 77.

### **About the Author**

Dr Amy Kellam's profile is found at the [School of Advanced Study website](#).

Email: [amy.kellam@sas.ac.uk](mailto:amy.kellam@sas.ac.uk).

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*Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) ICJ 2014 226

## ***IN MEMORY OF PROFESSOR PHILIP RUMNEY***

DUNCAN MCPHEE

University of the West of England

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**P**rofessor Phil Rumney died on 4 September 2022 at the age of 55.

Phil was a dedicated scholar in the field of Criminal Justice whose work did much to highlight the experiences of victims and survivors of sexual violence. A Professor of Criminal Justice at the University of the West of England, and later on, at De Montfort University, Phil produced work of much significance over the course of his career, exploring and analysing gaps in the criminal justice response to some of the most challenging crimes. His academic work and



publications explored how the law was defined in the context of sexual violence, how it operated in practice, and also took account of courtroom processes. He became an authority on the subject of male victims of sexual abuse and their experience of the criminal justice system and wrote widely about many facets of rape investigation and the impact of specialist policing teams and victim care. Phil also wrote about human rights issues and counter-terrorism, publishing his book; *Torturing Terrorists: Exploring the Limits of Law, Human Rights and Academic Freedom* in 2014.

Autumn 2022

Phil was deeply passionate about his work and was able to skillfully relay it to many different audiences, whether through the national press, his academic publications or his work with criminal justice agencies and charitable organizations. He placed great value on freedom of speech, open debate and was committed to evidence-led approaches to academic inquiry that defined his approach to scholarship. He was an excellent teacher and source of inspiration to many students and colleagues.

In 2020 Phil became the recipient of a lifetime achievement award as bestowed by the Men and Boys Coalition as recognition of his pioneering work on understanding the experiences of male victims of sexual assault.

He will be much missed by his friends, family and colleagues.



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## NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

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### Launch of the Veeder/ Roebuck Conference Room

On Monday 13 June 2022 the Institute of Advanced Legal Studies (IALS) was delighted to welcome guests from the international arbitration community to commemorate and celebrate the lives and work of the late Johnny Veeder QC and Professor Derek Roebuck. Professor Roebuck's landmark History of Arbitration Project has spanned 20 years and has been hosted by IALS since 2013. After Derek's death in 2020, a fundraising project was set up to ensure the completion of this work, which is being continued by IALS Associate Research Fellow Dr Francis Boorman and Dr Rhiannon Markless of the School of Advanced Study. The event was a great celebration for all the donors who have contributed to the History of Arbitration Project and the £182,000 that has been raised to date. During the evening, IALS was honoured to be joined by Susanna Hoe (widow of Derek Roebuck) and Marie Veeder (widow of Johnny Veeder) who unveiled the newly renamed Veeder-Roebuck Conference Room. This

space recognizes the enormous contribution made by Professor Roebuck along with the generous support of Johnny Veeder who continuously championed Derek's important work.

Throughout the evening, guests heard from key supporters of the project, including Director of IALS, Professor Carl Stychin, and friend of Johnny and Derek, Neil Kaplan (below), who also acted as a volunteer fundraising leader for the Arbitration Project.

A donor plaque has been created to acknowledge those who have donated in excess of £10k to the History of Arbitration Project. The plaque will be hung within the newly renamed conference room. The naming of the Veeder-Roebuck Conference Room was made possible thanks to the incredible generosity of our donors, including: Professor Doug Jones AO, Neil and Su Kaplan, Toby Landau QC and Nudra B Majeed, Karyl Nairn QC, Sir Bernard Rix, Audley Sheppard QC, The London Court of International Arbitration, Twenty Essex.

## New IALS Librarian, Marilyn Clarke

Ms Marilyn Clarke has taken up the post of IALS Librarian after the retirement of David Gee. Ms Clarke was formerly Director of Library Services at Goldsmiths, University of London, having previously served as Head of Discovery Services and Acting Director since 2016. She began her career in librarianship at Senate House Library as a cataloguer, before moving to Imperial College London. She is a graduate of London South Bank University and Birkbeck, University of London.

Ms Clarke brings a wide-ranging and extensive background in senior library strategic leadership, including capital projects and the management of teams and budgets. She has also been instrumental on the *Liberate our Library* initiative at Goldsmiths. This project is intended to decolonize and diversify the collections and professional practices through the practice of critical librarianship, a field in which Ms Clarke is a recognized expert with numerous publications and presentations to her name. Her focus is on delivering an inclusive service to all library users, leading on decolonization initiatives, and highlighting issues around diversity, racial inequality, and the lack of Black and Persons of Colour representation in higher education, particularly at senior level.

## Professor Carl Stychin's Visit to Ghana

Professor Stychin had a very successful visit to Accra in May to meet with Irene Ansa-Asaire, the Rector of MountCrest University College, and staff and students to discuss future collaboration. IALS has always been very keen to develop its presence internationally and particularly in the Global South and the Commonwealth. The many students who studied for masters and research degrees at IALS have returned to, often newly independent, countries within the Commonwealth and IALS has built on those relationships. MountCrest, a private higher education institution, was founded by Ms Ansa-Asare's father, Kwaku Ansa-Asare, and was the first private tertiary institution to provide law as a course of study in Ghana. Future collaboration includes plans to develop provision of PhD supervision via distance learning, particularly directed towards academics looking to study part time.

Professor Stychin also met with the next Inns of Court Judiciary Fellow, Justice Dennis Dominic Adjei, of the Ghana Court of Appeal, who will be visiting the Institute from January to March 2023.

## Upcoming IALS Event

### **IALS 75: ILPC Annual Conference 2022 Online Safety in a Connected World**

**Dates:** Thursday 17 November 2022 at IALS; Friday 18 November via Zoom

The International Law and Policy Centre (ILPC) 7th Annual Conference will explore the impact of policymaking focused on ensuring ‘online safety’ and the increased use of data-driven systems that are increasingly connecting all aspects of society, particularly the implications of these changes for the rights and responsibilities of individuals and organizations. Panels will address the development and future of these matters for regulation, policymaking and governance within the United Kingdom (UK) and internationally.

The ILPC Annual Conference will also include the ILPC Annual Lecture 2022, and the ILPC is delighted to announce that Professor Sonia Livingstone OBE will be delivering this year’s Annual Lecture. Sonia Livingstone DPhil (Oxon), OBE, FBA, FBPS, FAcSS, FRSA, is a full professor in the Department of Media and Communications, London School of Economics. She has published 20 books on media audiences, including *Parenting for a Digital Future* (Oxford University Press 2020). She has advised

the UK Government, European Commission, European Parliament, UN Committee on the Rights of the Child, Organisation for Economic Co-operation and Development, International Telecommunication Union and UNICEF on children’s internet safety and rights in the digital environment. She directs the Digital Futures Commission (with the 5Rights Foundation) and Global Kids Online (with UNICEF).

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## SAS IALS YouTube Channel

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading.

See [website](#) for details.

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## SPORTING ARBITRATIONS: 18TH-CENTURY RULES FOR BOXING

FRANCIS CALVERT BOORMAN

Institute of Advanced Legal Studies

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We might now think of the rarefied world of the Court for Arbitration in Sport when we attempt to imagine sporting arbitrations, but, in the 18th century, arbitrators were appointed on an *ad hoc* basis, and were expected to decide matters that would now be in the hands of referee, governing body and appeal court, often with big money riding on the outcome of their decisions. And rioting was not out of the question when arbitrators decided a sporting contest.

Boxing, or pugilism, flourished in 18th-century England, moving out of the bear gardens where it provided an entertainment alongside animal baiting in the early decades of the century (Litherland 2016). King George I erected a prize-ring for public use in Hyde Park in 1723. The sport underwent professionalization and commercialization through the century, as specialist boxing theatres were constructed, innovations such as gloves were

introduced, and rules were formulated. By the 1740s three categories had emerged: a form of exercise for the upper classes; a method of settling disputes for the lower classes; and a form of popular entertainment. Boxing was still of questionable legality, but was often protected by aristocratic patrons. Gambling was an important part of the sport and several hundred thousand guineas could change hands on a single fight. By the end of the century, boxers could become national heroes, thanks in part to the burgeoning field of sports journalism (Ungar 2012: 23-29).

Boxing pioneer Jack Broughton introduced a set of seven rules in 1743 for bouts at his amphitheatre in Tottenham Court Road, which became the basis of the code for most contests for over a hundred years (*Rules to be Observed in All Battles on the Stage* 1743). Rule VI stipulated:

That to prevent Disputes,  
in every main Battle, the

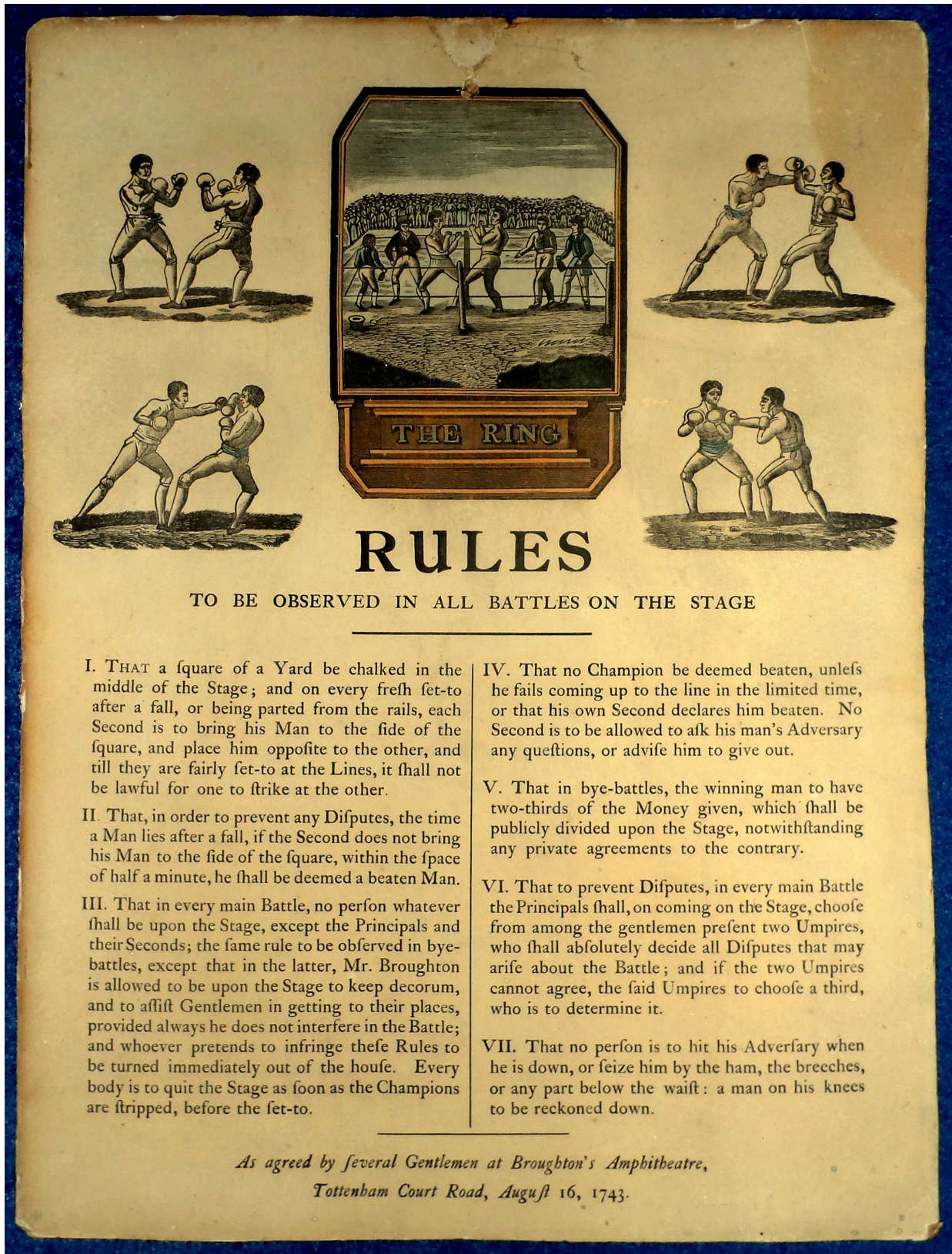


Figure 1: Rules to be Observed in All Battles on the Stage London, 1743.  
Source: [Broughton Rules.jpeg](#) Wikimedia Commons, the free media repository.

Principals shall, on coming on the Stage, choose from among the gentlemen present two Umpires, who shall absolutely decide all Disputes that may arise about the Battle; and if the two Umpires cannot agree, the said Umpires to choose a third, who is to determine it.

This may appear to modern eyes like a ‘hybrid’ model of dispute resolution, involving partisan negotiators. However, apart from the use of the word ‘Umpire’, this procedure exactly reflected 18th-century commercial arbitrations, each party to choose an arbitrator and those two to nominate an umpire in case they couldn’t decide all matters in dispute. The accompanying image (Figure 1), an illustrated copy of Broughton’s rules, shows a ring, crowded with boxers, seconds and umpires.

The evidence of arbitrators or umpires officiating in boxing matches is widespread. For instance, a report of a boxing match between Big Ben and Johnson in 1791 gives the strong impression that each fighter had an arbitrator as part of his entourage, alongside a second and a bottle holder. A third man was made umpire if the two arbitrators themselves could not agree upon the result (*Morning Post and Daily Advertiser* 1791).<sup>1</sup> Public interest

in the identity of the arbitrators was strong enough for a later correction to be issued (although it reversed the roles of arbitrator and umpire), identifying them as Lieutenant Colonel Churchill, Lord Barrymore and H H Aston (*Lloyd’s Evening Post* 1791). In front of a crowd of 5,000, Big Ben was victorious after Johnson ‘fell like a shot sparrow’ in the 24th round (*Morning Post and Daily Advertiser* 1791).

Arbitrators might decide the result of a single fight, but a body to govern and regulate the sport took longer to emerge. Even in the early 19th century, the concept of a national champion, despite occasional championship bouts, remained difficult to pin down. As Dennis Brailsford explains, ‘There was no ruling body to arbitrate, and the title depended upon a combination of consensus and the readiness of patrons to back contenders’ (Brailsford 1988: 75).

Of course, many other sports called on arbitrators, especially where high-stakes gambling was involved. These included cricket and especially horse racing, for which the Jockey Club often arbitrated from the 1750s.<sup>2</sup>

1 A daily newspaper published in London from 1772 to 1937.

2 See Roebuck & Ors (2019) chapter 18, from which the above text is also adapted.

### **About the author**

**Dr Francis Calvert Boorman** is an associate research fellow at IALS. He is an historian of locality and London, as well as arbitration. He co-authored *English Arbitration and Mediation in the Long Eighteenth Century* with Derek Roebuck and Rhiannon Markless, and is currently working on a book about arbitration in 19th-century England.

Email: Email: [francisboorman@hotmail.com](mailto:francisboorman@hotmail.com).

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### Legislation, Regulations and Rules

1743 Rules to be Observed in All Battles on the Stage, London