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Majority rule and human rights: identity and non-identity in *SAS v France*

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Abstract

This article considers the July 2014 decision of the European Court of Human Rights in SAS v France *in which the court upheld the legality of a ban on the wearing of the burqa and niqab in public places. Exploring the connection between* SAS *and a related trend of deference to the will of the national community in the court's jurisprudence, it relies on Joseph Slaughter's work to argue that the decision is best explained on the basis of what Theodor Adorno termed 'identity thinking' which, in a human rights context, involves the conceptualisation of human identity as something existing in and defined by the community rather than the individual. Drawing on the work of Franz Neumann, Otto Kirchheimer and Peter Mair, the article reflects on the social and political function of the ECtHR in the light of* SAS *and argues for an alignment between international human rights practice and the 'non-identity thinking' that Adorno advocated.*

Introduction

In *SAS v France*, the Grand Chamber of the European Court of Human Rights (ECtHR) decided that France's prohibition on the wearing of face-coverings in public did not violate the rights of a French Muslim woman who wore the niqab and burqa for religious, cultural and personal reasons.[1] The court preferred "the rights and freedoms of others" to her rights because 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'.[2]

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1 (2015) 60 EHRR 244.

2 Ibid 290, para 121 (quoting Articles 8(2) and 9(2) of the ECHR) and para 122.

Much recent commentary presents the decision as inconsistent with international human rights doctrine.[3] Rejecting these claims, I argue that the better view, grounded in an appreciation of the fundamental connection between international human rights doctrine and what Theodor Adorno labelled 'identity thinking',[4] is that the decision is consistent with and, indeed, the product of international human rights doctrine as reflected in the ECtHR's jurisprudence.

Drawing on Joseph R Slaughter's work, I argue that international human rights doctrine is founded on an understanding of individuals as existing in and identified with a particular, national community, rather than as individuals *qua* individuals.[5] Consistent with this foundation, and contrary to the received wisdom that '[o]ne of the reasons human rights law exists is to ensure that individual lifestyle choices are protected from majoritarian policies or populist infringement',[6] international human rights doctrine recognises that national majorities and the governments who purport to speak on their behalf are entitled to regulate the terms in which a non-identical individual presents their identity in the community.[7] Reading international human rights doctrine in this way, the ECtHR's decision in *SAS* can, in a purely doctrinal sense, be seen as correct and consistent with a long-established trend of deference to community will in the court's jurisprudence.

In place of the critique of *SAS* in the existing literature and its assumption that international human rights doctrine prioritises the individual over the community, this article reflects on the social and political function of the ECtHR, drawing on the work of Peter Mair, Franz Neumann and Otto Kirchheimer. Linking Mair's, Neumann's and Kirchheimer's work with Adorno's thought, it concludes with an argument for an alignment between international human rights practice and 'non-identity thinking'.[8]

Identity thinking and international human rights doctrine

Identity thinking involves the assumption that any individual can be identified with someone or everyone else.[9] From this perspective, legal processes and methods force everyone to identify with the(ir) community. Individuals are not the same as everyone else,

3 See, for example, S Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion?' <http://www.ejiltalk.org/author/sberry/>; H Yusuf, 'SAS v France: Supporting "Living Together" or Forced Assimilation?' (2014) 3(2) International Human Rights Law Review 277–302, <https://pure.strath.ac.uk/portal/files/39350802/Yusuf_IHRLR_2014_S_A_S_v_France_Supporting_Living_Together_or_Forced_Assimilation.pdf>; J Adenitire, 'SAS v France: Fidelity to Law and Conscience' 2015(1) European Human Rights Law Review 78; J Adenitire, 'Has the European Court of Human Rights Recognized a Legal Right to Glance at a Smile?' (2015) 131 Law Quarterly Review 43; J Marshall, 'SAS v France: Burqa Bans and the Control or Empowerment of Identities' 2015 15(2) Human Rights Law Review 377; M Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS' (2015) 4(1) Oxford Journal of Law and Religion 94, at 96–97 and 99–100.

4 T W Adorno, *Negative Dialectics* (Continuum 2007, originally published 1966) 149 translates the original German as 'identitarian thinking'; G Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W Adorno* (Verso 2014, originally published 1978) 57 prefers 'identity thinking'.

5 J R Slaughter, *Human Rights, Inc: The World Novel, Narrative Form, and International Law* (Fordham UP 2007).

6 Marshall (n 3) 387.

7 Marshall, ibid, notes '[i]n a liberal democracy, human freedom to develop one's own personality, as the person concerned sees fit, will thrive when people are not in fear of the consequences of wearing items of clothing. Thus that particular person is in control and empowered, as much as he or she can be in a social environment, of any decisions they take', but maintains that the individual *qua* individual is protected by human rights doctrine. See also J Marshall, 'The Legal Recognition of Personality: Full-Face Veils and Permissible Choices' (2014) 10 International Journal of Law in Context 64.

8 Adorno (n 4) does not use 'non-identity thinking', preferring 'negative dialectic' – see Adorno (n 4) 146–51 – but, see Rose (n 4) 57, that has become the standard term.

9 Adorno (n 4) 5: 'To think is to identify.'

but law strives to make them so in pursuit of order, dealing with its inevitable failure to capture the individual's complexity by insisting that individuals live according to a legally prescribed identity.[10]

Barter involves one thing being exchangeable for another despite them being non-identical and 'it is through barter that non-identical individuals and performances become commensurable and identical':[11] '[t]he spread of the [barter] principle imposes on the whole world an obligation to become identical'.[12] Thought ignores 'its own contradiction' as it glosses over the impossibility of a total knowledge or explanation of the world, emphasising the sense in which one person is like another whilst ignoring the sense in which they are not.[13]

Because thinking necessarily involves some measure of identity, Adorno advocates non-, rather than anti-, identity. Non-identity thinking accepts that individuals can be known to an extent, that there is a degree of sameness between individuals, whilst recognising the difference or non-identity between individuals.[14] It aims to mitigate the violence involved in the subjection of the non-identical to a dominant identity by treating thought as inherently incomplete and partial.[15] Whilst, from the perspective of non-identity thinking, thought and, by extension, law, offer partial and incomplete representations of the individual,[16] identity thinking insists on complete knowledge of the individual, forcing individuals to accept and identify themselves with the way they are conceptualised and known by others through legal processes:

> After the unspeakable effort it must have cost our species to produce the primacy of identity even against itself, man rejoices and basks in his conquest by turning it into the definition of the conquered thing: what has happened to it must be presented, by the thing, as its 'in-itself.' [17]
>
> The ideological side of thinking shows in its permanent failure to make good on the claim that the non-I is finally the I: the more the I thinks, the more perfectly it will find itself debased into an object. Identity becomes the authority for a doctrine of adjustment, in which the object – which the subject is supposed to go by – repays the subject for what the subject has done to it.[18]

10 Ibid 309: 'In law the formal principle of equivalence becomes the norm; everyone is treated alike . . . For the sake of an unbroken systematic, the legal norms cut short what is not covered . . . The total legal realm is one of definitions . . . These bounds, ideological in themselves, turn into real violence as they are sanctioned by law as the socially controlling authority.'

11 Ibid 146.

12 Ibid.

13 Ibid 148: 'Identity is the primal form of ideology. We relish it as adequacy to the thing it suppresses; adequacy has always been subjection to dominant purposes and, in that sense, its own contradiction.'

14 Ibid 5: 'The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy. Contradiction . . . indicates the untruth of identity, the fact that the concept does not exhaust the thing conceived'; 'Dialectics is the consistent sense of non-identity . . . My thought is driven to it by its own inevitable insufficiency, by my guilt of what I am thinking.'

15 T Adorno and M Horkheimer, *Towards a New Manifesto* (Verso 2011) 71: 'True thought is thought that has no wish to insist on being in the right.'; T Adorno, *Minima Moralia: Reflections from Damaged Life* (Verso 2005, originally published in 1951): 'The whole is the false.'; T W Adorno and M Horkheimer, *Dialectic of Enlightenment* (Verso 1997, originally published 1944) 244–45: 'The proposition that truth is the whole turns out to be identical with its contrary, namely, that in each case it exists only as a part.'

16 W Benjamin, *The Origin of German Tragic Drama* (Verso 1998, originally published 1963) 28: 'If philosophy is to remain true to the law of its own form, as the representation of truth and not as a guide to the acquisition of knowledge, then the exercise of this form – rather than its anticipation in the system – must be accorded due importance.'

17 Adorno (n 4) 148.

18 Ibid.

The subject or thinker 'conquers' and identifies the object he thinks about by compelling her to live as his 'definition of the conquered thing', his definition of her.

Identity thinking – the assumption of a communal, rather than individual, identity – is, as Slaughter shows, written into the foundations of international human rights doctrine in the Universal Declaration of Human Rights (UDHR),[19] and the common foundations of the UDHR and European Convention on Human Rights (ECHR) are reflected in the ECHR's preambular assertion that it 'take[s] the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. Article 1 ECHR situates every individual within a state – '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the [convention's] rights and freedoms' – and Article 19 defines the ECtHR's role as 'ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto'. When assessing the 'observance of the engagements undertaken by the High Contracting Parties', the ECtHR will, therefore, at least to an extent, defer to the state because the ECHR, like the UDHR, understands the individual as situated in a national community.[20]

Adopting Slaughter's analysis of the UDHR's text, Article 29 provides: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'[21] UDHR Article 6 builds on this, asserting the universality of legal personhood: 'Everyone has the right to recognition everywhere as a person before the law.'[22] Human rights law requires everyone to be a part of 'the[ir] community' as a means of ensuring that everyone discharges their 'duties to the[ir] community', the chief duty to the community being the 'free and full development of [their own] personality'. It is through this 'free and full development' within 'the community' that a person comes to be, and to be recognised as, 'a person before the law'; personhood and identity in law are equated with being *in* the community.

The development of individual personality outside of the community and in a way that precludes a person's recognition by the community, on the community's terms, as a person is incompatible with international human rights law's concept of human personality. Whilst '[t]he preamble [to the UDHR] initially treats the human personality as if it were an innate aspect of the human being' – through, for example, references to the 'inherent dignity and . . . equal and inalienable rights of all members of the human family' (quoting from the UDHR's preamble) – 'the [UDHR's] articles describe it as an effect of human rights – the product of contingent civil, political, social, cultural, and economic formations and relations'.[23] This reflects the linkage between human rights law and the *Bildungsroman*, the broad theme of Slaughter's book:

19 Slaughter (n 5) 17: '"personality" is not the thick, multi-faceted differential category of individual identity and self-expression contemplated in psychology and popular culture (although it inevitably has something to do with those). It is not the name of individual, irreducible difference but of sameness, the collection of common modalities of the human being's extension into the civil and social order. "Personality" is a technical term that means the quality of being equal before the law – to put it tautologically, the quality of being a person.'; Slaughter, ibid 20: 'One of the multiple meanings of incorporation comprehended in my title, *Human Rights, Inc*, is the notion that human personality development is a process of socialization, a process of enfranchisement into "those social practices and rules, constitutional traditions and institutional habits, which bring individuals together to form a functioning political community".' (footnote omitted)

20 Ibid 90: 'The UDHR's solution to this perennial Enlightenment problematic [individual vs state] is to pair the individual and society in a dialectical relation in which the human personality is both the product and engine of their interaction . . . international human rights law imagines an idealistic reconciliation of its two primary subjects in which individual and social demands become fully congruent through the mechanics (or aesthetics) of the democratic state'.

21 See ibid 61 on Article 29.

22 See ibid on Article 6.

23 Ibid 61.

> although the law . . . presumes that the individual's narrative capacity and predisposition are innate and equally shared by all human beings everywhere, the particular forms in which the will to narrate finds expression are inflected and normalized by the social and cultural frameworks in which the individual participates . . . precisely through the incorporative process of freely and fully developing the human personality.[24]

Slaughter argues that human rights law mirrors the structure of the *Bildungsroman*, 'whose plot we could provisionally gloss as the didactic story of an individual who is socialized in the process of learning for oneself what everyone else (including the reader) presumably already knows'.[25] 'Everyone has the right to recognition everywhere as a person before the law', but 'the law' conceives of 'everyone' on the community's terms, with the result that judicial legal reasoning tends to prefer the community's concept of human personality or identity when faced with a non-identical individual.[26]

The story of *SAS* and the related, broader trend of deference to community will in the ECtHR's jurisprudence is, in a sense, a *Bildungroman* in which the individual is 'socialized' by being made to '[learn] for [themselves] what everyone else . . . already knows'. This article tells that story.

Identity thinking and the ECtHR's *SAS* judgment

French legislative history

In April 2011 a French law, passed in October 2010, entered into force banning the concealment of a person's face in a public place: "No one may, in public places, wear clothing that is designed to conceal the face."[27] The legislative history begins in January 2010 with the publication of a parliamentary report that described the wearing of the full-face veil as "a practice at odds with the values of the Republic".[28] The report proposed a variety of measures, including legislation 'guaranteeing the protection of women who were victims of duress',[29] whilst noting a lack of 'unanimous [parliamentary] support for the enactment of a law introducing a general and absolute ban on the wearing of the full-face veil in public places'.[30]

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24 Ibid 40.

25 Ibid 3.

26 See P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* 2nd edn (Kluwer 1990) 605: 'The Commission and the Court appear to follow in many cases what might be called a *raison d'état* interpretation: when they weight the full enjoyment of the rights and freedoms on the one hand and the interests advanced by the State for their restriction on the other hand. They appear to be inclined to pay more weight to the latter.'; on a related point see P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* 3rd edn (Kluwer 1998,) 93: 'a mere reference to the margin of appreciation of national authorities without any further elucidation cannot be sufficient to justify the conclusion that there has been no violation . . . the Court has on some occasions, after referring to the margin, been very sparse in substantiating its approach. . . It may be doubted whether the Court will ever completely unveil the reasons for all choices of judicial policy that it makes.'; and for a more positive assessment, which, nevertheless, recognises the predominance of state interests, see A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 225: 'The margin of appreciation doctrine can have the desirable effect of encouraging an increasing number of states to submit to international judicial review, as those states observe the Tribunals giving appropriate deference to states' interpretations of their international human rights obligations.'

27 *SAS* (n 1) 254, para 28.

28 Ibid 249–50, paras 16–17 (quoting the parliamentary report).

29 Ibid 250, para 17.

30 Ibid.

In March 2010, following a request from the Prime Minister, the Conseil d'État advised against a ban on the full-face veil because 'such a ban would be legally weak and difficult to apply in practice'.[31] It proposed legislation that would target those 'who forced others to hide their faces and conceal their identity in public places' and prohibit the wearing of anything preventing identification where identification was necessary in connection with 'certain formalities', 'to safeguard public order' or to control 'access to or movement within certain places'.[32] In May 2010 the National Assembly passed a resolution "on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices", labelling the "wearing of the full veil" a "radical [practice] undermining dignity and equality between men and women . . . [that is] incompatible with the values of the Republic".[33] The resolution "[a]ffirm[ed] that the exercise of freedom of expression, opinion or belief cannot be relied on by anyone for the purpose of flouting common rules, without regard for the values, rights and duties which underpin society" and "[s]olemnly reaffirm[ed] . . . attachment to respect for the principles of dignity, liberty, equality and fraternity between human beings".[34]

In May 2010 the government introduced a Bill, which became the law of October 2010, to prohibit the concealment of the face in public places.[35] The Bill's explanatory memorandum noted: "France is never as much itself . . . [as] when it is united around the values of the Republic: liberty, equality, fraternity . . . [values which] guarantee the cohesion of the Nation . . . underpin[ing] the principle of respect for the dignity of individuals and for equality between men and women."[36] The memorandum claimed that "the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic", adding "[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together' in French society", "falls short of the minimum requirement of civility that is necessary for social interaction", "clearly contravenes the principle of respect for the dignity of the person" and represents "a conspicuous denial of equality between men and women".[37] The memorandum denies the possibility of being an outsider in society by affirming "the very principles of our social covenant . . . which prohibit the self-confinement of any individual who cuts himself off from others whilst living among them".[38]

The Presidents of the National Assembly and Senate referred the legislation to the Constitutional Council which declared the measure constitutional with the caveat that "prohibiting the concealment of the face in public places cannot . . . restrict the exercise of religious freedom in places of worship open to the public".[39] The Cour de Cassation, giving judgment in a criminal case involving the prosecution of a woman for wearing a full-face veil during a protest against the ban outside the Élysée Palace, affirmed the ban's legality on the basis that "it seeks to protect public order and safety by requiring everyone who enters a public place to show their face".[40]

31 Ibid 251, para 22.

32 Ibid para 23.

33 Ibid 251–52, para 24 (quoting the title and text of the May 2010 resolution).

34 Ibid (quoting the text of the May 2010 resolution).

35 Ibid 252, para 25.

36 Ibid (quoting the explanatory memorandum).

37 Ibid 252–53, para 25 (quoting the explanatory memorandum).

38 Ibid 253, para 25 (quoting the explanatory memorandum).

39 Ibid 255, para 30 (quoting the decision of the Constitutional Council).

40 Ibid 260, para 34 (quoting the decision of the Cour de Cassation).

Whilst the ban prohibits the wearing of face coverings in public places without targeting the burqa and niqab by name, it is clear that this is its intent. The explanatory memorandum resonates with the language of a French state united by its opposition to an outsider – indeed, when the memorandum declares that "France is never as much itself … [as] when it is united around the values of the Republic" it is clear that France's unification takes place through the othering of Muslim women who wear the burqa and niqab.[41]

The prevalence of tautology, understood in Slaughter's terms as 'the basic rhetorical and legislative form of obviousness – of truths held to be self-evident',[42] in the legislative history is striking. Vague phrases pepper the reports and memoranda – "the values of the Republic", "dignity", "liberty, equality and fraternity", "the values, rights and duties which underpin society" – reflecting the sense in which 'tautology is culturally constitutive – the corporate "everyone" [or insider], who already knows [what the words mean], is to some degree incorporated by that knowledge, by the extent to which a tautology is (or comes to be) compelling cultural common sense'.[43] The community is re-enforced and made real by the 'culturally constitutive' tautologies of the legislative process.[44] "France is never as much itself . . . [as] when it is united around the values of the Republic" – united by phrases whose meaning is apparent only to those who think they already know what those phrases mean; united in opposition to Muslim women who, by wearing the burqa and niqab, supposedly demonstrate that they do not know what those phrases mean; united in a shared sense that those women must, therefore, be taught what those phrases mean by being made to live in conformity with them, compelled to live as France's 'definition of the conquered thing'.[45]

The ECtHR's reasoning in *SAS*

The ECtHR regarded the case as 'mainly rais[ing] an issue with regard to the freedom to manifest one's religion or beliefs [under Article 9]',[46] notwithstanding its conclusion that 'personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life [under Article 8]'.[47] The court found an interference with Article 8 and 9 rights because the applicant faced a choice between dressing in accordance with her religious beliefs and complying with French criminal law.[48] The interference was clearly "prescribed by law" so the question was whether the ban pursued a legitimate aim and was "necessary in a democratic society".[49]

41 C Schmitt, *The Concept of the Political* (Rutgers UP 1976) 45: 'To the state as an essentially political entity belongs the *jus belli*, i.e., the real possibility of deciding in a concrete situation upon the enemy and the ability to fight [her] with the power emanating from the entity.'

42 Slaughter (n 5) 77.

43 Ibid 78; See Schmitt (n 41) 30: 'even more banal forms of politics appear, forms which assume parasite- and caricature-like configurations. What remains here from the original friend–enemy grouping is only some sort of antagonistic moment, which manifests itself in all sorts of tactics and practices, competitions and intrigues; and the most peculiar dealings and manipulations are called politics. But the fact that the substance of the political is contained in the context of a concrete antagonism is still expressed in everyday language.'

44 Schmitt (n 41) 30–31: 'all political concepts, images, and terms have a polemical meaning . . . Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted or negated by such a term.' (footnotes omitted)

45 Adorno (n 4) 148; See also the quotation from Slaughter (n 5) at n 25.

46 *SAS* (n 1) 287, para 108.

47 Ibid 286, para 107.

48 Ibid 287, para 110.

49 Ibid 287, para 111 (quoting Articles 8(2) and 9(2) ECHR).

The French government argued there were two legitimate aims – 'public safety and "respect for the minimum set of values of an open and democratic society"' – linking the second of these aims to 'three values': 'respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society'.[50] The court held that the impact of a 'blanket ban' on the applicant could 'be regarded as proportionate only in a context where there is a general threat to public safety' and, in the absence of any such 'general threat', the ban was disproportionate and not 'necessary, in a democratic society, for public safety'.[51]

Turning to "respect for the minimum set of values of an open and democratic society", the court noted that neither that aim nor the 'three values' referred to by the French government ('equality', 'human dignity', 'minimum requirements of life in society') are referred to in Articles 8 or 9.[52] The court acknowledged that a prohibition on anyone forcing a woman to conceal her face 'pursues an aim which corresponds to the "protection of the rights and freedoms of others"' but found that the argument could not be turned on its head 'in order to ban a practice that is defended by women . . . such as the applicant' because 'individuals [cannot] be protected . . . from the exercise of their own fundamental rights and freedoms'.[53] Similarly, the court concluded that 'respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places'.[54]

The court found, however, that 'under certain conditions . . . "respect for the minimum requirements of life in society" . . . – or of "living together" . . . can be linked to the legitimate aim of the "protection of the rights and freedoms of others"', in the context of 'the right of others to live in a space of socialisation which makes living together easier', describing the burqa and niqab as a 'barrier raised against others . . . concealing the face'.[55] This, it seems, is a right for the majority in a national community not to see visual evidence of cultural or religious traditions with which they are not associated; a right to live in a 'pure' cultural-aesthetic community free from images that the majority regards as 'other':[56]

> [The court] can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.[57]

For the ECtHR, 'the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society',[58] a question the national community is legally entitled to answer on the basis of a concept of identity in community and by 'consensus' and not a question which the individual is legally entitled to answer on the basis of their self-defined identity.

The ECtHR's assertions that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment

50 Ibid 288, paras 114 and 116.

51 Ibid 294, para 139.

52 Ibid 288, paras 114 and 116.

53 Ibid 289, para 119.

54 Ibid para 120.

55 Ibid 289–90, paras 121–22.

56 See M Hunter-Henin, 'Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 613, 628: 'Has the protection of public policy turned into the protection of the conformity of appearances?'

57 *SAS* (n 1) 289–90, para 122.

58 Ibid 296, para 153.

of people from minorities and avoids any abuse of a dominant position',[59] and that 'the role of the authorities . . . is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other',[60] ring hollow. The gap between this muted defence of a tolerant, pluralistic democracy and the forced assimilation of a Muslim woman into a French society of visible faces is bridged in two ways. First, by the right to cultural-aesthetic purity, noted above, and, second, by the 'margin of appreciation', with the court explaining that it has a 'duty to exercise a degree of restraint in its review of Convention compliance', that 'in matters of general policy . . . the role of the domestic policy-maker should be given special weight', and that 'France [therefore has] a wide margin of appreciation'.[61]

In their partial dissent Judges Nussberger and Jäderblom argue that 'there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style'.[62] They cite the court's insistence in its freedom-of-expression jurisprudence that the expression of 'opinions "that . . . offend shock and disturb"' is just as protected as the expression of opinions that meet with a more favourable response,[63] and reject the court's implication of a right 'to enter into contact with other people, in public places, against their will' because 'the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider'.[64]

'[A woman] must show what she has to sell'

Alain Badiou, writing about the 2004 French ban on the wearing of headscarves and other religious symbols in schools, declares 'the [2004] law on the headscarf' to be 'a pure capitalist law' because '[i]t prescribes that femininity be *exhibited* . . . that the circulation of the feminine body necessarily comply with the market paradigm. It forbids on this matter . . . all *holding back*'.[65] Badiou asks 'isn't business the really big religion?',[66] echoing the connection between identity thinking and a commodified, marketised society suggested in Adorno's linkage of '[t]he barter principle' with 'the principle of identification'.[67]

The 'outsider' who chooses to limit or deny interaction with others is anathema in today's 'space of socialisation', just as the protectionist state, detached from the global market and resistant to trade with the outside world, is anathema in a world of free-trade, foreign investment, convertible currencies and, it seems, convertible people. Being someone is equated with being part of the community, visible to others, to such an extent that 'a girl [or woman] *must* show what she has to sell. She must show what she's got to offer. She must indicate that hereafter the circulation of women shall obey the generalized model, and not a restricted economy.'[68] There is no right to be yourself if being yourself implies non-identity, barriers to trade, or departure from 'the generalized model'. Every individual is compelled to participate in a common space or mutual contract of exchange, 'barter[ing]' themselves with others on the basis of a communal identity.

59 Ibid 291, para 128.

60 Ibid para 127.

61 Ibid 296–97, paras 154–55.

62 Ibid 299–300, para OI-7.

63 Ibid (quoting previous ECtHR case law - see their fn 134).

64 Ibid paras OI-7–OI-8.

65 A Badiou, 'The Law on the Islamic Headscarf' in *Polemics* (Verso 2011) 98, 103 (original emphasis).

66 Ibid 101.

67 Adorno (n 4) 146; Slaughter (n 5) 34–39 considers the linkage between corporations, the market and human rights.

68 Badiou (n 65) 102 (original emphasis).

In cases like *SAS* involving tension between the community's concept of identity and an individual's presentation of a non-identical identity in the community, international human rights doctrine will compel an individual to exist in accordance with their community's 'civil, political, social, cultural, and economic formations and relations' because,[69] as discussed above, international human rights doctrine understands individuals as existing in and identified with a particular, national community. To say that there is no such thing as Judges Nussberger and Jäderblom's 'right to be an outsider' is, therefore, an understatement. A 'right to be an outsider' is anathema to an international human rights doctrine built on the concept of identity in community.

I therefore disagree with Myriam Hunter-Henin when she describes the court's emphasis on 'living together' as '[a] flawed legal basis',[70] with Hakeem Yusuf when he says that '[t]here is no solid legal or moral justification for imposing the will (real or imagined) of the majority',[71] and with Jill Marshall when she states that the court's approach is 'in opposition to rights enshrined in human rights law'.[72] These statements assume that the individual has priority over the community in international human rights doctrine when the opposite can be seen to be the case.

SAS in context: the pre-*SAS* cases

Religious dress and identity

Identity thinking pervades and explains pre-*SAS* ECtHR decisions on Islamic and religious dress and identity. In these cases the ECtHR recognises that national majorities and the governments who purport to speak on their behalf are entitled to regulate the terms in which an individual presents their identity in the community, prefiguring what is described in *SAS* as 'the right of others to live in a space of socialisation which makes living together easier'.[73]

In *Dahlab v Switzerland*, decided in 2001, the court rejected a primary-school teacher's challenge to a prohibition on her wearing a headscarf in school.[74] For the Swiss Federal Court her headscarf was "a powerful religious attribute" which, despite the absence of complaint from parents or pupils, "may have interfered with the religious beliefs of her pupils, other pupils at the school and the pupils' parents".[75] The ECtHR concluded that the authorities had not overstepped the margin of appreciation in balancing 'the need to protect pupils by preserving religious harmony' with the applicant's rights, labelling the headscarf 'a powerful external symbol' that 'appears to be imposed on women [and] . . . is hard to square with the principle of gender equality'.[76]

In *Leyla Sahin v Turkey*, decided in 2005, the Grand Chamber upheld a ban on the wearing of the headscarf in Turkish universities.[77] It found it 'understandable that the

69 Slaughter (n 5) 61.

70 Hunter-Henin (n 3) 96.

71 Yusuf (n 3) 11 (page reference is to weblink version of article referenced in n 3).

72 Marshall (n 3) 389.

73 *SAS* (n 1) 290, para 122; See S Juss, 'Burqa-bashing and the Charlie Hebdo Cartoons' (2015) 26(1) King's Law Journal 27, 34: 'the ECtHR . . . is reluctant to go against the interests of the state . . . it is not difficult to see how we get to SAS. Not only is it very much a continuation of past tendencies in the ECtHR, it is a hardening of them.'

74 Application No 42393/98, unreported <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643#{"itemid":["001-22643"]}>.

75 Ibid 4 (quoting the Swiss Federal Court).

76 Ibid 13.

77 (2007) 44 EHRR 99.

relevant authorities should wish to preserve the secular nature of the institution' in a 'context, where the values of pluralism, respect for the rights of others, and, in particular, equality before the law of men and women are being taught and applied in practice'.[78] Endorsing the emphasis in the Chamber's judgment on "the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts",[79] the Grand Chamber concluded that Turkey had not exceeded its margin of appreciation.[80]

In *Lautsi v Italy*, the Grand Chamber rejected a challenge to the presence, pursuant to government policy, of a crucifix in every Italian state-school classroom.[81] The applicants argued that the presence of a crucifix violated their rights under Article 9 and Article 2, Protocol No 1.[82] Treating Article 2, Protocol No 1, as 'the *lex specialis*',[83] the court held that Italy enjoyed a 'wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals'.[84] The Grand Chamber overruled the Chamber's conclusion that the crucifix, like the headscarf, is a "powerful external symbol".[85] In *Dahlab*, the court described the headscarf as 'a powerful external symbol' that created a 'need to protect pupils by preserving religious harmony', but in *Lautsi* it described the Christian crucifix as 'above all a religious symbol' that 'is not associated with compulsory teaching about Christianity'.[86] Despite the lack of complaint in *Dahlab* from any parent or pupil, the court concluded that 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect',[87] but in *Lautsi* the court regarded 'a crucifix on a wall' as 'an essentially passive symbol'.[88]

The court makes assumptions to match the position of the state appearing before it. In *Dahlab*, the court feels no need for evidence to support the conclusion that the headscarf may have a 'proselytizing effect'. It is not prepared to make a similar assumption regarding the crucifix in *Lautsi* due to a lack of evidence 'that the display of a religious symbol on classroom walls may have an influence on pupils'.[89] These are not evidence-based conclusions. Compatibility of the relevant symbol with the majority, community, government view of national history and culture dictates the outcome in both cases. Under cover of the margin of appreciation, the court bends its reasoning and its assessment of the evidence to suit the state in what can be seen as an effort to facilitate 'living together' on the majority's terms.[90]

78 Ibid 129, para 116.

79 Ibid 128–29, para 115 (quoting the Chamber's judgment).

80 Ibid 130, paras 121–22.

81 (2012) 54 EHRR 60.

82 Ibid 74, para 29; ECHR, Article 2, Protocol No 1: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

83 *Lautsi* (n 81) 83, para 59.

84 Ibid 84, para 61.

85 Ibid 87–88, paras 73–74 (quoting the Chamber's term).

86 Ibid 85 and 87, paras 66 and 74.

87 *Dahlab* (n 74) 13.

88 *Lautsi* (n 81) 87, para 72.

89 Ibid 85, para 66.

90 See C Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52, 54: 'The two cases [*Dahlab* and *Sahin*] . . . demonstrate the extent to which the Court was prepared to rely on government assertions about Islam and the wearing of headscarves – assertions that were not substantiated by any evidence or reasoning.'

In *Ahmet Arslan v Turkey*, decided in 2010, the court found violations of the applicants' Article 9 rights.[91] Whilst the finding of a violation in this case appears inconsistent with the image presented thus far of an ECtHR deferential to community will, the decision is a limited exception to the deferential trend which leaves the trend intact.

The applicants were convicted of offences relating to the wearing of religious clothing in public pursuant to Turkish legislation passed in 1925 and 1934 that prescribed the wearing of a brimmed hat, prohibited the wearing of a fez or other style of religious headgear and banned religious dress in public.[92] The ECtHR emphasised that the applicants were in a public street rather than a public institution as in *Leyla Sahin* at the relevant time, and that there was no evidence that their conduct threatened public order or exerted pressure on others.[93] The Turkish government defended the 1925 and 1934 legislation on the general basis that it sought to preserve a secular Turkish Republic.[94] In contrast with the French government's position in *SAS* there was no suggestion of a recent national debate, a pressing social issue, or a widely supported national policy on religious dress in public places. The divergent outcomes in *Ahmet Arslan* and *SAS* are explained by this contrast. The bar that a state needs to clear to avoid the finding of a violation by the ECtHR is low, but 80-year-old legislation, with no clearly demonstrated connection to current community will, will not suffice.

Following *Ahmet Arslan* and the enactment of the French ban, but before the judgment in *SAS*, some commentary suggested that the ECtHR, applying *Ahmet Arslan*'s narrow margin of appreciation, would conclude that bans on the burqa and niqab in public violated Article 9.[95] Such suggestions treat the margin of appreciation as substantive and determinative when it seems more appropriate to treat the doctrine as a reflection of the identity thinking on which international human rights doctrine is founded.

Myriam Hunter-Henin separates community will and the state's political programme from international human rights doctrine, noting '[t]he risk . . . that in the most high-profile cases [like *SAS*] national choices will be allowed to trump individual human rights for the sole reason that they have stirred intense national debate and obtained domestic political support'.[96] The suggestion that 'intense national debate' and 'domestic political support' are irrelevant when assessing human rights compliance is, as a matter of doctrine, misconceived. Because international human rights doctrine understands individuals as existing in and identified with a particular national community, rather than as individuals *qua* individuals, the majority within a national community have the 'trump' card when deciding how a non-identical individual may present their identity in the community and the ECtHR applies the margin of appreciation to reflect this. In *Ahmet Arslan* the ECtHR finds a violation of Article 9 because there was no particularly compelling argument that the criminalisation of wearing religious dress in public by historic legislation was supported by current community will. It finds no violation in *SAS* because of a clearly and recently expressed community will.

91 Application No 41135/98, unreported <http://hudoc.echr.coe.int/eng#{"itemid":["001-97380"]}> (in French).

92 Ibid 4, paras 20–21; on the laws of 1925 and 1934 see: Y Doğaner, 'The Law on Headdresses and Regulations on Dressing in the Turkish Modernization' (2009) 51 Bilig: Journal of the Social Sciences of the Turkish World 33, 38 and 43; W C Durham, D M Kirkham and C Scott (eds), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012) 122, fn 26.

93 *Arslan* (n 91) para 49.

94 Ibid para 26.

95 See B Rainey, E Wicks and C Ovey (eds), *Jacobs, White and Ovey: The European Convention on Human Rights* 6th edn (OUP 2014) 419; Hunter-Henin (n 56) 636–38.

96 Hunter-Henin (n 3) 116–17.

The margin of appreciation is not a fixed test applied consistently across the cases but a synonym for the concept of identity in community; a legal means of allowing the relevant national community rather than the ECtHR to decide.[97]

This analysis explains the finding of an Article 9 violation in *Eweida v UK*.[98] Of the four applicants in the case, only one was successful. The claims of a Christian nurse prevented from wearing the cross in the course of her employment, a Christian civic registrar dismissed because she refused to carry out civil partnership ceremonies due to her belief in exclusively male/female marriage, and a Christian relationship counsellor dismissed because of reservations about counselling same-sex couples, each having brought unsuccessful domestic proceedings against their employers, failed. In the case of the nurse the ECtHR reasoned that 'the domestic authorities must be allowed a wide margin of appreciation' because 'hospital managers were better placed to make a decision about clinical safety than a court'.[99] In the registrar's case it held that the avoidance of discrimination against same-sex couples was a legitimate aim, rejecting the claim because '[t]he Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights'.[100] The court dealt with the relationship counsellor's claim on the basis that '[t]he State authorities . . . benefitted from a wide margin of appreciation in deciding where to strike the balance between [the applicant's] right to manifest his religious belief and the employer's interest in securing the rights of others'.[101]

Only Ms Eweida was successful. Employed by British Airways (BA) as a member of check-in staff, until May 2006 she had worn the cross under her uniform. In May 2006 she started to wear the cross outside her clothing following a change of uniform. BA insisted that she comply with the uniform policy by concealing or removing the cross and offered her alternative work, which did not involve contact with customers, pending resolution of the dispute. Ms Eweida refused the alternative work and BA eventually changed its uniform policy, allowing Ms Eweida to return to her original post wearing the cross openly. Her ECtHR claim concerned the loss of earnings in the period in which she refused to accept alternative work.[102] The domestic courts dismissed her claim, rejecting the argument that there had been a violation of Article 9.[103] For the ECtHR 'the domestic courts accorded . . . too much weight' to 'the employer's wish to project a certain corporate image' and, 'there [being] . . . no real evidence of any real encroachment on the interests of others [by the applicant wearing the cross], the domestic authorities failed sufficiently to protect [Ms Eweida's] . . . right to manifest her religion'.[104]

The ECtHR's decision involves mild criticism of a domestic court decision and, by implication, the employment practices of a large corporation, but avoids criticism of public authorities – local councils and hospital authorities. Had *Eweida* involved UK legislation

97 For something close to a defence of this understanding of the margin of appreciation, see D McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65(1) International and Comparative Law Quarterly 21.

98 (2013) 57 EHRR 213.

99 Ibid 248, para 99.

100 Ibid 248–49, paras 105–06.

101 Ibid 250, para 109.

102 Ibid 219–20, paras 9–13.

103 Ibid 220–21, paras 14–17.

104 Ibid 246–47, paras 94–95.

limiting the wearing of the cross, analogous to the ban on the burqa and niqab in *SAS*, the court would probably not have found a violation.[105]

The ECtHR will defer to clear and current community will on the basis of a wide margin of appreciation (see *Dahlab*, *Leyla Sahin* and *Lautsi*). Violations may be found if the expression of community will is felt to be unclear, particularly where the legislation is historic (see *Ahmet Arslan*). Violations may also be found where the ECtHR concludes that a domestic court has failed to strike the right balance, particularly where private or commercial interests are involved (*Eweida*). The court will not, however, review the merits of legislation or policy reflecting *current* community will at the instigation of an individual applicant because doing so would, in conflict with international human rights doctrine's understanding of the individual as existing in and identified with a particular national community, imply that the individual exists outside the(ir) national community.

This analysis applies to *Thlimmenos v Greece*.[106] The applicant, a Jehovah's witness and, consequently, a conscientious objector, was convicted of insubordination in 1983 after refusing to serve in the Greek army.[107] Because of that conviction, and on the basis of legislation excluding those convicted of a felony,[108] in 1989 he was refused admission to the profession by the Greek Institute of Chartered Accountants.[109] The applicant claimed that his exclusion from the profession breached his Article 9 right to manifest his religious beliefs and his Article 14 right to non-discrimination in the enjoyment of Convention rights.[110]

The court found a violation of Article 14, rejecting the government's argument that 'persons who refuse to serve their country must be appropriately punished' because 'there [was] no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony'.[111] In reaching this conclusion the court criticised the state directly:

> it was the state . . . which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 . . . by failing to introduce appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants.[112]

Whilst, at first glance, this looks like a review of the merits of legislation, it needs to be seen in context. The court finds that the legislation governing admission to the profession should have made a distinction between those convicted of felonies and those convicted of felonies relating to the manifestation of their religion. That finding needs to be linked to the fact that in 1997 Greek law was changed to allow conscientious objectors to undertake civilian rather than military service and to allow those, like the applicant, who had been convicted of insubordination to apply to have their conviction deleted from the records on the basis of retrospective recognition as a conscientious objector.[113] The applicant did not apply for retrospective recognition, claiming to have been unaware of the relevant three-

105 M Hunter-Henin, 'Religion, Children and Employment: The Baby Loup Case' (2015) 64 International and Comparative Law Quarterly 717, 728–29, draws a distinction between the ECtHR's analysis of decision-making by a 'public authority' and decision-making by a 'private employer' in *Eweida* and related cases.

106 (2001) 31 EHRR 411.

107 Ibid 416, para 7, and 421, para 34.

108 Ibid 418, paras 14–16.

109 Ibid 416, para 8.

110 Ibid 421, para 33, and 425, para 50.

111 Ibid 424–25, paras 47–49.

112 Ibid 425, para 48.

113 Ibid 419, para 24.

month time limit,[114] but all parties accepted that the 1997 law could not have disposed of his claim because it did not provide for the payment of reparations.[115]

The ECtHR effectively applied the 1997 law and extended its logic to offer the applicant reparation.[116] The applicant should not, according to the court, have been barred from the profession because of a conviction related to his manifestation of a religious belief, something implicitly accepted by the 1997 law and its mechanism for deleting the criminal convictions of conscientious objectors.

Seen in this light, *Thlimmenos* is not a case in which the ECtHR reviews the merits of domestic legislation reflecting current community will but a case in which the ECtHR effectively applies current domestic legislation to address what the community itself, through that legislation, has come to recognise as a past injustice.

The court's jurisprudence in general

Consistent with the analysis in the preceding section, and beyond the limits of cases concerned with religious dress and identity, across its jurisprudence the court refrains from reviewing legislation or policy that is perceived to reflect current community will whilst being willing to find a violation where no connection between the legislation or policy in question and current community will is apparent.

In *Dudgeon v UK*, decided in 1981, the applicant, who was gay, claimed that the criminalisation of sex between men in Northern Ireland in Acts of Parliament passed in 1861 and 1885 breached his Article 8 right to private and family life and his Article 14 right to non-discrimination in the enjoyment of Convention rights.[117] Sex between men had been decriminalised in all other parts of the UK and,[118] assuming the finding of a breach of Article 8 and consequent reform to bring the law in Northern Ireland into line with the rest of the UK, the applicant argued that the difference in the ages of consent for gay and straight people – 21 for the former, 18 for the latter – breached Article 14.[119]

In 1977, as part of a government review, the Standing Advisory Commission on Human Rights recommended decriminalisation in light of 'evidence from a number of persons and organisations, religious and secular'.[120] The government decided, however, "to take no further action … [whilst] be[ing] prepared to reconsider the matter if there were any developments in the future which were relevant" in light of the 'substantial division of opinion' in Northern Ireland revealed in a consultation exercise.[121] Before the ECtHR the government did not defend the substantive merits of the legislation but argued that 'the moral climate in Northern Ireland', read in the context of controversy surrounding "'direct rule" from Westminster' in place of devolved government in Belfast, meant that it had 'a special responsibility to take full account of the wishes of the people of Northern Ireland before legislating'.[122] The court, nevertheless, found a violation of Article 8, noting that attitudes had changed since the passing of the legislation in the mid-nineteenth century,

114 Ibid 420, para 30.

115 Ibid para 29.

116 Ibid 427–29, paras 64–74.

117 (1982) 4 EHRR 149, 151, para 14, 160, para 37, and 169, para 65.

118 Ibid 152–54, paras 17 and 18.

119 Ibid 169, para 65.

120 Ibid 155, para 23.

121 Ibid 156–57, paras 25–26 (quoting a July 1979 statement to Parliament by the Secretary of State for Northern Ireland).

122 Ibid 166, paras 57 and 58.

with 'the great majority of the member-States of the Council of Europe' having decriminalised sex between men.[123] It found that no prosecutions had been brought in Northern Ireland concerning consensual sex between men aged over 21 'in recent years' and that there was '[n]o evidence' of any resultant '[injury] to moral standards . . . or . . . public demand for stricter enforcement of the [existing] law'.[124] The court was at pains to emphasise that it was not questioning the difference in the age of consent for gay and straight people throughout the UK,[125] reaching the discriminatory conclusion that 'vulnerable members of society, such as the young' required protection 'against the consequences of homosexual practices' in order to safeguard the "rights and freedoms of others" and ensure the "protection of . . . morals".[126]

Community will in Northern Ireland on the criminalisation of sex between men as reflected in the evidence received by the Standing Advisory Commission, the response to the government's consultation exercise, the lack of prosecutions, and the lack of protest against the lack of prosecutions, was ambiguous, and the government was not in a position to argue that criminalisation in Northern Ireland was substantively "necessary in a democratic society" given decriminalisation elsewhere in the UK. Seen in this context, *Dudgeon* is not the result of a substantive review of policy or legislation reflecting current community will but a finding of a violation in circumstances where no clear community will in support of historic legislation was discernible. As such, the decision is analogous to *Ahmet Arslan*, discussed above.

This analysis of *Dudgeon* applies equally to the 1988 decision in *Norris v Ireland*.[127] Mr Norris challenged 'the existence' of Irish laws, dating back to 1861, which made sex between men a criminal offence.[128] He had not been charged with or investigated for an offence nor was there any evidence of recent prosecutions for 'homosexual activities'.[129] The Irish government did not argue that current community will supported the legislation but that '[r]espect must . . . be afforded to [a] transitional period during which certain laws fall into disuse'.[130] Applying *Ahmet Arslan*-type logic, the court found a violation of the Article 8 right to private and family life as no current community support for the legislation was apparent.[131]

In *Hatton v UK*, the ECtHR's Grand Chamber refused to engage in any detailed review of the government's policy or its policy-making process, preferring the government's presentation of the UK economic interest in retaining night flights at Heathrow airport to the applicants' interest, protected under Article 8, as residents living near to Heathrow, in having a good night's sleep free from the disturbance of aircraft noise.[132] In its 2001

123 Ibid 167, para 60.

124 Ibid.

125 Ibid 169, para 66.

126 Ibid 163, para 47 (quoting Article 8(2) ECHR).

127 (1991) 13 EHRR 186.

128 Ibid 187–90, paras 8–14.

129 Ibid 187–89 and 192, paras 8–11 and 20.

130 *Norris v Ireland*, Report of the European Commission of Human Rights, 12 March 1987 <http://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["10581/83"],"itemid":["001-45392"]}>, para 42.

131 *Norris* (n 127) paras 42, 43 and 46–47.

132 (2003) 37 EHRR 611; Former ECtHR judge Loucaides – in L G Loucaides, 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' (July 2010), accessible at <www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/8> – cites *Hatton* as an example of the ECtHR's 'reluctance to find violations in sensitive matters affecting the interests of the respondent States' (see p 3 for quote). Juss (n 73) 28 refers to Loucaides on *Hatton*.

judgment the Chamber found a violation of Article 8 on the basis of a detailed review of government policy on night flights.[133] It noted that the UK government had not fully and properly assessed the economic importance of night flights to the UK economy and that no research into 'sleep prevention' (not being able to get back to sleep after being woken by noise) had been undertaken.[134] In 2003 the Grand Chamber set these criticisms aside and found no violation of Article 8 on the basis of favourable assumptions about the government's policy-making process: 'the Court considers it reasonable to assume that [night] . . . flights contribute at least to a certain extent to the general economy'.[135] The Chamber's approach, in a departure from the general trend, suggests an understanding of the applicants as individuals *qua* individuals, but the Grand Chamber reverts to type, preferring an approach which understands the individual as existing in and identified with a national community whose collective (economic) interests, as interpreted by the government, prevail.

Even the ECtHR's recent prisoner voting judgments, often interpreted as evidence of a court determined to override domestic law and government policy,[136] can be seen to involve only light-touch supervision which does little to disturb the court's general deference to domestic legislation and policy. As Ed Bates explains, whilst some aspects of the *Hirst* and *Frodl* judgments suggest a high degree of ECtHR control over domestic legislation and policy – in particular the suggestion in *Hirst v UK* and explicit statement in *Frodl v Austria* that a specific judicial decision, rather than legislation of general application, was required to disenfranchise a prisoner[137] – other cases, including *Greens and MT v UK* and *Scoppola v Italy*,[138] have moderated the position.[139] In *Scoppola*, the Grand Chamber rejected, as incompatible with Article 3, Protocol 1, any 'disenfranchisement [that] affects a group of people generally, automatically and indiscriminately based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances',[140] whilst leaving it to individual states to 'decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied'.[141]

Whilst the ECtHR has defined the parameters within which states may legislate to disenfranchise prisoners, those parameters exclude only absolute and indiscriminate

133 (2002) 34 EHRR 1.

134 Ibid 25, paras 101–03.

135 *Hatton* (n 132) 643, para 126.

136 For discussion see E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14(3) Human Rights Law Review 503.

137 *Hirst* (2006) 42 EHRR 849, 867 and 869, paras 71 and 77 – on which see Bates (n 136) 509; *Frodl v Austria* (2011) 52 EHRR 267; see also *McHugh and Others v UK*, Application No 51987/08, unreported <http://hudoc.echr.coe.int/eng#{"itemid":["001-151005"]}>, reaffirming *Hirst* and finding a violation of the Article 3, Protocol 1 ECHR rights of 1015 prisoners in view of the UK's continuing 'blanket' ban on prisoner voting.

138 *Greens* (2011) 53 EHRR 710; *Scoppola* (2013) 56 EHRR 663.

139 Bates (n 136) 505–18.

140 *Scoppola* (n 138) 681, para 96.

141 Ibid 682, para 102.

disenfranchisement.[142] The prisoner voting cases do not suggest an ECtHR prepared to review or reject the expression of current community will. In these cases the ECtHR is seeking the expression of community will on the implementation of Convention rights, as indicated in *Hirst*: 'it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote'.[143]

More broadly, the prisoner voting cases are consistent with the court's concern, expressed throughout the jurisprudence reviewed above, to respect community will. On 4 August 2016 85,112 people were imprisoned in the UK.[144] Not all of them will be eligible to vote but, on the assumption that many of them are, the exclusion of anything like that number would significantly affect the will expressed by the community through democratic processes.[145] If the prisoner voting cases reflect a higher standard of review compared to the cases discussed above, this is explained by the fact that the court is, in fact, seeking to protect the expression of community will. The logic of the *SAS* and prisoner voting judgments is one of inclusion in and identification with the community. In *SAS* this leads to a finding in France's favour and in some of the prisoner voting cases – notably *Hirst* – that same logic leads to the finding of a violation.

The court's deference to current community will is apparent in numerous other significant cases. In *Ireland v UK* (1978) and *Brannigan and McBride v UK* (1993) the court deferred to the UK government on the question of whether an Article 15 'public emergency threatening the life of the nation' existed and, consequently, found that the arbitrary detention of the applicants did not violate Articles 5 (right to liberty and security) or 6 (right to a fair trial).[146] In *Balmer-Schafroth* (1997), the court rejected an Article 6 challenge to the Swiss government's decision to extend the length of a nuclear power plant's operating licence in the face of objections from local residents who claimed that the plant was unsafe because the residents, despite their proximity to the station, 'did not . . . establish a direct link between the operating conditions of the power station . . . and their right to protection of their physical integrity'.[147] In *Refah Partisi* (2003), the court upheld the Turkish constitutional principle of secular government without any real review of the Turkish constitutional order, rejecting the applicants' challenge to the banning of their political party

142 See Bates (n 136) 518: 'following *Hirst* (or the version of that case endorsed by the Grand Chamber [in *Scoppola*] in 2012) Strasbourg still required observance of a minimum European standard – a rights-based approach to convicted prisoner voting in some form – but made it very clear that the model could be very basic and that the boundaries for reform within which the UK had to work really were wide.'

143 *Hirst* (n 137) 869, para 79.

144 Data from <www.howardleague.org/weekly-prison-watch/> (as at 4 August 2016).

145 See *Frodl* (n 137) 274, para 24: 'any conditions imposed [on voting] must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates.'

146 *Ireland* (1979–1980) 2 EHRR 25; *Brannigan* (1994) 17 EHRR 539; See M B Dembour, *Who Believes in Human Rights: Reflections on the European Convention* (CUP 2006) 38: 'Article 15 is an area of the Convention where the Strasbourg institutions have granted states a wide margin of appreciation.' 48: 'The granting to states of a wide margin of appreciation in respect of Article 15 has meant that the Court has refrained in practice from undertaking a factually close and theoretically strict analysis of the situation.'; and, in general on *Ireland* and *Brannigan*, 47–49.

147 *Balmer Schafroth v Switzerland* (1998) 25 EHRR 398, 615, para 40.

because it rejected that principle and declaring 'sharia . . . incompatible with the fundamental principles of democracy, as set forth in the Convention'.[148]

Taken together, the cases considered in this and the preceding section evidence a trend in the ECtHR's jurisprudence, consistent with the identitarian logic of international human rights doctrine, which determines the outcome in *SAS*; as a general rule the court will defer to current community will as evidenced in domestic legislation or policy.

European democracy

International human rights doctrine and the ECtHR's jurisprudence employ a superficial concept of participatory democracy that assumes a direct connection between community will, government policy and legislation. That concept supplies the rationale for deferring, in cases like *SAS* and under cover of 'a wide margin of appreciation', to the state on questions of what is "necessary in a democratic society".

Peter Mair's recent book, *Ruling the Void: The Hollowing of Western Democracy*, suggests there may be good reason to question the connection between a national community and legislation passed in its name.[149] Mair depicts a European 'kind of democracy without the demos at its centre' in which 'the people, or the ordinary citizenry, are becoming effectively *non*-sovereign' as '[political] parties and their leaders exit from the arena of popular democracy'.[150] Participation in elections has dropped markedly across Western Europe in the post-Cold War era – participation in the 2007 French parliamentary elections, for example, 'fell to a new record low of 60.4 per cent'.[151] Whilst 'the trend is not wholly unidirectional', 'the more recent the elections, the more likely they are to record troughs in participation'.[152] Political parties no longer target particular groups or interests, preferring to address the entire electorate: 'political competition has come to be characterized by the contestation of socially inclusive appeals in search of support from socially amorphous electorates'.[153] Politics becomes an exercise in 'theatre and spectacle', a kind of "video politics" in which citizens are designed out of the process, 'change[d] from participants into spectators, while the elites win more and more space in which to pursue their own particular interests'.[154] Politics and governance become not so much exercises in reflecting pre-existing community will in legislation as of manufacturing a community and its will through legislation; former French President Sarkozy's announcement, in a 2009 state of the nation address, that the burqa 'will not be welcome on our territory' seems the perfect example.[155] Opposition to an outsider or 'enemy', in the form of Islamic cultural, religious and aesthetic

148 *Refah Partisi v Turkey* (2003) 37 EHRR 1, 44, para 123; I wrote about the inadequacies of the court's decision in *Refah Partisi* in 'Walter Benjamin and the Re-Imagination of International Law' (2016) 27(1) Law and Critique 103, 114–15.

149 P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).

150 Ibid 9, 2 and 90.

151 Ibid 26.

152 Ibid 27 and 28–29.

153 Ibid 57.

154 Ibid 44 (Mair borrows the term "video politics" from Giovanni Sartori, *Homo Videns* (Economia Laterza 2002)) and 98.

155 See D Carvajal, *New York Times*, 'Sarkozy Backs Drive to Eliminate the Burqa', 22 June 2009 <http://www.nytimes.com/2009/06/23/world/europe/23france.html?_r=0>.

practices, is, then, a potential rallying point for Western European politicians in search of a power base.[156]

Liberalism and assimilation

The apparent affinity between international human rights doctrine, the ECtHR's jurisprudence and the assimilation of a non-identical individual into the community has roots that extend beyond legal doctrine and into the social, political and philosophical connection between 'liberal theory', its '[assumption] of a unity among men that is already in principle established', and the use of law's 'force' to secure the 'order' or 'harmony of a national community'.[157] Social 'order . . . in reality cannot exist without distorting [wo]men'.[158] Liberalism's assumption of an individual whose identity and personality depends on the broader community creates a national, liberal-democratic order that constrains individuality by force. Identity thinking is the means to secure order and ensure that individuals identify with the(ir) community.

In *Dialectic of Enlightenment*, Theodor Adorno and Max Horkheimer, taking the German Third Reich as their example, consider the conditions that lead to the demise of critical, reflective judgment. They argue that the Third Reich was not a deviation from enlightenment rationality but a hideous hyper-extension of enlightenment thought.[159] An insistence on the subordination of everything and everyone to social control, produced by a fear of the 'outside', created the conditions for the Third Reich.[160] No effective opposition to National Socialism in Germany was possible because enlightenment thought had created a climate of technical control in which individuals lacked critical subjectivity because they were required to identify with the system, the community.[161] For Adorno, law is as much a part of this problem as any other aspect of society; it claims to control the world and everything in it and, in the process, it denies the possibility of non-identity, of individual, critical judgment.[162]

Concerned by the Third Reich's incorporation of legal thought into the state machine, Franz Neumann, in *Behemoth*, contrasts 'general', 'formal' law applied by an independent judiciary, with National Socialist '[i]nstitutionalism', 'a juristic structure serving the common good', 'an integrated system of community law'.[163] Law, as a set of norms applied by judges exercising their own judgment, is overthrown by the rule of power.[164]

156 Schmitt (n 41) 46: 'The endeavor of a normal state consists above all in assuring total peace within the state and its territory. To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation. As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon the domestic enemy.' (paragraph break suppressed)

157 Adorno and Horkheimer, *Dialectic* (n 15) 169–70.

158 Ibid 170.

159 Ibid 176: 'The alliance between enlightenment and domination has cut the link between the aspect of truth in religion and the consciousness, and has retained only the objectified forms of religion. This is a dual benefit for the Fascists: uncontrolled longing is channelled into nationalistic rebellion, and the descendants of the evangelistic fanatics are turned . . . into sworn members of blood brotherhoods and elite guards; religion as an institution is partly embodied in the system and partly converted into mass culture.'

160 Ibid 16: 'Enlightenment is mythic fear turned radical . . . Nothing at all may remain outside, because the mere idea of outsideness is the very source of fear.'

161 See ibid 197–98.

162 Adorno (n 4) 309: 'Law is the primal phenomenon of irrational rationality. In law the formal principle of equivalence becomes the norm; everyone is treated alike . . . For the sake of an unbroken systematic, the legal norms cut short what is not covered, every specific experience that has not been shaped in advance.'

163 F Neumann, *Behemoth: The Structure and Practice of National Socialism* (Victor Gollancz 1942) 361–62, 366.

164 Ibid 373–74.

In a similar vein, Otto Kirchheimer contrasts the process of liberal-democratic adjudication with '[t]he bureaucracy of fascism'.[165] 'The law courts of a competitive society serve as umpires to regulate the conditions of competition', but under fascism every aspect of the state, 'judicial, administrative and police alike . . . executes and smooths the path for the decisions reached by the political and economic monopolies'.[166]

Legal controls to safeguard the freedom of the individual and her existence 'independent' from society are required because '[t]he democratic majority may violate rights' and '[a] wrong cannot possibly become right because the majority wills it so' – indeed '[p]erhaps it, thereby, becomes a greater wrong'.[167] Kirchheimer rejects the 'totalitarian judicial functionary' who 'guess[es] what would be the safest, that is, immediately most desirable, interpretation from the viewpoint of the authorities',[168] in favour of the idea of the judge as a constitutional adjudicator: 'the Western judge's policy directive, unlike that of his totalitarian colleague, does not come from explicit or intuitive communion with a party hierarchy [but] . . . from his own reading of the community needs, where lies its justification as well as its limitation'.[169]

The ECtHR's deference to community will, exemplified in *SAS* and consistent with a long-established trend in the court's jurisprudence, is on the wrong side of the line Neumann and Kirchheimer draw, reflecting the demise of the critical, reflective judgment Adorno and Horkheimer advocate. *SAS* is a stark reminder that the reactionary oppression of a minority can be compatible with, and is a latent but inherent possibility in, liberal democracies and human rights systems founded on identity in community.

Non-identity thinking and legal practice

The existing literature on *SAS* and religious dress and identity before the ECtHR either, as discussed above, assumes that the individual has priority over the community, or accepts and endorses the concept of identity in community and its implications for the non-identical outsider.

Ronan McCrea offers an example of this latter tendency.[170] He argues that '[t]he strongest justification for laws prohibiting the wearing of the veil in public are based on a vision of the individual in society and the duties that are incumbent upon us all when we place ourselves in public places shared with others' and that '[t]he individual who will not hold back from expressing their religious convictions . . . can arguably be accused of seeking to take tolerance from pluralist societies without offering reciprocal tolerance for those who do not share their faith'.[171] Accepting and incorporating majority rule and identity thinking into international human rights law in this way deprives the ECtHR of any meaningful jurisdiction over states. States become judges in their own cause as the court defers to community will except in cases where there is no clear connection between current community will and the challenged legislation (*Ahmet Arslan*; *Dudgeon*; *Norris*; *Thlimmenos*), where the court's deference to community will is challenged by legislation which has the effect of excluding a significant cross-section of society from the formation of community

165 O Kirchheimer, 'The Dual State: A Contribution to the Theory of Dictatorship by E Fraenkel' (1941) 56(3) Political Science Quarterly 434, 436.

166 Ibid.

167 F Neumann, 'On the Limits of Justifiable Disobedience' in F Neumann (H Marcuse (ed)), *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Free Press 1957) 149, 156.

168 O Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton UP 1961) 425.

169 Ibid 429.

170 R McCrea, 'The Ban on the Veil and European Law' (2013) 13 Human Rights Law Review 57.

171 Ibid 78 and 96.

will (*Hirst*), or where a domestic court is regarded as having struck the wrong balance between the rights of the individual and competing commercial or private interests (*Eweida*).

As an alternative to the choices available in the existing literature, jurisprudence and doctrine, we might focus on the tension between these existing approaches and the model of the judge, advocated by Adorno and Horkheimer, Neumann and Kirchheimer, as an independent, critical thinker. That model offers a way beyond the ECtHR's current jurisprudence, a way of fulfilling the 'utopian' promise of legal practice as a means of seeking an alternative future.[172]

If, as SAS suggests, in questions of religious, social and cultural identity, the ECtHR is unwilling to challenge the state and enquire into the rationale for the forced assimilation of non-identical individuals into the community, it is preferable, at least in relation to such questions, that there be no ECtHR. The dominant social, cultural and political orthodoxy and the widespread hostility to Islamic cultural, religious and aesthetic practices in Europe does not, after all, need the support of the ECtHR to exert its influence.

For ECtHR judges to neuter themselves on the basis of deference to community will when, as Mair's work shows, the connection between community will and legislation is contested, is to deprive the ECtHR of any independent social or political function on the basis of an outdated model of European democracy. Only by recovering a social and political function through a model of critical adjudication can the ECtHR demonstrate its continued relevance when deciding cases like *SAS* that involve questions of identity and non-identity. This implies an overt political confrontation between states or, more accurately, their governments, and the ECtHR. Human-rights thinkers and practitioners should embrace and advocate for that confrontation as an opportunity to shape the future, a potentially utopian 'break' with 'the system', with international human rights doctrine.[173] The alternative future depicted in *SAS* is of a European human-rights system that functions as another means of imposing identity on the non-identical. That future is bleak.

172 See C Douzinas, *The End of Human Rights* (Hart 2000) 369: 'human rights are our utopian principle: a negative principle which places the energy of freedom in the service of our ethical responsibility for the other'.

173 F Jameson, *Archaeologies of the Future* (Verso 2007) 232: 'The Utopian form itself is the answer to the universal ideological conviction that no alternative is possible, that there is no alternative to the system. But it asserts this by forcing us to think the break itself, and not by offering a more traditional picture of what things would be like after the break.' (footnote omitted)

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Adverse possession and unadministered estates: an unfair solution to a redundant Irish problem?

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Introduction

It is frequently asserted that the doctrine of adverse possession performs a valuable social function in Ireland by allowing the ownership of land forming part of an unadministered estate to be updated many years after the death of the owner. More specifically, it is argued that this role is particularly important in rural Ireland where, historically, will-making was uncommon, emigration was widespread and grants of representation were rarely extracted in relation to small farms.[1] The typical scenario involved the death of the registered owner of a farm[2] with the result that his children became entitled to the land as co-owners under the rules governing intestacies. However, only one (or some) of his children remained in possession of the farm for 12 years or more, while the others left to work and live elsewhere. In the meantime, the deceased farmer's estate remained unadministered. On the expiry of the limitation period, a Land Registry application could be made by the child in possession, frequently the eldest son, pursuant to s 49 of the Registration of Title Act 1964 to register him as the new proprietor on the basis of his adverse possession.[3] A s 49 application avoids the inconvenience and expense of extracting multiple grants if there was more than one death on the title or the need to obtain numerous consents to a deed of family arrangement for the purposes of releasing the intestate shares of the applicant's siblings.

The role played by the doctrine in this context was acknowledged in the Oireachtas debates which preceded the enactment of s 126 of the Succession Act 1965 which reduced the limitation period for claims in respect of the estate of a deceased person from 12 years to six years.[4] This amendment was clearly intended to promote reliance on the doctrine to resolve a problem perceived to be peculiar to rural Ireland at the time.

1 See A Lyall (with A Power), *Land Law in Ireland* 3rd edn (Round Hall 2010) 990; J C W Wylie, *Irish Land Law* 5th edn (Bloomsbury Professional 2013) para 23.42; R A Pearce, 'Adverse Possession by the Next-of-Kin of an Intestate' (1987) 5 Irish Law Times 281; Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 2005) 331–32.

2 Nearly all agricultural land in Ireland is registered in the Land Registry as tenant farmers who purchased their holdings under the Land Purchase Acts were required to apply for compulsory first registration pursuant to the Local Registration of Title (Ireland) Act 1891.

3 Keane J referred to this practice in *Gleeson v Feehan* [1997] ILRM 522, 539.

4 215 Dail Debates col 2027.

More recently, in its third-party submission to Grand Chamber in *Pye*,[5] the government of Ireland referred to the role played by the doctrine in facilitating the intergenerational transfer of farms in Ireland[6] and argued that the doctrine represented a proportionate means of achieving this and other legitimate aims, justifying any potential interference with the property rights of owners.[7] In sharp contrast, in England and Wales a co-owner under an unadministered estate is absolutely precluded from relying on the doctrine and it has been argued that it would be unfair to allow a strong-willed occupying member of the family to obtain title by adverse possession as a result of the generous attitude of other members of the family.[8]

Adverse possession between co-owners traditionally gave rise to theoretical difficulties as one of the basic tenets of co-ownership is unity of possession; therefore possession by one co-owner was deemed to be possession by all of them. Before the enactment of the Real Property Limitation Act 1833 it was only possible for a co-owner who could prove that he had ousted the other co-owners to rely on the doctrine against them. The *First Report of Commissioners on Real Property* published in 1829 indicated that it would be desirable to permit a finding of adverse possession between co-owners without proof of an ouster. Section 12 of the Real Property Limitation Act 1833 gave effect to this recommendation and provided that, if a co-owner was in possession of more than his share of the land for his own benefit, such possession would not be deemed to be the possession of the other co-owners.[9] While this rule is re-enacted by s 21 of the Irish Statute of Limitations 1957,[10] the English law on this issue diverged with the enactment of the Law of Property Act 1925 and the current position in England is that adverse possession between co-owners is absolutely precluded.[11]

If the co-ownership entitlements arise under an unadministered estate, the operation of the doctrine becomes even more complicated as ownership vests for the meantime in the deceased's personal representatives or the Irish High Court/English Public Trustee.[12] Occasionally, a personal representative, who is also entitled to a share in the estate, takes possession of the land for the limitation period. In this context, the implications of two other rules must be considered: the personal representative is deemed to hold the estate on trust for those entitled to it under the will or intestacy rules[13] and no limitation period

5 Third-party submission by the Irish government, 23 August 2006. See *JA Pye (Oxford) Ltd v UK* (2008) 46 EHRR 45.

6 Ibid para 13.

7 Ibid para 24.

8 G Miller, 'The Administration of Estates and Adverse Possession' (2000) 150 New Law Journal 940, 946.

9 Legislation equivalent to the Real Property Limitation Act 1833 was never enacted in the USA which has retained the requirement for an ouster to the present day. To rely on the doctrine of adverse possession, a co-owner must be in a position to prove a repudiation of the co-ownership relationship, notice of such repudiation to the co-owner out of possession and possession after such repudiation and notice for a time sufficient to satisfy the relevant statute of limitations. See W A Knight, 'The Adverseness of Possession to Fractional Interests' (1957) 9 Baylor Law Review 168; S O'Moore, 'Adverse Possession Between Cotenants: The Requirement of Actual Notice' (1971) 42 Mississippi Law Journal 137; S F Kurtz and H Hovenkamp, *Cases and Materials on American Property Law* (West Publishing Co 1987) 186–88.

10 Note that s 21 of the 1957 Act, although mentioned in the pleadings, appears to have been ignored by the court in a recent case, *Moore v Moore* [2010] IEHC 462.

11 Limitation Act 1980, Schedule 1, para 9.

12 Succession Act 1965, ss 10(1) and 13; Administration of Estates Act 1925, ss 1(1) and 9(1). Note that in England before 1 July 1995 the property of a deceased intestate vested in the Probate Judge (i.e. the President of the Family Division); s 14 of the Law of Property (Miscellaneous Provisions) Act 1994 substituted a new s 9(1) into the Administration of Estates Act 1925 which vests such property in the Public Trustee.

13 Succession Act, s 10(3); Administration of Estates Act 1925, s 33(1).

applies to actions to recover trust property in the possession of a trustee.[14] Under Irish law, a personal representative is not deemed to be a 'trustee' for the purposes of the running of the limitation period[15] and so he or she can rely on the doctrine to extinguish the claims of the deceased owner's successors. However, under English law the definition of a 'trustee' includes a personal representative[16] and therefore a personal representative may not rely on the doctrine of adverse possession against those with entitlements to the estate.

Recently, concerns have been expressed in law reform circles in Ireland and elsewhere in relation to the fairness of the doctrine of adverse possession, in particular the doctrine's limitations in protecting owners against the danger of inadvertently losing title by adverse possession and the extent to which the doctrine permits squatters who know that they do not own the land (i.e. deliberate or 'bad faith' squatters) to acquire title. In England and Wales, the qualified veto system of adverse possession introduced by the Land Registration Act 2002 which applies to land which has been registered in the Land Registry purported to address both concerns. Additional protection is conferred on the registered owner who may veto an adverse possession application, but the qualifications to the veto system preserve the operation of the doctrine for certain adverse possessors in the interests of fairness (for example, a good faith adverse possessor of boundary land).[17] In 2005, the Irish Law Reform Commission proposed certain reforms to the law on adverse possession which imposed a mandatory requirement for a court application and restricted the operation of the doctrine to certain categories of claimant. An attempt was made to preserve the existing role played by the doctrine in the context of unadministered estates by conferring jurisdiction on the court to make an order vesting ownership in the applicant where the adverse possession application 'relates to land comprised in a deceased person's estate and it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes'.[18] These Irish law reform proposals were ultimately jettisoned in response to critical submissions made to the Irish government by the Law Society's Conveyancing Committee, mostly related to the workability and increased costs involved in the administration of the proposed scheme.[19] However, the Irish Law Reform Commission plans to revisit the matter of reform in this area of law in the future. In this event, the introduction of a qualified veto system of adverse possession is likely to be considered for Ireland. A discussion of the substantive arguments in favour of the introduction of such a reform has taken place elsewhere.[20] The aim of this article, however, is to consider whether the doctrine of adverse possession should continue to play the same role in the context of unadministered estates. If the introduction of a qualified veto system of adverse possession is proposed for Ireland, it will be necessary to consider whether it should be tempered by a qualification to preserve its existing role in this particular context. This article discusses whether such a qualification is necessary in the interests of fairness to address a prevailing social problem. It concludes that the particular

14 Statute of Limitations 1957, s 44; Limitation Act 1980, s 21.

15 Succession Act 1965, s 123.

16 S 38(1) of the Limitation Act 1980 adopts the definition set out by s 68(1)(17) of the Trustee Act 1925.

17 The Law Commission also claimed that these reforms were essential to ensure the compatibility of the doctrine of adverse possession with title registration principles. For a critique of this justification for the reforms, see U Woods, 'The English Law on Adverse Possession: A Tale of Two Systems' (2009) 38(1) Common Law World Review 27, 31–38.

18 Law Reform Commission (n 1) 329–30.

19 See U Woods, 'The Position of the Owner under the Irish Law on Adverse Possession' (2008) 30 Dublin University Law Journal 298, 300–03.

20 For such a discussion, see U Woods, 'The Irish Law on Adverse Possession: The Case for a Qualified Veto System', PhD thesis, Queen's University Belfast, 2015.

problem of deceased farmers' estates remaining unadministered has become redundant and it is critical of the result achieved by the doctrine of adverse possession in the context of unadministered estates.

Parts 1 and 2 of this paper trace the historical development of this technically difficult area of law in England and in Ireland. While the current English position achieves a sensible result, it appears to have happened inadvertently and not as a result of any considered policy decision. In contrast, the traditional policy justification for the Irish position has been accepted on numerous occasions without any consideration of the fairness of the result, particularly in a non-agricultural context. Part 3 of this paper, therefore, examines whether the Irish position is justified in modern times. The paper concludes by discussing how the adoption of a qualified veto system of adverse possession could confer added protection on those with co-ownership entitlements under unadministered estates, but also preserve the doctrine to restore land to the market if such interests have been abandoned and facilitate certain informal transmissions on death.

1 The development of the law in England

In England and Wales, before the Law of Property Act 1925 came into force, many cases were heard which involved one or more co-owners relying on s 12 of the 1833 Act to claim the benefit of the doctrine of adverse possession where they had possessed the property to the exclusion of the other co-owners.[21] In more recent times, the Judicial Committee of the Privy Council has heard a number of cases on appeal from Commonwealth jurisdictions where the law on this issue has remained unchanged.[22]

The entry into force of the Law of Property Act 1925 on 1 January 1926 brought about a fundamental change to the legal structure of co-ownership in England and Wales. From that date the legal title to co-owned property could only be held by joint tenants and a statutory trust for sale was imposed in all cases of co-ownership where such a trust was not expressly created. This resulted in many co-owners holding the land on trust for sale for themselves as equitable tenants in common, or joint tenants; it also brought about an inadvertent change in the application of the doctrine of adverse possession, as was highlighted in *Re Landi*.[23] The circumstances of that case involved one tenant in common receiving the entire rent in relation to the co-owned premises for over 20 years from the end of 1923 onwards. Sir Wilfred Greene MR pointed out that the 1925 Act converted both tenants in common into trustees, although they were also beneficiaries. He held that s 12 of the 1833 Act no longer applied as it contemplated a co-ownership relationship which did not involve a trust. He noted: 'The language is quite inapt to cover the case of one of two trustees who are also their own beneficiaries.' Sir Wilfred Greene MR concluded that a trustee in possession or receiving rents and profits can never be regarded as doing so for his own benefit and, therefore, the limitation period cannot run in his favour.

The approach adopted in *Re Landi* gave rise to an inconsistency as a beneficial co-owner who was not a trustee[24] could bar the title of the other beneficiaries through adverse possession. This lacuna was closed by s 7(5) of the Limitation Act 1939 which made it clear that one beneficial co-owner cannot be in adverse possession against another, regardless of the location of the legal estate. This provision was re-enacted by para 9, Schedule 1 of the Limitation Act 1980. Although co-owned land is now regarded

21 See *Paine v Ryder* (1857) 24 Beav 151; *Thornton v France* [1897] 2 QB 143; *Glyn v Howell* [1909] 1 Ch 666.

22 See e.g. *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] AC 1072.

23 [1939] Ch 828.

24 An express trust for sale may have been created or the statutory trust for sale may have vested legal ownership in the Probate Judge or the Public Trustee.

as being held on a trust of land rather than a trust for sale,[25] para 9 provides that, where such land is in the possession of a person entitled to a beneficial interest in the land (and not being a person solely or absolutely entitled to the land), no right of action to recover the land shall be treated as accruing during that possession to any person in whom the land is vested as trustee or to any other person entitled to a beneficial interest in the land.

In *Earnshaw v Hartley*,[26] the Court of Appeal ruled that para 9 also applied in the context of an unadministered estate to prevent time running where one intestate successor possesses the property to the exclusion of others entitled to an intestate share. In that case a son had remained on the farm after his mother died intestate in 1983. He was later joined by his wife, the defendant, and in 1995 the son died. His mother had also been survived by three daughters who obtained letters of administration to their mother's estate in 1998 and sought various forms of relief, including a declaration as to the beneficial ownership and an order for sale. The defendant alleged that the daughters' entitlements had been extinguished by her husband's and her own successive adverse possession of the farm. Counsel for the defendant argued that para 9 did not apply before the grant of administration was extracted as the farm was vested in the President of the Family Division at that time and it was not held on a trust for sale. Nourse LJ refused to apply this literal interpretation to para 9 and stated that, although technically the farm was not held on trust for sale while it was vested in the President of the Family Division,[27] it was presumptively so held; it would be artificial to distinguish between the position before and after the grant of administration. In the same vein, counsel for the defendant argued that the siblings did not have a beneficial interest in the land or the proceeds of sale, but only a right to require the mother's estate to be duly administered and to receive a quarter share of the net estate on completion of the administration. Nourse LJ held that it would be equally artificial to suggest that the siblings did not have an interest in the farm which was sufficient for the purposes of para 9.[28]

As has already been mentioned, a personal representative is deemed to be a 'trustee' for the purposes of the Limitation Act 1980[29] and s 21 provides that no period of limitation shall apply to an action by a beneficiary to recover trust property in the possession of a trustee. Therefore, a beneficial co-owner in possession who has extracted a grant of representation will be prevented from relying on the doctrine on two grounds: first, because of his or her position as a trustee and second, because of his or her position as a beneficial co-owner.

Even if the beneficial co-owner in possession has not extracted a grant, the decision in *James v Williams*[30] highlights that he could be deemed to be an *executor de son tort* on the basis that he had intermeddled with the estate of the deceased. Although an *executor de son tort* does not come within the definition of a personal representative,[31] if he is also deemed to be a constructive trustee,[32] which happened in *James v Williams*, s 21 will apply to prevent time running in his favour. The circumstances in *James v Williams* were similar

25 The Trusts of Land and Appointment of Trustees Act 1996 replaced the trust for sale with a simple trust of land.

26 [2000] Ch 155.

27 Note that this role has been performed by the Public Trustee since 1 July 1995, see n 12 above.

28 See *Earnshaw* (n 26) 161.

29 See n 16 above.

30 [2000] Ch 1.

31 See Trustee Act 1925, s 68(1)(9).

32 A trustee is defined as including a constructive trustee by s 68(1)(17) of the Trustee Act 1925.

to those in *Earnshaw v Hartley*.[33] On the intestate death of the owner, his wife became entitled to the beneficial interest in the family home, but she took no steps to administer his estate. She died intestate in 1972 and the property was held on statutory trust for sale for her three adult children: a son, William junior; a daughter, Thirza; and another daughter, the plaintiff. The plaintiff had moved out of the property when she got married and only visited from time to time. After the mother died, the plaintiff's siblings made it clear to her that she was unwelcome at the family home and she became estranged from them. From that point onwards, William Junior behaved as if he owned the property. He left the property to Thirza when he died in 1993 and when Thirza died in 1995 it was left to her child, the defendant. The plaintiff sought a declaration that she was entitled to a one-third share in the property and an order for the sale of the property. The defendant contended that her claim was statute-barred.

It is unclear why the plaintiff failed to plead para 9 which prevents adverse possession between beneficial co-owners.[34] Instead, the parties focused on whether the son, as an *executor de son tort*, was also a constructive trustee; if he was, the parties accepted that the limitation period could not begin to run in his favour. Counsel for the defendant seemed to accept without question that his behaviour qualified as that of an *executor de son tort*. The court relied heavily on an article published in 1974[35] in which the author, Hinks, maintained that anyone who takes possession of the property of a deceased person without the permission of the personal representatives or the court is an *executor de son tort*.[36] Hinks noted that an *executor de son tort* can rely on the doctrine of adverse possession unless he or she is also a constructive trustee.[37] He pointed out that there would appear to be no justification for imposing a constructive trust where the *executor de son tort* is a complete stranger save in the most exceptional circumstances.[38] This makes sense as otherwise it would never be possible to acquire title by adverse possession against land which formed part of the estate of a deceased owner.[39] On the other hand, Hinks argued that, where a brother seeks to establish title by adverse possession against his adult siblings, there would appear to be every justification for imposing a constructive trust.[40] The court concluded that the circumstances of the case gave rise to such a constructive trust. The brother knew he was not solely entitled to the property when he took possession of it and it would be inequitable to allow him to take advantage of his decision not to take out letters of administration. Therefore, he was under an equitable duty to hold it for himself and his sisters on constructive trust.

33 Both cases are discussed by Miller (n 8) and Z Robertson, 'Intestate Succession and Adverse Possession' (2001) Private Client Business 40.

34 It is interesting, however, that the conversation in which she was told she was not welcome would have given rise to an ouster under the law which prevailed before the introduction of s 12 of the Real Property Act 1833. In *Earnshaw* (n 26), Nourse LJ commented that the impact of s 7(5) of the 1939 Act, and subsequently para 9, was the re-introduction of the doctrine of non-adverse possession amongst co-owners of land which had applied before the enactment of s 12 of the Real Property Act 1833. However, before 1833, adverse possession was possible between co-owners if an ouster could be proved; since the enactment of the 1939 Act it is clear that adverse possession between co-owners is never possible.

35 F Hinks, 'Executors de Son Tort and the Limitation of Actions' [1974] Conveyancer and Property Lawyer 176.

36 Ibid 184.

37 Ibid 182.

38 Ibid 184.

39 Such an approach is clearly not envisaged by s 26 of the Limitation Act 1980 which allows time to run against a deceased person's estate, regardless of whether a personal representative has been appointed.

40 Hinks (n 35) 185.

Jourdan and Radley-Gardner argue that the decision in *James v Williams* was *per incuriam* in relation to two matters.[41] First, it was made in ignorance of para 9 and should simply have been decided on the basis that the brother was a beneficial co-owner and so the limitation period could not have run in his favour. Second, the attention of the court was not drawn to an earlier decision of the Court of Appeal in *Pollard v Jackson*[42] which decided that a squatter who took possession of a flat, knowing of the owner's death, was neither an *executor de son tort* nor a constructive trustee. There seems to be a divergence of opinion on whether simply taking possession of property is sufficient to make a person an *executor de son tort*. Assuming that it is sufficient, the circumstances in *Pollard* can be clearly distinguished from those in *Earnshaw v Hartley* as the squatter in *Pollard* was a stranger and so would not have fallen within the category of circumstances which Hinks described as giving rise to a possible constructive trust. It should be mentioned, at this point, that if the Law Commission recommendations in its *Report on the Limitation of Actions*[43] are implemented, it will be possible for a trustee or a personal representative to claim the benefit of the limitation period against a beneficiary.[44] This would stunt the development of *James v Williams* as an authority in this area and a beneficial co-owner out of possession would be restricted to relying on para 9.

To summarise, in England and Wales, in all circumstances where co-ownership entitlements arise under a will or on intestacy, it is impossible for either a personal representative or someone with entitlements under an unadministered estate to benefit from the doctrine. Only a stranger to the title can benefit. Although the changes to the doctrine's application between co-owners, initially brought about by the 1925 legislation, may not have been the result of a deliberate policy decision, the position appears to have been accepted[45] and even embraced by commentators.[46]

The impact of recent reforms

The qualified veto, introduced by the Land Registration Act 2002 to govern adverse possession of registered land, may be exercised by the registered owner and other specified persons.[47] If the registered owner is deceased, she will obviously not be in a position to exercise a veto, although her personal representative may register as a person entitled to be notified of any adverse possession applications under rule 194.[48] If a stranger to the title was in adverse possession before the death of the registered owner, it behoves a personal representative to act quickly to ensure that the veto is not lost. If an adverse possession application is lodged after the death, but before the personal

41 S Jourdan and O Radley-Gardner, *Adverse Possession* 2nd edn (Bloomsbury Professional 2012) para 31.13.

42 (1994) 67 P & CR 327.

43 Law Commission, *Report on the Limitation of Actions* No 270 (2001).

44 Ibid paras 4.106 and 4.125.

45 This writer is not aware of any calls for a return to the position under s 12 of the 1833 Act.

46 Miller has argued that it would be unfair to allow a co-owner to benefit from the doctrine of adverse possession; see text accompanying (n 8) above.

47 Land Registration Act 2002, Schedule 6, para 2, requires the registrar to give notice of an adverse possession application to the registered proprietor of the estate, the registered proprietor of any charge, the registered proprietor of any superior registered estate (if the estate is leasehold), any person who is registered in accordance with rules as a person to be notified under this paragraph and other persons as rules may provide. Rule 194 of the Land Registration Rules 2003 provides that any person who can satisfy the registrar that he or she has an interest in a registered estate in land that would be prejudiced by the registration of the adverse possessor as proprietor of that estate may apply to be registered as a person to be notified under Schedule 6, para 2.

48 I am grateful to Mr Patrick Milne, Assistant Land Registrar with the English Land Registry, for discussing the notice requirements in this area with me. Any errors are my own.

representative has had a chance to administer the estate or register under rule 194, it is likely that no one will be in a position to exercise the veto. The legislative intention may have been to restrict the added protection of the veto to those who act quickly to update the register following a disposition. However, it is submitted that the current rules have the potential to operate quite harshly following a death on title where the registration gap before the registration of the transmission may be longer due to the delays inherent in extracting a grant of representation. It should be noted that the beneficiaries under the unadministered estate are not in a position to protect themselves, as an application by such beneficiaries to be notified of adverse possession applications pursuant to rule 194 would probably be rejected by the registrar on the basis that such beneficiaries have no interest in the land.[49]

This paper considers whether adverse possession is possible between beneficiaries under an unadministered estate and the Land Registration Act 2002 does not change the pre-existing law which prevented time running in these circumstances. As the law currently stands in England and Wales, neither a trustee nor a beneficiary can benefit from the doctrine of adverse possession against another beneficiary. However, time may run against a trustee if the beneficiary is solely entitled.[50] In its discussion of the exceptions to the veto system introduced by the 2002 Act, the Law Commission noted that a person solely entitled by will or intestacy would qualify as a person entitled to be registered as proprietor 'for some other reason'.[51] This exception would be relevant if the personal representative had registered himself as the owner and would prevent such a personal representative from vetoing an application by a person solely entitled who can also prove adverse possession of the land for at least 10 years.

Alternative remedies

Although a person entitled to a co-owner's share in land pursuant to an unadministered estate is precluded from relying on the doctrine of adverse possession, if she can prove that the deceased owner represented to her that she would have some interest in the land and she relied on that representation to her detriment, she may be entitled to a remedy under the doctrine of proprietary estoppel.[52] The court may even order that the property be transferred into her sole name. Recent restrictions imposed on this doctrine in the context of informal commercial transactions[53] do not appear to have impacted on the doctrine's potential to provide a remedy in the context of an informal testamentary

49 A beneficiary under a will or on intestacy is generally regarded as having no legal or equitable interest in the unadministered assets of the deceased's estate: see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. It is occasionally argued that a beneficiary entitled under a specific bequest or devise takes an equitable interest in the subject matter of the gift at the testator's date of death: see *IRC v Hawley* [1928] 1 KB 578.

50 Limitation Act 1980, para 9, Schedule 1.

51 See Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* No 271 (2001) para 14.43.

52 See *Gillet v Holt* [2001] Ch 210; *Re Basham* [1986] 1 WLR 1498; *Wayling v Jones* (1995) 69 P & CR 170.

53 See *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; M Dixon, 'Proprietary Estoppel – The Pendulum Swings Again?'[2009] Conveyancer and Property Lawyer 141; B McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 10(1) Oxford University Commonwealth Law Journal 95.

disposition.[54] Alternatively, a child of the deceased owner may be in a position to apply for provision under the Inheritance (Provision for Family and Dependants) Act 1975, if he or she can prove that the will or intestacy rules failed to make reasonable provision for his or her maintenance.[55] Such a claim must be brought within six months of the extraction of the grant of representation, although the court has discretion to extend this deadline.[56]

Where only one person with entitlements under an unadministered estate goes into possession, the others may be content to disclaim their interests or be bought out.[57] If the land has increased in value since this person went into possession, that individual's bargaining power will have decreased. As one court succinctly put it, often only the 'smell of oil' in previously valueless land rekindles an interest in its ownership.[58] If such negotiations fail, a personal representative or any of the beneficial co-owners may apply for an order for the sale of the property and the division of the proceeds between them.[59] If the other beneficial co-owners have abandoned the land and cannot be traced, it may be possible to register the remaining co-owner as the sole owner pursuant to a Benjamin Order or by taking out missing beneficiary insurance. Alternatively, the land may be sold by the personal representative in the course of administration,[60] or by the trustees of the land if it has already been vested in the co-owners by means of an assent. In the context of a sale by the trustees of the land, provided the statutory preconditions in relation to overreaching are met,[61] the purchaser will take the land free of the interests of any co-owners which attach instead to the capital money. Although adverse possession is often regarded as playing an essential role in restoring abandoned land to the market, the doctrine is unnecessary in this particular context as its release onto the market is facilitated by either the powers of the personal representative or the overreaching mechanism. The absent co-owners' share of the sale proceeds may be preserved for them in a separate account or, if missing beneficiary insurance or a Benjamin Order were obtained, it may be distributed to the remaining co-owner.

2 The development of the law in Ireland

A number of issues which had obfuscated the law in this area have recently been clarified by Irish case law and legislation. First of all, where only one or some of the persons entitled to an intestate share took or remained in possession after the death of the owner, doubts arose in relation to the impact of their entitlements as next-of-kin on the operation of the doctrine of adverse possession. A strong line of early authority

54 As demonstrated by the recent House of Lords' decision in *Thorner v Major* [2009] UKHL 18 where the court ordered the transfer of a farm into the name of the claimant who had worked on the deceased's farm for 30 years without pay in reliance on oblique assurances made by the deceased that he would inherit it. See B McFarlane and A Robertson 'Apocalypse Averted; Proprietary Estoppel in the House of Lords' [2009] Law Quarterly Review 535; M Dixon, 'Proprietary Estoppel: A Return to Principle?' [2009] Conveyancer and Property Lawyer 260.

55 See *Re Pearce* [1998] 2 FLR 705 where provision was made for a son who had worked for very low wages on his father's sheep farm.

56 Inheritance (Provision for Family and Dependants) Act 1975, s 4. See *Re Salmon* [1981] Ch 167 for judicial guidelines on how this discretion is exercised.

57 Solicitors advising such beneficiaries need to be mindful of the taxation implications of such arrangements.

58 *Quates v Griffin* 239 So 2d 803 (Miss 1970).

59 Trusts of Land and Appointment of Trustees Act 1996, s 14.

60 Administration of Estates Act 1925, s 39(1).

61 S 27(2) of the Law of Property Act 1925, as amended by the Trusts of Land and Appointment of Trustees Act 1996 requires the purchase money to be paid to at least two trustees or a trust corporation.

developed[62] which suggested that on the expiry of the limitation period such possessors took their own shares as tenants in common, but acquired the shares of those out of possession as joint tenants. The rationale was that before the estate is distributed, the next-of kin have specific equitable interests as tenants in common in the intestate's estate. Therefore, on the expiry of the limitation period, they would have extinguished the legal title in respect of their own shares, but they would have extinguished the entire title of those out of possession and so would take those shares as joint tenants, as if they were strangers to the title. This approach obviously makes it very difficult to trace the title, as the ruling in *Christie v Christie*[63] demonstrates. In that case, a farmer had died intestate and was succeeded by his wife and five children. His wife would have been entitled to a third share in the farm[64] and each child was entitled to a 2/15ths share as a tenant in common. The wife and two of his children remained in possession and, when the wife died, the court noted that each child, including those in possession, would have become entitled to a 1/5th of her third, i.e. another 1/15th share in the entire farm. On the expiry of the limitation period the two children in possession held 3/15ths each as tenants in common and became entitled to the remaining 9/15ths of the farm as joint tenants. Section 125(1) of the Succession Act 1965 now clarifies that, where two or more persons are entitled to shares in land forming part of the estate of a deceased person as co-owners and any of them enters into possession, they shall be deemed as between themselves and those who do not enter to have acquired title by possession as joint tenants and not tenants in common, notwithstanding any rule of law to the contrary. This provision treats those entitled to a testate or an intestate share as strangers with no rights in the estate for the purposes of the running of the limitation period.

Section 125 did not apply retrospectively and therefore failed to clarify the legal position in relation to the estate of a person who died before 1 January 1967 (the date the 1965 Act came into force). When this issue was raised in *Maher v Maher*,[65] O'Hanlon J acknowledged that the weight of Irish authority was in favour of the view that the next-of-kin remaining in possession should be regarded as tenants in common in relation to their own shares. However, he found the authorities to the contrary more persuasive and noted that the case law on this issue was not consistent. He ruled that where some of the next-of-kin of a deceased owner remain in possession to the exclusion of others, their possession of the entire property is adverse to the claims of the other next-of-kin and the personal representative and, on the expiry of the limitation period, they acquire title as joint tenants. He was not prepared to distinguish between the character of their occupation in relation to the shares claimed by them in their capacity as next-of-kin and the shares of the other next-of-kin which they were in the process of extinguishing. In the Supreme Court decision in *Gleeson v Feehan*,[66] Keane J finally put this matter to rest by endorsing the approach taken by O'Hanlon J in *Maher* and overruling any contrary authorities. Keane J held that it was contrary to elementary legal principles to regard the next-of-kin of an intestate or those entitled to the residuary estate of a deceased person as being the owners in equity of specific property. They are only entitled to a right, in the nature of a chose in action, to the payment to them of the balance of the estate after the

62 See *Ward v Ward* (1871) LR 6 Ch App 789; *Smith v Savage* [1906] 1 IR 469; *Christie v Christie* [1917] 1 IR 17. For a discussion of this line of authority, see Pearce (n 1); B Spierin and P Fallon, *The Succession Act 1965 and Related Legislation: A Commentary* 3rd edn (Butterworths 2003) paras 799–801.

63 [1917] 1 IR 17.

64 The land was leasehold which meant that it fell to be distributed according to the rules set out in the Statute of Distributions (Ireland) 1695.

65 [1987] ILRM 542.

66 [1993] 2 IR 113.

debts have been discharged, a right which can be enforced against the personal representative. It was unnecessary and inappropriate to analyse the ownership of the deceased's estate in terms of who was entitled to the legal estate and who was entitled to the equitable estate. He was satisfied that the possession of one of the next-of-kin and another person following the death of the owner was adverse to the title of the President of the High Court, in whom the entire estate was vested pending the raising of representation.[67] On the expiry of the limitation period they acquired title as joint tenants and on the death of one of them, the surviving joint tenant became the sole owner.

Section 125(2) clarifies that sub-s (1) applies even if one of the persons entitled to a share in the deceased's land entered into possession as a personal representative or subsequently took out a grant of representation to the estate of the deceased.[68] As has already been mentioned, s 123 provides that a personal representative shall not be a trustee for the purposes of the Statute of Limitations 1957.[69] Therefore, s 44 of the 1957 Act, which imposes no time limit on actions to recover trust property in the possession of a trustee, does not apply to actions against a personal representative in possession. Also, the definition of a trustee for the purposes of the Statute of Limitations does not include a constructive trustee[70] and so, in sharp contrast to the English position,[71] if the court deems the person who took possession to be an *executor de son tort*[72] and a constructive trustee for those entitled to the estate, this will not prevent the limitation period from running in that person's favour.

Finally, s 126 of the Succession Act has given rise to confusion and controversy in this area. It replaced s 45 of the 1957 Act which imposed a 12-year limitation period on actions in relation to any entitlements in the estate of a deceased person. The new limitation period is six years unless the right of action was fraudulently concealed, in which case s 71 of the 1957 Act applies. This amendment was clearly designed to speed up the clarification of title to land which forms part of an unadministered estate. However, a lacuna in the application of the new limitation period was highlighted by the

67 This approach contrasts sharply with the approach taken in *Earnshaw* (n 26).

68 See Spierin and Fallon (n 62) para 804, who point out that, once the estate has been administered and title has been vested in those entitled as tenants in common, s 125 will no longer apply and, where only some take possession for the limitation period, the old difficulties will arise. Those in possession will retain their own shares as tenants in common but the shares of the absent co-owners as joint tenants.

69 Conflicting early authorities had led to confusion over whether a personal representative was an express trustee, as such a trustee was barred from relying on the doctrine pursuant to s 25 of the Real Property Limitation Act 1833: see *Re Loughlin* [1942] IR 15 and *Vaughan v Cottingham* [1961 IR 184. Section 2(2)(d) of the Statute of Limitations 1957 clarified the position and this provision was substituted by s 123 of the Succession Act 1965.

70 Statute of Limitations 1957, s 2(2)(a)(i).

71 See *James v Williams* [2000] Ch 1.

72 The Law Reform Commission has suggested that if a person who takes possession of the deceased's land is deemed to be an *executor de son tort* he or she will not be able to avail of the running of the limitation period unless he or she fulfils all the duties of the office: see Law Commission, *Report on Land Law and Conveyancing Law (7): Positive Covenants over Freehold Land and Other Proposals* (LRC 70 2003) para 6.33. It would be quite strange if someone who took out a grant of representation could rely on the doctrine, while a person who did not take out a grant could not. It should be noted that the ruling of Gibson J in *Doyle v Foley* [1903] 2 IR 95, 100, contradicts the view expressed by the Law Reform Commission on this issue. He stated that unless it was possible to infer an express trust, agency or estoppel from the facts of the case, an *executor de son tort* is not in a fiduciary relation to a deceased person's estate. He pointed out that in all the authorities cited it was assumed by the court that, in the absence of special circumstances, such an executor could rely on the limitation period. As has already been mentioned, in England, where a personal representative is precluded from relying on the doctrine, it is accepted that an *executor de son tort* (provided he or she is not a constructive trustee) may benefit from the doctrine.

High Court decision in *Drohan v Drohan*[73] and the subsequent Supreme Court decision in *Gleeson v Feehan*.[74] The court, in both instances, ruled that s 126 only applies to actions brought by those entitled to a share in the estate and not to actions brought by the personal representative. Therefore, following an intestate death, if a grant has not yet been extracted and one of the next-of-kin has been in possession, another can extract a grant and rely on the 12-year limitation period to bring an action. It remains unclear whether the next-of-kin are then entitled to insist that the personal representative vests their shares in them, given their limitation period has expired.[75]

In the aftermath of the *Gleeson* case, practitioners called for reform in this area and the Law Reform Commission in a report published in 2003[76] recommended that a uniform limitation period of 12 years should be applied to claims by beneficiaries and by personal representatives. The Law Reform Commission acknowledged that a return to a 12-year limitation period in all cases arguably abandons the policy behind s 126, which was to quieten titles as soon as possible after the owner's death and thereby benefit those who remain on to run the family farm or business. However, the recommended approach would lead to greater simplicity and consistency within the general law of adverse possession and remove the anomalies which have arisen since the passing of s 126.[77] Section 126 provides that the limitation period commences on the date that the right to receive the share or interest accrued and, as this has also been a source of confusion and debate,[78] the Law Reform Commission recommended legislative clarification that the right of action should be deemed to accrue on the date of death.[79]

These recommendations have yet to be implemented. Although Keating endorses the recommendation for statutory clarification that time begins to run on the date of death, he criticises the primary recommendation for an increase in the limitation period.[80] He argues that personal representatives should be brought within the scope of the original amendment. In his opinion, a limitation period of six years is in keeping with the general policy against delay in the administration of estates. In Keating's experience, beneficiaries are not coy when it comes to claiming shares or interests in estates and he notes that any tardiness may be remedied by the citation process. Although he was of the opinion that beneficiaries are rarely undone by sloth, the experience of Land Registry officials seems to suggest otherwise. Over 1000 adverse possession applications are made in relation to registered land on an annual basis[81] and an internal survey conducted by the Property Registration Authority in 2008 revealed that over 56 per cent of these involved adverse possession between family members, typically in relation to property forming part of an

73 [1984] IR 311.

74 [1993] 2 IR 113.

75 See Spierin and Fallon (n 62) para 811; P R Coughlan 'Limitation of Actions: the Recovery of Land by Personal Representatives' (1991) 13 Dublin University Law Journal 164, 167–68; M Hourigan 'The Running of Time in Succession Law: Gleeson v Feehan and Purcell' (2000) 5(2) Conveyancing and Property Law Journal 34, 36.

76 Law Reform Commission (n 72) ch 6.

77 Ibid para 6.44.

78 Does the right to receive the share or interest arise on the date of death, when the grant of representation is extracted or once the personal representative takes possession? See Law Reform Commission (n 72) paras 6.14–22.

79 Ibid para 6.27.

80 A Keating, *The Law and Practice of Personal Representatives* (Round Hall 2004) para 9.19.

81 This level of applications appears to be quite consistent: 1378 s 49 applications were received in 2007 and 1081 applications were received in 2011.

unadministered estate.[82] This survey also revealed that objections are usually received to such applications and the most frequent objector is someone who claims to be entitled to a share on intestacy or under the will of the deceased registered owner. Of course, once the limitation period has expired, such an objection has no legal basis and will not prevent registration in the absence of another valid ground for objection, for example, proof that the objector continued to engage in acts of possession, that the applicant was not in possession, or was in possession pursuant to an express or an implied licence.

Where only one or some of the next-of-kin enter into or remain in possession following the death of the deceased owner, those out of possession are clearly in a very precarious position as the law currently stands. Any licence agreement which renders the possession consensual and non-adverse should be recorded in writing to avoid future misunderstandings and solicitors consulted by such next-of-kin need to bear in mind the different limitation periods in order to avoid the possibility of a negligence claim.[83]

3 A critique of the Irish approach

It is submitted that the role played by the doctrine in updating the ownership of farms following a death on title is no longer significant.[84] The traditionally casual approach to the administration of estates comprising agricultural land has disappeared during recent decades, probably due to the advent of EU grants. On the death of a farmer, his or her family will wish to ensure that any outstanding entitlements under the single-farm payment scheme are paid into the estate and they will be conscious of the need to transfer the ongoing entitlements. These entitlements pass separate to the land and, in the absence of a specific bequest, they pass to the residuary legatee. The Department of Agriculture requires the submission of a grant of probate or a grant of administration intestate and a valid herd number to secure the transfer of inherited entitlements. Frequently, waivers are also submitted to allow the entitlements to be transferred to the person who is inheriting the farm.[85] Once the grant has been extracted, it is a fairly simple matter to update the land register which explains why the doctrine is no longer relied on to update farm ownership following a death on title.[86]

The Northern Ireland Law Commission has recently argued that the doctrine of adverse possession continues to perform a useful function in relation to succession to registered farmland[87] and refers to two recent cases to demonstrate this point: *Renaghan v Breen*[88] and *Meyler v Ferris*.[89] The commission also maintains that the advent of EU grants, payments or regulations has not changed matters, as generally these schemes do not require the applicant to be the owner of the land. For example, the Nitrates Action

82 This survey is set out in Appendix 2 and discussed in chapter 3, part 2, of the PhD thesis mentioned above (n 20). The survey illustrates the most common functions performed by the doctrine: namely, the resolution of title defects, updating ownership of property forming part of unadministered estates; tidying up informal transactions; restoring abandoned land to the market and resolving boundary disputes.

83 See Hourigan (n 75) 36.

84 This has been informally confirmed by Irish Land Registry officials.

85 I am grateful to the Inheritance Enquiry Unit of the Department of Agriculture for discussing these requirements with me.

86 While there is no guarantee that the person inheriting the farm will update the register following the issue of the grant, it is likely that obtaining the grant would be viewed as the most onerous part of this process.

87 See Northern Ireland Law Commission, *Supplementary Consultation Paper Land Law* (NILC 3 2010) para 2.29.

88 [2000] NIJB 174.

89 [2009] NICA 16.

Programme Regulations (NI) 2006 (No 489) apply to the 'controller' of the land.[90] As was mentioned above, however, on the death of the original applicant, the administrators of such schemes will generally require proof of a transfer of entitlements and, at least in the case of the single-farm payment, the submission of a grant of probate/ administration intestate. While it may be that the doctrine continues to play a role in this respect in Northern Ireland, in the Republic of Ireland, the evidence indicates that this is no longer the case. It should also be noted that neither of the cases cited by the Northern Ireland Law Commission involved a family member who had gone into possession of a farm many years ago and was now attempting to update the ownership of land forming part of an unadministered estate. In *Renaghan v Breen*, the disputed land comprised a house and yard which had been the subject matter of an informal transfer to the plaintiff's great-grandfather dating back to the 1880s. It had subsequently passed down through the family line to the plaintiff. The court was satisfied that adverse possession had been established against the registered owner by the cumulative adverse possession of the plaintiff's predecessors or in the alternative by the plaintiff's 12 years' adverse possession since 1975. Although the disputed land in *Meyler v Ferris* was a farm, the paper title was completely up-to-date until the death of the owner, Bridie Ferris, in 2005. She had left the land to her niece, but her nephew claimed in these proceedings to have acquired title to the farm by adverse possession. The court was satisfied, however, that any acts of adverse possession by the defendant had only begun in 2001 and, therefore, the limitation period had not expired.[91] It submitted, therefore, that these authorities do not demonstrate that the doctrine continues to play an important role in updating the ownership of farms forming part of an unadministered estate.

If this peculiarly agricultural justification for the doctrine has become obsolete, it is necessary to consider whether adverse possession should continue to play the same role in the context of unadministered estates. Is it fair to allow the occupying sibling to extinguish the rights of those out of possession? Although it is difficult to make generalisations in this area, it could be argued that the moral entitlement of an applicant who has entered or remained in possession of the family home or a residential investment property following the death of a parent is not as strong as that of a child who had been raised to take over a farm and perhaps forgone an education and adequate pay during the lifetime of the parent. It is also easy to imagine a situation where absent members of the family were content to allow a sibling to continue to occupy a property, but failed to appreciate that their interests were in danger of being extinguished by neglecting to formalise the arrangement. The fact that family members frequently object to s 49 applications reflects the counter-intuitive nature of the law on this issue. The potential for misunderstanding renders absent members extremely vulnerable, an argument which has been made to justify the English position which precludes adverse possession in such circumstances.[92]

90 It could be argued that the most straightforward way for a farmer to demonstrate control of the land (assuming he or she is not in occupation under a lease or a licence) is to submit proof that he or she is the current registered owner, although admittedly those administering such schemes may not insist on this: see *Meyler v Ferris* ibid (the defendant had applied for and received certain subsidies in relation to the land for a few years until the niece who had inherited the land objected that he did not have permission to claim them).

91 The facts of this case bear some resemblance to those of *Gunning v Sherry* [2012] IEHC 88. In *Gunning*, the owner of a cottage had made a will leaving it to his wife and two daughters. After he died, one of the daughters attempted to rely on the doctrine of adverse possession against her mother and sister, but the court held that she had failed to demonstrate anything approaching the requisite limitation period.

92 See Miller (n 8).

At the beginning of this paper, the Law Reform Commission's proposals for the reform of the Irish law on adverse possession were mentioned. These reforms required an applicant seeking to establish title by adverse possession to make a court application and purported to limit the doctrine's operation so that it would no longer operate unfairly.[93] Although these recommendations appear to have been abandoned, they are still of interest as the Law Reform Commission envisaged a continuing role for the doctrine in the context of unadministered estates. The court would be permitted to grant a vesting order if the adverse possession application related to land comprised in a deceased person's estate and it was reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes.[94] This reform seems to be designed to preserve the role played by the doctrine in effecting the transfer of a farm forming part of an unadministered estate to a child who remained in possession following the intestate death of a farmer. However, the introduction of an approach which appears to require the court to guess at the subjective views of the deceased owner seems unwise, especially when the doctrine of proprietary estoppel provides a much more stable basis for the grant of a remedy in such circumstances[95] and also allows the court more flexibility in its response.[96] If the child can prove an intention to create legal relations, consideration and part performance, it may also be possible to prove that the deceased entered into a contract to leave a particular property to him or her by will. In *McCarron v McCarron*,[97] the Supreme Court was satisfied that the farmer had entered into a contract to devise the farm to the plaintiff (his first cousin once removed) in consideration of the free labour that the plaintiff had provided on the farm and would continue to provide during the farmer's lifetime.[98] The court ordered specific performance of that contract,[99] but Murphy J noted that the plaintiff may also have been entitled to a remedy pursuant to the doctrine of proprietary estoppel. It is important to note, however, that recent case law[100] has treated such causes of action as subsisting against the deceased on his or her date of death and therefore subject to s 9(2)(b) of the Civil Liability Act 1961 which imposes a

93 Law Reform Commission (n 1) 327–32.

94 The court would also have the option of ordering the payment of compensation. The requirement for a court application and the possibility of compensation were criticised by the Law Society of Ireland as they would increase costs and clog up the courts unnecessarily given that the Land Registry procedure has been operating successfully to date.

95 See *Smyth v Halpin* [1997] 2 ILRM 38 where in response to his father's assurance that the family home would be his after his mother's death and, at his father's suggestion, the son built an extension to the home at his own expense. When his father left the home to one of his daughters instead, the court ordered a conveyance of the house to the son pursuant to the doctrine of proprietary estoppel.

96 In some circumstances, conferring a right of residence or awarding compensation may be more appropriate than an outright transfer of ownership. See H Delany, *Equity and the Law of Trusts in Ireland* 4th edn (Round Hall 2007) 728–38.

97 [1997] 2 ILRM 349.

98 The court commented that in some parts of Ireland, particularly rural areas, a meeting of minds can be achieved without as detailed a discussion as might be necessary elsewhere and noted how the evidence of the plaintiff evinced a natural courtesy (which John Millington Synge associated with the west of Ireland) which often results in an unwillingness to pursue discussion to a logical and perhaps harshly expressed commercial conclusion.

99 Such a remedy will not usually be available in England and Wales as contracts for the sale of land entered into after 26 September 1989 are void unless they are in writing; see s 2(1) of the Law Reform (Miscellaneous Provisions) Act 1989.

100 *In the Matter of the Estate of F Deceased, S 1 v PR 1 and PR 2* [2013] IEHC 407; *Prendergast v McLaughlin* [2009] IEHC 250; *Corrigan v Martin* (HC, 13 March 2006). See also, A Keating, 'The Application of s 9(2)(b) of the Civil Liability Act 1961 to Equitable Causes of Action Against Estates of Deceased Persons' (2010) 15(2) Conveyancing and Property Law Journal 37.

limitation period of two years from the date of death[101] to bring proceedings against the deceased's estate.

It should be noted that a child also has the option of bringing an application pursuant to s 117 of the Succession Act 1965,[102] although such an application must be brought within six months of the extraction of the grant[103] and is unavailable if the parent dies intestate.[104] If the court is of the opinion that the testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means, whether by will or otherwise, it may order that just provision be made for the child out of the estate.[105] In assessing the extent of that moral duty, the court will have regard to special circumstances, such as where 'a child is induced to believe that by . . . working on a farm, he may ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly'.[106]

McDonald v Norris[107] concerned a s 117 application by a son who had left school early to look after the farm after his father had an accident and had worked for minimal recompense for over 20 years. The relationship between father and son had been very bad since the son's marriage and, at one point, the son was imprisoned for refusing to comply with an order for possession of the lands which his father had obtained against him. While the son was in prison, the father sold some of the land and transferred another portion to the applicant's younger brother. The Supreme Court acknowledged the applicant's bad behaviour towards his father, but felt that it should be considered in the context of his father's reaction to his marriage. His bad behaviour diminished the extent of the father's moral obligation, but did not extinguish it. The court ordered the transfer of the remaining lands to the son, on condition that he paid a sum of money to his cousin (the father's intended beneficiary). *A v C and D*[108] concerned an application by a son who had received a third share in the proceeds of sale of one parcel of land, €40,000, a site and some machinery. The deceased's grand plan was to leave a farm to each of his three sons, but difficult economic conditions intervened and when he died he only owned two

101 Or the period of limitation prescribed by the Statute of Limitations 1957 or any other limitation enactment, whichever expires earlier. No special shortened limitation period is imposed in relation to subsisting claims against an estate in England; see the Law Reform (Miscellaneous Provisions) Act 1934.

102 The Law Reform Commission has recently sought views on whether s 117 of the Succession Act 1965 should be repealed, retained as it is, or amended; see Law Reform Commission, *Issues Paper on Section 117 of the Succession Act 1965* (LRC IP 9 2016) para 1.5.

103 S 117(6) of the Succession Act 1965 originally set a time limit of 12 months, but it was reduced to six months by s 46 of the Family Law (Divorce) Act 1996. This time limit is strictly applied (see *MPD v MD* [1981] ILRM 179) and the personal representatives are under no obligation to inform the testator's children of their right to bring a s 117 application (see *Rojack v Taylor and Buchalter* [2005] IEHC 28). It was recently clarified that the six-month limitation period does not run from the issue of an *ad litem* grant: see *In the Matter of the Estate of F deceased* (n 100). The Law Reform Commission has recently sought views on whether s 117(6) should be amended to extend this time limit and to clarify that the limitation period begins to run from the date of death or some other date; see Law Reform Commission (n 102) paras 3.5 and 4.3.

104 The deceased must die wholly or partly testate: see the 1965 Act, s 109. In *RG v PSG* (HC, 20 November 1981), Carroll J held that the deceased had died testate for the purposes of s 109 even though the will was wholly inoperative at the date of his death. The Law Reform Commission has recently sought views on whether s 117 should be extended to claims by children of parents who die intestate; see Law Reform Commission (n 102) para 2.3.

105 See J C Brady, S*uccession Law in Ireland* 2nd edn (Butterworths 1995) paras 7.48–79; Speirin and Fallon, (n 62) paras 695–745; F de Londras, P*rinciples of Irish Property Law* 2nd edn (Clarus Press 2011) paras 16.69–96.

106 See *Re ABC deceased; XC and Others v RT and Another* (HC, 2 April 2003). See *MH and NMcG v NM and CM* [1983] ILRM 519.

107 [2000] 1 ILRM 382.

108 [2007] IEHC 120.

farms. The applicant had been dependent on the deceased for many years to provide him with a farming livelihood and a residence for his family which he would now lose. The court was satisfied that the deceased had failed in his moral duty. An order for the transfer of either of the farms to the applicant would leave the deceased's remaining children inadequately provided for and, instead, the court ordered that the sum of €750,000 be substituted for the applicant's testamentary legacy of €40,000.[109]

Hourican notes that, if a s 117 application or proprietary estoppel claim seems unlikely to succeed, the child may bring a claim, in the alternative, for payment on a *quantum meruit* basis for works done or services rendered by the plaintiff for and at the request of the deceased.[110] It is clear, therefore, that a child who feels hard done by as a result of the intestacy rules or the provision made by a parent's will may have access to a number of remedies which allow the court the flexibility to specifically address the injustice and limit the impact of any order on the other beneficiaries. To avail of any of these remedies, the child must be cognisant of the relevant limitation periods as such actions become statute-barred within a short period of time. The reason for these special shortened limitation periods following a death is clear. As Fennelly J stated in *Corrigan v Martin*:

> One relevant consideration is that those charged as executors or administrators of estates of deceased persons are entitled and, indeed, bound to carry out their tasks with reasonable expedition and that creditors of the estate and, ultimately, the beneficiaries are entitled to have the estate administered within a reasonable time. I believe the Oireachtas deliberately chose to impose a short but fair time limit on claims so that these desirable objectives would be achieved.[111]

Conclusion

Adverse possession is a crude mechanism to rely on to resolve the disputes which can arise between beneficiaries with an entitlement to land following a death on title. It results in the automatic transfer of ownership to the possessor without any consideration of the circumstances of the other beneficiaries or their vulnerability to a claim when a family member goes into possession. It is submitted that these beneficiaries are in need of additional protection and this paper demonstrates that adequate alternative remedies exist to protect a beneficiary with a moral claim.

It would not be appropriate to emulate the English law which absolutely precludes adverse possession between co-owners, as there is no appetite in Ireland to impose a trust of land on co-owners.[112] Neither would such reform be necessary to achieve the desired result. It is submitted that the doctrine of adverse possession should continue to operate

109 The court rejected the applicant's claim that he had acquired title to the residence and surrounding lands by adverse possession as the court was satisfied that he had been present by the licence of the deceased. The court also rejected his claim for a remedy pursuant to the doctrine of proprietary estoppel on the basis of the improvements which he had carried out to the residence, as the court could find no evidence of an assurance by the deceased that the residence would be his.

110 M Hourican, 'Section 117 Claims: Practice and Procedure and Matters to Bear in Mind' (2001) 6(3) Conveyancing and Property Law Journal 62. Note that, in *Coleman v Mullen* [2011] IEHC 179, the court emphasised that, if the services were rendered on a voluntary basis and without an intention to create legal relations, a *quantum meruit* claim must fail.

111 *Corrigan v Martin* (HC March 13 2006) p 6 of transcript, endorsing the views expressed by O'Higgins CJ in *Moynihan v Greensmyth* [1977] IR 55.

112 See Law Reform Commission (n 72) para 5.05; Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34 2004) para 6.03; Law Reform Commission (n 102) para 3.5.

between co-owners, but, at the end of the limitation period, a veto should be conferred on the co-owners out of possession. This would enable land to be brought back on to the market in the event that certain co-owners had abandoned their interests, but would also confer added protection on vulnerable co-owners who had assumed that their interests were not in danger of being extinguished. The impact would be similar to a return to the law on non-adverse possession, which required proof of an ouster between co-owners,[113] although the veto approach would be much more straightforward to apply.

As has been argued elsewhere, registration principles should not limit the protective scope of any qualified veto system of adverse possession introduced in Ireland.[114] Therefore, following a death on title, the veto could easily be extended to any personal representative appointed and any beneficiaries entitled under the will or the rules on intestacy.[115] Where land was being adversely possessed by a stranger to the title before the death of the owner, this approach, in contrast to the English one, would confer added protection on his or her successors during the period following the death of the owner while the estate remains unadministered and the register is out-of-date. If one successor makes an adverse possession application against other successors with entitlements under an unadministered estate, those out of possession would be able to veto the application. If they fail to exercise their veto, because they have no objection to the registration of the applicant as owner or they have abandoned their interests, the application would proceed. Also, the personal representative's veto would not be effective against an adverse possessor solely entitled under the deceased owner's will or the rules governing intestacies. Therefore, the doctrine would continue to play a very limited role where the unadministered estate involved abandoned interests or an informal transmission.

If the veto is exercised, the dispute will have to be resolved between the successors. The adverse possessor may have to negotiate releases from the objectors if he or she wishes to be registered as the sole owner and, if these releases are not forthcoming, and the beneficiaries are not prepared to be registered as co-owners, the property would have to be sold in the course of administration and the proceeds distributed amongst them.[116] It is important to bear in mind that a claim based on the doctrine of proprietary estoppel or s 117 of the 1965 Act would also be available in the immediate aftermath of the deceased's death. However, restricting the operation of the doctrine of adverse possession in this particular context would render it necessary to ensure that the alternative remedies available are adequate. Therefore, it is submitted that, in line with previous recommendations which have been made in this regard, s 117 of the Succession Act should be extended to intestate deaths and the court should be given a discretion to extend the deadline for bringing such an application.[117]

113 See above (n 9).

114 See Woods (n 20), chs 2 and 9, for further discussion.

115 Where such information is not available, notice could be served by posting site notices or advertising in newspapers.

116 Pursuant to s 50 of the Succession Act 1965.

117 See the Law Reform Commission, *Report on Land Law and Conveyancing Law* (LRC 30 1989) 21–24; Law Reform Commission (n 102) paras 2.3 and 3.5. See also, E Storan, 'Section 117: Another Means for the Courts to Rewrite a Will?' (2006) 11(4) Conveyancing and Property Law Journal 82a. Similarly, it may be necessary to revisit the shortened limitation period imposed by s 9(2)(b) of the Civil Liability Act 1961 in relation to subsisting claims against an estate.

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Capitalising on the conceptual divide: access to public and private justice in children's proceedings

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Introduction

The basic concept of a public/private divide in law has been used commonly to distinguish between children's proceedings in Northern Ireland, with proceedings involving private disputes among family members seeking some determination in relation to childcare arrangements on the one hand, and proceedings taken by public agencies seeking to protect the welfare of children on the other. Despite this, and aberrating from jurisprudence on the public/private divide in law generally,[2] children's proceedings emanate from a distinctive statutory framework which overtly unifies many elements of public and private law. Moreover, the crossover between public and private law measures in many proceedings taken under that framework in practice compounds the difficulties in describing their relationship dichotomically. Thus, much of the debate on the nature of the divide and on rules relating to the exclusivity of proceedings does not apply with equal force in this context.[3] For the purposes of this paper, the reach of public law has been construed broadly to include all decisions, actions and omissions by emanations of the state which have an influence on the outcome of children's proceedings. The paper does not seek to advance a normative position on the appropriate extent of state involvement in children's proceedings.[4]

It should be noted at the outset that the statutory framework in question, namely the Children (Northern Ireland) Order 1995 (hereinafter the 1995 Order), does not eliminate

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2 *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 WLR 1096.

3 For a succinct account of this debate as it relates to Northern Ireland, see Gordon Anthony, *Judicial Review in Northern Ireland* 2nd edn (Hart 2014) ch 2.

4 For the leading analysis of competing views on this subject, see Lorraine M Fox Harding, 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy (I)' (1991) 13(3) Journal of Social Welfare and Family Law 179; see also: John Eekelaar, 'Self-Restraint: Social Norms, Individualism and the Family' (2012) 13(1) Theoretical Inquiries in Law 75.

all distinctions between public and private law.[5] The position is nuanced, as the first section of this paper seeks to explain. It will advocate the idea of a public/private law spectrum in children's proceedings, in lieu of the arguably inappropriate binary classification used currently. The next section highlights, by way of example, how the binary classification of children's proceedings according to a simplistic public/private divide may operate to the detriment of the legislative aims of the 1995 Order without coherent justification. The example concentrates on proposals made by the second Access to Justice Review commissioned by the Department of Justice for Northern Ireland[6] together with proposals included in a more focused consultation on the scope of civil legal aid carried out by the same Department.[7] Both exercises proposed approaching reform differently for public and private law children's proceedings respectively, akin to an analogous set of proposals adopted by the government of England and Wales in 2012.[8] This paper will suggest that those proposals are based on a flawed understanding of how children's proceedings have been legislatively designed and of their functioning in practice. The relevancy of these flaws is that they appear to be rationalised by the orthodox conception of proceedings which divides them into the public and the private.

It will be concluded that the concept of a public/private divide in children's proceedings is being used to structure and validate cuts to state-funded legal services. It will be suggested that the concept of a public/private divide is a particularly inappropriate framework for understanding children's proceedings in this context, which ought to be displaced by a more accurate spectral model; a model which recognises the varying degrees of public and private law involved in each set of proceedings. It will be argued that, if a spectral model were accepted, proposals for reforming the system of state-funded legal services for children's proceedings would require reconsideration, so long as the level of state involvement in children's proceedings continues to be regarded as a determinative factor in legal services policy-making. This conclusion underlines the importance of unlocking the boundaries of legal thought on the public/private divide insofar as it relates to children's proceedings in Northern Ireland, and the need to research, construct and teach an accurate theoretical framework for understanding those proceedings.

5 The extent to which the almost equivalent Children Act 1989 truly integrates public and private law has been described as 'a matter for continuing consideration', see Richard White, Paul Carr and Nigel Lowe, *The Children Act in Practice* 2nd edn (Butterworths 1995) 289. For a discussion of the arguments for and against substantive integration of public and private law more broadly, see Dawn Oliver, *Common Values and the Public–Private Divide* (Butterworths 1999) 248–66. See also Peter Cane, 'Accountability and the Public/Private Distinction' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 247–76. For a more recent analysis of the differences between public and private law values, see David Feldman, 'The Distinctiveness of Public Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015) 17–36. For a different modern analysis, suggesting greater commonality between public and private law, see Paul Craig, 'Limits of Law: Reflections from Private and Public Law' in N W Barber, Richard Ekins and Paul Yowell, *Lord Sumption and the Limits of Law* (Hart 2016) 175–92.

6 Department of Justice for Northern Ireland, *Access to Justice Review 2: The Agenda* (September 2014) <http://www.dojni.gov.uk/index/access-to-justice-review-2-agenda-setting-document.pdf>; Department of Justice for Northern Ireland, *Access to Justice Review 2: Final Report* (3 November 2015) <www.dojni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-part-2-report.pdf>.

7 Department of Justice for Northern Ireland, *Consultation Document: Scope of Civil Legal Aid* (October 2014) <http://www.dojni.gov.uk/index/public-consultations/archive-consultations/scope-of-civil-legal-aid-consultation-final-document.pdf>; Department of Justice for Northern Ireland, *Post Consultation Report: Scope of Civil Legal Aid* (March 2015) <www.dojni.gov.uk/index/public-consultations/archive-consultations/post-consultation-report-on-scope-of-civil-legal-aid.pdf>.

8 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Children's proceedings in Northern Ireland

Historically, state intervention in the interests of children's welfare across the UK was once concerned with merely 'conditioning the exercise of paternal/parental rights'.[9] However, notions of the public interest eventually provided the rationale for greater interventionism through social care legislation.[10] This shift was driven to some considerable extent by jurisprudence emanating from the European Convention on Human Rights (ECHR),[11] by the ratification of the UN Convention on the Rights of the Child (UNCRC),[12] by domestic case law,[13] by child abuse cases highlighted in the media,[14] and by various official reviews of the law.[15] The current legislative framework, having been shaped by these varied forces, is a carefully constructed one. It was first enacted in the form of the Children Act 1989 (the 1989 Act) in England and Wales and subsequently in the form of the almost equivalent 1995 Order. The substantive law of Northern Ireland governing children's welfare therefore continues to mirror that developed and implemented in England and Wales to a large extent.

Unifying legislative principles

The 1995 Order consolidated most provisions of family law affecting the care, upbringing and protection of children in Northern Ireland mainly by making the welfare of children a court's paramount consideration in all proceedings.[16] This paramountcy principle, developed initially in case law,[17] applies regardless of whether a court is invited to determine childcare arrangements by a Trust in so-called public law proceedings or by disputing parents in so-called private law proceedings. The 1995 Order provides a non-exhaustive welfare checklist which comprises seven specific considerations that a court shall have regard to[18] when deciding whether to make, vary or discharge an Article 8 order (generally thought of as private law orders) or an order under Part V (generally thought of as public law orders).[19] It has been held that this provision also satisfies the requirements of Article 8 of the ECHR by ensuring that the order proposed is in accordance with the law, necessary for the protection of the rights and freedom of others,

9 Kerry O'Halloran, *The Welfare of the Child: The Principle and the Law* (Ashgate 1999) 38.

10 Ibid.

11 For a discussion of how the ECHR influenced the relevant legislation despite failure by the UK government to incorporate it until the passage of the Human Rights Act 1998, see Kerry O'Halloran, *Family Law in Northern Ireland* (Gill & Macmillan 1997) 222–23.

12 The UK signed the Convention on 19 April 1990, ratified it on 16 December 1991, and it came into force on 15 January 1992. While it has yet to be incorporated into domestic law, Lord Kerr of the UK Supreme Court recently made dissenting remarks suggesting that it should nonetheless be considered directly enforceable in domestic law, see *R (SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [255]–[256]. Lady Hale delivered a different opinion with similar effect, holding that the court should have regard to the UNCRC as an aid to the construction of the ECHR, see ibid [218], referring to *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [21] (Maurice Kay LJ). For a discussion of constitutional issues raised by Lord Kerr's unorthodox approach to the UNCRC, see Conor McCormick, 'Debating Constitutional Dualism' (UK Constitutional Law Association Blog, 24 November 2015) <http://ukconstitutionallaw.org/2015/11/24/conor-mccormick-debating-constitutional-dualism/>.

13 Most notably *Gillick v West Norfolk and Wisbech* [1985] 3 All ER 402, as discussed in O'Halloran (n 11).

14 O'Halloran (n 11) 224–25.

15 Most notably the 1985 Review of Child Care Law which led to *The Law on Child Care and Family Services* (Cmnd 62 1987) and the Law Commission's *Review of Child Law: Guardianship and Custody* (Law Com No 172 1988).

16 Children (Northern Ireland) Order 1995, Article 3(1).

17 *J v C (An Infant)* [1969] UKHL 4, [1969] 2 WLR 540.

18 Children (Northern Ireland) Order 1995, Article 3(3).

19 Ibid Article 3(4).

and proportionate.[20] However, the primary legislative intent behind the checklist was to help promote consistency in decision-making and to improve the overall coherence of the law affecting children.[21]

Alongside the welfare principle and its concomitant checklist, the same set of general principles apply to children's proceedings. Perhaps the most important of these is the concept of parental responsibility,[22] defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.[23] This concept acts as an important counterbalance to state interventionism that might otherwise be stimulated by the welfare principle and, by replacing the concepts of parental rights and duties which applied previously, it loosely implies that parental authority can only be used legally for the benefit of the child.[24] It also enables parental authority to be temporarily discharged by persons or bodies other than a parent. In this latter respect, the concept is reframed in a way which 'allows it to now play a more consistent role in both public and private family law'.[25] The concept of parental responsibility is supplemented by a duty imposed on public authorities to promote the upbringing of children by their families insofar as it is possible to do so while safeguarding and protecting children's welfare; a duty which signifies a statutory presumption in favour of kinship care.[26] This approach furthers the idea of shared responsibility for children's welfare as between the state and children's parents – the public sphere and the private sphere – albeit that responsibility is intended to rest primarily with children's parents.

The 1995 Order also enacts a no-order principle favouring non-intervention by courts in the absence of evidence showing that the making of an order, be it public or private, will improve a child's welfare.[27] Similarly, the legislation requires that courts shall have regard to the general principle that any delay in determining the question before them is likely to prejudice the welfare of the child,[28] and enables courts to prevent further and unnecessary litigation at odds with a child's welfare by requiring leave before further applications can be made – again regardless of whether those questions or applications sound in public or in private law.[29] It is therefore clear that these principles, consistent with

20 *Re H (Contact Order) (No 2)* [2002] 1 FLR 22, 37 (Wall J).

21 O'Halloran (n 11) 237.

22 Children (Northern Ireland) Order 1995, Articles 5–7.

23 Ibid Article 6(1).

24 O'Halloran (n 9) 82. Some have argued that the concept of parental responsibility has been systematically diluted by way of judicial interpretations of the statutory provision in England and Wales since its initial enactment in the 1989 Act. See Peter G Harris and Robert H George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (2010) 22 Child and Family Law Quarterly 151.

25 O'Halloran (n 9). However, it has been highlighted that, despite a single definition of parental responsibility, in reality decision-making by Trusts is constrained in a way which does not apply to parents. See Brigid Hadfield and Ruth Lavery, 'Public and Private Law Controls on Decision-Making for Children' (1991) 13(6) Journal of Social Welfare and Family Law 454.

26 Children (Northern Ireland) Order 1995, Article 18(1).

27 Ibid Article 3(5). It has been suggested that the use of this presumption, among others, has been rejected by the courts of England and Wales and (commendably) substituted with individual assessments of what children's welfare demands in a particular case. See Jonathan Herring and Oliver Powell, 'The Rise and Fall of Presumptions Surrounding the Welfare Principle' (2013) 43(5) Family Law 553, 557–58.

28 Children (Northern Ireland) Order 1995, Article 3(2). Note that in the absence of any real sanctions for delay this principle is aspirational and nothing more.

29 Ibid Article 179(14). Courts are guided by a range of factors when deciding whether or not to make an order of this type. See Jonathan Herring, *Family Law* 6th edn (Pearson Longman 2013) 508–10.

the welfare principle and the concept of parental responsibility, are intended to give equal shape to the discretion afforded to judicial authorities faced with the task of conducting children's proceedings brought either by parents or by Trusts. This 'underlying conceptual unity'[30] reflects the original argument made by the Law Commission in its review preceding the 1989 Act, namely that legal 'consistency, clarity and simplicity' are strong grounds for a combined approach to public and private law which affects children.[31]

The public/private law spectrum in children's proceedings

While the unifying principles outlined above bind together public and private law in the 1995 Order to a significant degree, the legislation does preserve some ostensible distinctions between these spheres when it comes to the types of court orders available. Private law orders are characterised as those which settle a contest between parents in respect of some childcare arrangements. Typical orders will determine, inter alia: with whom a child will reside;[32] whether the person with whom a child resides must allow the child to visit or stay with another person, or for that person and the child otherwise to have contact with each other;[33] any steps which a person with parental responsibility is prohibited from taking,[34] such as removing a child from the jurisdiction;[35] and specific issues that may arise,[36] such as where a child will attend school.[37] Public law orders are characterised as those applied for by a Trust[38] which must satisfy the court that a set of threshold criteria have been met to justify state intervention.[39] The statutory threshold stipulates that there must be reason to believe that a child is suffering, or at risk of suffering, significant harm attributable to a lack of parental care or to the child being beyond parental control.[40] If satisfied that this threshold is overcome,

> . . . the court will then consider whether it is appropriate to make an order, giving effect to the welfare and non-intervention principles enshrined in Article 3 of the 1995 Order, and alert to its duty as a public authority under s 6 of the Human Rights Act 1998 and the right to family life in ECHR Article 8, with the best interests [of the child] the paramount consideration.[41]

Typical orders will require, inter alia: that a child be placed in the care of a Trust[42] (which thereby acquires parental responsibility for the child,[43] without extinguishing the parental

30 Fox Harding (n 4) 180.

31 *Review of Child Care Law: Guardianship and Custody* (n 15) paras 1.10–11.

32 Children (Northern Ireland) Order 1995, Article 8(1).

33 Ibid.

34 Ibid.

35 *Ciaran v Niamh* [2009] NIFam 18, [20] (Gillen J).

36 Children (Northern Ireland) Order 1995, Article 8(1).

37 *Re AB (Specific Issue; Education)* [2008] NIFam 2.

38 The main public bodies involved in children's proceedings in Northern Ireland are the five Health and Social Care Trusts; Belfast, Northern, South Eastern, Southern, and Western. They provide a range of health and social care services under contract with the Regional Health and Social Care Board, while the Department of Health has overall responsibility for implementing the Children (Northern Ireland) Order 1995. The Department of Health was named the Department of Health, Social Services and Public Safety until the recent passage of the Departments Act (Northern Ireland) 2016, s 1(5).

39 See, for example, *In Re M (A Child) (Threshold Criteria – Terminal Illness)* [2015] NIFam 8.

40 Children (Northern Ireland) Order 1995, Article 50(2).

41 *Re C, A Child (Care Proceedings)* [2011] NIFam 9, [80] (McCloskey J). For an overview of the ECHR jurisprudence applicable in this context by virtue of the Human Rights Act 1998, see Ciaran White, *Northern Ireland Social Work Law* (LexisNexis 2004) 217–23.

42 Children (Northern Ireland) Order 1995, Article 50(1)(a).

43 Ibid Article 52(3)(a).

responsibility of the child's parents);[44] or that a supervising Trust worker be appointed to advise, assist and befriend a child,[45] who may direct the child to do various things[46] such as to participate in specified activities.[47] These care and supervision orders can also be issued on an interim basis[48] where the court is satisfied that there are 'reasonable grounds' for believing that the threshold criteria for making a full order are met.[49]

While this binary description of court orders is alluringly clear, it fails to capture the reality of how public and private law intersect commonly in proceedings where applications are made for one category of court order or the other, whether by a Trust or by a parent. It is suggested that, in discussing the nature of state involvement in children's proceedings, a spectral view should be promulgated instead. Examples for six different points on the proposed spectral model are provided below – ranging from purely private law proceedings to purely public law proceedings – which are intended to highlight the folly in classifying proceedings dichotomically. This model expands on the research of Andrew Bainham, who has highlighted the hybrid nature of many children's proceedings in England and Wales.[50] Bainham's insights apply with much force in Northern Ireland too, as the examples and citations below seek to demonstrate. It should be emphasised that the variability of intersection between public and private law in each set of children's proceedings makes the decision to identify six points on the proposed spectral model an arbitrary one taken only in the interests of written exposition.

Purely private law proceedings

Purely private law proceedings lie at one end of the spectrum. These are exemplified by cases involving a dispute between family members who are otherwise unknown to social services. In such cases, proceedings are governed by the welfare principle and there is no need to examine the statutory threshold criteria in order for a court to have jurisdiction to make an appropriate order. Take, for example, the case of a child's parents who are disputing the minutiae of contact arrangements and no agreement can be reached about them out of court.[51] So long as the court does not believe that either parent is at risk of causing harm to the child, an application of this nature will be decided entirely on the basis of the welfare principle and absent the involvement of any public authorities. Unfortunately, there is no data available at present to illustrate the (in)frequency of such proceedings.

Private law proceedings containing public law elements

Then there are private law proceedings containing public law elements.[52] Three examples are specified below.

First, there are cases which involve the commissioning of an Article 4 report.[53] These arise where the court, often acting of its own volition, requires the relevant Trust to arrange for a suitably qualified person, who is invariably a social worker, to report to the

44 Ibid Article 5(5).

45 Ibid Article 54.

46 Ibid Schedule 3.

47 Ibid Schedule 3, para 2(1)(c).

48 Ibid Article 57(1).

49 Ibid Article 57(2).

50 Andrew Bainham, 'Private and Public Children Law: An Under-Explored Relationship' (2013) 25(2) Child and Family Law Quarterly 138.

51 Ibid 156.

52 Ibid 140–41.

53 Children (Northern Ireland) Order 1995, Article 4.

court any identifiable welfare needs undisclosed by the disputing parties to private law proceedings.[54] They can be triggered by obvious animosity between the parties which causes concerns to be raised about the nature of care being given to the children.[55] For instance, consider the seemingly private law dispute in *Re H and P* between the father and maternal uncle of children whose mother had once lived with the maternal uncle, but had since died.[56] The father sought, inter alia, to displace a residence order in respect of the children that would change their residence from the maternal uncle's abode to the father's abode, while the maternal uncle opposed this application and instead proposed shared residence between himself and the father.[57] In deciding the application in the father's favour, Stephens J made specific reference to the Article 4 report of a Trust which had 'had concerns as to child protection issues' involved in the private law proceedings.[58] The report expressed support for the father's application, suggesting that the standard of care provided by the father was 'very appropriate both physically and emotionally'[59] and that a shared residence order would be inappropriate given the distrust in existence between the parties which was submitted as contrary to the children's needs for stability and security. The persuasive power of the Article 4 report in this case illustrates how the mechanism constructs 'a privileged status' or 'a mantle of reliability' extended to certain professionals (such as social workers governed by public law) who, unlike ordinary witnesses in legal proceedings (such as family members governed by private law), are permitted to give their opinion on any matter over which their expertise extends – such as the parenting skills displayed by the parties.[60]

Second, if there is a significant level of concern about children's welfare in private law proceedings, so much so that it appears to the court that a care or supervision order may be appropriate because the children could be suffering or at risk of suffering significant harm, the court may instead direct that the Trust carry out an investigation under Article 56 of the 1995 Order.[61] The Trust must then consider, inter alia, whether it should apply for a care or supervision order[62] and provide reasons if it decides not to.[63] Notably, where a direction has been given under Article 56, the court may make an interim care or supervision order with respect to the child concerned if it is satisfied that there are reasonable grounds for believing that the significant harm threshold set out in Article 50(2) is established.[64] White points out that this is the only occasion where the court can make a public law order without an application being made,[65] albeit such orders are interim only. This is perhaps the most extreme form of interventionist public law that can feature amidst nominally private law proceedings. However, the court is powerless to go any further if it disagrees with the Trust's reported findings as it cannot interfere with the Trust's administrative discretion by ordering that public law proceedings be initiated. In *Re O and S*,[66] Gillen J was cognisant of this limitation in finding that the court had no power

54 Kerry O'Halloran, *Child Care and Protection: Law and Practice in Northern Ireland* (Thomson Round Hall 2003) 131.

55 White (n 41) 225.

56 *Re H and P (Residence Application)* [2011] NIFam 16.

57 Ibid.

58 Ibid [2] (Stephens J).

59 Ibid [40] (Stephens J).

60 Michael King and Christine Piper, *How the Law Thinks about Children* (Gower 1990) 45–47.

61 Children (Northern Ireland) Order 1995, Article 56.

62 Ibid Article 56(2)(a).

63 Ibid Article 56(3)(a).

64 Ibid Article 57(1).

65 White (n 41) 247.

66 *Re O and S (Residence Order: Contact: Implacable Hostility)* [2005] NIFam 4.

to institute public law proceedings itself – despite the circumstances of the case involving a mother whose hostility towards her children having contact with their father was held to have constituted emotional abuse and to have satisfied the significant harm threshold.[67] Gillen J deferred so far as to say that the court should not 'seek in any way to interfere with the professional exercise of the [T]rust's investigative functions'.[68] Contrarily, Bainham suggests persuasively that there is a case to be made for providing courts with the power to order a Trust to launch public law proceedings, concentrating especially on cases where the court considers that 'the authority's unwillingness to issue public law proceedings has been influenced by strategic cost-saving decisions'.[69] Herring has also submitted that, where a public authority becomes aware that a child is suffering serious abuse following a court-ordered investigation, it is under a duty to protect the child by virtue of the Human Rights Act 1998.[70] It might therefore be possible to argue that this duty could be construed so as to require a Trust to apply for a care or supervision order.

Third, courts occasionally make Article 16 family assistance orders in private law proceedings which entail the Trust making a suitably qualified person available, normally a social worker, to 'advise, assist and (where appropriate) befriend any person named in the order'.[71] This, of course, constitutes a minimalist form of state intervention – an admittedly mild, but patently public law measure. The public nature of the order is minimised by the need for the consent of all parties (including the Trust, excluding the child),[72] but maximised by the need for the circumstances warranting an order to be exceptional (such as where a parent lacks particular skills required to care for the child).[73] These requirements make the order particularly difficult to classify, thus constituting a high-water mark in terms of hybrid public/private law mechanisms found in the 1995 Order.

In summary, public law elements of private law proceedings include court-ordered Trust investigations into children's general welfare, court-ordered Trust investigations into children's welfare where the court suspects a care or supervision order may be appropriate, and consensual family assistance orders which cause social workers to become involved in the interests of children's welfare. Such elements will normally involve a report prepared by the Trust which is likely to carry significant weight in determining relevant private law applications. A Trust's presence at court during the relevant private law proceedings is also likely and, in many cases, desirable. It has been suggested that the reason why Trusts might seek to exert influence over private law proceedings in this way relates to a reluctance on their part to issue public law proceedings for reasons of cost (both in relation to the legal costs and the costs of maintaining children in care pursuant to a care or supervision order if that proves necessary).[74] Given a statutory preference for kinship care,[75] it is perhaps unsurprising that Trusts should wish to engineer the outcome of private law proceedings to their own contentment wherever possible. They may seek to achieve this by backing a private litigant's application through any of the mechanisms explored above, in an attempt to

67 Ibid [17] (Gillen J).

68 Ibid.

69 Bainham (n 50) 151. Bainham makes his suggestion in the context of discussing the Children Act 1989, s 37, which is equivalent to the 1995 Order, Article 56.

70 Herring (n 29) 601.

71 Children (Northern Ireland) Order 1995, Article 16(1).

72 Ibid Article 16(3)(b).

73 Ibid Article 16(3)(a). See, for example, *Re W* [1999] 9 BNIL 40.

74 Bainham (n 50) 141.

75 Children (Northern Ireland) Order 1995, Article18(1)(b).

arrange a safe outcome for the child without launching public law proceedings and working through the public law threshold requirements that doing so would require. However, this approach is not always successful. For example, in *Re T and P*, Gillen J ordered that, in circumstances where an Article 8 residence order was sought by the father of children whose mother had made significantly harmful unfounded allegations of sexual abuse against him, a care order was more appropriate despite the Trust's support for the father's private law application.[76]

Private law proceedings converted to public law proceedings

The next point on the public/private law spectrum worthy of discussion concerns private law proceedings which convert completely into public law proceedings. As some of the cases discussed hitherto suggest, this may occur where a Trust decides that the threshold for public law proceedings has been met while a private application is ongoing. Bainham describes how this might arise in practice, in circumstances where a Trust may have been supporting one parent it believed was able to raise the children while guarding against child protection concerns in respect of a second parent:

> Let us suppose . . . that the mother is a chronic alcoholic with a record of neglecting the children. The father, on the other hand, is seen as sufficiently able to provide 'good enough' care for the child, having separated from the mother. The authority supports a residence order to the father provided that the mother's contact with the child is heavily circumscribed and initially supervised. Then the authority discovers that, contrary to its expectations, the parents have resumed their relationship, the father is misusing drugs and both parents have been dishonest in their dealings with the allocated social worker. In these circumstances the authority may conclude that 'enough is enough' and issue public law proceedings. The private law case is then consolidated with the public law case, but it is the latter which will now be the dominant application before the court. Private has turned public.[77]

It should be noted that, consistent with the spectral view of children's proceedings advocated herein, in order for private law proceedings to convert into public law proceedings there will normally be some varying degree of Trust involvement in the private law proceedings to begin with. This much belies any notion of a clear divide between the private and public law measures at play in such proceedings.

Purely public law proceedings

At another point on the spectrum there are children's proceedings featuring no recognisable elements of private law which could rightly be classified as being matters of purely public law. This is most obviously the case in care order applications involving serious non-accidental injuries to children where there are no alternative carers available or suggested by the parents and the only option is therefore long-term substitute care.[78]

Public law proceedings containing private law elements

Just as there can be private law proceedings with public law elements, sometimes public law proceedings can contain private law elements. For balance, three examples of this nature are specified below.

76 *Re T and P* [2001] 9 BNIL 32.

77 Bainham (n 50) 142.

78 Ibid 156.

First, under the 1995 Order the National Society for the Prevention of Cruelty to Children (NSPCC) and any of its officers are explicitly included within the legislative definition of 'authorised persons' who may apply for a care or supervision order.[79] Given that the NSPCC is a privately founded charity, incorporated by royal charter in 1895, it might be thought unusual that the organisation has been empowered to intervene in private family lives with state permission – especially when there are now dedicated public bodies in existence for this purpose. It is also notable that the organisation's trustees describe one of its purposes as 'to prevent the public and private wrongs of children' on the register of the Charity Commission.[80] White highlights rightly that this is explicable by reference to the historical development of the child protection regime across the UK, which was once driven by a philanthropic effort rather than by the state.[81] The associated difficulties involved in classifying the NSPCC using a public/private dichotomy are well demonstrated by *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, wherein the House of Lords decided, following a series of overturned appeals below it, that the NSPCC could rely on 'public interest immunity' to justify its refusal to disclose details about the identity of its informants as regards the ill-treatment and/or neglect of children. This decision was reached by analogising the purposes of the NSPCC with those of widely recognised public authorities such as the police. Nonetheless, as under the orthodox view it remains a privately constituted organisation, the unique powers of the NSPCC to apply for nominally public law orders represent yet another iteration of the intersection between public and private spheres in legal proceedings affecting children's welfare in this jurisdiction, although such applications will, of course, be of a dominantly public law nature.

Second, by virtue of the welfare checklist discussed above, the court must have regard, inter alia, to the range of powers available to it under the 1995 Order in any particular set of proceedings.[82] Thus, as the accompanying guidance to the Order explains, whenever the court is 'considering whether to make, vary or discharge an order under Part V of the Children Order, it must consider whether a different order from the one applied for might be more appropriate'.[83] Therefore, it is open to the court on an application for a public law care order to decide that the child's interests would be better served by making a private law residence order in favour of a specified relative.[84] A determination of this sort implicitly removes the need to establish that the public law threshold has been met under Article 50(2).[85] Moreover, the court may also make an Article 8 order as an interim measure when a care application is pending.[86] For example, the court could make a residence order in favour of a specified relative until the date of the hearing in respect of the care order application,[87] though such residence orders must

79 Children (Northern Ireland) Order 1995, Article 49(2)(a).

80 Charity Commission, 'The National Society for the Prevention of Cruelty to Children' <http://apps.charitycommission.gov.uk/Showcharity/RegisterOfCharities/CharityWithPartB.aspx?RegisteredCharityNumber=216401&SubsidiaryNumber=0>.

81 White (n 41) 235. See also Kathryn Chan, *The Public–Private Nature of Charity Law* (Hart 2016, forthcoming), where it is argued that charity law itself is best understood as a hybrid legal tradition.

82 Children (Northern Ireland) Order 1995, Article 3(3)(g).

83 Children (Northern Ireland) Order 1995: Guidance and Regulations: Volume 1: Court Orders and Other Legal Issues, para 5.53.

84 Ibid.

85 Ibid.

86 Children (Northern Ireland) Order 1995, Articles 11(3) and 11(7)(c); Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

87 Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

be accompanied by an interim supervision order unless the court is satisfied that the children's welfare will be safeguarded without one.[88] In those circumstances, the court can regulate the child's contact with his or her parents during the interim period by making a contact order.[89] Alternatively, the court can prevent contact altogether prior to the hearing by means of a prohibited steps order.[90]

The case of *Re F and T* provides a clear example of this phenomenon in practice, where Stephens J delivered a provisional judgment granting private law residence orders consecutive to interim care orders put in place until it was discerned whether the mother's agreement would be received in respect of certain 'precautions' which the judge included in an appendix to his judgment.[91] The precautions to which the mother was asked to agree (which were, in effect, *preconditions* on which the private law orders depended) ranged from agreeing to surrender her child's passports, to arranging mental health support, to agreeing to work openly and honestly with social services.[92] The court therefore adjourned further consideration of any final public law care or supervision orders, while making the interim care orders mentioned above, in order to provide the mother with an opportunity to confirm that her children's welfare would be ensured by the making of private law orders with public law conditions attached. It appears inappropriate to claim that these proceedings fall on any one side of a public/private law divide, as they seem to be an intertwined hybrid of both.

Third, where a public law care plan is drawn up in favour of a child's family member which is contested by another family member, for example, where a parent contests a guardianship order in favour of a grandparent, the final hearing can end up taking place under the guise of public law proceedings when they are in fact a contest between private parties. Bainham memorably describes this sort of scenario as 'a private law dispute under a public law umbrella'.[93]

In summary, private law elements of public law proceedings include the power of a private charity to initiate public law proceedings; the availability of so-called private law orders to the court in public law proceedings (sometimes on an interim and/or concurrent basis); and the occurrence of contests between private individuals under a public law umbrella in circumstances where there is disagreement about the provisions made in a care plan.

Public law proceedings converted to private law proceedings

Finally, there are public law proceedings which convert completely into private law proceedings. If the existence and risk of significant harm to a child has been dealt with to the satisfaction of the relevant Trust and the court, public law cases will almost inevitably conclude 'either in the child remaining with or returning to a parent, or being entrusted to a relative'.[94] Thereafter, on the expiry of any concurrent supervision order which may have been made as a transitionary measure, further disputes between family members will be dealt with directly through private applications by those affected.[95]

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88 Children (Northern Ireland) Order 1995, Article 57(3).

89 Children (Northern Ireland) Order 1995: Guidance and Regulations (n 83) para 5.54.

90 Ibid.

91 *Re F and T (Care Proceedings: Residence)* [2011] NIFam 1, [98]–[100] (Stephens J).

92 Ibid Schedule of Precautions (Stephens J).

93 Bainham (n 50) 142.

94 Ibid 143.

95 Ibid.

The crossover between public and private law measures in children's proceedings illustrated by these examples, together with the unifying legislative principles enshrined by the 1995 Order, show the difficulties in speaking of a public/private divide in this context. Using a conceptual divide as the framework for distinguishing proceedings is only useful to the extent that it accurately describes the involvement of the state in determining the outcome of those proceedings. That is to say, defining and labelling one set of legal proceedings 'public' and one set 'private' is only justified if the differences in state involvement between them are clear and meaningful, thus rendering separate designations useful. By thinking about the level of state involvement as spectral in nature, it becomes difficult to determine where the critical point which marks the separation between spheres on the gradient of public/private law might defensibly lie. Therefore, as a matter of jurisprudence, the mismatch between terms used to describe children's proceedings and the actual nature of those proceedings appears to be unsatisfactory. However, as the following section will explain, it can become a matter of significant practical importance too when considered in the context of state help towards access to justice.

Capitalising on the conceptual divide

State-funded civil legal services are part of a volatile area of law in Northern Ireland. This section begins by outlining the current legislation in conjunction with a brief assessment of the pertinent distinctions and commonalities between rules for state-funded civil legal services applications in relation to so-called public and private law children's proceedings. It then examines some further reform proposals which, it is argued, are problematised by the spectral model for considering children's proceedings advocated above. This discussion will lead to the conclusion that a new way of thinking is necessary in relation to how the system of accessing justice through children's proceedings might be reformed.

Civil legal services

Both civil and criminal legal aid used to be governed primarily by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (hereinafter the 1981 Order) and, indeed, most applications signed before 1 April 2015 continue to be governed by it.[96] But, by the commencement of the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014 (hereinafter the 2014 Act), the functions and staff of the Northern Ireland Legal Services Commission (NILSC) transferred to an executive agency of the Department of Justice called the Legal Services Agency Northern Ireland (LSANI) and the legislation governing civil legal aid transferred from the 1981 Order to the Access to Justice (Northern Ireland) Order 2003 (hereinafter the 2003 Order).[97] Civil legal aid has since become known as civil legal services.[98] In order to commence civil legal services, a suite of subordinate legislation has been made,[99] exercising powers conferred on the Department of Justice by the 2003 Order which were vested in it in 2010.[100]

96 Access to Justice (2003 Order) (Commencement No 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015, Article 3(1).

97 Legal Aid and Coroners' Courts (2014 Act) (Commencement No 1) Order (Northern Ireland) 2015.

98 Access to Justice (Northern Ireland) Order 2003, Article 10(1).

99 Civil Legal Services (General) Regulations (Northern Ireland) 2015; Civil Legal Services (Financial) Regulations (Northern Ireland) 2015; Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015; Civil Legal Services (Costs) Regulations (Northern Ireland) 2015; Civil Legal Services (Cost Protection) Regulations (Northern Ireland) 2015; Civil Legal Services (Statutory Charge) Regulations (Northern Ireland) 2015; Civil Legal Services (Remuneration) Order (Northern Ireland) 2015; Civil Legal Services (Disclosure of Information) Regulations (Northern Ireland) 2015.

100 Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 17, para 53.

This legislation governs, for the most part, applications for state funding to support individuals who are taking, defending or party to both so-called public and private children's proceedings. There is a mandatory 'merits test' which must be satisfied,[101] requiring that there must be reasonable grounds for the applicant to be involved in the relevant proceedings,[102] as well as financial eligibility requirements – which are sometimes referred to as a 'means test' – establishing an allowable limit on the assessable income and capital of an applicant for civil legal services.[103] Since the commencement of the new rules on 1 April 2015, there are three types of civil legal services for cases which fall within scope. First, there is 'Legal Advice and Assistance' through which funding can be provided for advice or assistance on any matter of law up to a cost of £88, including all children's proceedings. Further work in excess of £88 is subject to the prior authority of LSANI.[104] Second, there is 'Representation Lower Courts'. A funding certificate of this kind would be appropriate if funding for representation is required for children's proceedings commenced in a Magistrates' Court, a Family Proceedings Court or a Domestic Proceedings Court.[105] Third, there is 'Representation Higher Courts'. A funding certificate of this kind would be appropriate if funding for representation is required for children's proceedings commenced in a County Court, a Family Care Centre, the Court of Appeal in Northern Ireland, or the Supreme Court of the UK.[106]

Prior to 1 April 2015, there were special rules in place for some children's proceedings under Article 172 of the 1995 Order, which amended the 1981 Order.[107] The key provision provided that legal aid (as it then was) had to be granted to any parent or person with parental responsibility to cover proceedings relating to an application for: a care or supervision order; a child assessment order; an emergency protection order, or an extension or discharge of an emergency protection order.[108] In such cases, provided the application was completed correctly and accepted by the NILSC (as it then was) as being within the ambit of Article 172, legal aid could not be refused on grounds of means or merits. The orders that were listed under Article 172 are classified as public law orders and were afforded this special treatment because of the assumption that they would necessarily involve a high risk of state interventionism. This assumption grounded the rationale for state-funded legal representation as of right. The same assumption was thought inapplicable to private law proceedings, driven in part by the orthodox conception of public and private law proceedings as being clearly divided between those with and without state involvement. Other so-called public law proceedings which were not listed under Article 172 were considered on a case-by-case basis by the application of means and merits tests consistent with applications relating to so-called private law proceedings.

101 Access to Justice (Northern Ireland) Order 2003, as amended by the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014, Article 14(2A).

102 Ibid.

103 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015.

104 Civil Legal Services (General) Regulations (Northern Ireland) 2015, reg 32.

105 Ibid, reg 2.

106 Ibid.

107 Children (Northern Ireland) Order 1995, Article 172.

108 Ibid Article 172(3).

However, Article 172 has been repealed[109] and replaced with a slightly different framework.[110] The new regulations provide similarly that legal services shall be available to children and persons with parental responsibility without reference to their financial resources in, inter alia, applications for the same public law order applications which were covered by the previous regime.[111] The main difference in regimes is that a merits test will now be applied in such applications,[112] as in all other applications not excepted under the relevant regulation,[113] albeit LSANI has confirmed in writing that the merits test 'will be met in these cases because of the nature of the case', elaborating only by referring to the 'the parties with parental rights and the nature of the proceedings'.[114] As a result of LSANI's somewhat questionably fettered construction of its new discretion, the most recent reforms appear to have had little effect on the privileged status of some so-called public law proceedings in the field of access to justice. The level of state involvement in determining the outcome of proceedings continues to be recognised as a justification for state-funded legal services, with only those proceedings which might be thought of as having a very high propensity for state involvement (i.e. proceedings likely to be at the public end of the public/private law spectrum) benefiting from exceptions in relation to financial eligibility requirements.

Further proposals to reform civil legal services

The Department of Justice for Northern Ireland has considered further reforms to civil legal services in children's proceedings in at least two of its recent public consultations. Some of the proposals made in each consultation are discussed below, followed by a brief critique of their shared assumptions.

First, the second Access to Justice Review (the Review), launched in September 2014[115] and reported on in November 2015,[116] was fundamentally driven by the goal of developing a vision for the future of publicly funded legal services in Northern Ireland during a difficult economic climate. In particular, it sought to prioritise those services where publicly funded advice and/or representation should be provided in order to meet human rights obligations, safeguard the interests of the vulnerable and meet the wider public interest.[117] The Review invited comment on a broad range of proposals, but the most pertinent for present purposes were as follows. It was suggested that the provision of legal services in respect of public law children cases might be regarded as 'part of the irreducible minimum of service provision'.[118] In contrast, consideration was given to removing private family law from the scope of legal services except where there is objectively verifiable evidence that domestic violence or child abuse may be at stake,

109 Access to Justice (Northern Ireland) Order 2003, Article 49(2), repeals the statutory provisions specified in Schedule 5 to the extent specified in col 3 of that schedule. The Children (Northern Ireland) Order 1995 is listed in Schedule 5, with Article 172 included in col 3. This provision was commenced by the Access to Justice (2003 Order) (Commencement No 7, Transitional Provisions and Savings) Order (Northern Ireland) 2015, Article 2.

110 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015.

111 Ibid reg 4(1)(d)(i)(aa)–(dd).

112 Access to Justice (Northern Ireland) Order 2003, as amended by the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014, Article 14(2A).

113 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, reg 4.

114 Email from the Legal Services Agency Northern Ireland to author (2 October 2015).

115 *Access to Justice Review 2: The Agenda* (n 6).

116 *Access to Justice Review 2: Final Report* (n 6).

117 *Access to Justice Review 2: The Agenda* (n 6) para 1.1.

118 Ibid para 5.5.

based closely on the reforms introduced in England and Wales in 2012.[119] The agenda for the Review noted the criticism which has followed the 2012 reforms in general terms[120] and the final report cited some of its many detailed critiques.[121] By way of example, some criticism of the regime has been dispensed by the judiciary of England and Wales. In a recent case about contact arrangements and specific issues relating to education and health, involving litigants who would have been entitled to legal services before the 2012 reforms, Mostyn J held that it was impossible for the relevant parties to be expected to represent themselves having regard to the factual and legal issues at large.[122] He said that to do so 'would be a gross inequality of arms, and arguably a violation of their rights under Articles 6 and 8 of the European Convention on Human Rights and Article 47 of the European Charter of Fundamental Rights'.[123] The agenda for the Review also countenanced an expanded role for mediation in private family disputes, together with ways of limiting the provision of legal services in cases involving repeated applications to the court.[124]

Surprisingly, the final report of the Review recommended that *all* applications for legal services should be merits tested, even those relating to so-called public law proceedings, because in some circumstances, the report suggests, parents may not be considered a serious or high priority for funding (for example, 'an estranged parent who has hitherto shown little interest in the children or the proceedings').[125] Nonetheless, so-called public law proceedings remain privileged by the recommendations, as they suggest that the proposed eligibility test 'should be specific to public law proceedings' and 'should not include prospects of success criteria',[126] which are recommended in relation to so-called private law proceedings. The proposal to remove so-called private law proceedings from the scope of legal services is not recommended, but the aforementioned prospects of success criteria are, together with, inter alia, a cost–benefit test;[127] financial conditions designed to encourage earlier dispute resolution;[128] a new form of funding called an 'Early Resolution Certificate';[129] and a range of 'controls' on long-running contact disputes, designed to make remuneration for such cases 'significantly less generous than for cases which resolve early'.[130] Much more 'significant' use of family mediation is also recommended alongside a collection of incentivising reforms.[131] Most radically, a feasibility study on the complete overhaul of so-called public law proceedings is recommended, which would place them in the hands of an inquisitorial tribunal akin to

119 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

120 *Access to Justice Review 2: The Agenda* (n 6) para 5.11.

121 *Access to Justice Review 2: Final Report* (n 6) para 18.3.

122 *MG and JG v JF* [2015] EWHC 564 (Fam), [10] (Mostyn J).

123 Ibid. For a second striking example, see *Re K and H (Children)* [2015] EWCA Civ 543.

124 *Access to Justice Review 2: The Agenda* (n 6) paras 5.15–16. It ought to be noted that the Children (Northern Ireland) Order 1995, Article 179(14), already enables the court to prevent further and unnecessary litigation on a matter upon which it has made a ruling. In addition, the director of LSANI now has the power to make a prohibitory direction to deal with unwarranted applications under the Civil Legal Services (General) Regulations (Northern Ireland) 2015, reg 30.

125 *Access to Justice Review 2: Final Report* (n 6) paras 18.17–18.19.

126 Ibid paras 18.18.

127 Ibid para 18.48. The recommendation specifies that the cost–benefit analysis should be 'expressed in private client terms', namely whether 'a reasonable private paying client would be prepared to pay for the work to be undertaken if they could afford to do so'.

128 Ibid paras 18.56–57.

129 Ibid paras 18.44–18.52.

130 Ibid paras 18.32–18.33.

131 Ibid ch 17.

the Children's Hearing system in Scotland.[132] While 'identifying the appropriate jurisdiction' of such a panel is highlighted as an issue for consideration,[133] the final report otherwise fails to acknowledge the difficulties in isolating so-called public law proceedings for reform in the context of the interconnected public and private law measures which have been developed under the 1995 Order. At the time of writing, the recommendations of the report were themselves subject to a public consultation. While the consultation closed on 9 February 2016,[134] its outcomes have not yet been published.

Second, a consultation on the Scope of Civil Legal Aid (the consultation), launched in October 2014[135] and finalised in a post-consultation report in March 2015,[136] was undertaken in order to examine how best to give effect to recommendations arising from the first Access to Justice Review which reported in September 2011[137] and also 'to explore any other changes to the scope of civil legal aid that will help deliver the strategic objective of bringing legal aid expenditure within budget'.[138] The consultation also invited comment on a broad range of proposals, but the most pertinent for present purposes were as follows. Consistent with the initial terms of the Review, although inconsistent with the recommendations of its final report, the consultation document categorically stated that the Department of Justice would not be considering any proposals that would affect *either* 'Special Children Order Proceedings (cases that involve the state taking a child into care and not subject to either a means or a merits test)' – which are now listed under regulation 4 of the Civil Legal Services (Financial) Regulations (Northern Ireland) 2015 – *or* 'other public law children cases which are subject to a means and/or merits test'.[139] The consultation therefore exhibited a foregone determination not to remove from the scope of civil legal aid (as it then was) or to change the existing rules in respect of *any* so-called public law children's proceedings. In contrast, the consultation gave extensive consideration to taking so-called private law children's proceedings out of scope, either entirely or partially. The consultation document highlighted the criticisms arising from analogous reforms in England and Wales, noting a range of detrimental and unforeseen outcomes.[140] Nonetheless, an option to limit multiple private family law applications in the same case (mirroring the Review proposal above), as well as an option to take private children's proceedings entirely out of scope and to fund greater use of mediation in its place, were both proposed by the consultation.[141]

The proposal to remove private cases entirely from scope was abandoned in the end, although it was averred that the issue will be kept under review,[142] following strong opposition from respondents to the consultation who highlighted a drop in the uptake of mediation services in England and Wales since analogous reforms were introduced,

132 Ibid ch 16.

133 Ibid para 16.22.

134 Department of Justice for Northern Ireland, *Consultation on the Report of the Access to Justice Review Part Two* (3 November 2015) <https://www.dojni.gov.uk/consultations/report-access-justice-review>.

135 *Consultation Document: Scope of Civil Legal Aid* (n 7).

136 *Post Consultation Report: Scope of Civil Legal Aid* (n 7).

137 Department of Justice for Northern Ireland, *Access to Justice Review Northern Ireland: The Report* (August 2011) <http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/access-to-justice-review-final-report.pdf>.

138 *Consultation Document: Scope of Civil Legal Aid* (n 7) para 2.1.

139 Ibid para 10.5.

140 Ibid para 11.6.

141 Ibid paras 11.24–25.

142 *Post Consultation Report: Scope of Civil Legal Aid* (n 7) para 3.29.

alongside a rise in the number of personal litigants.[143] On the other hand, the proposal to limit the number of multiple applications in the same so-called private law proceedings was recommended by the consultation report and it therefore set out an intention to issue guidance to the NILSC (as it then was) to 'tighten up the eligibility test and introduce the presumption that legal aid would be available for limited contact hearings only'.[144] It further noted that the guidance would require an outline of 'the circumstances in which legal aid will no longer be granted, including listing any exemptions'.[145] The Department of Justice hopes to achieve savings of approximately £9 million per annum prospectively as a result of the proposed reforms.[146]

It is clear from both the Review and the consultation that policy on children's proceedings under development by the Department of Justice is being shaped significantly by the problematic orthodox conception of a public/private divide. For example, the extensive exemption of children's proceedings on the public side of this artificial divide from consideration in the context of reforms to publicly funded legal services is problematic to the extent that it fails to recognise how some public law proceedings effectively become private law cases under a public law umbrella. However, the extensive inclusion of children's proceedings on the private side of the artificial divide for consideration in respect of proposals to make budget savings is undoubtedly more concerning. In a case where one parent objects to contact arrangements in favour of another parent, for example, where the favoured parent is the beneficiary of significant support from the relevant Trust, the prospect of a limitation on the number of applications that the disadvantaged parent can make with the benefit of adequately remunerated legal advice and representation to properly submit those applications after the first several instances seems unlikely to ensure access to justice nor equality of arms. This illustrates how thinking about children's proceedings along the lines of a public/private divide could mask the actual level of state involvement in the outcome of a particular set of children's proceedings, thereby undermining the rationale for subjecting proceedings on one side of the artificial divide to reductions in scope while uncritically preserving the existing scheme in respect of proceedings on the other side. Current orthodoxy may in this way allow the state to capitalise on the conceptual divide without coherent justification.

The department's policy approach also raises normative concerns about the consistency at state level regarding the appropriate extent of the state's role in family law disputes.[147] While such concerns lie outside the remit of this paper's focus, it is

143 For an excellent review of the implementation of civil legal aid reforms in England and Wales since 2012, see National Audit Office, *Report by the Comptroller and Auditor General: Implementing Reforms to Civil Legal Aid* (20 November 2014, HC 784). For academic research on the issues raised by litigants in person, see, for example, Liz Trinder and Rosemary Hunter, 'Access to Justice? Litigants in Person Before and After LASPO' (2015) 45(5) Family Law 497; Mavis Maclean and John Eekelaar, 'Legal Representation in Family Matters and the Reform of Legal Aid: A Research Note on Current Practice' (2012) 24(2) Child and Family Law Quarterly 223. For further research on the 'slowly increasing use of mediation' as a means of resolving family disputes in England and Wales since 2012, see, for example, Lisa Parkinson, 'Mediation and the Government Response to LASPO' (2015) 45(9) Family Law 1021.

144 *Post Consultation Report: Scope of Civil Legal Aid* (n 7) para 3.38.

145 Ibid para 4.9.

146 Ibid para 4.8.

147 John Eekelaar and Mavis Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart 2013) 206. Eekelaar and Maclean highlight that the Coalition government's legal aid reforms in 2012 betrayed an analogous attitude that suggested so-called private family law disputes were 'for the parties to sort out, and not the concern of the state' while also noting that 'in a strangely inconsistent manner, it imagine[d] that legislation could be important in affecting the extent of parental involvement with children after separation'.

acknowledged that they are gaining increasing attention in the UK and beyond,[148] where discontent about the continued resort to misleading public/private law discourse is growing and calls to discard that dubious distinction are spreading.

Conclusion

A child's future care, upbringing and protection is at risk in every set of legal proceedings initiated to determine those arrangements, regardless of the level of state involvement in the outcome. Those issues and their resulting impact are not necessarily more or less serious whether the proceedings are classified as public or private, but, if the level of state involvement in determining their outcome is taken to be a factor of importance in deciding whether publicly funded legal advice and representation is justified, then a new framework for evaluating proceedings in that light should be developed to displace the boundaries of legal thought which prevail at present. This paper began by explaining how the legislative design of the 1995 Order was marked by efforts to bridge public and private law by making children's welfare the main organising principle when processing legal proceedings in which they are involved. At this stage it should be clear that further reform proposals in relation to state-funded civil legal services risk inconsistency with these legislative aims insofar as they could entrench the notion of a divide by bifurcating the applicable rules without coherent justification and without regard to the overriding priority otherwise given to children's welfare in legal decision-making processes. It was also suggested that the operation of the 1995 Order in practice has delivered even greater intersection between public and private law than has been appreciated previously, and further suggested that this phenomenon might be better understood by promulgating a spectral model for considering the level of state involvement in children's proceedings. On the basis of that model, it is submitted that the current approach to reforming how justice is accessed in children's proceedings requires reconsideration in an environment free from the constraints on legal thought produced by a problematic public/private dichotomy.

148 For example, see Bill Atkin, 'Controversial Changes to the Family Justice System in New Zealand: Is the Private Law/Public Law Division Still Useful?' (2015) 29 International Journal of Law, Policy and the Family 183.

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The sun is setting: is it time to legislate pre-packs?

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Abstract

This article provides a critical evaluation of the Graham Review recommendations concerning pre-packs; a timely review which is required to provide a benchmark against which it would be possible to assess the quality of any legislative initiatives which may be taken in the future.

Keywords: corporate insolvency; Graham Review; pre-pack pool; viability review; SIP 16; marketing; valuations

1 Introduction

Despite pre-packaged administrations (pre-packs) accounting for only a fraction of all insolvency procedures, they have received a considerable amount of attention that has perhaps not been fully deserved.[2] Often misunderstood at best, the key aspect of the pre-pack procedure permitting such a negative response, resides with the lack of transparency that surrounds the process.[3] This well-documented criticism is also associated with the way in which connected parties can purchase the old company, leaving many creditors frustrated with both the lack of information received[4] and the diminutive monies received from which they are owed.[5]

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2 In 2011, the Insolvency Service estimated that 25 per cent of the 2808 companies that entered administration in 2011 used the pre-pack procedure; and that nearly 80 per cent of pre-pack sales were to connected parties. It is expected that from a class of around 20,000 companies that enter an insolvency procedure every year, there are approximately 700–750 pre-packs per annum. See Insolvency Service, *Annual Report on the Operation of Statement of Insolvency Practice* 16, January/ December 2011.

3 Whilst the pre-pack process seems to have gained much exposure in recent years, it is by no means a new concept; it was often frequently used by administrative receivers, alas certainly not to the same degree of formalities as the US Chapter 11.

4 Often concerning the decisions made by the insolvency practitioner.

5 The latest empirical research shows that, in a case study of 497 companies, on average just over £500,000 is owed to unsecured creditors. See the final report to the Graham Review, April 2014, prepared by Professors Peter Walter and Chris Umfreville with the assistance of Dr Paul Wilson, *Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration* (University of Wolverhampton 2014) 30.

Due to the sustained criticism, pre-packs have received over the years,[6] Vince Cable MP commissioned Teresa Graham CBE to undertake an independent review of the pre-pack process,[7] as part of the government's wider 'Transparency and Trust' agenda.[8] The initiative behind the agenda was to detect weaknesses in the UK's company law framework and find solutions to ensure that the UK remained a competitive and attractive place to conduct business. To achieve this goal it was identified that there was a need for increased levels of trust and confidence within the system and this extends to the professionals who deal with companies when they go insolvent.[9]

The Graham Review (the Review) unequivocally reported that self-regulation would be a better option than to legislate, which in itself should be seen as the last resort. The Review made six recommendations, which have since become somewhat essential to its survival as a non-legislative procedure. Ministerial pronouncements have put the profession under notice that, unless it takes proper steps to produce substantial compliance with the Review's findings, then legislative power will be exercised.[10] To date, while there has been no official follow-up report assessing the measures taken by the profession, the Review appears to have attracted widespread support,[11] giving hope that the Review, which took nine months to complete, may see its recommendations adopted over the course of the next year or so.

Based on the intricacies of the recommendations, should they be implemented in full, this would lead to a drastic change in the way in which insolvency practitioners deal with distressed companies. The changes will redefine the pre-pack process, including the role of those who implement pre-pack strategies. The Review proposes non-legislative action, but it will be examined whether over time legislation will become inevitable. What is therefore required is a balanced evaluation and critique of the Graham proposals: one that is capable of providing some form of yardstick against which to test the quality of any legislative initiatives which may be taken in the future.

6 In 2010 the government consulted on improving transparency and confidence in pre-packaged sales in administrations. This work led to a proposal that creditors be given a short period of notice prior to sales going ahead. This proposal was withdrawn in early 2012, as the government was not convinced that the specific benefit of the proposal outweighed the overall benefit to business of keeping to the micro-business moratorium.

7 Graham Review into Pre-pack Administration, Report to the Rt Hon Vince Cable MP, June 2014 <www.gov.uk/government/publications/graham-review-into-pre-pack-administration>.

8 See Department for Business, Innovation and Skills. 'Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business' (June 2013) 15, paras 43–44.

9 Ibid 43.

10 See Graham Review into Pre-Pack Administration (n 7), where the pronouncement is stated at the beginning of the Review (10, para 4.2) and then reiterated (67, paras 9.37–39). Quite interestingly, the last paragraph recommends that any such reserve power bestowed upon government by Parliament should be time-limited (a 'sunset clause'), leading one to conclude that these changes might actually occur instead of remaining a mere consultation exercise.

11 Key figures who have expressed support for the recommendations include: Business Minister Jenny Willott; Insolvency trade body R3 President, Giles Frampton; the Institute of Chartered Accountants in England and Wales' Executive Director, Professional Standards, Vernon Soare; and Matthew Fell, Director of Competitive Markets at the Confederation of British Industry. For a full review of their comments see <www.gov.uk/government/news/willott-announces-plans-to-clean-up-pre-pack-insolvency-deals>.

2 Terms of reference and the main concerns

The details that the review team were given focused on improving transparency and creditor confidence in pre-packaged sales in administrations.[12] The terms are worth reiterating here for ease. The four terms were:

- to assess the long-term impact of pre-pack deals to form a view as to whether they encourage growth and employment and whether they provide the best value for creditors as a whole;
- to assess the usefulness of the pre-pack procedure in the context of business rescue generally, using international comparisons as and when appropriate;[13]
- to assess whether pre-packs cause detriment to any particular groups of creditors and specifically whether unsecured creditors are disadvantaged; and
- to assess whether there are any practices associated with pre-packs which cause harm.[14]

This article will refrain from specifically dealing with these terms. Instead, it will investigate the six recommendations that were proposed and whether, based on their intentions, they would constitute good legislative inputs, should this occur in the future. In terms of the research conducted for the Review, its overall contribution in providing statistical data remains limited. Whilst the pool of businesses studied as part of the Review is respectable in size,[15] further data in assessing pre-packs is required as this undertaking represents only a few of its kind.[16] It should be noted that the Review was limited in scope and neglects to consider any real alternatives to the pre-pack model. Instead, it has chosen to refurbish the process with some new fixtures in the hope that it can somehow help to silence the critics.

To determine the viability of the recommendations it is imperative that the basis for change is reviewed. It is well established that the positives, whilst few in number, do provide some justification for the continuance of the procedure.[17] The difficulties that thwart pre-packs, as the Review was careful to point out, were the negative preconceived ideas that surround the process. Whilst there has been some attempt at collating data on pre-packs prior to the Review, the publications were limited in scope and did not provide any support or undermine those preconceptions. The Review therefore represents the most in-depth scrutiny of pre-packs to date.

Why this Review and subsequent reports are critical is because it helps to increase awareness and understanding of a mechanism that permits business rescue – a process that is required in an efficient insolvency regime. Without such a procedure, many

12 See generally T Astle, 'Pack Up Your Troubles: Addressing the Negative Image of Pre-packs' (2015) 28(5) Insolvency Intelligence 72–74.

13 There has not been much research conducted on pre-packs in EU member states, but a fresh review on this area would provide for a fascinating read.

14 Graham Review into Pre-Pack Administration (n 7) 11.

15 A random sample of 499 companies that entered pre-pack administrations in 2010 was selected. 2010 was chosen as this allowed time for the new SIP 16 process to have become embedded and to allow the research team to monitor the success of the purchasing company for three full years following the sale.

16 The last major review of pre-packs would be that conducted by Sandra Frisby, see S Frisby, *Report to the Insolvency Service: Insolvency Outcomes* (Insolvency Service June 2006); S Frisby, *A Preliminary Analysis of Pre-Packaged Administrations, Report to the Association of Business Recovery Professionals* (August 2007).

17 To name but a few, pre-packs can preserve jobs, are usually cheaper than an upstream procedure, deferred consideration is, by and large, paid, and that the pre-pack procedure may bring some limited benefit to the overall UK economy.

companies will needlessly fail. This in turn would create a volatile commercial environment which contravenes the aims set out by the government's wider 'Transparency and Trust' agenda as mentioned above.

By accepting the necessity of pre-packs, the catechism is whether they should continue to operate as they are, be subject to less regulation, or whether the Government should legislate? The possibility of banning pre-packs or finding an alternative poses interesting questions which will be considered towards the end of this article.

To address the case for further regulation in a pre-pack the main criticism stems from the lack of transparency that surrounds the process. Other factors include the duration and quality of marketing of a pre-pack, the valuation methodology, and that no consideration is given to the future viability of the newly purchased company. These concerns were examined in the Review, which collectively formed the foundations for the six recommendations which would hopefully lead to improvements against the main criticisms of pre-packs.

3 The six recommendations

The Review was somewhat prejudiced against taking a legislative approach to pre-packs due to Teresa Graham's personal views.[18] It is likely that such a strong viewpoint will have invariably had a bearing on the outcome of the Review, including the form that the recommendations would ultimately take. Given the noted criticisms and the presented opportunity, the six recommendations are not as radical as they could have been. However, they do represent a turning point for insolvency practitioners. Furthermore, the Review is absolute in its intention to bring some change, no matter how sweeping, by providing an ultimatum that if the concerns are not addressed, legislation, whilst not desirable, would ensue. The viability of these proposals requires detailed review.

3.1 Pre-pack pool

The first key recommendation prescribes that on a voluntary basis, connected parties should approach a 'pre-pack pool' before the sale and disclose details of the deal for the pool member to opine on.

The purpose of this recommendation was to address the lack of transparency by offering a method which would keep most concerned parties informed, despite the clear feedback from stakeholders that secrecy is a strength of the pre-pack process. The data compiled by the University of Wolverhampton, which provided the Review with the key information on the characteristics of companies that entered pre-packs in 2010, makes for interesting reading. It is noted that the mean average, in which a company may enter a pre-pack, was 12.29 years.[19] There is a clear spike with companies that enter a pre-pack at between 5–7 years and then at 10–20 years, demonstrating that pre-packs are not generally companies in their infancy, but ones that have been operating for a number of years with possible strong affinities with the business and those that are controlling it.[20] This bond has caused many negative perceptions, with some creditors accusing pre-packs of favouring connected parties. The research conducted by the Review does nothing to quash this belief. On the contrary, it galvanises the premise that this negative preconception is well founded.

18 Graham Review into Pre-Pack Administration (n 7) 5.

19 See Walter and Umfreville (n 5) 12.

20 Graham Review into Pre-Pack Administration (n 7) 59.

The result is that creditors are less likely to receive a return when a connected party is involved than when they are not. The Review gauged exactly what the distribution range was for the returns that unsecured creditors could receive. It appears that again the negative preconception surrounding distribution has led many to believe that connectivity has an impact and, whilst in some limited sense it has, the reality is that in the majority of cases no distribution was made at all.[21] The percentage of companies that make no distribution rests at just over 60 per cent. When it is considered that around 15 per cent of companies have an unknown distribution, the figure could actually be enhanced, leading to speculation that as high as three-quarters of unsecured creditors are unlikely to receive any return.

The impact that connected parties have on pre-packs is quite startling, even though the data only goes to prove that the negative preconceptions were actually true. The data shows limited benefit to unsecured creditors and – as expected – a better faring for secured and preferential creditors. In administration the prescribed part would assist unsecured creditors to a degree, but the difficulties arise where there are no funds to distribute at all. It appears that whether it is by pre-pack or by the upstream process (administration), unsecured creditors have very limited scope for expecting a return. Therefore, whether the pre-pack process was opened to a screening pool, it begs the question: what benefit would this have? It is clear that a comparison between classic administration and pre-packs shows that there is little to be gained from further transparency and a lot to be lost by removing the secrecy that surrounds the process.

3.1.1 Connected parties

In terms of the connected sales, something which the pre-pack pool recommendation aims to address, the statistics, whilst confirming some of the adverse preconceptions, should not be seen as something entirely negative. It is vital that it is made clear that creditors do not lose money when a company pre-packs – at this point the money has already been lost.[22] It is likely that the anger vented from unsecured creditors is in frustration of not knowing what was happening to the company. This is in addition to the likely premise that the old management, which may or may not have been responsible for the demise of the company, is permitted to have a second chance to purchase the company at a discount, thereby benefiting at a cost to other creditors. The Review shows that, out of a possible 499 companies that entered a pre-pack, 316 were connected sales and 182 were not connected, proportioned at 63.3 per cent and 36.5 per cent respectively.[23] This figure is somewhat of a decrease on the statistics obtained a few years ago with a review by the Insolvency Service in 2011 stating that the connected sales figure was as high as 80 per cent,[24] but it is a slight increase on the Association of Business Recovery Professionals' statistics published in March 2010 which was at 59 per cent.[25] Whatever the figure may actually be, there will be disagreements as to the criteria that need to be satisfied for a person to be deemed 'connected' to the old company.[26]

21 For a breakdown of the dividends (pence in the pound) distribution, see ibid 31–33.

22 Ibid 37.

23 Data for one business was unknown.

24 See Insolvency Service (n 2).

25 The Association of Business Recovery Professionals in March 2010 put the figure at 59 per cent, see <www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/Pre_packs_and_SIP_16_March_2010.pdf>.

26 Further research with insolvency practitioners is required and RPBs should be encouraged to assist in this pursuit. It remains baffling how reviews can be submitted without obtaining full details from the profession.

Setting the criteria for what amounts to a 'connected sale' is critical to understanding not only what happens to a distressed company when it enters a pre-pack, but also to determine who the likely purchasers are. It is imperative to clarify this point as pre-packs have to be designed with an end result in mind;[27] the procedure is only effective if it is utilised. If the pre-pack works successfully on the basis of operating in a secret format, the recommendation of a pre-pack pool may be severely counterproductive.

It is worth noting that, since the Review published its final report, a fall-back provision has been included in the Small Business, Enterprise and Employment Bill (June 2015) which will enable the Secretary of State to make regulations restricting the ability of an administrator to make disposals to persons who are connected with the company.[28] This is clearly aimed at the most controversial type of pre-pack. One suspects that, should abuse be evident, then the use of the pre-pack will not be controlled by self-regulatory mechanisms.[29] This presents a solid advancement for what has been the rhetoric position for so long.

The Review provides for a much wider definition of what is a connected party than that contained in the Insolvency Act 1986.[30] The Review states that a connected party is any individual who had control of the insolvent company and exercises control over the new company. This is a wide definition that may refer to business sales where an individual is a director of either company, or where a company exercises control both in the old company and new company because of its level of share capital. This definition is devised with the ingenuity of those who would implement pre-packs in mind. It has been created as a means to close any possible loopholes on what amounts to a connected party for the purposes of a pre-pack. There can be no question that minor technicalities would be exploited for the purpose of ensuring that a company could avoid complying with any provisions that the insolvency practitioner deems counterproductive to his or her overall objective. What, however, would be the case if connected members of the old company formed a new company, which in turn made a pre-pack deal for the old business? A consortium made up of connected parties could well hide amongst the shadows of a new company and, by doing so, avoid the potential scrutiny under the pre-pack pool as suggested under recommendation number one. Consideration of this matter would require a review of s 435(10), Insolvency Act 1986, which states that in determining whether any person or company has control of a company, sales to secured lenders who hold security for the granting of the loan (with related voting rights) as part of the lender's normal business activities over one-third or more of the shares in both the insolvent company and the new company are not included.

This slight amendment regarding the lender's normal business activities is to prevent the aforementioned group companies forming to bring themselves into this exception by making a consortium loan and taking security. Whether this would address the most unscrupulous of group company consortiums remains to be seen, but it should not come as a surprise if what is proposed in the Review is abused.

27 Namely, where possible, to save the company/business as a going concern. See Schedule B1, Insolvency Act 1986.

28 See cl 129 of the latest version of this Bill. The wording is: 'The Secretary of State may by regulations make provision for: (a) prohibiting, or (b) imposing requirements or conditions in relation to, the disposal, hiring out or sale of property of a company by the administrator to a connected person in circumstances specified in the regulations.'

29 D Milman, 'Corporate Insolvency in 2015: The Ever-Changing Legal Landscape' (2015) Company Law Newsletter 1, 2.

30 See also P Bailey, 'Pre-Packs Report Published but Fights Shy of Legislative Reform' (2014) Company Law Newsletter 1, 3.

The details that surround the pre-pack pool reveals a novel idea. The proposition includes a pool of experienced business people which should be formed to enable independent scrutiny of a connected party pre-pack deal. The Review is not clear on the exact details that surround such an unprecedented concept in UK insolvency practice, but it does provide some guidance on the design of the structure.

3.1.2 Members of the pool

In terms of who would administer the pool, it is envisaged that a small secretariat would be involved, which would control membership of the pool; including responsibility for selection, training, monitoring[31] and evaluation. Such a secretariat, and its pool members, could be compared with the structure and role of the recognised professional bodies (RPBs) and it would be of no surprise if the Review sought inspiration for such from the professional bodies. Closer inspection of the selection process would be critical to ensure that independence is maintained. It is highly unlikely that the independent value in terms of knowing a particular party would be achieved in all cases since the experts will be chosen for their familiarity with the type of company in question. Instead the pertinent objective should be to promote independence, ensuring that the pool members are not influenced, against better commercial judgment, to accept a pre-pack proposal when it should be rejected. The distribution of cases is expected to rotate when approached by a connected party. However, it is inevitable that, whilst all pool members may have a sufficient level of expertise, some may possess specialised knowledge that places them in a better position to make a decision on a proposed pre-pack. Such occurrences may be quiet rare. This is because most companies fall under a similar structure. However, the key point here is for the Review to insist on a strict rotation basis that adds an unrealistic burden on the process.

It is important to clarify that the independent aspect of the pool can only be achieved if the pool is free from the influence of any of the RPBs and, as such, be seen to operate as a separate body that simply reviews pre-pack proposals and reports directly back to the connected party in question. How this will be addressed in practice was not made clear in the Review. Instead, the Review chose to emphasise that the pool concept was a new idea. It is worth exploring this notion in more detail. To ensure that the pool concept works in practice would be reliant on leaving the administrator, to a large degree, with the task of approaching the pre-pack pool association and asking them to put together a professional group that would be competent to assess any pre-pack proposal that the company would be likely to receive. Despite the pool members poached for their skills from a range of industries and disciplines, members are likely to be nominated to the secretariat by professional organisations, such as the Confederation of British Industry, EEF (The Manufacturers' Organisation) and the Institute of Directors, and this will be subject to availability. A process subject to availability of resources ensures that quality has to be compromised.

Furthermore, if members can be nominated to the secretariat, not all will be familiar with the process or the expectations placed upon them. As with any professional position, there is a tendency to provide reams of information on how something should be done. This, along with the time restraint of half a day to review a proposal, adds pressure on members to make a decision, which may or may not be justifiable. Given the nature of pre-packs, time is of the essence; in an environment where speed will often trump all

31 The secretariat would monitor performance standards for the pool based on: turnaround time; positive bilateral feedback from directors; unsolicited feedback from professionals involved, or creditors. See Graham Review into Pre-Pack Administration (n 7) Annex H.

other concerns, there is some apprehension that too much expectation is being placed on members. It is unlikely that liability will not be wilfully attached to any pool member. Yet, it is difficult to say just how such a case would unfold if a connected party pursued a claim against a pool member for having overlooked or intentionally weakened the 'hold harmless' position in the letter sent to the member at the beginning.[32]

The publication of the details regarding the opinion of the pool and viability review pose a number of interesting questions. To what extent the publication would reveal details surrounding the pre-pack remains irresolute. It clearly would not be able to reveal any sensitive information that may prevent future amendments to failed proposals, which subsequently could be accepted. The value of such reports would depend and vary according to the input of different pool members. Whilst transparency may take a closer step to being realised, a consistent approach to reviewing pre-pack proposals submitted by connected parties would become a key concern.

If the pool were used, it is clear that there would be inconsistencies across the pre-pack spectrum. The Review suggests that there would be no prescription as to what material the pool member would require in order to comment on the deal – this would be for the party approaching them to decide. This wide discretion is coupled with a time restriction in that the pool member will spend no more than half a day reviewing such contents. To allow for standardised practice and to allow pool members to review proposed pre-packs in a consistent manner, it is vital that the submissions follow a best practice guideline – a pre-pack proposal document should be considered. In terms of the response that pool members should give, the Graham Review included at Annex I a specimen form of what could be included.

Since the pre-pack pool will not be applicable to unconnected parties, any method employed to render a person or a group as unconnected will be exploited. The matter is further complicated by the proposal that the pre-pack pool only be conducted on a voluntary basis. The suggestion would be that this should be made compulsory, since the process involving deals can remain secret within the pool.

3.2 Viability review[33]

Recommendation number two provides that, on a voluntary basis, the connected party completes a 'viability review' on the new company.

Determining the viability of pre-pack proposals attempts to address the criticism that there is no quality check for these future plans that often fail. Permitting these non-viable business plans to re-enter the market degrades the rescue culture. It also gives a false impression that the new company had any realistic chance of successfully trading again. This is particularly true in relation to pre-pack deals conducted by connected parties, something which the empirical data mentioned above in section 3.1 has illustrated. There is no doubt that the figure is high for connected parties. Yet, it should be considered that this may be the case because connected parties, rather than those who are unconnected, are more willing to purchase these failed businesses and take the risk in reviving the company's fortunes.

The viability review, as suggested by the Review, would require a plan showing how the new company is to survive for at least 12 months from the date of statement. It is interesting to note that 12 months was chosen as the relevant time period. The empirical

32 This is in fact addressed in Annex I which provides a statement suggesting that the administrator will be responsible for making the decision. See ibid 93–94.

33 Ibid 62, para 9.11.

data contained in figure 7.3 of the Review contains statistics demonstrating the failure rates of new companies (illustrating pre-packs and trading administration) and figure 7.5 shows the failure rates by connected sales – both illustrating that the point of failure is at its highest between 12–24 months. Within three years, 29 per cent of connected pre-packs subsequently failed, compared to 16 per cent for those that were unconnected. Clearly, by year three almost a third of pre-pack purchasers to connected parties have failed again. Taking the period of 12–24 months into account, the rate of failure is at 14 per cent, with a cumulative figure (taking into account those failures within the first 12 months) at just over 20 per cent.

The viability review detailing what the new company would do differently from the old company to prevent failure does not in any way guarantee future success. What this review achieves is to ignore the more complex reasons why companies fail. The narrative within the review can have the best intentions, but ultimately it is just a proposal stating what is hoped to be achieved. If the intention is to make connected parties think about what they are going to do, rather than just blindly purchase the company, then it is possible that this could lead to better business plans being drafted, which in turn may have better chances of success. This unfortunately fails to make a distinction between the purchasers' own business plans and sharing the finer details in a viability review with the creditors. The two viability reports would clearly be different, not to mention that they may contain confidential elements as to what the purchasers intend to do with the new business. It must be considered as to whether the viability review will add anything to reduce the noise that surrounds pre-packs.

The proposed specimen wording for pool members' statements has been provided in Annex I of the Review. It is a simple overview that does much to distance itself from the decisions made by the administrator. The statement leaves little to the imagination in terms of embracing the ideas and makes it explicitly clear that the pool member has no view on whether the new company will remain a going concern in the near future. This no doubt intends to remove potential negligent liability claims from materialising. However, a statement merely reflecting on whether the proposal is reasonable surely lacks what the public had hoped for in order to quash the suspicions that surrounded the process?

The voluntary nature of this narration goes some way to illustrate its weakness and likelihood that it would rarely be ratified, given the lack of any incentive. This is witnessed in the apparent lack of commentary that the administrator can input when attaching, if available, the viability review to the Statement of Insolvency Practice (SIP) 16 before sending it to the creditors. Whether the market will come to expect these viability reviews remains to be seen, but this would be the only way, barring making the review compulsory, that would encourage the take-up.

3.3 SIP 16 – REDRAFT[34]

Recommendation number three states that SIP 16 should be redrafted and that the Joint Insolvency Committee should consider the draft SIP 16 contained in Annex A of the Graham Review.

SIP 16 was revamped in November 2013 and, with little surprise, in light of recommendations one and two, it is recommended that it should be redrafted again. A copy of the redrafted SIP 16 is contained within Annex A, which simply aims to improve the perception of pre-packs as well as tightening up the language used. With the original

34 Ibid 63, para 9.20.

wording of SIP 16, it is a welcome sight that additional assistance could be given surrounding the marketing and valuation process.

Following a comparison with the existing SIP 16, the original 13 paragraphs largely match with the Review's 17, albeit with a few adjustments. The changes commence with paragraph three, which incorporates an element of fairness into the process by ensuring that both unsecured and secured interests are considered and that the insolvency practitioner can demonstrate this. The practitioner does have a duty to creditors as a whole, but it is questionable whether fairness can enter the debate.[35]

Paragraph 4 introduces a new awareness principle that an insolvency practitioner should consider when dealing with a pre-pack, especially when the purchasers happen to be connected parties. It is not clear as to what insolvency practitioners should do by recognising the high level of interest that surrounds such a deal, other than to ensure that they complete their duty in accordance with the related insolvency provisions and practice statements. It is foreseeable that the real purpose behind this paragraph is to make insolvency practitioners aware that their actions will be scrutinised by creditors and the public alike and that they should, where possible, reduce the noise that may surround such a deal. Whether this may influence the way that they conduct the pre-pack and in turn breach at least one of the five fundamental principles[36] remains highly probable. Furthermore, there is a possibility that the 'influence' may lead to intimidation threats. These may occur when an insolvency practitioner may be deterred from acting objectively by threats, actual or perceived, due to the negative publicity that the pre-pack may induce.

Paragraph 10 presents new ground by insisting that valuations are obtained by independent valuers carrying professional indemnity insurance (PII). It is hoped that making the process more transparent and assigning the valuation to professionals would provide come comfort to at least some of the classes of creditors that the most beneficial valuation has been obtained. This is further enhanced by paragraph 11 which states that any deviation from paragraph 10 must be explained to creditors in the pre-pack statement. Given the importance of marketing and valuation, these new additions to SIP 16 will be considered separately.

3.4 Marketing[37]

Recommendation number four focuses on marketing and that all businesses should comply with the six principles of good marketing and that any deviation from these principles be brought to creditors' attention.

The statistics have changed somewhat dramatically over the last few years as greater research has been conducted in this field. For example, in 2007, Sandra Frisby in her research suggested that only 18 of the 227 businesses (7.9 per cent) of the whole pre-pack database were marketed in the appropriate way.[38] This should now be contrasted with the Final Report to the Review completed in April 2014,[39] which shows that from a class of 497 pre-packs, 303 businesses (60.9 per cent) involved marketing activity whilst

35 A discussion on what amounts to fairness, whilst interesting, is beyond the scope of this article.

36 The five fundamental principles are: integrity; objectivity; professional competence; confidentiality; professional behaviour.

37 See Graham Review into Pre-Pack Administration (n 7) 64, para 9.23.

38 Frisby (n 16) *A Preliminary Analysis of Pre-Packaged Administrations*, 30, 49.

39 Walter and Umfreville (n 5) 22.

103 businesses (20.7 per cent) received none at all.[40] The Final Report warrants further attention. Of the businesses that were subject to a market period, 118 were unknown, leaving data available for 190 businesses. Less than 20 were subject to longer than six months' marketing and 65 businesses received less than two weeks' marketing. The remaining figures show that around 55 businesses were on the market for between two weeks and a month; just over 40 businesses received between one month and three months, leaving around 10 businesses being on the market for three to six months.[41]

Exactly what equates to the optimal or reasonable marketing period is dependent on the nature and size of the business. What is clear is that some form of marketing is present. However, further research into the type of media exposure administrators are utilising is required to show whether certain methods result in better results.

The noticeable change in how administrators implement marketing strategies is without question due to the introduction of the original SIP 16 statement in January 2009, which has since been amended in the 2013 version. The Review, whilst observing the redesigned 2013 edition, has incorporated in its own redesigned SIP 16 a number of paragraphs. These refer to marketing and how this can be better conducted with the creditors in mind. The original SIP 16 has been criticised for being poorly drafted and having no requirements on administrators to explain why a type of marketing has taken place, if any. Improvements were made in the November 2013 redraft, which did require administrators to explain situations where no marketing had been conducted. The reality is that there are still wide discrepancies across the profession on how such SIP 16 statements should be compiled. There is a hope that, since November 2013, there have been improvements. Yet it must be said that there has not been enough research in this area to state otherwise.

To address the marketing concerns, six principles of good marketing were suggested by the Review. Whether the principles would lead to better marketing remains speculation, but it is worth exploring to see whether they show any promise in potentially improving creditors' perceptions that they are getting the best deal available.

3.4.1 The six good principles of marketing

i Broadcast rather than narrowcast

Marketing the business as widely as possible, proportionate to the nature and size of the company, in order to maximise the pool of potential purchasers is not as simple as it may sound. The Review suggests that different methods of media may be adopted to achieve this outcome. Yet it leaves the choice to the discretion of the administrator, reverting the process back to its arbitrary confinements. Administrators are apt in the art of making commercial judgments, but a deep comprehension of media techniques and exposure may not be one of them. It is perhaps prudent for the RPBs to conduct training for their members in this field if this first principle is to be maximised.

ii Justify the media used

Following on from the broadcast principle, the statement to creditors should explain the reasons underpinning the marketing and media strategy adopted. To what extent media strategies will have to be explained remains elusive and will no doubt fail to satisfy all of

40 Of those cases which involved no clear evidence, this was determined by reviewing the SIP 16 Reports. Additionally nine cases were inconclusive due to no information available.

41 Walter and Umfreville (n 5) at 23.

those concerned. The data available to justify using one particular classified section in a newspaper over another may result in pedantic disputes, but it does raise the real possibility of complaints materialising over the methods and media adopted. Whether such complaints would be justified would depend on the justification provided by the administrator. In the case that a complaint emerged, principle two, as it would be attached to the SIP 16 statement, would fall to the respective RPB to determine. However, given how current complaints by RPBs are dealt with, it is unlikely that many breaches would be found.

iii Ensure independence

It is hoped that administrators have conducted their own marketing of the business without simply relying on others (namely the business) to do it for them. The Review quite rightly applies some common sense and reminds administrators that they need to satisfy themselves that the marketing undertaken has been adequate. To satisfy that such marketing efforts have been sufficient will require proof that could be included in the SIP 16 statement. The level of detail would be dependent on the company, but it will be important that the administrator provides clear evidence that independent work has been implemented by itself.

iv Publicise rather than simply publish

Justifying the period of time in which a business has been marketed leaves the possibility that marketing strategies may simply be subjected to standard period slots to remove the prospect of creditors insinuating that businesses have received insufficient marketing timeframes. Naturally, timeframes will be susceptible to the nature and size of the company. However, informing creditors of the reason for the length of time settled upon may undermine the commercial expertise that administrators possess. It is inevitable that a trade-off between the desires of the creditors and the commercial prudence of the administrators has to be kept in check. Ultimately, the administrator is instructed to deal with the company and he or she will make their decision based on the facts and not be influenced by factors that are not relevant to the company obtaining its optimal potential.

v Connectivity

Despite the flexibility promoted in the first few principles, the principle of connectivity aims to encourage the use of online communication – accepting that the internet offers the widest population of any medium. It will naturally depend on the nature and size of the company, but it does encourage administrators to be more mindful about the extent of exposure the business is subjected to. Simply putting an advert in the local paper would, in most cases, be deemed to be insufficient and lack any reasonable justification for keeping the marketing so narrow. Whether any breaches to administrators' professional codes would occur if they fail to adhere to this principle would depend on a holistic look at the marketing effort that has been undertaken. In this day and age, it is imagined that almost all, if not all, administrators are familiar with the internet and this principle is included on the basis of transparency rather than encouraging administrators to act in a different way.

vi Comply or explain

The final principle of comply or explain is aimed at satisfying all creditors that the marketing strategy adopted achieved the best outcome for all creditors. Whether this would lead to administrators releasing their marketing research and findings would pose

interesting questions regarding the competency of their skills and whether the administrators had, through the implementation of their duties, satisfied the creditors that they had achieved the best result. By diverting such information, which may or not be sensitive, there would have to be some model of best practice developed by the RPBs. It would be vital to ensure that the reports compiled by administrators were not only consistent, so as to promote consistency across the profession, but it would also be imperative to ensure that a level of confidence be instilled into the process to show the creditors that all that can be done, is being done. To satisfy this end it is therefore necessary that under this principle clear explanations must be provided to justify the action. If not, doubt will prevail as to whether the best marketing strategy has been undertaken.

3.5 Valuations[42]

Recommendation number five states that SIP 16 be amended to the effect that valuations must be carried out by a valuer who holds PII.

One of the main preconceptions that creditors tend to quote as a dislike with the pre-pack process is the way in which a business or assets have been valued. Valuations are clearly imprecise by nature and can change from day to day. However, the concern is not so much with the value, but in knowing that the best price has been obtained by the administrator. To achieve this, the request for an independent valuation makes complete sense and, in practice, should have been the norm anyway. The data from the Final Report shows that, from 497 businesses, an overwhelming majority of 453 cases (91 per cent) sought an independent valuation.[43] Determining the discrepancies, if any, between a possible valuation calculated by an administrator and one by an independent valuer would make for a fascinating read. It must be acknowledged that this test would be the only real way to determine whether the creditors' preconception that administrators undervalue businesses or assets could be proven. Given the lack of research in determining the difference in valuations, it illustrates that the marketing recommendation as stated in the Review is nothing more than an attempt to appease creditors and comfort them with a process that is hoped to be more transparent. But it should be noted that, by proposing such a recommendation, the Review has inadvertently added fuel to the fire and insinuated that the creditors' fear may be justified and that such tasks like valuation should be moved to another professional body that is more experienced in that field.

The Review recommended one important factor in relation to the independent valuer. Part of the requirement for the valuation to be conducted by a valuer with PII was due to providers of such implementing their own stringent checks on those who applied for cover. It was in this knowledge that this would provide some comfort to creditors knowing that the valuation process is executed by someone who is competent and would represent a fair value for the business/its assets. It would therefore be essential, should the administrator choose a valuer without PII, to justify why this is the case; it is likely that this course of action would lead to more PII appointments so that administrators can demonstrate that they have considered the creditors' best interest as a whole.

3.6 SIP 16 – Insolvency Service withdrawal from monitoring SIP statements[44]

Recommendation number six states that the Insolvency Service should withdraw from monitoring SIP 16 statements and that the monitoring be picked up by the RPBs.

42 See Graham Review into Pre-Pack Administration (n 7) 66, para 9.27.

43 Walter and Umfreville (n 5) 23.

44 See Graham Review into Pre-Pack Administration (n 7) 67, para 9.32.

Whilst the Review commends the work conducted by the Insolvency Service over the five years since monitoring commenced, it believed that the review of SIP 16 statements is now best left to the RPBs. The Review was careful to state that the Insolvency Service has shed light onto much of the way in which administrators completed SIP 16 statements. However, going forward it could become more streamlined if the administrators' own professional body monitored the process, thereby developing a closer working relationship. This approach should be adopted with caution. There are already concerns regarding the complaint procedure and how it is perceived that RPBs protect their members from adverse acts, usually initiated by disgruntled creditors. If the RPBs gain the responsibility to review their members' SIP 16 statements, then transparency will be absolutely critical to ensure there is trust within the system. It is acts such as this that could further undermine the pre-pack process, rather than reinvent it as a process. A way to address the fear would be for the RPB to regularly publish details relating to the statements received and, if necessary, make its decisions available for scrutiny.

4 Future implications

4.1 Regulation

The preference for regulation, even if reduced, is highly favoured by the Review. Much of this rests with the desire to take non-invasive action against a profession that is deemed to be quite capable of regulating its own business and members. Whilst the Review provided a pronouncement to the insolvency profession that, if it did not address the concerns, legislation would more than likely follow, the real problem is implementing the required changes across the different RPBs. For instance, many professions have one professional body, such as the Institute of Civil Engineers which regulates 86,000 members from 150 countries around the world. By contrast, there are eight RPBs that regulate 1735 insolvency practitioners.[45] A solution that addresses the recommendations and ensures a consistent approach is implemented across all insolvency work would be to merge the RPBs to create one professional body accountable for regulating all insolvency practitioners. Greater unity between those who work in the profession could only lead to a more transparent system. The structure of how they operate could probably remain the same, whilst recognising that Scotland and Ireland may have some slight differences. All members could ultimately come under one body that could possibly be named the Association of Responsible Insolvency Professionals (ARIP).

4.2 Legislation or compromise

Creating the necessary framework that would legislate pre-packs would in some ways mirror the provisions that govern administration. If the profession fails to adhere to the Review and adopt the six recommendations, there will be some trepidation as to what would happen next. It has been stressed in the Review that legislating pre-packs is not the desirable outcome, therefore a compromise is likely to follow. A best practice approach would involve recommendations one and two giving way, particularly since they are only recommended on a voluntary basis, for the certainty that recommendation four is addressed urgently. If the marketing of businesses complies with the six principles of good marketing, it is entirely possible that this could be incorporated in either SIP 16, or some additional guidance code that insolvency practitioners must follow. It is again likely

45 See Association of Business Recovery Professionals (R3) 'The Future of Insolvency Practitioner Regulation' <www.r3.org.uk/media/documents/policy/policy_papers/insolvency_industry/The_future_of_insolvency_practitioner_regulation.pdf>.

that, even if a compromise was struck, further amendments to the adopted recommendations would be likely as, for example, the marketing and valuation principles, due to their new nature, will require some tweaking.

4.3 Ban on pre-packs

Prohibiting the use of pre-packs would only lead to another model developing, likely reflecting the original model in all but name. The truth is that pre-packs serve a purpose and fill the void when administration cannot assist. Preconceptions that surround pre-packs, whether true or not, have resulted in an unfair amount of negative attention. This has invariably tarnished the reputation of a procedure that above all else tries to procure a better result for the troubled company than would likely be achieved through administration. The reality is that administration is not a process that suits all companies and so another, alternative, system is required to ensure troubled companies do not needlessly fail.

5 Alternatives?

If the main concern about accepting the recommendations is that the value of the company may be diminished if secrecy is not maintained, then it should be emphasised that the justifications and reasons for the sale to connected parties must be made available after the process has been implemented. A cooling-off period of 14 days could be introduced which would allow the proposals to be reviewed by members to ensure that the deal is sufficient. This is not too dissimilar to recommendation one, except that this still allows the deal to go ahead in secrecy, albeit in the knowledge that, if a bad deal is submitted, then it will be discarded within the 14 days and the potential opportunity will be lost, unless a compromise on the original deal can be met.

6 Conclusion

The six recommendations put forward by the Graham Review go some way to alleviating the stigma that presently surrounds the pre-pack process. Existing professional guidance from the RPBs in the form of SIP 16 does set out a number of principles to assist administrators in implementing pre-packs, but it does not address a number of key issues such as marketing and valuation. These two principles alone would help to appease creditors, knowing that the company has been properly evaluated and accurate values have been placed on the company. The inclusion of these two principles in a newly drafted SIP 16 would demonstrate that the profession was serious about operating in a more transparent environment.

It should be noted that the criticisms surrounding pre-packs have been around for some time and the lack of any real attempt to deal with them has caused the negative perceptions to grow. The absence of solutions, or the will to address the concerns, has raised the possibility that the perception of abuse is perhaps greater than the actual occurrence of it. However, according to the data compiled by Wolverhampton University, some of the creditors' fears are essentially substantiated – namely that most pre-packs do involve the sale to connected parties.

If the sale to connected parties remains the biggest concern, the implementation of the six principles as recommended by Graham will make no difference to appeasing the creditors. The reality is that, on the whole, connected parties offer a better deal for the company than an outside investor. In some cases this deal is the only option available for the company and hence a lifeline for employees and businesses that rely on it. By endorsing the six principles, the process will still permit the sale to connected parties. If

creditors can accept this, but argue it is not the outcome that they challenge but the process in which it is achieved, then the Graham principles may be successful.

As to whether the endorsement of the six principles would be enough to prevent eventual legislation is probably wishful thinking. This is evident for a number of reasons.

Firstly, the voluntary nature of the pre-pack pool and the viability review remains a serious concern. If purchasers do not wish to participate, there are no incentives to encourage them to change their minds and, in turn, there are no consequences for pursuing a strategy outside of the pool. Whilst the logic of having two options available tries to compromise on allowing secrecy to be maintained where required to assist a deal, it begs the question of just how many purchasers would subject their deal to the pool? The better solution would be to submit all potential deals to the pool and insist on strict confidentiality clauses around the process.

Secondly, the viability review itself is nothing short of an optimistic business plan with a hope that things will work out. No guarantees can be given about future success so it is questionable whether a good business plan is any better than a bad one? A good plan can perhaps sell an idea, give a better forecast, but ultimately the market in which the company operates will decide its fate and this is something that cannot be that easily predicted, as many companies have found out since the collapse of British bank Northern Rock.

Thirdly, alternatives to legislation either result in an increase in regulation or the position remaining the same. Since no change is likely to result in legislation, additional regulation would only serve to bring pre-packs one step closer to being legislated. It appears from this position that legislation is imminent. To ban the process would result in the realisation that the pre-pack process is actually needed, which brings us to the more pertinent question: what is the main benefit of the pre-pack? The answer rests with the flexibility it affords administrators in completing a deal to save a business without having to adhere to the stringent processes that classic administration possesses. Based on this, should the profession reject the Graham Review recommendations and stand firm against any change? It is unlikely that it will have a choice – change is coming whether the profession likes it or not. On a final point, what the Review fails to acknowledge is that it is not the pre-pack process itself that is the problem, but *the environment in which business is conducted*. There is a general mistrust in the UK when it comes to a company suffering financial troubles. Whilst it may be the case that the management may have caused these, the fear of malicious abuse being involved often materialises. This, combined with pre-packs allowing old management to buy back the company, creates an unsavoury taste for creditors who suspect, perhaps wrongly, that the management has somehow benefited at their expense. In order for the Graham Review to have teeth, there perhaps needs to be an additional recommendation that creditors' attitudes to insolvency proceedings need to informed and realistic.

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The legitimacy of extralegal property: global perspectives and China's experience

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Abstract

Binary thinking has been entrenched in property law, posing challenges to the protection of land tenure and land users who have no title to the land they cultivate. This paper critiques the state-law-centred approach to evaluating the legitimacy of property and defends extralegal property as legitimate claims to land and related natural resources that are not against the law, but that are not recognised by the law as formal property rights. It begins with an overview of how the legitimacy of property is conceived of at the global level, drawing upon several conceptual frameworks of property developed via global initiatives and soft law instruments. That being done, it moves to examine the legitimacy of extralegal property from the local perspective, looking at a case study of 'minor rights property' in China. It is argued that long-term usage of land supported by the prevalence of this practice and social consensus should be regarded as one of the major sources of the legitimacy of property. The paper concludes that the state-law-centred approach to evaluating the legitimacy of property overlooks a range of legitimate property claims and the plurality of norms governing property relations. In order to recognise the full spectrum of property, we should link global perspectives with local experiences.

Introduction

Extralegality has an uneasy relationship with property. In his very influential and often-cited book *The Mystery of Capital*, de Soto argues that it is the lack of legal property and the predominance of extralegal property that traps people in poverty; extralegal property needs to be converted into legal property via titling, for legality is coupled with title (property representation) and it is title that enables people to obtain liquid capital.[2] He also argues that 'it is legality that is marginal; extralegality has become the norm'.[3] In his case study of Peru, it is estimated that '53 per cent of city dwellers and 81 per cent of people in

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2 H de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan 2001).

3 Ibid 30.

the countryside live in extralegal dwellings'.[4] It may be true that extralegality prevails over legality in terms of scale, but it is frequently stigmatised as 'illegal', 'underground' and 'unregulated', or is often associated with the 'black-market' economy.[5]

De Soto's analysis of extralegal property and the international drive to individualise land rights that his work has propelled do not capture the nature of property and oversimplify the source of the legitimacy of property. The concept of property is fluid. For de Soto, property is essentially a conversion mechanism whereby assets can be transformed into capital. In such an analysis, the scope of property is reduced to things – whether it be 'assets' or capital; people and social relations are excluded from consideration. Moreover, de Soto overemphasises individual absolute dominion manifest in Blackstonian private ownership.[6] As a result, a new category of 'property outsiders' or 'legally propertyless masses', in particular those who hold nothing other than occupation or use rights, have been generated and have been denied their entitlements to property-holding in law.

This paper re-evaluates the relationship between extralegality and property and critiques the state-law-centred approach to evaluating the legitimacy of property. By property we mean property in land and related natural resources and, as explained in section two, we use property and land tenure interchangeably, as both emphasise the relationship between people and land as well as the relationship between people with respect to land. We focus on how legitimacy derives from long-term relationships in dealing with land. In developing this argument, we draw several crucial distinctions. The first distinction is between ownership and property. We will discuss in detail in the following sections that ownership is static, formulated by political discourses and ideologies with entrenched boundaries of exclusion; whereas property is dynamic, based on long-term social interactions where a plethora of property claims have emerged, many of which are extralegal. We define extralegal property as legitimate claims to land and related natural resources that are not against the law, but that are not recognised by the law as formal property rights; the origin of extralegal property is outside the scope of law.[7] This leads to the second distinction between property claims and property rights. While both are part and parcel of diverse property relations, property claims are often based on de facto use, long-term social interactions and custom. Indeed, the source of the legitimacy of property is closely linked to time. By contrast, property rights are recognised and enforced by the state.[8] The fact that some property claims have not been

4 Ibid.

5 B J Miller, 'Living Outside the Law' (2007) 5 Journal of International Human Rights 127, 127.

6 William Blackstone defined property as 'the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'; W Blackstone, *Commentaries on the Laws of England, Vol I: Of the Rights of Persons* (Clarendon Press 1766) 2. See also R W Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds), *Early Modern Conceptions of Property* (Routledge 1996) 95–110, 95.

7 According to the *Oxford English Dictionary*, the term 'extralegal' is defined as '(of an action or situation) beyond the province of the law'. Customary tenure may not be recognised by the state, as is the case with many African countries, and therefore customary tenure can be broadly conceived as extralegal property. See e.g. K Deininger, 'Land Policies for Growth and Poverty Reduction' (World Bank 2003) xviii.

8 O M Razzaz, 'Examining Property Rights and Investment in Informal Settlements: the Case of Jordan' (1993) 69 Land Economics 341, 341–42.

recognised by law does not mean that they are illegitimate.[9] This point of view has been supported by UN-Habitat (the UN Human Settlements Programme), which has stated that 'a number of parties can hold different tenure claims and rights in the same piece of land. These can be either, formal/legal, or informal/extra-legal'.[10]

Property is mostly governed by domestic law. Yet, acknowledging the legitimacy of extralegal property is challenging if we only focus on property law in the domestic context. For example, for scholars in jurisdictions where the rule of law has been well developed, it would be difficult for them to comprehend why an 'illegal' practice could be legitimate. Further, binary thinking is entrenched in the general conceptual framework of property in many legal systems. For instance, we are familiar with the idea that ownership can be divided into state ownership, commons and private ownership, which leaves limited scope for according recognition to other forms of property and property hybrids. Although recent studies of the spectrum of state, private, communal, public property and property hybrids have begun to break down boundaries within property law and to capture the diversity of property, they have not yet covered a wide range of diverse contexts that include Asian, South-American and African experiences.[11]

We need to look at the conceptual framework of property at the global level. Since the second half of the twentieth century, the scope of property has dramatically expanded from the local to the global.[12] As a result, a plethora of treaties, customary norms and soft law instruments has emerged to constitute a new body of law – 'international property law', as Sprankling calls it.[13] In section two, we look at the changes to the traditional conceptual framework of property made by some global initiatives, soft law instruments and policy recommendations, including the proposals of UN-Habitat and the Voluntary Guidelines on the Responsible Governance of Tenure prepared by the Food and Agricultural Organisation (FAO) of the UN in 2012 (hereinafter, the Voluntary Guidelines 2012).[14]

After sketching out the conceptual framework of property from the global perspective, our research extends to the local experience. We use 'minor rights property' in China, the

9 See e.g. A Smart and F M Zerilli, 'Extralegality' in D M Nonini (ed), *A Companion to Urban Anthropology* (Wiley-Blackwell 2014) 222–38, 231 (discussing the ways in which 'something [that] a government considers illegal is thought by participants to be legitimate'); U Mattei and L Nader, *Plunder: When the Rule of Law Is Illegal* (Blackwell 2008); B Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) 30 Review: A Journal of the Fernard Braudel Center 45 (challenging the dichotomy between legal and illegal); F M Zerilli, 'The Rule of Soft Law: An Introduction' (2010) 56 Focaal–Journal of Global and Historical Anthropology 3, 3–4 (arguing 'conceptions, ideas, and practices' concerning property emanate from 'a variety of normative sites and institutions located beyond the margins of the state').

10 UN-Habitat, 'Securing Land rights for All' (2008) <http://mirror.unhabitat.org/pmss/listItemDetails.aspx?publicationID=2488>.

11 See e.g. A Lehavi, *The Construction of Property: Norms, Institutions, Challenges* (CUP 2013) (discussing the US, British and Israeli experiences and the transformation of the nature of property in globalisation).

12 T Xu and J Allain, 'Introduction: Property and Human Rights in a Global Context' in T Xu and J Allain (eds), *Property and Human Rights in a Global Context* (Hart 2015) 9.

13 J G Sprankling, *The International Law of Property* (OUP 2014).

14 'The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' adopted in Rome in 2012. The Voluntary Guidelines promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty <www.fao.org/nr/tenure/voluntary-guidelines/en/>. See also R Hall and I Scoones, 'Next Steps to Strengthen Global Land Governance', *The Conversation*, 11 May 2016 <http://theconversation.com/next-steps-to-strengthen-global-land-governance-58940>. It is argued that 'the voluntary guidelines represent a unique example of collaborative "soft law"', as the UN Committee on World Food Security opened up the opportunity for the direct involvement of a wide range of shareholders in preparing and drafting the Voluntary Guidelines.

subject of competing and even conflicting property claims, as a case study. In many areas in China a de facto property market is emerging that consists of affordable properties called 'minor rights properties'; however, this does not constitute a formal legal concept. These sorts of properties are built by farmers on collectively owned rural land that is reserved for agricultural purposes or for farmers' residential use according to the classification of land use control. Buyers of such properties can obtain an ownership certificate issued by the township government. However, the 'legality' of such ownership certificates is highly questionable as, according to the law, only governments at the county level or above have the authority to issue these ownership certificates and register these properties.[15] When purchasing these properties, buyers cannot use mortgages or apply for bank loans to support their purchase. The 'minor' nature of such properties is manifested in: the inferior status of the land use rights (hereinafter LURs) to the collectively owned rural land compared to those of urban land in terms of transferability on the property market; and by these properties' 'illegal' and non-registrable status. Despite this inferior status, a minor rights property market is flourishing, due in large part, it seems, to the fact that prices are low and more affordable compared to those available on the urban property market. There were already 6 billion square metres of minor rights properties nationwide by June of 2010.[16] In Shenzhen, for example, approximately 49.27 per cent of properties were characterised as minor rights property as of the end of 2011.[17] In section four, we distinguish different types of minor rights property and defend one type which is built on farmers' residential plots rather than on arable land. This sort of property is usually a big house which contains several flats. Farmers retain one or two flats for the use of their own family; other flats are available for sale. This particular type of minor rights property constitutes a form of extralegal property.

Our study of minor rights property speaks to analyses of property 'from the margins'.[18] It begins by introducing property law in China, which embodies binary thinking of ownership and closely links with the urban–rural divide (section three). This section also examines the emergence of 'primary rights property' in order to compare it with minor rights property. It then moves on to analyse controversies surrounding minor rights property in China (section four). That being done, it identifies the origin of extralegality, locating this issue within the context of profound socio-economic transformations, in particular urbanisation, which is breaking down the urban–rural divide (section five). It then criticises the state-law-centred approach to evaluating the legitimacy of property (section six). Finally, it concludes that the legitimacy of extralegal property does not depend on the sanction of the law. Extralegal property mirrors the heterogeneity of property relations and antedates the formation of formal, legal property. The conclusions also point out that there are limits to using national law to protect

15 Article 10 of the Property Law (2007), promulgated by the National People's Congress; Article 4 of the Methods on the Housing Registration (2008), issued by the Ministry of Construction on 22 January 2008. The township level is lower than the county level in the Chinese governance system.

16 See 'There are 6 Billion Square Meters Minor Rights Properties in China' (Zhongguo xiao chanquanfang huo da 60 yi pingfang mi), at <http://house.ifeng.com/special/xiaochanquanfang/focus/detail_2010_06/03/1580970_0.shtml>.

17 W C Zhu, 'The Dilemmas of Minor Rights Property' ('Ganga de xiao chanquan fang') *Southern Metropolis Daily* (*Nanfang dushi bao*) (24 August 2012).

18 See e.g. A J van der Walt, *Property in the Margins* (Hart 2009); G Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic 2011). See also L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 62 Current Legal Problems 409, 426 (arguing that 'analyses from the perspective of the less-propertied person allow us to see more clearly the political choices we have made through our value commitment and to reflect on whether the distributional consequences are normatively desirable').

extralegal property, highlighting instead the possibility of using soft law, such as global guidelines, which may employ moral force in order to influence states.

Our method is primarily historical, probing the origin of minor rights property. We review the property system and analyse its margins. We have done a substantial survey of Chinese laws and regulations pertaining to property from 1949, the founding date of the People's Republic of China (PRC), and have found that no laws or regulations prohibit the sale of minor rights property. We also contrast the primary property market with the minor property market and compare the central government's approach to minor rights property with the local government's approach and with the social conception of minor rights property. We focus on systemic issues and, for this purpose, our research is not an empirical study, which would usually require the gathering of evidence from localities, although we are aware of local particularities and variations given the size and diversity of China. Indeed, to study China, the choice is usually between a macro-study of the system or the structure of the whole country and a micro-study of a locality (for example, a province, a city or a village, usually through fieldwork). The problem with the study of a specific locality is that a conclusion to a study that is relevant or useful for one locality (for example, Henan province) is not necessarily relevant or useful for another locality (for example, Hunan province). That said, although we choose to focus on the 'big picture' in this paper, this does not mean we shall overlook the importance of field research; we intend this to be the next step in our research, and the subject of further papers.

The legitimacy of property: global perspectives

Against the international drive to individualise land rights propelled by de Soto, diverse forms of tenure have been recognised by global initiatives, soft law instruments and policy recommendations.[19] In 'Securing Land Rights for All', published by UN-HABITAT in 2008, different terms have been used, including:

- **land rights:** socially or legally recognized entitlements to access, use and control areas of land and related natural resources;
- **property rights:** recognised interests in land or property vested in an individual or group and can apply separately to land or development on it. Rights may apply separately to land and to property on it (e.g. houses, apartments or offices). A recognised interest may include customary, statutory or informal social practices which enjoy legitimacy at a given time and place;
- **land tenure:** the way land is held or owned by individuals and groups, or the set of relationships legally or customarily defined amongst people with respect to land. In other words, tenure reflects relationships between people and land directly and between individuals and groups of people in their dealings in land.[20]

These concepts all speak to the three important aspects of property in land and related natural resources: these dimensions concern not only relations between people and land, but also relations between the individual and groups of people with respect of the land;

19 E.g. FAO Land Tenure Studies 10, 'Compulsory Acquisition of Land and Compensation, FAO, Rome 2008', Foreword: 'Effective land tenure institutions are needed to administer who has rights to which natural resources for which purposes, for how long, and under what conditions' <www.fao.org/docrep/011/i0506e/i0506e00.htm>; Voluntary Guidelines 2012, 2.4, emphasises 'the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary'; FAO Land Tenure Studies 10, 4.33 covers statutory tenure (defined in written law) and customary tenure.

20 UN-Habitat (n 10) 5.

it includes entitlements to access, use and control land and related natural resources; its legitimacy may come from social recognition and practices and depends on different contexts. It seems that the concept of tenure or property in land and related natural resources encompasses these important aspects. Therefore, in our following discussion, we use these two concepts interchangeably.

The 'continuum of land rights' approach (Figure 1) was adopted at the 2011 UN-Habitat Governing Council as a resolution by member states.[21] This approach is seen as:

> the more sustainable way of providing security of tenure for all, at scale. The approach, described as a system where different sources of land access and use patterns co-exist, allows a diversity of tenure situations ranging from the most informal types of possession and use, to full ownership.[22]

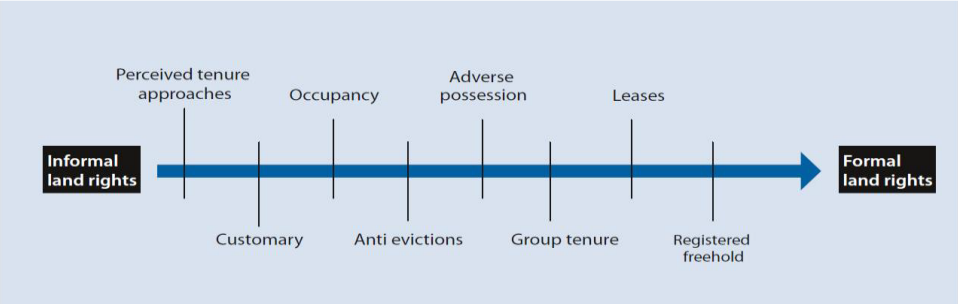

Figure 1: The 'continuum of land rights' approach[23]

Yet, 'contrary to the name of the model, discrete tenure types are depicted in harmony with a staged understanding of tenure and incremental movement through the land rights and land tenure types'.[24] Indeed, this model has several limits. It uses statutory concepts such as registered freehold and adverse possession that may sound familiar to English or American property lawyers, but may sound foreign to people from other jurisdictions. It is still confined by binary thinking due to its adherence to the distinction between informal and formal land rights. It is based on a linear, teleological model that presupposes that informal land rights ought to be transformed into formal land rights, as indicated by the arrow which only moves in a single direction. Further, it overlooks the context.

LEAP (the Legal Entity Assessment Project) has proposed another continuum of land rights model.[25] It has revised the linear evolution of different types of tenure, as indicated in Figure 2, so that the arrows move in both directions. However, it still highlights boundaries such as formal versus informal; there is no specific emphasis on communal property; and it uses registration and written rental agreements as the measure of land tenure security.

21 GLTN (Global Land Tool Network), 'Celebrating the Continuum of Land Rights' <www.gltn.net/index.php/media-centre/gltn-news/177-celebrating-the-continuum-of-land-rights>.

22 Ibid.

23 Source: UN-HABITAT (n 10) table 1.5.

24 J Whittal, 'A New Conceptual Model for the Continuum of Land Rights' (2014) 3 South African Journal of Geomatics 13, 14.

25 'LEAP came into existence in 1988 when a group of KwaZulu-Natal land practitioners from NGOs, government and the private sector began to focus on why the communal property institutions (CPIs) set up under land reform appeared to be failing' <www.mdukatshani.com/leap-home.php>.

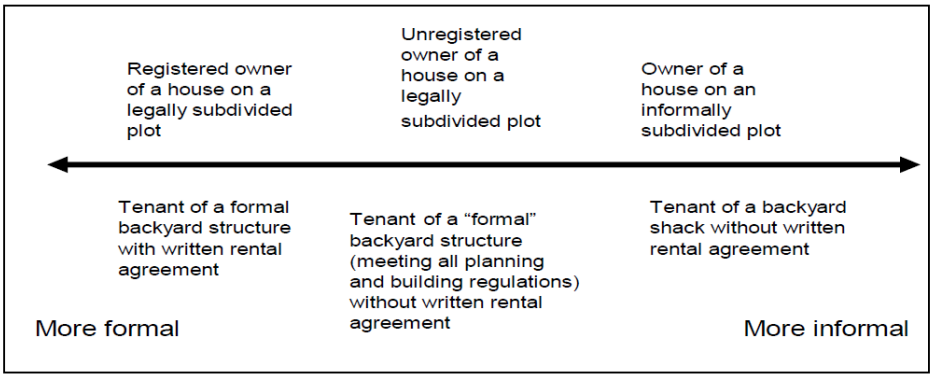

Figure 2: LEAP's continuum of land rights[26]

The Voluntary Guidelines 2012 and relevant FAO studies have improved the models proposed by UN-Habitat and LEAP, emphasising the importance of context in perceiving the idea of land tenure. The Voluntary Guidelines seek to promote 'secure tenure rights and equitable access to land, fisheries and forests' by setting out best practice.[27] In preparing the draft of the Voluntary Guidelines 2012, many non-state actors were involved in the process of negotiation, including non-governmental organisations (NGOs), farmer associations, development agencies and the private sector.[28] One outcome of the negotiation is that the 'cultural, religious or emotional aspects of the land' have been recognised.[29] 'States should recognize that policies and laws on tenure rights operate in the broader political, legal, social, cultural, religious, economic and environmental contexts'.[30] More importantly, extralegal property, including customary tenure, has been recognised in FAO land tenure studies.[31] Lands under customary tenure cannot be simply treated as 'public or government land, vested in the nation or in the name of the president in trust for the citizens'.[32]

While the protection of indigenous and customary tenure has gained momentum due partly to the development of international human rights law and soft law, protection afforded to extralegal property remains an understudied area. Our research shifts the Voluntary Guidelines' focus on customary and indigenous tenure to extralegal tenure based on social relations between individuals and groups of people with respect to the land. This point will be elaborated in Figure 3 (page 196) and the case study of minor rights property in China.

Extralegal tenure may be interpreted very broadly and encompass customary and indigenous tenure, however, the three types of tenure identified in Figure 3 are formed on a different basis. As discussed above, customary tenure may not be recognised by the state and is often regarded as extralegal; some groups such as fisherfolk, herders and

26 Source: L Royston and C Kihato, 'One Step at a Time: Linking the Tenure Security Continuum Concept to the Findings of Urban LandMark's Operation of the Market Study in Maputo' *Urban LandMark* (12 April 2012) <www.urbanlandmark.org.za/conference/2012_presentations/lauren.pdf>.

27 Voluntary Guidelines 2012, iv.

28 A Arial et al, 'Governance of Tenure: Making it Happen' (2012) 1 Land Tenure Journal 63, 66, <www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewFile/51/91>.

29 FAO Land Tenure Studies 10 (n 19) 7.

30 Voluntary Guidelines 2012, 5.9.

31 FAO Land Tenure Studies 10 (n 19) 34.

32 Ibid.

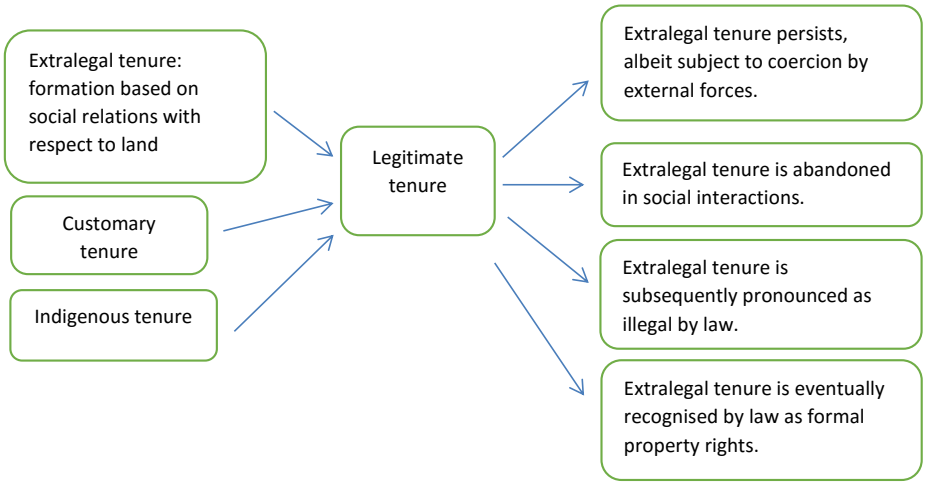

Figure 3: Legitimacy of property and different 'stories' of the transformation of extralegal tenure

pastoralists may not be characterised as 'indigenous', but may hold customary tenure. The legitimacy of customary tenure derives from custom. Indigenous peoples' resource use is integral to their cultural identity. Although indigenous peoples may not have sufficient recourse to national law to protect indigenous tenure, protection of indigenous tenure has been gradually incorporated into an international human rights framework.[33] Human rights have also become the major source of legitimacy of indigenous tenure.

Our primary concern in this paper is extralegal tenure, whose legitimacy derives more from a de facto situation, based on social relations between individuals and groups of people with respect to the land. These social relations are shaped and reshaped by a variety of bonds such as shared economic interests and values, which encompass both spatial and temporal dimensions. For example, people share a sense of belonging by reference to locality and they follow the same rules of the use of resources which may be intergenerational, but not yet amount to customary. Compared to customary and indigenous tenure, this type of extralegal tenure receives the least protection from national law.

The role of social relations in the formation of extralegal tenure indicates that social sanctions should be regarded as one source of the legitimacy of tenure: when people defend their land tenure, they are supported by the wider consensus of the community. Here, we could draw links to relevant discussions on 'the moral economy' where some 'legitimising notion of right' is not to be found in either state law or 'the free market'.[34] Of course, we should recognise that property claims may have different degrees of legitimacy due largely to the different length of land use and degree of social consensus. These property claims may also be subject to various degrees of protection, as these claims 'can be stronger or weaker according to social conventions, the law, enforcement conditions, and length of possession, political support, etc.'.[35] As a result, there may be different stories (we use the word 'stories' to avoid indicating the linear evolution of

33 A Clarke, 'Property, Human Rights and Communities' in Xu and Allain (n 12) 19–40.

34 See e.g. E P Thompson, *Customs in Common* (Merlin Press, reprinted in paperback 2010), ch IV 'The Moral Economy of the English Crowd in the Eighteenth Century' 185–259.

35 UN-Habitat (n 10) 5.

property rights) of the transformation of extralegal tenure as elucidated in Figure 3. That said, the possible transformations of extralegal tenure should not be used to reject its nature as legitimate tenure.

Property law in China and 'primary rights property'

Before looking at the nature of minor rights property, it may be helpful to start with a brief background introduction to Chinese property law. In the Mao era (1949–1978), the conception of ownership in China was overwhelmingly influenced by former Soviet jurisprudence. Ownership was regarded as indivisible and absolute. Public ownership (including state and collective ownership)[36] was superior to individual interests; private ownership was virtually abandoned;[37] acquisition and management of property was under an overarching administrative fiat.[38]

Although civil law-making in the post-1978 era returned to the German Civil Law framework,[39] a clear boundary between public ownership and private ownership still exists in the law and a tri-ownership system including state ownership, collective ownership and private ownership has evolved and persisted. The right to property is defined broadly, but also vaguely, in the General Principles of the Civil Law (GPCL) (1986), as 'ownership and property rights relevant to ownership'.[40] The concept is specified in the Property Law (2007) as *wuquan*, literally property rights over things (*wu* means things, particularly tangible things; *quan* means rights). The scope of property rights is limited by the *numerus clausus* principle: *wuquan* includes ownership, usufructuary rights and security rights.[41] While public ownership of land is still perceived to be ideologically important in China, the right to use the land by individuals and households has become one of the most fundamental and, at the same time, controversial issues in Chinese property law.

According to Article 4 of the Land Administration Law (1986, amended 1988, 1998, 2004), the state controls the purposes of the use of land. The state formulates overall plans for land utilisation and classifies the purposes of land use into agriculture, construction use and unused. Article 4(1) of the Land Administration Law provides:

36 Article 10 of the Constitution (1982, amended 1988, 1993, 1999 and 2004) : 'Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; residential plots and private plots of cropland and hilly land are also owned by collectives.' Article 9 of the Land Administration Law (1986, amended 1988, 1998, 2004) defines collective ownership in the same way as Article 10 of the Constitution.

37 Private ownership was not formally abolished in 1949 and a mixed economy was adopted between 1949 and 1956 as a prelude to nationalisation of private capital. Whether or not a complete system of public ownership was established is unclear. E.g. Article 11 of the 1954 Constitution recognised private property: 'the State protects the right of citizens to own lawfully-earned incomes, savings, houses and other means of life'. Article 12 of the 1954 Constitution provides: 'the State protects the right of citizens to inherit private property according to law'. See the English version of the 1954 Constitution, in A P Blaustein (ed), *Fundamental Legal Documents of Communist China* (Fred B Rothman & Co 1962). The content of Article 11 of the 1954 Constitution was restated in Article 9 of the 1975 Constitution, but 'the right to inherit private property' was abandoned in the 1975 Constitution.

38 See P Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices' (2003) 2 Washington University Global Studies Law Review 119, 126–27.

39 Legal reforms that occurred in the late Qing (1840–1911) and Republican (1911–1949) periods introduced many aspects of the Civil Law system to China from Germany, via Japan. See T Xu, *The Revival of Private Property and its Limits in Post-Mao China* (Wildy, Simmonds & Hill 2014) ch 2.

40 GPCL (1986) ch 5, s 1.

41 Property Law (2007) Article 2.

> Land for agricultural use' refers to land directly used for agricultural production, including cultivated land, woodland, grassland, land for farmland water conservancy and water surfaces for breeding; 'land for construction use' refers to land on which buildings and structures are put up, including land for urban and rural housing and public facilities, land for industrial and mining use, land for building communications and water conservancy facilities, land for tourism and land for building military installations.

Article 12 of the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas (1990, hereinafter the Interim Regulations) provides:

> The maximum term with respect to the assigned right to the use of the land shall be determined respectively in the light of the purposes listed below:
>
> (1) 70 years for residential purposes;
>
> (2) 50 years for industrial purposes;
>
> (3) 50 years for the purposes of education, science, culture, public health and physical education;
>
> (4) 40 years for commercial, tourist and recreational purposes; and
>
> (5) 50 years for multiple uses or other purposes.[42]

Since 1978 collective ownership of rural land has been fragmented into various forms of use rights according to the control of the purposes of the use of land, including the rights to farm land for agricultural use, that is 'contractual management rights',[43] and use rights to land for construction purposes. Unlike use rights to urban land, there is no maximum term specified in law for using rural land for construction purposes. Land for construction use includes farmers' residential plots reserved for farmers to build their houses, which constitute 70 per cent of rural land for construction use.[44] However, the extent to which the use rights to rural land may be transferred and disposed of has raised a lot of debate. For example, chapter 13 of the Property Law (2007) deals with LURs to rural residential plots, but fails to clarify the issue of the transfer and sale of these use rights (in instances where the plot has not been reclaimed by the state first). As a result, many informal norms concerning the transfer and sale of LURs have emerged at the grassroots level, giving rise to various sorts of property claims which are not necessarily recognised by law as property rights.

The difference between the primary and minor rights property markets is closely linked with the rural–urban divide, which has become entrenched in the Chinese governance system in the post-1949 era. The Maoist regime, although it claimed to be pro-village and anti-city, 'was fundamentally urban after all'.[45] Industrialisation was the priority in the making of the modern state and the transfer of agricultural resources to subsidise the industrial sector enlarged the gap between the rural and urban areas. The mobility of rural people to cities was controlled by the state through the household registration system (*huji*

42 Article 149 of Property Law (2007) provides: 'When the period of time for the right to the use of land for construction of residences expires, it shall automatically be renewed.'

43 The term increased from 15 years in 1984 to 30 years under Article 14 of the Land Administration Law (1998).

44 H Yu and F Zhang, 'New Land Reforms Plans Cannot Rescue "Minor Rights Property"' ('Xin tugai fang'an nan jiu "xiao chanquan fang"') *Economic Observer* (*Jingji guancha bao*) (29 November 2014).

45 D Strand, 'New Chinese Cities' in J W Esherick (ed), *Remaking the Chinese City: Modernity and National Identity, 1900–1950* (University of Hawaii Press 2000) 223.

zhidu)[46] in which rural households were treated as 'second-class citizens' in terms of their entitlements to social security, education and health-care provision. Further, the rural–urban divide has been closely linked to two different land systems – the rural land system and the urban land system: urban land is owned by the state and rural land is owned by the collectives; ownership of the land itself cannot be transferred.

In the post-Mao era, and especially in the post-Deng period (1992–), large-scale rural–urban migration and rapid urban expansion have led to the relaxation of legal and administrative distinctions between urban and rural. For example, 17 provinces, autonomous regions and municipalities have abolished the category of rural household (*nongye hukou*).[47] Yet the land system still remains as an obstacle to bridging the gap between the rural and urban areas.

Before 1978, urban land was not a commodity and was allocated by administrative methods. The state granted LURs to its agencies, for example, governments, state-owned enterprises, hospitals and universities.[48] These state agencies were not just land users, but also held management rights and functioned as the de facto owners.[49] Urbanisation, which fuelled the commercial value of urban land, has speeded up since the late 1980s and increased the demand for urban land in the 1990s. This change called for a new mechanism to improve the marketability of the urban land system while maintaining the doctrine of state landownership. It was in response of this challenge that the LURs system emerged. The establishment of the LURs system also served as an engine to boost economic growth.[50] The LURs system, along with the change in housing provision through which urban households were given the opportunity to purchase their flats or houses for the first time, has led to the formation of the urban property market in China.

The lease of state-owned lands has been legalised via the promulgation of the Land Administration Law (1986). In April 1988 the Constitution was also amended to provide that 'the right of land use can be transferred in accordance with the law' (clause 4 of Article 10).[51] However, rather than establishing an LURs system based on market principles, a 'dual-track' LURs allocation system was introduced to assign LURs in urban areas. A dual-track allocation system means that LURs are assigned in two ways: allocation (*huabo*) and assignment (*churang*). Allocation is the transfer of LURs to state-owned users without either time limits or land-leasing fees; assignment is the transfer of LURs to non-state users via tender, auction or negotiation for a fixed period and for payment of land-leasing fees.[52] Together, allocations and assignments of LURs constitute the primary property market. The transfer of LURs via sale has, in effect, created a secondary property market.

46 See e.g. X Cheng, 'Problems of Urbanization under China's Traditional Economic System' in R Y Kwok et al (eds), *Chinese Urban Reform: What Model Now?* (ME Sharpe 1990) 67–68.

47 T N Li and Y Lin, '17 Provinces Issued Local Plans to Reform the Household Registration System' ('17 Shengfen chutai difang ban hugai fang'an') *Economic Information Daily* (*Jingji cankao bao*) (9 June 2015).

48 See e.g. Y Hsing, 'Land and Territorial Politics in Urban China' (2006) 187 China Quarterly 575, 579.

49 Ibid 580.

50 See F L Wu and L J C Ma, 'The Chinese City in Transition: Towards Theorizing China's Urban Restructuring' in L J C Ma and F L Wu (eds), *Restructuring the Chinese City: Changing Society, Economy and Space* (Routledge 2005) 267.

51 The first auction of land use rights was held in Shenzhen on 1 December 1987. Article 10 of the 1982 Constitution states: 'No organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means.'

52 Article 12 of the 'Interim Regulations'. See also S P S Ho and G C S Lin, 'Emerging Land Markets in Rural and Urban China: Policies and Practices' (2003) 175 China Quarterly 681, 687.

The Urban Real Estate Administration Law of the PRC was promulgated in 1994 (amended in 2007) for the purpose of administering urban land and real estate in China. It confirms the functioning of the dual track LURs allocation system and the existence of the dual property market. Article 3 of the Real Estate Administration Law stipulates that the state shall adopt a system of paid transfer of LURs for the use of state-owned land for a limited period, except in instances where LURs are obtained through the state land allocation system in accordance with this law. Article 12 provides that the assignments of LURs could adopt tender, auction and negotiation. However, in reality, assignment often lacks a transparent procedure.[53] Under the dual allocation system, the property market is largely controlled by administrative power.

'Minor rights property' and legitimate property claims

It may be helpful to clarify the scope of the minor rights property we are looking at in order to define and defend legitimate property claims. There are two categories of minor rights properties – those built on rural land where construction has been authorised by the state and those built on agricultural land. According to the state control of land use discussed above, the state restricts conversion of land for agricultural purposes to land for construction in order to keep the total area of the land for construction under control and to provide special protection for agricultural land. For example, Article 63 of the Land Administration Law (2004) stipulates that no right to the use of land owned by rural collectives may be assigned, transferred or leased for non-agricultural construction. This is in line with China's land policy and the pressing need to feed 1.3 billion people.[54] Building minor rights properties on agricultural land changes the use of the land and is against the law.[55]

In terms of minor rights properties built on rural land for construction purposes, there are also two kinds of properties. One kind is built by the village committees on the village communal land; the other is built by farmers on the residential plots.[56] The former are mostly for commercial purposes rather than for farmers' residential use. As discussed above, they contravene the law of land use control. Our focus is thus on those minor rights properties built by farmers on the residential plots – their purpose is not for large-scale commercial sale; there are no issues with any violation against the control of the use of the rural land.

Despite the popularity of the minor rights properties, the vagaries of such a de facto property market are due largely to the government's critical scrutiny. For example, during the 17th National Land Day campaign on 25 June 2007, jointly sponsored by the Ministry of Land and Resources and the Beijing municipal government, one of the issues that apparently seized the attention of buyers or potential buyers of minor rights properties was concern about the 'security' of ownership rights: these properties cannot be registered, and buyers cannot use mortgages or bank loans to support their purchase. On 11 December 2007, the State Council declared that 'city and township residents should

53 See e.g. C R Ding and G Knaap, 'Urban Land Policy Reform in China's Transitional Economy' in C R Ding and Y Song (eds), *Emerging Land and Housing Markets in China* (Lincoln Institute of Land Policy 2005) 22; L H Li, *Urban Land Reform in China* (Macmillan 1999) 26.

54 Preserving 1.8 billion *mu* (1 hectare = 15 *mu*) of arable land in order to ensure the country's food supply is a national policy, but arable land only constituted 12.7 per cent of the total land in 1996, and this figure decreased to 11.3 per cent (around 1.6 billion *mu*) in 2013: World Bank <http://data.worldbank.org/indicator/AG.LND.ARBL.ZS/countries>.

55 X W Chen, 'Minor Rights Properties are Illegal and Cannot be Transferred' ('Xiao chanquan fang bu hefa bu neng jiaoyi') *Economic Information Daily* (*Jingji cankao bao*) (31 October 2014).

56 S J Huang, 'Minor Rights Properties: Reasons and Solutions' ('Xiao chanquan fang: Chengyin yu chulu') in J H Pan et al (eds), *A Report on the Development of Chinese Cities, No 4* (*Zhongguo chengshi fazhan baogao*, No 4) (Shehui kexue wenxian chubanshe 2011) 273–96.

not purchase "minor rights properties" in rural areas'.[57] Following this declaration, a large number of minor rights properties in several areas were forcibly demolished.[58] By contrast, township governments clearly acquiesced in the development of these properties, a fact which not only reflects an increasingly complex relationship between central and local government, but also strengthens the legitimacy of minor rights property if we follow an estoppel-type argument. Township governments do not have the authority to assign LURs and, therefore, they cannot profit from collecting the land-leasing fees. As a result, township governments have managed to find an alternative source of income by encouraging the development of minor rights properties, thereby competing for income from land with the superior levels of government.[59] Moreover, there exist provincial variations in dealing with minor rights property. For example, in Beijing a lot of minor rights properties have been demolished on the orders of Beijing municipal government, whereas in Shanghai the Higher People's Court has recognised the purchasers' right to continue possessing and using minor rights properties.[60]

Despite the central government suppression, the minor rights property market has become a vibrant realm where transactions frequently take place. The central government has tried, at least intermittently, to prevent the property market's drift towards extralegality

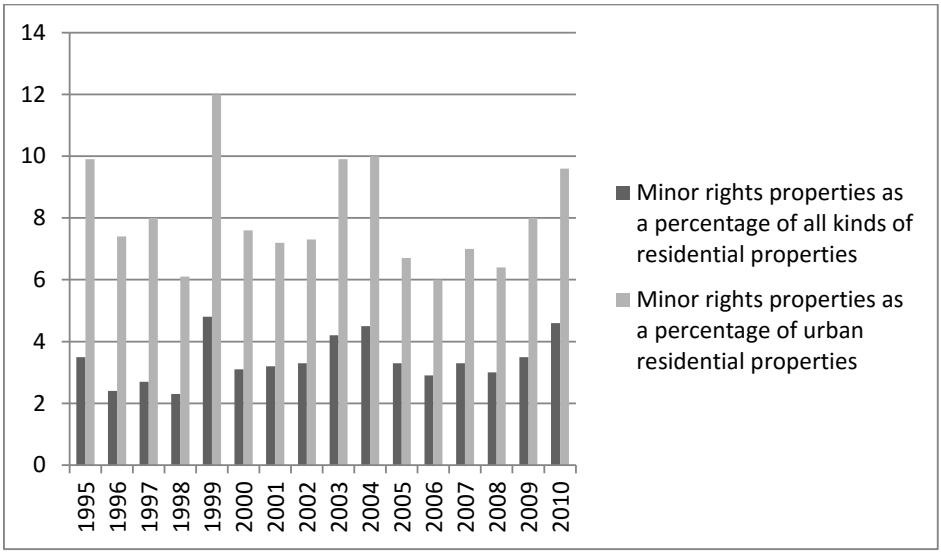

Figure 4: The vibrancy of the minor rights property market[61]

57 See J D Wu, 'A Ban on the "Minor Rights Properties" Cannot Solve the Problem' ('Xiaochanquan fang bude mai bu yiweizhe jiejue wenti') *South China Weekend* (*Nanfang Zhoumo*) (20 December 2007).

58 See R Ding, 'The Ministry of Land Resources: Minor Property Rights Apartments that Contravene the Regulations will be Demolished' ('Guotu bu: yanzhong weigui de xiaochanquan fang jiangbei chaichu') *Beijing Business Today* (*Beijing Shangbao*) (13 December 2007).

59 For the role of township governments in relation to property rights, see e.g. Y Hsing, 'Broking Power and Property in China's Townships' (2006) 19 Pacific Review 103.

60 REICO Report, 'Research into Minor Rights Property: Situations and Solutions' ('Woguo xiao chanquan fang yanjiu: Xianzhuang yu chulu') (30 March 2012) <www.chinavalue.net/Finance/Article/2012–3-30/199011.html>.

61 Source: 'Saving Minor Rights Properties' ('Zhengjiu xiao chanquan fang') <http://bj.house.163.com/special/lianghuixiaochanquanfang/>.

– but with little success: the minor rights property market continues to exist, and minor rights properties constitute a significant number of residential properties (Figure 4).

The origin of extralegality and diversity of property relations

An examination of the nature of the minor rights property market warrants a brief review of its origins and historical development. Since land reform (1950–1953), residential plots had been recognised as farmers' private property, and this was confirmed in the 1954 Constitution, but was subsequently abolished by Article 10 of the 1982 Constitution. Because of the change, farmers only have use rights to the residential plots. The subsequent collectivisation (1966–1976) introduced some fundamental changes to rural landownership, primarily via the issue of a series of Communist Party leaders' speeches and policy documents rather than law. Indeed, there were actually no clear policies regarding how to acquire, utilise, transfer and dispose of property rights until the publication of the Revised Draft Principles on the Work of the People's Communes ('60 Principles on the People's Communes') in 1962. The Draft Principles are self-contradictory in that: they prohibit the lease and sale of rural residential plots in Article 21; whereas in Article 45 they recognise that farmers have full ownership over the houses built on the residential plots and that they have the right to lease or sell these properties.[62] These provisions have caused serious problems in terms of transferring farmers' houses: when farmers have sold their houses, have the residential plots also been transferred? Farmers have recourse to consensus reached among themselves. In fact, since 1962, the transfer of farmers' houses between friends and relatives has become a common phenomenon.[63] Farmers have tried to avoid talking about the transfer of land or land rights; rather, they have achieved a consensus that land rights have in fact been transferred as well. However, the nature of such sales remains vague: could the seller of the house ask for the residential plot back by arguing that the sale of residential plots is illegal and therefore the sale contract is void? This has actually become a major source of disputes in rural China, especially when the land value increases, but the sale price is only based on the value of the house rather than the value of the land. Despite the existence of disputes, the minor rights property market continues to grow and the demand for minor rights properties is no longer limited to close friends and relatives within the rural area in the way that it used to be.

The huge demand for rural houses since the economic reform commencing in 1978, the undercurrents of rapid urbanisation, as well as farmers' strong motivation to benefit from such urbanisation, have led to the extensive construction of minor rights properties, which began in the early 1990s. A particularly interesting phenomenon concerns the relationship between the construction of these sorts of properties and the formation of 'villages within the city', which are more than semi-undifferentiated urban/rural spaces. During the process of urbanisation, a large number of villages have been gradually enclosed in newly constructed urban areas. These have become the 'joints' between the urban and rural areas, and eventually 'villages within the city' have formed in the expanding urban areas: residents of these villages live in the city – even the city centre – and enjoy city life as urban residents. However, the land of these 'villages' is still collectively owned by the villages themselves, the community is still governed by the village committees and the residents are still members of the village. In other words, they still hold agricultural household registration and, in theory, they are still the owners of the

62 Q R Zhou, 'Minor Property Rights, Big Opportunities' ('xiao chanquan, da jihui') *Economic Observer* (*jingji guancha bao*) (27 August 2007).

63 Ibid.

land where the village is located.[64] Farmers have begun to lease their houses to migrants who work in the city but choose to reside in these urban villages because of the affordable housing prices. As time goes along, the distinction between lease and purchase has become blurred and many leases have transformed into de facto sales.

Ironically, the early stage of the formation of minor rights properties was an active response to a series of governmental reforms and it also gained the government's support from the 1980s to the 1990s. As discussed above, in the late 1980s, on the basis of the introduction of the LURs system, urban households in China were given the opportunity to purchase their own flats or houses for the first time. The private housing market has since flourished. In order to obtain more land for construction, collaboration was formed between property developers and the rural collectives – property developers provided funding and the rural collectives provided land. In some developed areas, such as the Jiangsu and Zhejiang provinces, many rural households extended their houses; some urban residents also went to rural areas and built houses. Most of these houses were owner-occupied, but some were available for rental or for sale.[65] The booming of minor rights properties has also been driven by the industrialisation that has taken place in the Pearl River Delta region since the early 1980s. Foreign investment was introduced in this region and a large number of enterprises and migrant workers moved in, creating a huge demand for space for factories and housing. As a result, many village committees built factories or residential houses on rural land for rental or for sale. In the meantime, many farmers individually or jointly built new houses on the residential plots or built extensions to their houses for the same purposes.

Buyers of minor rights properties are attracted by their relatively low price, which only constitutes approximately one-third of that of commercial housing.[66] According to a survey, 60.3 per cent of people are willing to purchase minor rights property; 86 per cent support the view that minor rights property should be legalised; and 76.3 per cent think that the legalisation of minor rights property will make the overall housing price cheaper.[67]

Most purchasers envision property as their 'home' rather than 'capital'. Although some of the purchasers of minor rights properties are investors who want to buy these properties for rental purposes, they are not the super-rich in the sense that they could not afford to invest in the formal property market. Most purchasers are pensioners, young professionals who have just started their careers, and rural migrants in the city who cannot afford the high price of commercial housing and, in the meantime, want to own their houses.[68] As a result, purchasing minor rights properties becomes a reasonable and legitimate choice. According to a survey conducted by Jin Zhifeng and others in Nanjing, 98 per cent of households who have bought minor rights properties simply want an adequate standard of housing for living.[69] Moreover, the source of their funds comes from savings and they are therefore able to avoid the risk of being too reliant on bank

64 See J Y Xu, 'The Villages with the City, Migrant Workers, Minor Rights Properties, and the Urban-Rural Divide' ('Chengzhong cun, nongmin gong, xiao chanquan fang yu chengxiang eryuan tizhi gaige') (2010) 2 Huxiang Forum 100.

65 Huang (n 56).

66 See 'What is Minor Rights Property?' ('Shenme shi xiao chanquan fang'), Renminwang Theory Channel, 22 February 2012 <http://theory.people.com.cn/GB/49154/49155/17190374.html>.

67 REICO Report (n 60).

68 Zhou (n 62).

69 Z F Jin et al, 'Research on the Activities of Minor Rights Properties' Buyers: A Survey Based on Nanjing' ('Xiao chanquan fang yezhu goufang xingwei yanjiu: jiyu Nanjingshi de wenjuan diaocha') (2015) 36 Shanghai Land and Resources (Shanghai guotu ziyuan) 40.

loans, or of being in debt to loan sharks. Their property being extralegal actually gives them a strong degree of security. This echoes the argument made in relevant literature that 'security of tenure does not require the issue of full legal title'.[70]

The price of normal commercial housing is high and this is in part due to the fact that, when using state-owned urban land to construct housing, property developers need to pay land-leasing fees to the government;[71] and it is further due to the fact that commercial housing developers also want to make high profits. The fees and profits all increase the price of legal urban housing. Further, the building of commercial housing usually requires the acquisition of the collectively owned land from the rural collectives, but farmers gain very little from land acquisition for property development. After acquiring the land from the collectives, the government leases the land to commercial developers in return for their payment of high land-leasing fees; farmers just receive compensation for the required LURs and cannot benefit from the value added to the land via development.[72] As a result, farmers are keen to build housing independently for the purposes of sale. The development of minor rights property has a huge impact on the profits accrued by the property developers on the commercial property market and it also indirectly affects the government's income drawn from land leasing. As a result, the central government has tilted toward the curtailment of minor rights properties.

Extralegality, law's limits, and plural rules

The process of property law-making in China is one in which social reality pushes the law to reform and this process struggles to strike a balance between party policy and law, as well as between central and local law-making. Law-making in China is guided by a principle that asserts that broad legislation is always better than detailed legislation. Under this guideline, national law only provides general principles and needs to be complemented by various kinds of regulations for implementation. As a result, there exists a complex hierarchy of law-making power and legislative organs (Figure 5). Specifically according to the Legislation Law of the PRC (2000), the National People's Congress and its Standing Committee exercise state legislative power (Article 7); and only national laws may be enacted in respect of matters relating to 'acquisition of non-state assets' (Article 8 (6)). The State Council enacts administrative regulations in accordance with the Constitution and national law in order to implement the law (Article 56). Various ministries and commissions under the State Council also exercise regulatory power and make administrative rules in accordance with national law, administrative regulations and decisions and orders of the State Council in order to implement administrative regulations (Article 71). The Local People's Congress and Standing Committee make local decrees and local governments make local rules within their authorities (Articles 68, 71). In theory, the Constitution has the highest authority, followed by national laws and administrative regulations, which have higher authority than local decrees and

70 A Gilbert, 'On the Mystery of Capital and the Myths of Hernando de Soto – What Difference Does Legal Title Make?' (2002) 24 International Development Planning Review 1, 5. See also Razzaz (n 8); O M Razzaz, 'Legality and Stability in Land and Housing Markets' (1997) 9 Land Lines <www.lincolninst.edu/pubs/487_Legality-and-Stability-in-Land-and-Housing-Markets->; Deininger (n 7) 39; D W Bromley, 'Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady' (2009) 26 Land Use Policy 20.

71 See Article 8 of the 'Interim Regulations' and Article 8 of the Urban Real Estate Administration Law (1995, revised 2007).

72 For land development rights in China, see T Xu and W Gong, 'Taking as Giving, Appropriation as Access: Transfers of Land Development Rights and China's Recent Experiments' (2013) 64 Northern Ireland Legal Quarterly 411.

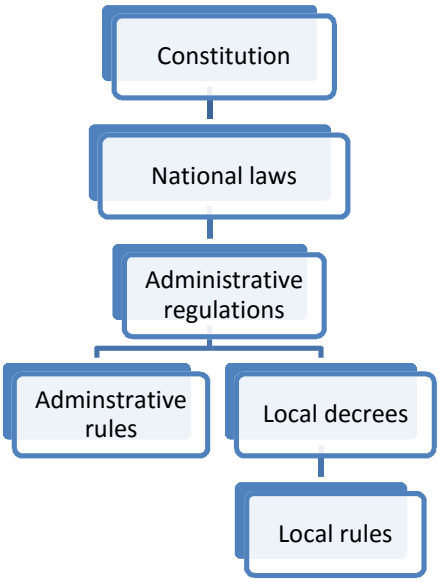

Figure 5: The hierarchy of law-making in China

administrative or local rules (Article 79).[73] Local authorities tend to make law that suits local interests, but not the national interest. Moreover, both the central government and local authorities tend to issue policies rather than laws and regulations in order to deal with matters relating to farmers' property. As a result, competing and even conflicting rules have been generated, giving rise to an extralegal grey area. However, these conflicting rules, a product of the wrestling for power between the central and local government, should not be used to refute the legitimacy of extralegal property.

The central government has, in fact, issued various policies concerning how best to deal with minor rights properties, which does indeed suggest some uncertainty within the higher-level authorities about the status of these properties. There are actually no laws prohibiting farmers from selling these properties. Article 62 of the Land Administration Law (2004) merely stipulates that individual rural households can only have one residential plot; if they have sold or leased their houses, their application for another residential plot should not be approved. Further, farmers' sale of their houses is not against the Property Law (2007).[74] The subsequent ban on farmers' sale of their own

73 Ibid 418.

74 E.g. Article 39 of the Property Law (2007) provides that owners of immovables or movables shall be entitled to possess, use, benefit from and dispose of the immovables or movables according to law. Article 153 of the Property Law also stipulates that laws such as the Land Administration Law and the relevant state regulations shall be applicable to the obtaining, exercising and transferring of the right to the use of the residential plots.

residential properties was issued in the form of a series of policy documents formulated by the central government.[75]

Turning to the issue of whether urban residents can buy minor rights properties, no laws prohibit urban residents from doing so. Before 1998, it was legal for urban residents to build houses on the collectively owned rural land as long as they obtained approval from the county government and fulfilled several requirements (Article 41 of the Land Administration Law (1986)).[76] However, when the Land Administration Law was revised in 1998, this article was deleted, and the city residents' right to build houses in rural areas was thus abolished. That said, the law does not explicitly forbid urban residents from buying properties located in the rural area. Again, prohibition was issued via the publication of a series of policy documents.[77]

From the above analysis, we can see that only documents issued by the State Council prohibit these sales of the minor rights properties, but these policy documents do not constitute administrative regulations.[78] Therefore, the announcement made by the State Council and relevant administrative departments declaring that minor rights properties are illegal does not have a solid legal foundation. It is better to characterise minor rights property as 'extralegal' rather than illegal.

The evolution of property finds great proximity to extralegality in profound socio-economic transformations, such as the economic reform commenced in 1978 in China, which is often characterised as 'groping for stones to cross the river',[79] as well as the rapid urbanisation thereafter. This metaphor indicates both that economic reform is directed by the ongoing facts without clear guidelines or legal rules and that the making of guidelines and legal rules often lags behind the pace of economic reform. Indeed, China's economic reform is not just a 'planned and top-down' project directed by the central government. Beijing did not and is not able to conceive a unified and comprehensive plan that oversees every process and aspect of economic reform. The reality has been far more complex and

75 E.g. Article 2 of the Circular on 'Strengthening the Administration of the Transfer of Land Use Rights and Prohibiting Speculative Land Dealings', issued by the General Office of the State Council in May 1999, provides that: 'farmers cannot sell their houses to urban residents and applications from urban residents to use farmers' collectively owned land to build houses shall not be approved'. Similar prohibitions issued by the General Office of the State Council include the following: Article 2 of the Circular on 'the Stringent Implementation of the Laws and Policies Concerning the Use of Rural Collective Construction Land' (No 71 2007) and Article 3(6) of the Circular on 'the Active and Steady Promotion of the Reform on the Household Administration System' (No 9 2011). The same ban can also be found in Article 13 of the Opinions on 'Enforcing the Management of Rural Residential Plots' (No 234) issued by the Ministry of Land and Resources on 2 November 2004.

76 Those requirements include that the area to be used shall not exceed the standards set out by the provinces, autonomous regions and municipalities; that users should pay compensation and resettlement fees just like those provided for farmers when their land is acquired by the state for the purpose of national construction.

77 The State Council issued the 'Decision on Deepening the Reform and Strengthening the Management of Land' (No 28) on 21 October 2004. Article 10 of this Decision prohibits urban residents from buying residential plots in rural areas. The Ministry of Land and Resources Management also issued many rules banning the issuing of ownership certificates to the owners of minor rights properties, including the Circular on 'Strengthening the Management of Construction Land' issued on 11 August 2009.

78 According to the Chinese Legislation Law (2000), the State Council can make regulations. Article 56 of the Chinese Legislation Law reads: 'The State Council enacts administrative regulations in accordance with the Constitution and national law.' Administrative regulations may provide for the following: (i) matters for which enactment of administrative regulations is required in order to implement a national law; (ii) matters subject to the administrative regulation of the State Council under Article 89 of the Constitution.

79 Development is closely associated with social, cultural, institutional and political transformations; see D Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1 Accounting, Economics, and Law 1, 29.

intricate.[80] In fact, many initiatives that have propelled the reforms have emanated from the grassroots; some grassroots initiatives have eventually forced the law to bend to social pressures, in its creation and enforcement. Yet, in many cases, grassroots initiatives tend to run into obstacles when they seek legal recognition; these initiatives are bitterly suppressed, if they contravene the vested political and economic interest.

Concluding remarks

The case study of China's experience helps contextualise global concerns regarding the definition of property and the extent to which the measure of the legitimacy of property has been recast. It also enables us to define extralegal property and to highlight the importance of recognising legitimate property claims. In China, farmers' use rights to residential plots are characterised as one form of usufructuary rights, that is, the right to use another person's property. The law fails to clarify the extent to which these use rights may be transferred and disposed of, leading to controversies surrounding the sale of minor rights property. As one form of extralegal property, minor rights property has been formed on the basis of long-term use of the land and via social interactions among farmers themselves, between farmers and urban residents and between farmers and local government. It has been supported by social consensus and can promote a considerable degree of security of tenure. However, the enforcement of these legitimate property claims may be eroded or shattered by 'bad law' or political condemnation and security of tenure may also be weakened. For example, threats to security of tenure come from demolitions and evictions ordered by the central government. And it is not because of extralegality that the central government condemns minor rights property. Rather, it is due to the fact that such property threatens potential vested interests, be they of a political or economic nature. The law cannot capture the diversity of property relations due to its inherent limits (for example, its incoherence and its inability to reflect a complex and changing society); minor rights property has been pronounced illegal by government policies and documents, creating 'legally propertyless masses'.

The burgeoning of minor rights property in China clearly challenges the status quo system of law and exhibits a potential to change the law. If we recognise the legitimacy of minor rights property built on farmers' residential plots, it means that use rights to farmers' residential plots could be transferred and enjoy the equal status as use rights to urban land for construction purposes. It also means that farmers and urban residents would enjoy equal access to land. As these use rights are separated from collective ownership of rural land, the transfer of these rights will not affect the integrity of collective ownership of rural land; instead, it promotes more efficient use of the land. For example, we could follow the practice of transferring use rights to urban land and set up a fixed term for the use of the residential plots. The collectives, the owner of rural land, could charge the purchasers a land-leasing fee. As such, the rural collectives, farmers and rural residents with low income could all benefit from the development of rural land, while the collective ownership of rural land, in particular arable land, is still being protected.

Minor rights property works in favour of legally propertyless masses and there is a strong case for its retention. However, national law is unlikely to afford sufficient protection, as in national law the source of the legitimacy of property is strongly linked to the state. We need to turn our attention to the global level, such as the Voluntary Guidelines 2012, where a spectrum of property/tenure has been recognised (as further

80 See also J Kynge, *China Shakes the World: A Titan's Rise and Troubled Future – And the Challenge for America* (Houghton Mifflin 2006) 12–14.

developed in Figure 3), including the access to, use of and control over land and other natural resources by people who may hold nothing other than user rights to land and natural resources.[81] Of course, while soft law protection of property is often alleged to have limited legal effect due to its 'non-binding' nature and a lack of formal enforcement mechanisms, soft law may nevertheless provide a timely response to global concerns, fill in gaps where hard law protection is ineffective, recast the measure of the legitimacy of property and become the starting point for negotiating international, binding commitments.[82] More work needs to be done to link the global with the local: facilitating the development of global guidelines via the study of local experience; and experimenting with mechanisms to internalise global guidelines in local contexts.

81 T Xu and W Gong, 'Communal Property Rights in International Human Rights Instruments: Implications for De Facto Expropriation' in Xu and Allain (n 12) 225.

82 T Xu, 'Hidden Expropriation in Globalisation and Soft Law Protection of Communal Property Rights' in B Hoops et al (eds), *Rethinking Expropriation Law II: Context, Criteria and Consequences of Expropriation Law* (Eleven International Publishing 2016) 89–109, 107.

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The ministerial power to set up a public inquiry: issues of transparency and accountability

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Abstract

The Independent Panel Inquiry into Child Sexual Abuse was left in crisis following intense pressure from survivors and their families, the public and media. Two senior legal figures, Baroness Butler-Sloss and Fiona Woolf, both resigned from the position of chair to the inquiry following concerns over their links with the establishment. Questions were raised over the independence of a process convened by the Home Secretary, to investigate apparent failures on the part of institutions, which would include scrutinising the actions of a former Home Secretary in handling allegations of child sexual abuse in the past. Demands for an inquiry with greater statutory powers, including the power to compel the giving of evidence on oath, ultimately resulted in the Independent Panel being disbanded and a new public inquiry, the Independent Inquiry into Child Sexual Abuse, being convened. Against the background of this and other inquiries, this article examines the serious questions raised about the powers of a minister to set up a public inquiry, the lack of open and transparent decision-making processes and the extent to which those ministerial decisions are open to public scrutiny and accountability.

Introduction

One of the key functions of a public inquiry convened by a minister into a matter of public concern is to hold those in authority to account. It is therefore essential that a public inquiry is set up in such a way as to command public confidence and trust in the independence and integrity of the resultant inquiry and its findings. The establishment of the Independent Panel Inquiry into Child Sexual Abuse in 2014[2] prompted an eight-month period of intense pressure and lobbying from the survivors and their families, the public and the media, who were unhappy with the way in which it had been convened. It resulted in the resignation of two chairs to the inquiry, the original panel being dissolved and a new public inquiry, the Independent Inquiry into Child Sexual Abuse (IICSA)[3] being convened on a statutory basis.[4]

1 I am very grateful to Robert Lee and Jonathan Doak for much helpful insight into the development of this article.

2 An independent inquiry panel of experts in the law of child protection to consider whether public bodies and other non-state institutions have taken seriously their duty of care to protect children from sexual abuse: HC Deb 7 July 2014, vol 584, col 25.

3 <www.iicsa.org.uk/>

4 HC Deb 7 July 2014, vol 584, col 25. Hearings are due to commence in 2016.

The Seven Principles of Public Life,[5] devised by the Committee on Standards in Public Life,[6] set out the basis of the ethical standards expected of public office-holders. They include the requirement for openness:

> Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

And accountability:

> Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.[7]

Whilst not legally binding, these principles have come to inform public life and other codes of conduct, such as the Ministerial Code,[8] which sets out the standards of conduct expected of ministers, and also to inform legislation.[9] In this article I argue that the lack of open and transparent decision-making processes when a public inquiry is convened and the absence, in the public domain, of clear published criteria and reasoning behind those decisions, restricts the scope for public scrutiny and accountability. This in turn can damage public confidence in the ensuing public inquiry and its findings, by giving rise to concerns over the motives behind the decisions made and a lack of independence of the inquiry process from government and the executive.

Ministerial decisions taken when convening a public inquiry may be challenged by judicial review, but there are a number of practical limitations to this as a safeguard. Ministers are accountable to Parliament and the electorate and, as the IICSA itself illustrates, public pressure can influence ministerial decisions. However, there is no formal process by which representations may be made to the minister, nor any requirement for public consultation. The extent to which the public and interested parties have influenced such decisions has varied widely between inquiries.

By way of background, with particular reference to the IICSA, and also to other key public inquiries such as the Mid Staffordshire NHS Foundation Public Inquiry (hereinafter Mid Staffordshire Inquiry), Litvinenko and Chilcot Inquiries,[10] this article firstly examines the considerable discretion afforded to the minister over whether or not an inquiry is convened, what powers an inquiry is given, the appointment of its chair and the setting of its terms of reference, which all have a fundamental impact on the nature of the inquiry and public perception of its independence and integrity. Secondly, it analyses the extent to which the exercise of that discretion is transparent and open to public scrutiny and accountability and the scope for victims, survivors and their families, and the wider public, to influence or challenge the decisions reached.

The 2014 House of Lords Select Committee on the Inquiries Act 2005 (hereinafter the HL Select Committee) provided the first parliamentary post-legislative scrutiny of the Inquiries Act 2005 and considered the law and practice relating to inquiries into matters of public concern, in particular those convened under the Inquiries Act 2005 (hereinafter

5 Committee on Standards in Public Life, 'The Seven Principles of Public Life' (May 1995). Also known as the Nolan Principles.

6 A public body that advises the UK government on ethical standards across public life in the UK.

7 Seven Principles (n 5) principles 5 and 4 respectively

8 The most recent version of which is the Cabinet Office, *Ministerial Code*, October 2015.

9 Such as the Freedom of Information Act 2000

10 Inquiry to examine the Commissioning, Supervisory and Regulatory Organisations in Relation to their Monitoring Role at Mid Staffordshire NHS Foundation Trust between January 2005 and March 2009; Inquiry to Investigate the Death of Alexander Litvinenko on 23 November 2006; Inquiry into the UK's involvement in the Conflict in Iraq.

the 2005 Act). It took evidence from inquiry chairs and secretaries, lawyers and academics, inquiry witnesses, interest groups and others. This article draws on that evidence, the report produced (hereinafter 2014 Select Committee Report),[11] and the government's written response (hereinafter Government Response),[12] together with parliamentary debates, government publications, media reports and wider literature.

Convening a public inquiry

Role

Before considering the significance of the ministerial decisions taken while setting up public inquiries, it is helpful to first consider the role of public inquiries. Public inquiries may serve a number of different purposes: establishing the facts; determining accountability; learning lessons and making recommendations to prevent recurrence; restoring public confidence; catharsis; developing public policy and discharging investigative obligations under Articles 2 and 3[13] of the European Convention on Human Rights (ECHR).[14] They may also vary greatly in terms of the nature of their subject. Some cover events which suggest a breakdown in the rule of law, such as the Scott Inquiry,[15] some involve a single death, such as the Victoria Climbié Inquiry, and others many deaths, as with the Shipman Inquiry.[16] But what they all share is that they are inquiries into significant matters of public concern.[17]

A call for a public inquiry will frequently occur immediately following an event causing national concern. However, there may be a long delay, such as in the case of the IICSA, where calls for a public inquiry into wide-scale child abuse came years after the events, triggered by press reports on Jimmy Savile's behaviour, following his death in 2012.[18] By the time a minister is faced with the decision of whether or not to convene a public inquiry, a momentum of public pressure may have built up from the media, the families of victims, victim support groups, non-governmental organisations (NGOs) and from the lobbying of Parliament by individuals and pressure groups. The minister may be under considerable pressure to act quickly. Many groups will express frustration at the apparent failures of the system and feel that, without a public inquiry, their voice will not be heard.[19]

11 HL Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143).

12 Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093 2014)

13 The rights to life and to not be tortured or subjected to torture or inhuman or degrading treatment or punishment.

14 List from Jason Beer et al, *Public Inquiries* (OUP 2011) paras 1.02–10

15 Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions.

16 Cabinet Secretary Advice Note on the Establishment of a Judicial Inquiry into Phone Hacking (19 March 2010) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/60808/cabinet-secretary-advice-judicial.pdf>.

17 On the role and functions of public inquiries, see also Mark Elliott and Robert Thomas, *Public Law* 2nd edn (OUP 2014) ch 17, para 2.2.

18 'Jimmy Savile Accused of Sexual Abuse' *BBC News* (1 October 2012) <www.bbc.co.uk/news/entertainment-arts-19776872>.

19 For example, see 'Bishop Calls for Buncefield Inquiry' *Evening Standard* (London, 11 January 2006) <www.standard.co.uk/newsheadlines/bishop-calls-for-buncefield-inquiry-7084716.html> and David Conn, 'Theresa May to Heed Campaigners' Call for Inquiry into Battle of Orgreave' *The Guardian* (London, 15 December 2015) <www.theguardian.com/politics/2015/dec/15/theresa-may-to-heed-campaigners-call-for-inquiry-into-battle-of-orgreave>.

Ministerial powers

The decisions whether or not to convene an inquiry and, if so, its nature, are for the minister whose department is most relevant to the matter of public concern (as discussed in greater detail below). There is no process by which those demanding a public inquiry can make an application and the court cannot mandate a minister to call a public inquiry. Whilst Parliament does not itself have power to set up a public inquiry, it can exert political pressure on a minister to do so and the public may apply pressure on Parliament by lobbying both Houses, through letters, presentations, briefings and meetings and through the media. In the case of the IICSA, the announcement of a public inquiry came relatively soon after the call. However, in many cases, such as that of the Mid Staffordshire Inquiry, there may be a protracted period of campaigning before an inquiry is convened.[20] In many cases, a call for an inquiry will be unsuccessful.[21]

The minister must also decide the extent to which any inquiry will be held in public. Not all inquiries into matters of public concern are public inquiries; inquiries may be held entirely in public, in private, or a combination of the two. (The Chilcot Inquiry is an example of a public inquiry that held a number of its hearings in private.) There is no automatic entitlement to a public inquiry as opposed to a private inquiry and, again, the decision as to whether the advantages of a closed inquiry outweigh those of an open inquiry is predominantly a matter for the minister.[22] It seems right in principle that an inquiry into matters of public concern should itself be heard in public unless there is a strong public-interest argument for the inquiry, or some part of it, to be heard in private,[23] for example, to protect matters of national importance or security. The 2005 Act includes a presumption that inquiries into matters of public concern will be held in public. However, as is argued below, ministers on occasions appear to be choosing to side-step the use of this legislation, which has given rise to concerns that some such decisions may have been motivated by a wish to conceal or suppress some aspects of the truth from the public. There has been much debate over ministerial decisions to hold all or part of an inquiry in private, with many such decisions being the subject of judicial review proceedings,[24] as well as public and media scrutiny.

A further decision for the minister is the basis upon which a public inquiry is to be convened. As considered in more detail below, inquiries may be statutory or non-statutory in nature. Most statutory inquiries are now held under the 2005 Act, s 1 of which provides that a minister 'may' cause an inquiry to be held under the Act. The power to convene a non-statutory public inquiry falls under the general ministerial prerogative. Again, ministerial discretion is extremely broad. There is no formula or criteria in the 2005 Act for convening a statutory inquiry beyond those stated in s 1:

20 See Julie Bailey oral evidence taken before the HL Select Committee (23 October 2013) Q173: 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>.

21 Such as the call for a public inquiry into the death of four soldiers at Deepcut Barracks and the death in custody of teenager Joseph Scholes

22 See *Scott Baker JR (Persey) v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794, para 69.

23 See *Report of the Royal Commission on Tribunals of Inquiry* (Cmnd 3121 1966) para 40 (Salmon Report).

24 See R *v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993) (the Allitt Inquiry); R *v Secretary of State for Health, ex parte Wagstaff;* R *v Secretary of State for Health ex parte Associated Newspapers Ltd* [2001] 1 WLR 292 (the Shipman Inquiry); R *(Persey) v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) (the Foot and Mouth Inquiry).

where it appears to him that—

(a) particular events have caused, or are capable of causing, public concern, or

(b) there is public concern that particular events may have occurred.

For a non-statutory inquiry, there are no criteria at all.

Precisely which minister is responsible for an inquiry is an administrative or political decision, rather than a legal one. An area of concern frequently raised is that the minister exercising the discretion, and making the decision about whether or not to set up a public inquiry, is often the minister for the department that is, or may find itself, under scrutiny.[25] Equally, the actions of the government itself may be under scrutiny.[26] This can generate significant public concern over the clear conflict of interest that arises and the lack of independence of an inquiry from government and ministerial departments.

Whilst setting up an inquiry should not be a political decision, political considerations frequently influence the decision. Calls for both the Marchioness and Mid Staffordshire Inquiries were initially refused by the then government, but promised by the opposition, which then convened the public inquiries on coming to power.[27] The request for the Litvinenko Inquiry was initially refused because of concerns about damaging UK relations with Russia.[28] It is an often-quoted belief[29] that a minister will concede a public inquiry to appease immediate pressure from the public and media and 'kick the issues into the long grass', hoping that public interest and political criticism will have faded by the time the inquiry report is produced.[30]

Transparency

Concern over the motives behind a decision is exacerbated by the lack of transparency. As Eversheds[31] noted in written evidence before the HL Select Committee, 'there is no transparency in the decision-making process conducted by Ministers/Government when deciding to set up, or not set up, an inquiry and the public is often not fully appraised of the reasons behind a particular decision being made'.[32]

Despite the fact that the 2005 Public Administration Select Committee report, *Government by Inquiry*, recommended that ministers should justify their decision whether or not to hold an inquiry based on a published set of criteria (and proposing some criteria that might form a basis for this),[33] the later 2014 Select Committee Report rejected

25 For example, the Mid Staffordshire Inquiry.

26 For example, the Bloody Sunday and Chilcot Inquiries.

27 See, for example, Julie Bryant on the effect of the change of government on the call for the Mid Staffordshire Inquiry, oral evidence taken before the HL Select Committee (23 October 2013) Q162.

28 The Home Secretary admitting 'international relations' were a factor in the government's decision not to hold a public inquiry. See Terri Judd, 'Alexander Litvinenko death: Theresa May admits "international relations" affected Ruling' *The Independent* (London, 19 July 2013) <www.independent.co.uk/news/uk/politics/alexander-litvinenko-death-theresa-may-admits-international-relations-affected-ruling-8720405.html>.

29 See, for example, Steve Richards, 'The Real Purpose of Public Inquiries' *The Independent* (London, 16 June 2010) and Simon Jenkins, 'Politicians Who Demand Inquiries Should be Taken Out and Shot' *The Guardian* (London, 25 June 2013).

30 The 2014 Select Committee Report noted that it had received no evidence of this for statutory inquiries though it did receive evidence from Liberty to the effect that this was the purpose of the Detainee Inquiry. See HL Select Committee (n 11) para 98.

31 An international law firm and solicitors to the Bloody Sunday, Shipman, Rosemary Nelson and Mid Staffordshire Inquiries, and who acted for the Metropolitan Police Authority in the Leveson Inquiry.

32 Eversheds' written evidence to the HL Select Committee (n 20) para 13.

33 Public Administration Select Committee, *Government by Inquiry* (HC 2004–2005, 51-I) para 184.

similar suggestions made by witnesses before it.[34] It warned 'there is a danger fixed criteria might fetter discretion and so limit the circumstances when an inquiry may be set up' and concluded that 'there neither can nor should be fixed criteria regulating the setting up of inquiries'.[35] It also concluded that:

> . . . it is right that the power to establish a public inquiry should be held by a minister of the relevant department. The fact that ministers are accountable to Parliament, and that Parliament can always call for an inquiry to be set up, allows sufficient Parliamentary involvement in the process.

Whilst recognising the need to avoid the introduction of over-prescriptive criteria, it is argued that the introduction of broad criteria or guidance, as well as engaging more openly with those campaigning for a public inquiry, and the wider public, at an early stage would go a long way towards addressing concerns and managing expectations.

In addition to the absence of published criteria by which the decision is reached, currently, there is not even a requirement for a minister to give reasons when refusing a public inquiry. Ministerial statements to Parliament are often, but not always, given. (Reasons that have been given include the thoroughness of earlier investigations,[36] cost, time and money, and international relations.[37] A minister may also be concerned about the possibility of setting a precedent, and thereby increasing calls for a public inquiry, as well as timing issues, for example, proximity to an election, which would raise questions over motivation.)[38]

Concluding that calls for a public inquiry are frequent and numerous and it would be impractical to record and respond to every call,[39] rather than suggesting criteria for when reasons should be given, the Select Committee recommended that ministers retain a general discretion as to when to give reasons for their decisions, but added that reasons not to hold an inquiry should always be given to Parliament where there has been a 'failure in regulation' and following a request by a coroner to convert an inquest into an inquiry.[40] The government accepted there should be 'some explanation' of a decision not to convene a statutory inquiry, only in the circumstances identified and for domestic bodies, and following a request to convert an inquest,[41] but there was no suggestion of legislative change.

Whilst this may go some way towards improving accountability to Parliament in these circumstances, it is argued that it does not go far enough to address wider concerns over the lack of transparency of the decision-making process and the effect on public confidence in the public inquiry process. There are frequent calls for clearer criteria and reasoning from those campaigning for public inquiries.[42] The absence of any published criteria or guidance as to when an inquiry may or may not be convened, and the fact that there will be occasions when no reasons are given for refusing a public inquiry, exacerbates concerns about the motivation behind those decisions.

34 See, for example, Robert Francis QC, written evidence to the HL Select Committee (n 20) para 14.

35 HL Select Committee (n 11) para 51.

36 For example, the death of Daniel Morgan; the death of four soldiers at Deepcut Barracks; and Mid Staffordshire (decision later reversed).

37 The death of Alexander Litvinenko.

38 Cabinet Secretary Advice Note (n 16).

39 HL Select Committee (n 11) para 110.

40 Ibid paras 111–12.

41 Ministry of Justice (n 12) paras 33–36.

42 See, for example, Christopher Jefferies and Julie Bryant, oral evidence taken before the HL Select Committee (23 October 2013) (n 20) Q162 and 179.

Limited scope for challenge

In reaching a decision, the minister is exercising a public law function and the decision may therefore be challenged by way of judicial review.[43] There have been many judicial review challenges to decisions refusing to convene a public inquiry, on the basis that the decision was unreasonable, bearing in mind the nature of the issue or the level of concern, or that the minister had taken into account irrelevant considerations in deciding to hold an inquiry,[44] some of which have been successful.[45] In such circumstances, the role of the court is one of review, not appeal. It cannot order a minister to convene an inquiry, but can require the minister to remake the decision,[46] which may ultimately result in an inquiry being convened.

Such proceedings, however, have their limitations. In order to bring an application for judicial review, leave of the court is required, which will not be granted unless the court considers that the applicant has a 'sufficient interest' in the matter to which the application relates.[47] Few ordinary members of the public with 'sufficient interest' are familiar with, or have access to the resources to bring, judicial review proceedings. Further, there is concern that recent controversial changes to judicial review introduced by the Criminal Justice and Courts Act 2015, including the tightening of the criteria for granting judicial review and changes to the rules on the legal costs of interveners in judicial review proceedings, will make it harder for individuals, the families of victims, survivor support groups, NGOs and pressure groups to challenge ministerial and governmental decisions, thus weakening judicial review as an important safeguard.

Judicial review is not, however, the only way in which the public may challenge a decision to refuse a public inquiry. Under the doctrine of ministerial responsibility, ministers are answerable to Parliament for their actions and the actions of their departments. As we have seen in the case of inquiries such as the IICSA, Mid Staffordshire and Chilcot Inquiries, public pressure from individuals and pressure groups via the media, social media and the lobbying of MPs, has a significant, albeit informal and non-legal role to play.[48] However, this form of informal public and political accountability has also given rise to concerns over inconsistency. It is dependent on well-mobilised groups building a sufficient momentum of publicity and wider public support to be able to influence ministers and Parliament. Numerous extraneous factors will come into play and this route, as a form of accountability, can by no means be assured.

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43 A decision to refuse a public inquiry can be judicially reviewed irrespective of whether or not reasons are given.

44 See Cabinet Secretary advice note (n 16).

45 For example, Shipman (n 24); *Baha Mousa, R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2007] 3 All ER 685; and *Litvinenko, R (on the Application of Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin).

46 See Jason Varuhas, 'Ministerial Refusals to Initiate Public Inquiries: Review or Appeal' (2014) 73(2) Cambridge Law Journal 238, criticising the court's approach in *R (Litvinenko)* (n 45) as approaching the case as though it was hearing an appeal rather than exercising a supervisory function.

47 See Senior Courts Act 1981, s 31(3). The Act does not define 'sufficient interest', but leaves the decision to the court, which will consider, inter alia, the merits of the challenge, and whether or not personal rights or interests are involved: *IRC v National Federation of the Self Employed and Small Businesses* [1982] AC 617. Where judicial review is sought by survivor support groups, NGOs and pressure groups, the court may take into account the reputation of the body; whether a significant number of members are affected by a decision; and whether it is reasonable for the group or organisation to claim on behalf of its members: see *R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329 and *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1WLR 386.

48 For example, in the case of the Mid Staffordshire Inquiry, Cure the NHS. See <www.curethenhs.co.uk>.

A minister's discretion over whether or not to convene an inquiry and, if so, the extent to which it will be held in public, is very broad. As seen above, the decision-making process is neither open nor transparent, which has in turn raised significant concern about the motivation behind such decisions, particularly where the actions of the minister's department, or the government itself, would be under scrutiny in any subsequent public inquiry. However, concern over ministerial discretion exercised when setting up a public inquiry goes further. As can be seen from the IICSA, even when a public inquiry is announced, those who had called for the public inquiry may then refuse to participate because of the basis upon which it has been convened[49] and whether it is a statutory or non-statutory inquiry, which can have a fundamental influence on the nature of the inquiry and public perception of its independence and integrity.

Statutory and non-statutory inquiries

Statutory inquiries have 'more teeth'

When announcing the establishment of the Independent Panel Inquiry into Child Sexual Abuse in 2014, the Home Secretary justified the decision to make it a non-statutory inquiry on the basis that 'it can begin its work sooner and, because the basis of its early work will be a review of documentary evidence rather than interviews with witnesses who might themselves still be subject to criminal investigations, it will be less likely to prejudice those investigations'.[50] The statement added that the panel would have access to government papers and be free to call witnesses from organisations in the public and private sectors, and in wider civil society, and, should the inquiry panel chair deem it necessary, the government would convert it into a statutory public inquiry.[51]

Five months later, in a statement before the Home Affairs Committee,[52] following widespread media criticism and representations from survivors and their lawyers to the effect that they would not participate unless the inquiry was a statutory inquiry, the Home Secretary announced that the inquiry should have the powers of a statutory inquiry. After further intense pressure, the Home Secretary subsequently announced that the original Independent Inquiry Panel would be disbanded and a new 2005 Act Inquiry, the IICSA, would be convened, because of the 'robustness in law' of a statutory inquiry and its power to compel witnesses to give evidence.[53]

In order to understand the strength of feeling on the part of the survivors, it is important to look at the two key differences between statutory and non-statutory inquiries. The first is that, unlike in the case of non-statutory inquiries, the 2005 Act confers on statutory inquiries the power to compel the giving of evidence, including compelling witnesses to attend to give oral evidence, produce documents and provide a written statement.[54] The Act also permits the chair to take evidence on oath,[55] ensuring that anyone who gives false evidence could face criminal sanctions. Sometimes, merely the

49 Another example being the family of Patrick Finucane, Northern Ireland solicitor, who initially opposed the establishment on an inquiry under the 2005 Act because of the powers given to ministers to impose restrictions on the disclosure and publication of evidence (see further discussion below).

50 HC Deb 7 July 2014, vol 584, col 25.

51 Position restated in HC Deb 3 November 2014, vol 587, col 543.

52 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/the-work-of-the-home-secretary/oral/16895.html>

53 HC Deb 4 February 2015, vol 592, cols 276–77.

54 2005 Act, s 21.

55 Ibid s 17.

existence of powers to compel the giving of evidence, without enforcement, is sufficient to make a difference to the effectiveness of an inquiry.

Counsel to the Robert Hamill Inquiry[56] explained that, when the inquiry was set up, it did not have powers of compulsion over witnesses:

> We were told unequivocally that the Protestant witnesses who were on the street and were vital to it would not give evidence. We were able to convert, thinking we needed to convert, to get powers under the 2005 Act, and as soon as we had the powers we had the witnesses . . . As far as we are concerned, the real distinction between a non-statutory inquiry and a statutory inquiry is those teeth.[57]

The second key difference is that, under the 2005 Act, there is a presumption that the hearings will be held in public. Subject to restrictions imposed by the minister or chair,[58] the chair must take such steps as he or she considers reasonable to secure that members of the public (including reporters) are able:

(a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.[59]

The intention is to provide transparency and openness to the proceedings whereby the public, by attendance, or by the press televising or reporting the proceedings, are free to draw their own informed conclusions. It also provides interested parties with an often much sought-after opportunity for their voices to be heard.

Despite clear advantages to convening a statutory inquiry and the fact that the 2005 Act is generally recognised to be 'good legislation',[60] when exercising their discretion, ministers have frequently chosen to set up alternative forms of non-statutory inquiry or investigation, such as a Parliamentary Inquiry, Counsel of Privy Councillors, Royal Commission or independent review with elements of a public hearing. These non-statutory versions include high-profile inquiries such as the Chilcot Inquiry into the Iraq conflict, the Butler Inquiry into intelligence on weapons of mass destruction and the Bichard Inquiry into child protection procedures following the Soham murders.[61]

Serious questions have been raised about the motivation behind decisions not to convene a statutory inquiry and the effect on public perception and trust. Once again, there is neither a formal process nor criteria by which to determine if an inquiry is to be statutory or non-statutory and no openness or transparency to the decision-making process.[62] There is a concern that ministers are apparently choosing to side-step the

56 Inquiry into the actions of the Royal Ulster Constabulary following the death of Robert Hamill.

57 Ashley Underwood, oral evidence taken before the HL Select Committee (20 November 2013) (n 20) Q250.

58 2005 Act 2005, s 19.

59 Ibid s 18.

60 See HL Select Committee (n 11) para 214. However, there have been notable critics, particularly when the Inquiries Bill was first presented, chiefly over ministerial powers and the use of restriction notices, including: the panel members of the Bloody Sunday Inquiry; Amnesty International; and in an all-party motion introduced before Dáil Éireann. See the discussion in Beer et al (n 14) paras 1.67–71. Concern since appears to have eased for some, as the extent to which those powers have been used in practice has not been as great as initially feared (see n 75 below).

61 Inquiry into child protection procedures in Humberside Police and Cambridgeshire Constabulary following the murder of Jessica Chapman and Holly Wells.

62 It would appear that informal discussions take place at ministerial level and the Prime Minister has the final say: see Shailesh Vara MP, oral evidence taken before the HL Select Committee (11 December 2013) (n 20) Q327–28.

legislation when it suits them because it is felt the 2005 Act somehow 'ties their hands, is too complicated, [or] is too public'.[63] During the HL Select Committee, Baroness Buscombe posed the question:

> Why should the public have any trust in a non-statutory inquiry when, the very people who were behind that legislation instantly chose to avoid it when, for example, setting up the Iraq inquiry?[64] . . . Can we not read from that, being cynical, that this means that some of the truth can be avoided where the inquiry is non-statutory?[65]

There is no express presumption in favour of using the 2005 Act, in the Act itself or elsewhere. Convening non-statutory inquiries under the general ministerial prerogative is a well-established practice. In the pre-2005 Court of Appeal case of *Crampton*,[66] Sir Thomas Bingham MR stated that, simply because a statute gives a minister power to establish an inquiry, it does not mean the minister lacks authority to establish an inquiry of any other kind, nor that the minister must establish all inquiries under the statute that provides compulsory powers. However, in the House of Lords debate on the 2014 Select Committee Report, Lord Trimble referred to one of the main intentions behind the 2005 Act and the explanatory notes to the 2005 Bill, which was 'to consolidate numerous pieces of subject-specific legislation' and 'to provide a comprehensive statutory framework for inquiries set by Ministers to look into matters of public concern'[67] stating that:

> That language points to the Act being used for inquiries generally. It does not say that the Act is optional . . . That would be a rather novel proposition for legislation. I know that the practice has developed of non-statutory inquiries and it is perhaps late in the day to challenge that now. However, I suggest that it is not really within the original intention of the Act, which is why we made the recommendations we did . . .[68]

The Select Committee recommended that:

> . . . inquiries into issues of public concern should normally be held under the Act. This is essential where Article 2 of the ECHR is engaged.[69] No inquiry should

63 Ibid Lord Richard (11 December 2013) Q323.

64 The Chilcot Inquiry.

65 See question of Baroness Buscombe, oral evidence taken before the HL Select Committee (10 July 2013) (n 20) Q36.

66 *Crampton* (n 24).

67 Explanatory Notes to the Inquiries HL Bill (2004–2005) para 3. There are only a very few examples of alternate legislation continuing to apply, such as the Financial Services Act 2012 or the Merchant Shipping Act 1995.

68 HL Deb 19 March 2015, vol 760, col 1143. See also *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 AC 513 where the House of Lords ruled that the Home Secretary had acted unlawfully in failing to implement, by statutory instrument, a statutory scheme for criminal injuries compensation under the Criminal Justice Act 1998, choosing instead to amend an existing non-statutory scheme under the Royal Prerogative.

69 Articles 2 and 3 ECHR impose on governments an obligation to conduct an effective official investigation into any death resulting from the use of force or resulting from the state's failure to protect the right to life (see, for example, the ECHR determination in *Osman v UK* (1998) 29 EHRR 245; *McCann v UK* (1995) 21 EHRR 97), including the need for there to be a 'sufficient element of public scrutiny' (see Lord Bingham's summary of the Article 2 requirements in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51). It is only inquiries with statutory powers to compel the production of documents and the attendance of witnesses to give evidence on oath that will be compliant with Article 2. Also, the lack of rules governing public and private hearings are more likely to result in non-statutory inquiries being non-compliant with Article 2 than statutory inquiries. See HL Select Committee (n 11) paras 69–76.

> be set up without the power to compel the attendance of witnesses unless ministers are confident that all potential witnesses will attend.

It recommended retaining the possibility of inquiries being held otherwise than under the Act where, for example, security issues are involved, or other sensitive issues which require evidence to be heard in secret, adding 'Ministers should give reasons for any decision to hold an inquiry otherwise than under the Act.'[70]

This was rejected by the government, asserting that the 2005 Act represents an important starting point and that 'Ministers should not feel constrained from considering other options which may be better suited to the circumstances', interpreting s 1(1)[71] as being merely permissive, providing flexibility as to whether to use the Act or not, noting that s 15 allows for conversion into a 2005 Act inquiry if organisations or individuals refuse to co-operate with a non-statutory inquiry.[72]

Choosing a non-statutory inquiry

Whilst taking great issue with the government's rejection of the recommendation that public inquiries should normally be held under the 2005 Act, for reasons of public perception and trust and discussed in greater detail below, it is accepted that there will be occasions where convening a non-statutory inquiry will be appropriate. Examples might include where there is a need for evidence to be heard in secret for the protection of matters of national importance and national security or where the release of material might jeopardise economic measures concerning Britain's economy.[73] It may also be concluded, for example, that powers of compulsion over witnesses are not appropriate because evidence is being sought from citizens of foreign jurisdictions.[74] In such cases, there is a balance to be found between the need to maximise the public nature of an inquiry and the importance of enabling an effective investigation to take place. An inquiry with severe restrictions to public access might, on occasion, be better than no inquiry at all.[75]

Practical arguments have also been put forward in favour of non-statutory inquiries. Sir John Chilcot, chair of the Chilcot Inquiry, felt that 'the powers of compulsion contribute to an overly formal or court-like adversarial process' in what is an inquisitorial procedure.[76] A number of witnesses appearing before the HL Select Committee thought that the taking of evidence on oath would not make a practical difference, largely because, with the mass of documents and other evidence before the inquiry, anyone lying risked being caught out and anyone minded to lie would do so on oath or otherwise.[77]

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70 HL Select Committee (n 11) paras 81–82.

71 'A Minister may cause an inquiry to be held under this Act.'

72 Ministry of Justice (n 12) para 31.

73 See Shailesh Vara MP, oral evidence taken before the HL Select Committee (11 December 2013) (n 20) Q321.

74 See, for example, ibid, Peter Riddell (17 July 2013) Q59.

75 An alternative argument: the family of Patrick Finucane, a Northern Ireland solicitor, initially opposed the establishment of an inquiry under the 2005 Act into his murder by paramilitaries and collusion by the state because of the power conferred on the minister by the Act to impose restrictions on the disclosure and publication of evidence. The family subsequently changed its position, having seen the 2005 Act in practice and having received undertakings regarding the use of restriction notices. (However, the government ultimately decided to hold an independent review rather than the public inquiry that had been promised to the family. The family brought judicial review proceedings *Re (Finucane) v Secretary of State for Northern Ireland* [2015] NIQB 57) and an appeal against partial dismissal of the application for judicial review has been listed before the Court of Appeal.

76 HL Select Committee (n 11) para 68.

77 See Public Administration Select Committee (n 33) para 113 and, for example, Professor Tomkins and Sir Stephen Sedley, oral evidence taken before the HL Select Committee (10 July 2013) (n 20) Q36.

However, irrespective of the extent to which it is thought that statutory powers of compulsion over witnesses would make a practical difference, thought must be given to the fact that choosing to convene a non-statutory inquiry can, and does, give rise to major issues over public perception and trust. A 2010 Cabinet Secretary advice note stated:

> Non-statutory inquiries (e.g. Chilcot) are normally used where the actions in question are mainly those of public officials, who can be expected (or to an extent required by government) to cooperate without the need for the inquiry to have powers of compulsion. If such cooperation is not forthcoming a non-statutory inquiry can be turned into a statutory one, with the relevant powers.[78]

A major role of public inquiries is to hold the executive to account. I would argue strongly therefore that, where the actions in question are mainly those of public officials, for example, in a case such as the IICSA, dealing with allegations of an establishment cover-up,[79] it is even more important to ensure public perceptions of integrity and to ensure that, from the outset, there is a presumption that hearings will be held in public and that the inquiry is given powers of compulsion over witnesses and the power to take evidence on oath.

Public influence

The background to the establishment of the IICSA shows that pressure from survivors and their families, pressure groups, the public and media can result in a decision to convert, or disband, a non-statutory inquiry in favour of convening a statutory inquiry. It remains to be seen whether this is the start of public pressure increasing the proportion of statutory rather than non-statutory inquiries that are convened.

Relying on this form of public pressure as a process of accountability brings with it its own concerns. The failure to get the model right from the outset, and ministers being seen to backtrack on previous decisions, risks damaging confidence in the public inquiry process itself. A further concern is the way in which this can lead to inconsistencies between inquiries. In the case of the IICSA, the survivors, their families and the pressure groups were well informed about the significance of the distinction between the two types of inquiries. Most members of the wider general public are unlikely to know if an inquiry is statutory or non-statutory, nor appreciate the significance. Many might simply assume that a public inquiry, set up to investigate such serious issues, would have the power to enable it to take evidence on oath and require documents to be produced, in a way they are familiar with in the court system. Limited public understanding of the implications of the decision made reduces the potential for public scrutiny and the potential for public pressure to be brought to bear.

The power of a minister to decide whether or not a public inquiry will be a statutory or non-statutory inquiry is hugely significant because of the profound effect that decision can have on the powers, effectiveness and degree of openness of the subsequent inquiry, the role of which is to hold those in authority to account. The fact that unease is expressed over ministers appearing to deliberately side-step the use of the 2005 Act when it suits is a major cause for concern. In the case of the IICSA, public pressure was sufficient to force a change but, in that case, the calls went further. A further, highly contentious issue was the identity of the chair to the inquiry.

78 See Cabinet Secretary Advice Note (n 16).

79 See Peter Wanless and Richard Whittam, 'An Independent Review of Two Home Office Commissioned Independent Reviews Looking at Information Held in Connection with Child Abuse from 1979–1999' (11 November 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/372915/Wanless-Whittam_Review_Report.pdf>.

The chair

Significance

The choice of chair is critical to the success of a public inquiry. If the public is to have confidence in the inquiry process and its recommendations it must have confidence in the chair. The public identifies with the chair; often, for example, with the Leveson and Chilcot Inquiries, an inquiry is identified by, and inextricably linked with, the identity of its chair.

The majority of inquiries are chaired by a judge,[80] retired judge, or senior member of the legal profession,[81] chosen for their experience and expertise in assessing and handling large volumes of evidence, their publicly recognised independence and their proven integrity and authority. Others are chaired by senior civil servants,[82] or others outside of the legal professions,[83] known for their standing and expertise in the subject matter of the inquiry, or in the operation of public sector bodies, or where the highly politically sensitive nature of the inquiry means it is not appropriate for a judge to be involved.[84] The inquiry may be undertaken by the chair alone, or with one or more other members forming an inquiry panel. In addition to sharing the workload, panel members may bring a diversity of professional backgrounds, expertise, knowledge and perspective. The existence of a panel can also enhance public confidence in the fairness of the process and add credence to the inquiry's conclusions.[85]

Timing

Despite the choice of chair being critical to the success of the inquiry, the appointment process and announcement is often carried out in alarming haste. Under s 6 of the 2005 Act, when convening a 2005 Act public inquiry, the minister must make a statement to Parliament to that effect, 'as soon as is reasonably practicable'.[86] That statement must also specify who has been appointed as chair and whether the minister has, or proposes to appoint, any other members to the panel.[87] Mounting public pressure to announce the establishment of a public inquiry, and the fact that both statements must be made at the same time, means the selection process may take place over a very short period of time with very little time for deliberations and, at times, an astonishingly short amount of time for discussions with the proposed chair in advance of the announcement. Sir Robert Francis, the chair of the Mid Staffordshire Inquiry, in his evidence to the HL Select Committee, stated that he was phoned up without warning and asked to decide within an hour whether to accept the appointment 'because the Minister was in a hurry to make an

80 Which requires consultation with the Lord Chief Justice, s 10(1) 2005 Act, which is due to be changed to requiring consent rather than consultation. See Ministry of Justice (n 12) para 40.

81 Such as the Bloody Sunday, Hamill, Al Sweady, Azelle Rodney and Leveson Inquiries.

82 For example, the Butler and Chilcot Inquiries.

83 For example, the Foot and Mouth and Climbié Inquiries.

84 Lord Woolf, cited in Public Administration Select Committee (n 33) para 187.

85 Sarah Garner, Peter Jones and Isabelle Mitchell, 'Public Inquiries: Appointments' *Insight* (18 June 2013) available via Westlaw.

86 2005 Act, s 6(1).

87 Ibid s 6(2).

announcement'.[88] Sir John Chilcot had 10 minutes in which to accept the invitation to chair the Inquiry into the Iraq conflict.[89]

The 2014 Select Committee Report stated:

> We are not saying that ministerial haste has ever resulted in the appointment of a chairman whose appointment might subsequently have been regretted, but there is much to be said for a process which is less hurried and more transparent . . . We believe the fact of the inquiry and the name of the chairman should not necessarily be the subject of the same statement, and we recommend that section 6(2) should be amended accordingly.[90]

This recommendation was accepted by the government,[91] but the relevant legislation has yet to be amended. Once in force, it will allow the minister greater time in which to consider the appointment and hear representations from victims, survivors and their families and other interested parties. The extent to which this will transpire in practice remains to be seen.

Independence

The chair must be impartial[92] and that impartiality must be beyond doubt in order to command public trust in the chair and the inquiry itself. A difficult balance needs to be struck between identifying an individual with sufficient knowledge, expertise and interest in the issues and them being so close to the subject matter of the inquiry as to give rise to a conflict of interest.[93] Once again, neither the decision-making process nor the criteria applied in any given case are in the public domain, limiting the scope for public scrutiny. Draft Cabinet Office Guidance,[94] which is non-binding, states only that, when making an appointment:

> . . . the Minister may seek advice from professional, regulatory or other bodies in the appropriate field . . . the department should not approach any individual until the Minister has been consulted . . . The Lord Chancellor and Secretary of State should be consulted where there is a proposal to appoint a judge or legal officer.[95]

Advice is likely to be sought from people who have handled inquiries and dealt with the proposed chair in the past. In politically contentious matters, the Prime Minister would be consulted.[96]

This is in sharp contrast, however, to the appointment of judges where the Judicial Appointments Commission (JAC), an independent public body, is responsible for selecting candidates to recommend for judicial appointment. The JAC includes lay members, who provide an independent voice and ensure a public input into the appointment, distancing the process from political influence. The Lord Chancellor's role

88 Robert Francis QC, oral evidence taken before the HL Select Committee (30 October 2013) (n 20) Q205.

89 Oral evidence taken before the Foreign Affairs Select Committee (4 February 2015) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html>.

90 HL Select Committee (n 11) para 114.

91 Ministry of Justice (n 12) para 39.

92 2005 Act, s 9.

93 See Garner et al (n 85).

94 Cabinet Office, *Inquiries Guidance: Guidance for Inquiry Chairs, Secretaries and Sponsor Departments* <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf>.

95 With reference to the Cabinet Office, *Ministerial Cod*e, May 2010, para 4.11.

96 Shailesh Vara MP, oral evidence taken before the HL Select Committee (11 December 2013) (n 20) Q332.

in the appointment of individual members of the judiciary is deliberately limited to avoid the risk of 'politicising the appointments process' and 'undermining the independence of the judiciary'.[97] As a result, particularly where the chair is not a member of the judiciary, the lack of independence of the current process, coupled with its lack of transparency, makes it vulnerable to allegations of politically motivated appointments and raises concern that those appointed lack sufficient independence from the executive and political establishment.

The lack of openness to the decision-making process may also give rise to wider concerns over independence. Shortly after the appointment of Lord Leveson,[98] a senior member of the judiciary, to the position of chair to the Inquiry into the Culture, Practice and Ethics of the Press, reports emerged of Lord Leveson having recently attended two parties at the home of Rupert Murdoch's son-in-law. Questions were raised about his ability to be seen to be independent. Chris Bryant, the Labour MP who had been campaigning on phone-hacking, said: 'If this had been known from the start it might be fine – as with every step, transparency has come by dragging it out of them.'[99]

Links with the establishment were a major cause for concern when the Independent Panel Inquiry into Child Sexual Abuse was convened in 2014. The Home Secretary announced that the panel chair would be Baroness Butler-Sloss,[100] the first female Lord Justice of Appeal and, until 2004, the highest-ranking female judge in the UK, and an expert in the field of child protection and the chair of the Cleveland Child Abuse Inquiry. From the time of the announcement, however, many expressed concerns over Baroness Butler-Sloss's links to the establishment, as the sister of the former Lord Chancellor Michael Havers, Attorney General in the 1980s, and over his role in previous investigations. Whilst not questioning Baroness Butler-Sloss's integrity, there was concern that she would be seen as part of the establishment, which would undermine public confidence. Following intense pressure from victims groups, MPs and the media,[101] within a week Baroness Butler-Sloss had stepped down.

Two months later it was announced that Fiona Woolf, a solicitor who had held a number of senior positions including President of the Law Society and Lord Mayor of London, had been appointed as the new chair.[102] Fiona Woolf soon faced calls to resign, from survivors groups and MPs,[103] and there was widespread media coverage over personal links with the former Home Secretary, Lord Brittan, who was Home Secretary in the 1980s and who was likely to be called to give evidence over his handling of allegations of abuse during his time in office.[104]

97 See Select Committee on the Constitution, *Judicial Appointments* (HL 2010–2012, 272) paras 26 and 139.

98 Lord Justice of Appeal.

99 Christopher Hope, 'Phone Hacking Inquiry Judge Attended Parties at Home of Rupert Murdoch's Son-in-law' *The Telegraph* (London, 22 July 2011) <www.telegraph.co.uk/news/uknews/phone-hacking/8656131/Phone-hacking-inquiry-judge-attended-parties-at-home-of-Rupert-Murdochs-son-in-law.html>.

100 HC Deb 9 July 2014, vol 584, col 20WS.

101 Such as Mary Dejevsky, 'Elizabeth Butler-Sloss is Too Close to the Establishment to Lead this Abuse Inquiry' *The Guardian* (London, 10 July 2014) <www.theguardian.com/commentisfree/2014/jul/10/elizabeth-butler-sloss-establishment-child-abuse-inquiry>.

102 HC Deb 5 Sep 2014, vol 585, col 28WS.

103 Such as Matthew Weaver and Fiona Mason, 'Child Abuse Inquiry: Woolf Pressed to Quit over "Dinner Parties with Brittan"' *The Guardian* (London, 22 October 2014) <www.theguardian.com/society/2014/oct/22/child-abuse-inquiry-fiona-woolf-dinner-parties-lord-brittan>.

104 Lord Brittan died on 21 January 2015, prior to being called to give evidence before the inquiry.

The government stood by the appointment. However, after mounting pressure, and survivors' pledges to boycott an inquiry with her in the chair,[105] Fiona Woolf resigned, recognising she did not command the survivors' confidence. It was subsequently announced[106] that the original panel would be disbanded and Justice Lowell Goddard, a New Zealand High Court Judge with no ties to the UK establishment nor persons likely to be investigated, would chair a new 2005 Act inquiry, the IICSA, assisted by panel members.[107] As the Home Secretary stated when first announcing the inquiry, 'With allegations as serious as these, the public needs to have complete confidence in the integrity of the investigation's findings . . . '[108]

It is clear that public pressure can bring sufficient weight to bear to influence the appointment and the government must listen to the concerns of the public. However, as argued above, public pressure from individuals and pressure groups via the media, social media and the lobbying of MPs is an inconsistent form of accountability. Further, there have been words of caution over the nature of public consultation. Sharon Evans, one of the original panel members of the Independent Panel Inquiry into Child Sexual Abuse, warned against listening to the vocal minority 'engaging in personal attacks against panel members' instead of the majority of abuse survivors.[109] Baroness Butler-Sloss cautioned against giving victims too much influence over who chairs an inquiry and facing the risk of having a chair without the necessary experience for the role.[110] The chair[111] appointed must be seen to be impartial and independent in all respects: independent from the government and the executive, but also independent from survivors, their families, NGOs, pressure groups and the media.

Terms of reference

Consultation

The final power exercised by a minister when convening a public inquiry is the power to set the terms of reference. The terms of reference are a crucial factor in determining an inquiry's ambit, length, complexity, cost and ultimately its success. An inquiry may only investigate those matters that are covered by its terms of reference.[112] If the terms of reference are too wide, it may result in unnecessary cost and delay, and may introduce extraneous questions which merely confuse the essential issues.[113] If the terms of reference are too narrow, it may appear that the government is attempting to deflect criticism or avoid difficult political issues by restricting the scope of the inquiry.

105 David Barrett, 'Abuse Victims Pledge to Boycott Fiona Woolf inquiry' *The Telegraph* (London, 31 October 2014) <www.telegraph.co.uk/news/uknews/law-and-order/11200795/Abuse-victims-pledge-to-boycott-Fiona-Woolf-inquiry.html>.

106 HC Deb 12 March 2015, vol 594, col 40WS.

107 Professor Malcolm Evans OBE; Ivor Frank; Professor Alexis Jay OBE; and Drusilla Sharpling CBE. The new panel, unlike its predecessor, does not include victims of child sexual abuse, but is supported by a consultative panel including victims and survivors, thus strengthening its perceived independence.

108 HC Deb 7 July 2014, vol 755, col 54.

109 Mark Watts, 'Theresa May to Scrap Panel for Inquiry into Child Sex Abuse' *ExaroNews* (London, 20 December 2014) <www.exaronews.com/articles/5438/theresa-may-to-scrap-panel-for-inquiry-into-child-sex-abuse>.

110 'Butler-Sloss Cautions over Victims' Role in Abuse Inquiry' *BBC News* (London, 31 December 2014) <www.bbc.co.uk/news/uk-30640879>.

111 And panel members.

112 2005 Act, s 5(5).

113 See Public Administration Select Committee (n 33) para 74.

The minister convening an inquiry is responsible for setting the terms of reference[114] and may at any time amend them if he or she considers that the public interest so requires.[115] Whilst Parliament must be informed of the terms of reference of a statutory inquiry,[116] it has little involvement in determining the terms of reference of either statutory or non-statutory inquiries.

In contrast to the previous decisions made when convening a public inquiry, when setting the terms of reference of a statutory inquiry there is a legal requirement for the minister to consult. Section 5(4) of the 2005 Act provides: 'Before setting out or amending the terms of reference of a statutory inquiry, the minister must consult the person he proposes to appoint, or has appointed, as chairman.' However, in practice, the extent of the consultation is often extremely limited. There is often strong public and political pressure to announce an inquiry and its terms of reference very quickly. Consultation frequently takes place before the chair has had chance to undertake more than a very cursory consideration of very limited material and before the chair is well placed to provide meaningful input.[117] In evidence to the HL Select Committee, Sir Robert Francis spoke of the 'panic' when a public inquiry is announced with terms of reference stating: 'A chairman is found at an hour's or even less notice and given some terms of reference, which of course he is "consulted on" at a point where he has no more information than he has read in the newspapers about the subject.'[118] The minister may subsequently rely on the power to amend terms of reference, but that brings with it the risk of undermining work that has already been undertaken or creating a lack of clarity that exposes the inquiry to judicial review challenges.

As with the announcement of the chair, for statutory inquiries, the terms of reference have to be announced in the same statement to Parliament as the announcement of the inquiry itself.[119] The 2014 Select Committee Report recommended that a short 'cooling-off' period be allowed after an announcement of an inquiry and draft terms of reference, while the chair familiarises him or herself with the material and consultation takes place, with the final terms of reference being the subject of a separate statement.[120] In its response, the government rejected this suggestion, stating 'terms of reference and any amendments to them, are invariably discussed and agreed with the chair' adding 'it is neither practical nor sensible for there to be two sets of terms of reference in the public domain'.[121]

Whilst it may be possible in some cases to clearly define the terms of an inquiry from the outset, there will be many instances where that is not the case. It is argued that the government's response fails to address the reality of the situation, which is that, due to time pressure, consultation that currently takes place at this stage is often merely perfunctory and discussion over the final terms of reference continue once the chair has

114 2005 Act, s 5(1)(b) for inquiries convened under the 2005 Act.

115 Ibid s 5(3) for inquiries convened under the 2005 Act.

116 Ibid s 6(1).

117 Jason Beer QC, oral evidence before the HL Select Committee (16 October 2013) (n 20) Q121; Robert Francis QC, written evidence para 42; and Julie Bailey oral evidence (23 October 2013) Q160.

118 Ibid Robert Francis QC, oral evidence (30 October 2013) Q215.

119 Inquiries Act 2005, s 6(2).

120 Also recommending that the consent of the chair be required to set or amend terms of reference, rather than the current requirement to consult: HL Committee (n 11) paras 144–46.

121 Ministry of Justice (n 12) paras 52–53.

had the opportunity to familiarise him or herself with the material.[122] Relying on powers to amend risks undermining public confidence in the process and exposing it to legal challenge. There is a strong argument that the process would be better served by regularising the position by a change to the legislation to allow for initial draft, or indicative, terms of reference to be announced, with final terms of reference being the subject of a separate statement following a short period of meaningful consultation.

Influence

In addition to consultation with the chair, witnesses before the HL Select Committee also called for the minister to be required to have regard to, though not be bound by, consultation with core participants[123] and the wider public, who may have valuable input on the formulation of the terms of reference.[124] Currently, whether statutory or non-statutory, practice can differ greatly between inquiries. The Foot and Mouth and Detainee Inquiries, both non-statutory inquiries, did have a period of consultation for three months before the Inquiry started, during which there were discussions between the chair and government representatives, as well as informal consultation with relevant stakeholders.[125] The Chilcot Inquiry, also non-statutory, had no consultation at all.[126] The core participants to the Al Sweady Inquiry, a statutory inquiry, were given an opportunity to feed into the terms of reference and the chair invited comments on the terms of reference at the outset of the proceedings.[127] In contrast, there was no consultation exercise on the Mid Staffordshire Inquiry, a statutory inquiry, because of the time pressure under which the inquiry was operating.[128]

Whilst not going so far as including 'the wider public', the 2014 Select Committee Report recommended that interested parties, particularly victims and victims' families, should be given an opportunity to make representations about the final terms of reference, 'which may have the additional benefit of avoiding judicial review of the terms of reference, as happened with the Robert Hamill Inquiry'.[129] The government accepted the recommendation in part, with the caveat that 'this proposal would not be helpful in cases where the Government wished to respond swiftly to an issue or issues of public concern and it would be potentially problematic in cases where there are multiple victims',[130] leaving the position open to varied interpretation. As a result, the potential for terms of reference to be decided in undue haste, without the benefit of wider consultation, remains. A change in legislation allowing final terms of reference to be announced in a separate statement to the announcement of the inquiry, after a period of

122 This response also raises issues of timing. As discussed above, the government has accepted the recommendation that the announcement of the identity of the chair may form the subject of a later statement. As a result there may be no chair available for consultation over the terms of reference at the time the inquiry is announced.

123 A few interested parties with a particularly close connection with the work of the inquiry may be formally recognised by the inquiry and designated a privileged status, known as 'core participant status', which is the primary means of direct access to the inquiry process. The term 'core participants' is used in statutory inquiries convened under the Inquiries Act 2005. In non-statutory inquiries the terms 'interested parties' or 'full participants' may be used.

124 See, for example, Eversheds written evidence to the HL Select Committee (n 20) para 12; and Robert Francis QC oral evidence (30 October 2013) Q215.

125 Ibid Alun Evans, oral evidence (16 October 2013) Q131.

126 Oral evidence taken before the Foreign Affairs Select Committee (n 89) Q3.

127 Susan Bryant, oral evidence taken before the HL Select Committee (6 November 2013) (n 20) Q238.

128 Robert Francis oral evidence taken before the HL Select Committee (30 October 2013) (n 20) Q215.

129 HL Select Committee (n 11) paras 150–51.

130 Ministry of Justice (n 12) para 55.

meaningful consultation with the chair, would also allow time for consultation with interested parties and, if appropriate, the wider public.

Consultation and engagement with core participants and the wider public may also assist with managing expectations. In evidence to the HL Select Committee, Peter Riddell, a panel member of the Detainee Inquiry,[131] spoke of the difficulties and frustrations over the inquiry's terms of reference. During that inquiry, there was a clash of expectations between the panel's focus on the awareness of the British government and intelligence agencies of alleged mistreatment of British detainees and the expectations of the detainees and NGOs that there would be inquiries into allegations of torture.[132] This led ultimately to a boycott by the detainees, their lawyers and NGOs. During the same evidence session, Karl Mackie on behalf of CEDR[133] suggested:

> . . . a one-month period of consultation, particularly with key potential stakeholders in the inquiry subject matter, to consider how to draft terms of reference that match the needs of the parties and create legitimate expectations of what the inquiry process could deliver rather than have a problem of expectations at the end of the process . . .[134]

The IICSA illustrates how public pressure outside a formal consultation process may, on occasions, be sufficient to influence or force the amendment of an inquiry's terms of reference. The terms of reference for the original non-statutory Independent Panel Inquiry into Child Sex Abuse set out the scope of the inquiry, including the statement that the inquiry panel would 'cover England and Wales' and 'consider these matters from the 1970s to the present'.[135] When, in 2015, in response to sustained public pressure and the resignation of two chairs to the inquiry, the panel was disbanded and a new statutory inquiry convened, the Home Secretary also reviewed the terms of reference in light of feedback from survivors. This resulted in a widening of the scope of the inquiry, including the removal of any cut-off date for the work of the inquiry and liaison to take place between the inquiry and its counterparts elsewhere in the UK.[136] However, as seen above, such change is dependent on well-mobilised groups building a momentum of publicity and support, sufficient to trigger engagement of the minister, and is no substitute for a formal process of consultation.

Whether through formal or informal processes, public consultation must be carefully managed. Not all public concerns can or will be addressed in the final terms of reference, which may result in the public feeling ignored. Clear communication of what is and is not to be considered by the inquiry is essential, as is the extent to which an inquiry is or is not required to make findings of responsibility and accountability.[137]

131 <www.detaineeinquiry.org.uk>

132 Peter Riddell, oral evidence taken before the HL Select Committee (17 July 2013) (n 20) Q59.

133 Centre for Effective Dispute Resolution.

134 Dr Karl Mackie, oral evidence taken before the HL Select Committee (17 July 2013) (n 20) Q59.

135 <http://data.parliament.uk/DepositedPapers/Files/DEP2014–1359/Terms_of_reference_CSA_Inquiry.pdf>

136 HC Deb 12 March 2015, vol 594, col 41WS. As child protection is a devolved matter, other jurisdictions in the UK will look at the issues within their own geographical remit. However, joint protocols will be set up with counterpart inquiries in Scotland, Northern Ireland and in Jersey to ensure that information can be shared and lines of investigation can be followed across geographical boundaries.

137 See CEDR, 'Inquiries into Inquiries Outcome of Symposium and Proposed Next Steps' (available from CEDR) 24 April 2013.

The Chilcot Inquiry[138] has been the subject of much criticism, including for its length and the delay in publishing its report. One of the difficulties facing the inquiry was that its terms of reference are so broad. The inquiry was set up to consider Britain's involvement in the Iraq conflict between mid-2001 and July 2009, from the run-up to the conflict and the subsequent military action to its aftermath. When speaking to the BBC, Lord Butler[139] stated that governments, when setting up inquiries of this sort, 'try to satisfy everybody . . . They do not want to be seen to be restricting anything, which can, or does, lead to great problems.' He concluded that, when pressing for a public inquiry with a wide remit, people need to be mindful of unforeseen consequences. There is the potential for complainants to press for an inquiry to be so far-reaching it may not be manageable and they may be frustrated in the results sought.[140] In the case of the IICSA, the significant widening of the terms of reference in light of feedback from the survivors, whilst welcomed by those pressing for change, will also result in the survivors, who in many cases have already waited decades to be heard, facing a substantially longer and much more drawn-out process.

Conclusion

It is essential that the public has confidence and trust in the independence and integrity of an inquiry if it is to command confidence in its process and ultimately its findings. The minister is afforded considerable discretion over whether or not to convene a public inquiry, the extent to which any inquiry will be heard in public, its powers, the identity of its chair and the scope of its terms of reference. The way in which that discretion is exercised has a significant bearing on the nature and public perception of any subsequent inquiry.

Concerns are frequently raised about the motivation behind the exercise of the ministerial discretion. One of the key roles of a public inquiry is to hold those in authority to account and concern over conflicts of interest will inevitably arise where the minister exercising that discretion is a member of the establishment and is often the minister of the department, or a member of the government, that is itself under scrutiny. Irrespective of the extent to which concerns of this nature are justified, they undermine public confidence in the public inquiry process.

There have long been complaints over the lack of openness and transparency to the decision-making process, which exacerbates those concerns and reduces scope for public accountability and scrutiny. There is a lack of any formal structure for interested parties and the wider public to make representations to ministers and there are practical limitations to judicial review as a safeguard. The IICSA illustrates that public pressure can be sufficient to force a minister to revisit those decisions, but reliance on public and media pressure, in the absence of any formal process for representations or consultation, can give rise to inconsistent approaches between inquiries and to public uncertainty.

Whilst the Government Response to the 2014 Select Committee Report accepted some recommended changes to the decision-making process, to make it more transparent and open to public engagement, many recommendations were rejected. It is argued, an opportunity to improve public confidence and trust in the public inquiry process was missed. Publishing broad criteria or guidance by which to justify a decision whether or not to convene an inquiry, and the extent to which an inquiry will be heard in public, less haste and greater transparency to the appointment process for the chair, a presumption

138 Iran Inquiry

139 Chair of the Review of Intelligence on Weapons of Mass Destruction.

140 Lord Butler, 'The World at One' (BBC Radio 4, 23 January 2015) <www.bbc.co.uk/programmes/p02hhydk>.

that public inquiries would normally be held under the 2005 Act and greater engagement and consultation with interested parties and the public over the terms of reference of a public inquiry would increase scope for greater public scrutiny and accountability and would go a long way to address many of the concerns expressed. In a 2013 letter from the Home Secretary to the coroner of the Litvinenko Inquest, one of the reasons given for initially refusing to convene a public inquiry into the events surrounding the death of Litvinenko, and possible Russian state involvement, was that:

> An inquest managed and run by an independent coroner is more readily explainable to some of our foreign partners, and the integrity of the process more readily grasped, than an inquiry, established by the Government, under a Chairman appointed by the Government which has the power to see Government material, potentially relevant to their interests, in secret.[141]

It is not, however, only 'foreign partners' who need to understand the public inquiry process and be convinced of its integrity; this applies equally to the UK public as a whole.

141 Letter from The Rt Hon Theresa May to Sir Robert Owen (17 July 2013) <www.litvinenkoinquiry.org/wp-content/uploads/2013/07/130717-HS-to-Coroner-redux.pdf>.

LEGISLATION, TRENDS AND CASES

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Legislation

In need of a fresh start: gender equality in post-GFA Northern Ireland

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Almost 20 years after the 1998 Good Friday Agreement (GFA),[1] evidence suggests that decision-making in Northern Ireland remains a relatively closed process.[2] Despite the pledge of equal participation of women in public life, women have remained largely marginalised in this regard and, in particular, remain systemically excluded from positions of power and influence.[3] The chronic under-representation of women in public life coincides with the development of an increasingly regressive legal and political discourse in respect of women's agency in the legislature and in the courts.[4] Against this backdrop, the number of women elected to the Northern Ireland Assembly (NIA) lags well behind other devolved institutions.[5]

This occurs against an evolving normative international and regional framework[6] which acknowledges that, in the absence of the active participation of women, the goals of equality, development and peace cannot be achieved.[7]

In that context, this brief evaluation of specimen commitments falling within thematic parameters shines a spotlight on the significant failing of Northern Ireland's world-renowned peace process – to address the post-conflict needs of women.

1 The Agreement: Agreement Reached in the Multi-Party Negotiations (NIO Belfast 1998).

2 Assembly and Executive Review Committee, *Report on Women in Politics and the Northern Ireland Assembly* (NIA 2015).

3 Women comprise 19 per cent of chairs of public bodies and 33 per cent of public appointments in total. Women comprise 80 per cent of those in part-time employment. A mere 18 per cent of County Court judges are female and, until two appointments in 2015, there were no female members of the judiciary at more senior rank. There are currently no female permanent secretaries within the Northern Ireland Civil Service and at grade 5 and above only 33 per cent of staff are women. In education, there are no female University Vice Chancellors: Michael Potter, 'Who Runs Northern Ireland? A Summary of Statistics relating to Gender and Power' Research and Information Service Briefing Paper 79/14 (NIA 2014).

4 *Northern Ireland Human Rights Commission v Department of Justice for Northern Ireland* [2015] NIQB 96; NIA, Official Report (Hansard) Wednesday 10 February, 2016, vol 112, no 5, 77–120.

5 Women comprise 48 per cent of the Welsh Assembly and 35 per cent of the Scottish Parliament: Suzanne Breen, 'Record Number of Women MLAs returned to Stormont' *Belfast Telegraph* (Belfast, 9 May 2016).

6 UNSC Res 1325 (31 October 2000) UN DOC S/RES/1325. See also wider WPS agenda, CEDAW General Recommendation No 30 (18 October 2013) CEDAW/C/GC/30.

7 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995 A/conf.177/20 (1995) endorsed by GA Res 50/203, 22 December 1995.

While fractured momentum may be typically observed within peace processes,[8] in the case of Northern Ireland, an unquestioning approach to this rationale risks imparting the impression of 'inevitability'. In so doing, it may serve to obscure or underplay the structural fault-lines which have precipitated periodic crisis and intermittent collapse of the process.

I argue that a forensic analysis suggests that 'routine existential' crises[9] are, in fact, a consequence of sustained regression on fundamental aspects of the 1998 GFA.[10] The application of a 'gender lens' to the process of implementation enables the identification of substantive attrition and claw-back.

Criteria for evaluation

In order to evaluate the Northern Ireland transition, I use an analytical framework synthesised from the work of Bell[11] and Chinkin.[12] Bell posits that peace processes can usefully be disaggregated to reveal three stages; pre-negotiation, framework/substantive and implementation agreements.

Chinkin refines Bell's model, further proposing 'questions of substance' which should frame a gender analysis of framework agreements. Gender analysis must be specifically applied to human rights guarantees, security and political participation.[13] I evaluate 'specimen' commitments made in the GFA within these thematic parameters, as illustrative in assessing the transition from a gender perspective.

Human rights

Parties' affirmation on the 'the right of equal opportunity in all social and economic activity' in the GFA was given expression by s 75 of the 1998 Northern Ireland Act. The s 75 duty was exalted as 'unique and world leading',[14] earning the impressive moniker of 'single most extensive positive duty imposed in the UK'.[15]

The available evidence, however, indicates that the statutory equality duty has not delivered in respect of gendered inequality. Conversely, problems with implementation and regression may have actually compounded discrimination and inequality for the most marginalised women. Critiques of the duty cite institutional resistance as a key impediment. Theories range from the benign – attributing this to an inherently

8 Christine Chinkin, 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring the Participation of Women – A Framework of Model Provisions' Expert Group Meeting (UN Division for the Advancement of Women', 10–13 November 2003) 3.

9 Malachi O'Doherty, 'Stormont Crisis: Why Did Sinn Fein Decide to Vote Against Welfare Bill' *Belfast Telegraph* (Belfast, 20 March 2015).

10 GFA (n 1).

11 Christine Bell, 'Women and the Problems of Peace Agreements: Strategies for Change' in R Coomaraswamy and *D* Fonseka, *Peace Work: Women, Armed Conflict and Negotiation* (Women Unlimited 2005).

12 Chinkin (n 8).

13 Ibid13–26.

14 Colm O Cinneide, *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (Equality and Diversity Forum 2003); Paul Chaney and Theresa Rees, 'The Northern Ireland Section 75 Equality Duty: An International Perspective' Annex A in Eithne McLaughlin and Neil Faris, *The Section 75 Equality Duty: An Operational Review* (NIO 2004).

15 Tanya Barnett Donaghy, 'Mainstreaming Northern Ireland's Participative Democratic Approach', paper presented to the Jubilee Conference of the Australasia Political Studies Association, Australian National University, Canberra 2002.

conservative civil service resistant to innovation[16] – to the more malign – suggestive of tolerance for the promotion of equality further down the food chain, but resistant to implementation at the top.[17] Certainly, when it comes to the decisions with significant resource implications, there is ample evidence of systematic failure to subject policy to full impact assessment. What is beyond dispute is the stark fact that no significant budget lines have been re-profiled or adjusted as a result of identified gender impacts.

Problems with implementation have been further compounded by a reassertion of a controversial community relations paradigm.[18] Section 75(2) of the duty imposes a 'lesser'[19] obligation to have regard for the need to promote good community relations. The common practice of government, to treat as equivalent sub-ss 75(1) and (2) has rendered objective need subservient to a need to maintain good relations and militated against the very type of redistributive action necessary for the delivery of equality in real terms.

Section 75 has also been critiqued on the basis of a failure to be responsive to intersectionality of discrimination in the lives of women and, in particular, its failure to acknowledge the distinct interplay of gender, religious belief and political opinion which exists in Northern Ireland.[20] Evidence of a worsening situation in terms of the intersectionality of women's inequality can be adduced from statistics of housing need in North Belfast. Women most impacted by social housing inequalities are statistically more likely to be lone parents, have less disposable income and less control over family income. They constitute the 'low paid and unofficial labour market'.[21] Catholics represented 73 per cent of those on waiting lists, but only 35.7 per cent of those awarded accommodation, whereas Protestant applicants constituted 26.2 per cent of the waiting lists but represented 64 per cent of those offered accommodation.[22] The stark nature of these statistics has been of sufficient import to draw the attention of the UN Committee on Economic, Social and Cultural Rights.[23] There have been suggestions that non-governmental organisations and women's groups may be consciously avoiding intersecting religious and political inequalities in reports and lobbying as a tactical approach to their own survival.[24] Funding and broad-based appeal may be jeopardised where groups are perceived as divisive, overtly political or departing from the narrative of 'balance'.

Security

The application of a gender lens to issues of women's security in post-GFA Northern Ireland is very revealing.

16 Christopher McCrudden, 'Mainstreaming Equality in Northern Ireland 1998–2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998', Annex B in McLaughlin and Faris (n 14).

17 Martin O'Brien, 'Section 75: A View from the Community and Voluntary Sector' in McCrudden (n 16).

18 See 'Unequal Relations? Policy, the Section 75 Duties and Equality Commission Advice: Has "Good Relations" Been Allowed to Undermine Equality?' Committee on the Administration of Justice (CAJ), May 2013, Belfast.

19 The legislation as drafted is particularly clear that s 75(1) is the primary duty, evidenced by the use of the phrase 'due regard' in opposition to the weaker obligation of 'regard' which is the language of the secondary duty outlined in s 75(2).

20 Eilish Rooney, 'Women's Equality In Northern Ireland's Transition: Intersectionality in Theory and Place' (2006) 14 Feminist Legal Studies 353.

21 Mary Daly, 'Women and Poverty' (Attic Press 1989); Eilish Rooney and Aisling Swaine, 'The "Long Grass" of Agreements: Promise, Theory and Practice' (2012) 12 International Criminal Law 545.

22 CAJ, *Equality in Northern Ireland: The Rhetoric and the Reality* (Shanways 2006); Rooney and Swaine (n 21).

23 Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Combined Fourth and Fifth State Party Report' E/C.12/GBR/CO/5 12 June 2009.

24 Rooney and Swaine (n 21).

Physical security

Arguably one of the most pressing risks to women's physical security and integrity is posed by intimate partner violence (IPV). McWilliams and Ni Aoláin note that IPV can actually increase in the post-conflict setting and may take on particular features as a result of access to legal and illegal weaponry.[25] It is imperative therefore that policy responses to IPV in the post-conflict institutional arrangements are robust and contextualised.

The Tackling Sexual Violence and Abuse Regional Strategy,[26] however, has failed at the most basic level to acknowledge the transitional context and the particularities of the problem it ostensibly seeks to address. It further failed to identify and situate statutory responses within a human rights framework of state obligations. The effect of which, according to McWilliams and Ni Aoláin, was to situate individuals as 'pleaders for protection' rather than bearers of rights and status, as of right.[27]

The strategy's approach to domestic violence as 'irrespective of gender' has led to the capture of other forms of abuse, which can occur in the domestic setting. This composite approach has served to obscure the unequal power dynamics in intimate partner relationships, which form the kernel of the problem.

Legal security

The GFA considered policing and justice in the context of rights, safeguards and equality of opportunity. It commits to the establishment of an independent commission tasked with making recommendations for future policing arrangements.[28] Compositional data indicated that 8 per cent of Royal Ulster Constabulary personnel identified as Catholic and only 13 per cent as female. Female officers were disproportionately over-represented in the part-time reserve and under-represented at senior levels.[29] The Patten Commission report published in 1999, acknowledged the need for seismic compositional change towards representativeness.[30]

Section 46(1) of the Police Act 2000 facilitates 50/50 Catholic/Protestant quotas, whereas s 48 makes provision for a gender action plan aimed at increasing representation. The distinction in the two approaches taken to effect compositional change could hardly be starker. The religious differential was considered of significant political import to necessitate immediate introduction of quotas in order to effect rapid change to critical mass. The issue of unrepresentativeness in gender, however, was not similarly regarded, despite UK obligations under the Convention on the Elimination of all Forms of Discrimination Against Women and a recommendation from the then Equal Opportunities Commission.[31] Upon the expiration of the temporary recruitment

25 Monica McWilliams and Fionnuala Ní Aoláin, 'There is a War Going on You Know: Addressing the Complexity of Violence Against Women in Conflicted and Post Conflict Societies' (2012) 1(2) Transitional Justice Review 2.

26 Tackling Sexual Violence and Abuse: A Regional Strategy 2008–2013 <www.dhsspsni.gov.uk/tackling_sexual_violence_and_abuse_strategy.pdf>.

27 McWilliams and Ni Aoláin (n 25).

28 GFA (n 1) 'Policing and Justice', para 3.

29 Paddy Hillyard, Monica McWillaims and Margaret Ward, 'Reimagining Women's Security: A Comparative Study of South Africa, Northern Ireland and Lebanon' Northern Ireland Gender Audit (Economic and Social Research Council 2006) <www.wrda.net/Documents/NIGenderAudit.pdf>.

30 *A New Beginning: Policing in Northern Ireland. The Report of the Independent Commission on Policing for Northern Ireland* (NIO 1999) recommendation 112, para 14.17, recommendation 121, para 15.10

31 'Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (30 July 2012) CEDAW/C/GBR/CO/7 <www.ohchr.org/EN/hrbodies/cedaw/pages/cedawindex.aspx>; and Hillyard et al (n 29).

measures in 2010, women comprised 25.54 per cent of the Police Service of Northern Ireland and Catholic members made up 29.38 per cent.[32]

Economic security

Commitments made to tackle structural inequalities by law may prove as challenging as commitments made to secure political reform.[33] Nowhere is this better exemplified than in the failure of the British government to establish a Bill of Rights for Northern Ireland.[34]

The Montréal Principles attest that economic, social and cultural rights have a particular significance for women.[35] The principles further acknowledge that women's predisposition to socio-economic deprivation is compounded in conflict and post-conflict settings.[36] With the recognition that civil and political rights are largely justiciable by virtue of the 1998 Human Rights Act,[37] women have the most to gain from the articulation of socio-economic rights within a Bill of Rights.

Following consultation with civic society, the Human Rights Commission, as mandated by the GFA, provided recommendations for a full suite of justiciable rights to constitute a Bill of Rights for Northern Ireland.[38] The specified rights included economic and social rights.[39] The creation of legally enforceable economic and social rights goes right to the core of the pervasive structural inequalities which subordinate women as 'lesser' and in this way have the potential to be truly redistributive. The Northern Ireland Office (NIO) unilaterally rejected the case for economic, social and cultural rights.[40] The British government has since rendered the Northern Ireland Bill of Rights proposal hostage to an emerging debate in Britain, effectively sounding the death knell on the process. Analysis of comments made by state party representatives at the UK examination by the Committee on Economic, Social and Cultural Rights (CESCR) in 2009 are particularly revealing in establishing the policy of the current British government in respect of economic, social and cultural rights as constituting 'mere principles and values' and 'non justiciable'.[41] Indeed, the current British government's commitment to repeal the 1998 Human Rights Act bodes ill for rights enhancement. At this juncture, regression on existing civil and political rights appears more likely.

32 *Police (Northern Ireland) Act, 2000: Review of Temporary Recruitment Provisions* (NIO 2011).

33 McCrudden (n 16) 520.

34 GFA (n 1) 'Rights, Safeguards and Equality of Opportunity: Human Rights', paras 4 and 5.

35 'Montréal Principles on Women's Economic, Social and Cultural Rights' (2004) 26 Human Rights Quarterly 760, 761.

36 Ibid.

37 Human Rights Act 1998.

38 Northern Ireland Human Rights Commission, 'Summary: A Bill of Rights for Northern Ireland' (Advice to the Secretary of State for Northern Ireland 2009).

39 Over 90 per cent of those polled believed it was 'very important' that a Bill of Rights contained economic and social protections: 'Submission from the Human Rights Consortium to the Northern Ireland Affairs Committee' May 2009 <www.publications.parliament.uk/pa/cm200809/cmselect/cmniaf/memo/billofrights/ucm0602.htm?>.

40 NIO, 'A Bill of Rights for Northern Ireland: Next Steps. A Consultation Paper' (Belfast November 2009).

41 CESCR, Concluding Observations E/C12GBR/CO/5 12 June 2009.

Political participation

The GFA affirms the right of women to 'full and equal political participation'.[42] In contrast to the myriad of provisions aimed at ensuring representation of the different political traditions, it contains no provisions which would give effect to this commitment.

Chinkin acknowledges that a peace agreement may provide for power-sharing, but be silent about women's participation in political structures. She observes, however, that 'provision for gender balance in the provisional administration will set the scene for the long term political participation of women'.[43] This view is validated by Galligan's observation that the early pattern of women's exclusion here has become more difficult to address as the Assembly has bedded down.[44] The absence of legal quotas from the framework agreement has been a defining structural inhibitor which has in practice resulted in a 'catch 22' situation where, unless more women are elected to the Assembly, it is unlikely to pass legislation to promote greater participation.[45] Galligan notes that 'a more diverse legislature generates a more inclusive political agenda: the gendered impact of economic, health, family and educational policies are among the sectors that become open to debate leading to gender attuned policy outcomes'.[46] The Sex Discrimination (Election of Candidates) Act 2002 enables parties to voluntarily adopt measures to boost women's share of candidacy. The fact that women comprised only 28 per cent of those returned on foot of the 2016 Assembly Election indicates that parties have failed to do this in any meaningful way.

Acknowledging then the paucity of female representation in the political institutions and public life here in general, the concept of a Civic Forum provided an unparalleled opportunity to ensure that women could impact on the decision-making process. It was envisaged that representatives from a wide range of sectors, including the women's sector, would sit alongside the Assembly functioning as a consultative mechanism on social, economic and cultural matters.

The Civic Forum was suspended in 2002 with the devolved institutions. Unlike the other institutions provided for by the GFA, the Civic Forum was never re-activated. The recent 'Fresh Start' Agreement makes provision for a 'compact civic panel' of six members. Appointed directly by the First and Deputy First Ministers, they will be tasked 'to consider specific issues relevant to the Programme for Government'.[47] This circumscribed 'intermediary' model is far removed from the model of participative governance envisaged by the GFA. Further and compelling evidence of the exclusion of women from the decision-making process at an institutional level is illustrated by the profile of the North's most senior civil servants; permanent secretaries who are exclusively male.[48]

42 GFA (n 1) s 6, para 1.9.

43 Chinkin (n 8).

44 Yvonne Galligan, 'Women in Politics and the Northern Ireland Assembly' Knowledge Exchange Seminar Series, Assembly and Executive Review Committee (NIA 2015) 1 <www.niassembly.gov.uk/globalassets/documents/official-reports/assembly-executive-review/2013-2014/140624_womeninpoliticsandtheniassemblyprofyvonnegalligan.pdf>.

45 Margaret Ward, 'Gender, Citizenship and the Future of the Northern Ireland Peace Process' (2005) 40(3/4) Eire-Ireland 1, 15 <http://www.cain.ulst.ac.uk/issues/women/docs/ward05peaceprocess.pdf>.

46 Galligan (n 44).

47 A Fresh Start: The Stormont Agreement and Implementation Plan (Northern Ireland Executive 17 November 2015).

48 S McCaffery and C Campbell, 'The Civil Servants Helping to Run Stormont's New Administration' thedetail <www.thedetail.tv/articles/the-civil-servants-helping-to-run-stormont-s-new-administration-f538097b-f9df-4703-9d53-24ec9c60b361>.

UNSCR 1325

A further obstacle to women's political participation has been the failure to implement UNSCR 1325 Women, Peace and Security (WPS). The resolution formally acknowledges women's right to participate in all aspects of conflict resolution and peace-building. The British government does not regard the conflict here as having met the definition of 'armed conflict' necessary to implement UNSCR 1325. As a consequence, despite being a society in transition from conflict, Northern Ireland has not been incorporated within the British government's National Action Plan.

A Westminster inquiry established to look at the implementation of the resolution received testimony from women which revealed that pressure was being applied to women at community level not to 'rock the boat'.[49] It was repeatedly put to the panel that in the absence of 'appropriate and robust' interventions, regression was inevitable.[50]

The Committee for the Elimination of Discrimination Against Women has expressed concern at the low representation of women in the post-conflict process as a consequence of failure to implement UNSCR 1325 in Northern Ireland.[51] By virtue of its innovative General Recommendation 30 on Women in Conflict Prevention, Conflict and Post Conflict Situations, it has offered the prospect of fusing the UN Security Council WPS Agenda with its own periodic reporting mechanisms in a way which does not directly engage international humanitarian law.[52]

Conclusion

The Northern Ireland transition was distinct from the majority of international peace processes in that women were included in the initial phases and, as a result, were able to impact upon the nature of the negotiation process and framework agreement in ways which yielded potentially far-reaching equality and human rights commitments. Those commitments, however, have failed to be consolidated in the process of implementation which has followed. At each successive stage, the implementation process has become more exclusive and the agenda has narrowed considerably, largely at the expense of those measures with inherent transformative potential.

While power-sharing and consociational arrangements undoubtedly provide stability in transitions from violent conflict, the Northern Ireland experience suggests that they may also constrain deeper aspects of political transformation.[53] Brown and Ni Aoláin observe that 'while power sharing models offer the illusion of a transformed political landscape, in practice, for women the patterns of exclusion function in deeply similar ways'. Women's demand for equality of status has been largely sidelined by politicians and civil servants, who continue to prioritise central power issues and maintaining co-

49 Elizabeth Law and Ann Marie Gray, 'The Politics of Defining "Armed Conflict" in Northern Ireland' Open Democracy (26 June 2014) <www.opendemocracy.net/5050/elizabeth-law-ann-marie-gray/politics-of-defining-armed-conflict-in-northern-ireland>.

50 Ibid.

51 Committee on the Elimination of Discrimination Against Women, 'Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland' CEDAW/c/GBR/CO/7 30 July 2013.

52 General Comment on Women in Conflict Prevention, Conflict and Post-Conflict Situations, 18 October 2013 CEDAW/C/GC/30 <www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>.

53 Kris Brown and Fionnuala Ní Aoláin, 'Through the Looking Glass: Transitional Justice Futures through the Lens of Nationalism, Feminism and Transformative Change' (2014) International Journal of Transitional Justice 1–23.

operation between the two main Nationalist/Unionist blocs. Since the GFA, there have been a succession of further negotiations and agreements. Each of these agreements has been precipitated by political crises arising from outstanding commitments and/or allegations of default. Issues have included the impasse over the transfer of policing and justice functions, allegations of armed group activity and problems within the power-sharing architecture.[54] Ongoing default in respect of the key equality and human rights provisions has not, of itself, been regarded as sufficiently important to precipitate a crisis within the Stormont body politic. On the contrary, in each successive negotiation since 1998, equality and human rights elements have been eroded with consistency and power issues aggrandised.

The Stormont House Agreement last January collapsed all of the GFA commitments in respect of rights, safeguards and equality of opportunity into one catch-all, generic paragraph.[55]

The attrition of inclusivity has eventuated in a process with questionable legitimacy. In this context, issues of culture, rights and legacy will remain pernicious in the absence of a gender-inclusive process which is grounded firmly in principles of human rights, substantive equality and governance. Eighteen years on from 1998, the promise of the 'full and equal participation of women' may now be even more elusive than it was then.

54 A Fresh Start (n 47).

55 Para 69, Stormont House Agreement: 'Noting that there is not at present consensus on a Bill of Rights, the parties commit to serving the people of Northern Ireland equally, and to act in accordance with the obligations on government to promote equality and respect and to prevent discrimination; to promote a culture of tolerance, mutual respect and mutual understanding at every level of society, including initiatives to facilitate and encourage shared and integrated education and housing, social inclusion, and in particular community development and the advancement of women in public life; and to promote the interests of the whole community towards the goals of reconciliation and economic renewal.'

NILQ 67(2): 241–50

Trends and innovations in the market for legal services

Strategies for managing change and the use of paraprofessionals: a cross-sector study for the benefit of post-LETR providers of legal services

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PART TWO: THE LEGAL SERVICES SECTOR AND THE SHARED MANAGEMENT AGENDA

Introduction

The Legal Education and Training Review (LETR) Report[2] contemplates the nature of legal services and seeks to establish a framework to support and facilitate provision of these services. The market is experiencing 'a time of unprecedented change with consumer demands, technology and the regulatory system fundamentally changing the way that legal services are delivered'.[3] One essential feature of the framework will be how providers of legal services will manage this change and how they can best prepare their managers for that role.

This is not an issue faced only by lawyers. Other sectors have experienced an equally significant change, particularly in the public sector. This two-part paper asks whether the experience of management in the public sector can inform the current debate on management in the legal services sector (LSS). Part One[4] proposed the authors' theoretical model, which recorded their observations that change management in the public sector can be categorised into three strategies. Part Two considers the recent history of the LSS and finds that the changes faced resonate with those already experienced in the public sector. Through this cross-sector analysis, the papers reveal that there exists a shared management agenda, which may not otherwise have been readily apparent. Part 2 concludes by articulating clearly this shared agenda, with the aim of engaging stakeholders within the LSS, informing their debate as to how to implement and manage change and having impact by preventing them from reinventing the proverbial wheel.

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2 LETR Independent Research Team, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR 2013).

3 SRA, *Training for Tomorrow: Ensuring the Lawyers of Today Have the Skills for Tomorrow* (Solicitors Regulation Authority 2013).

4 C Shephard and I A Todd, 'Strategies for Managing Change and the Use of Paraprofessionals: A Cross-Sector Study for the Benefit of Post-LETR Providers of Legal Services, Part 1' (2016) 67(1) Northern Ireland Law Quarterly 99.

The theoretical model

Students of business administration will be familiar with the standard theoretical models of managing change. As few in the LSS will be familiar with those models, the theoretical model from Part One[5] is replicated in Table 1.

Table 1: Strategies observed in public sector management

1	Provide the service as before and meet every imperative for efficiency by requiring highly qualified staff to work harder
2	Substitute paraprofessionals for professionals
3	Substitute capital for labour

The conclusions of Part One

Part One concluded that, in the further education (FE) and NHS sectors, Strategy One had proven unfeasible. Both sectors were committed to Strategies Two and Three. The management agenda was to focus on the role of paraprofessionals (in particular, that they become less averse to risk to secure institutional objectives) and on the potential for capital deployment and development. It revealed a genuinely shared agenda across these sectors.

The legal services sector

This second part considers whether that shared agenda is confined to the public sector or whether it extends to the critically important sector of the LSS. How has the LSS sought to improve efficiency? Are Strategies Two and Three evident in the LSS and, if so, are the professionals and managers in the sector faced with the same shared management agenda as are managers in the public sector?

In no sector is the role of the professional and the paraprofessional being more openly debated than in the LSS. The LETR Report:

> . . . highlights the emergence of a variety of new 'non-legal', hybrid and technician roles that are being developed within both conventional law firms and alternative business structures as well as the growing number of paralegal roles and the blurring of boundaries between the roles of the qualified solicitor and others directly involved in the delivery of legal services.[6]

As with the NHS, the use of the term 'paraprofessional' is, itself, problematic. 'Paralegal' remains undefined[7] and Fellows of the Chartered Institute of Legal Executives (CILEx) are quite rightly likely to bridle at any apparent lack of respect for their hard-won professional status.[8] However, to maintain consistency in the comparison of experience across sectors, all service providers who are not solicitors or barristers will be referred to as paraprofessionals (consistent with the approach of describing nurses as paraprofessionals because they are not doctors).

5 Ibid.

6 SRA (n 3) 15.

7 Rebecca Waller-Davies, 'New Register Means Paralegals Will Be Regulated for the First Time as of Today' The Lawyer2B (6 July 2015) <http://l2b.thelawyer.com/issues/l2b-online/new-register-means-paralegals-will-be-regulated-for-the-first-time-as-of-today/>.

8 Alex Aldridge, 'No Bachelors Required' *The Guardian* (London, 21 February 2012) <www.theguardian.com/law/2012/feb/21/training-as-a-legal-executive>.

Strategy Two has been a very significant part of the development of the provision of legal services. CILEx was established in 1963 (though it can be traced back to 1892)[9] and the growing use of its members by law firms has led to significant developments in the status of legal executives. The Legal Services Act 2007 (LSA07) created a pathway for legal executives to become 'authorised persons' undertaking specified 'reserved legal activities' alongside solicitors and barristers.[10] They are eligible to be partners in law firms, advocates and judges (the first legal executive judge being appointed in 2010).[11] It also introduced alternative business structures (ABSs), allowing legal executives to become partners in law firms. These changes offered significant opportunities to paraprofessionals and the LETR Report recognised that the LSA07 had triggered 'a state of rapid development and transition' in the LSS.[12] The UK Commission for Employment and Skills (UKCES) recognised a need to 'up-skill paralegals in transactional work'.[13] A growing paralegal market is emerging in Manchester, where manager-led paralegal teams have been established by Addleshaw Goddard, Berwin Leighton Paisner, Freshfields[14] and DWF.[15]

Not all paralegal workers are, however, qualified legal executives and, again, there is a *hierarchy* of paraprofessionals, with considerable overlap both between paraprofessionals themselves and also between paraprofessionals and professionals. (Paralegal qualifications are also offered by the National Association of Licensed Paralegals and through the Institute of Paralegals (IOP).)

Together, these paraprofessionals have undertaken large volumes of work previously undertaken by professionals. A survey by CILEx revealed that, of those in their survey, most were fee earners and nearly a third were engaged in conveyancing, whilst a further third were engaged in probate/wills and personal injury.[16] This was, at one time, core activity for many solicitors. The LETR Report records that some respondents to their survey described the scale of paralegal use at the high-volume end of the market as 'staggering'.[17] Indeed, the LETR Report pointed to reports of firms where recruitment had been 'substantially' or 'entirely' diverted from training contracts for aspiring solicitors to a common, paralegal route for entry, from which individuals could subsequently be selected for professional training depending on their proven aptitude and the needs of the firm.[18] Recently, some firms have ringfenced training contracts for their own

9 CILEx, 'Why Become a Chartered Legal Executive Lawyer: Facts and Figures' (2016) <www.cilex.org.uk/about_cilex_lawyers/why_be_a_cilex_lawyer.aspx>.

10 CILEx, 'What CILEx Lawyers Do' (2016) <www.cilex.org.uk/about_cilex_lawyers/what_cilex_lawyers_do.aspx>.

11 'CILEx Fellow Becomes Deputy DJ' *New Law Journal* (26 September 2013).

12 LETR Report (n 2) v.

13 UKCES, *Skills for Jobs: Today and Tomorrow: The National Strategic Skills Audit for England* (2010) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/339960/national-strategic-skills-audit-for-england-2010-volume-2-the-evidence-report.pdf>.

14 Rebecca Waller-Davies, 'Freshfields Ransacks Manchester Paralegal Market with Lure of Huge Salary Boost' The Lawyer2B (20 July 2015) <http://l2b.thelawyer.com/freshfields-ransacks-manchester-paralegal-market-with-lure-of-huge-salary-boost/>.

15 'Apprentices Join DWF's Paralegal Academy' (23 September 2011) <www.insidermedia.com/insider/northwest/59321-apprentices-join-dwfs-paralegal-academy>.

16 CILEx, 'Who Are Chartered Legal Executive Lawyers?' (2016) <www.cilexcareers.org.uk/about-us/about-the-role>.

17 LETR Report (n 2) para 3.56.

18 Ibid. 2.136

paralegals.[19] The Law Society: Junior Lawyers[20] claims that in 2012 there were twice as many paralegals (300,000) as solicitors (125,000) and barristers (12,000) combined. Moreover, whilst paralegal numbers[21] are expected to rise by 17 per cent[22] in the next decade, a biennial survey of law firms reveals a less attractive forecast in graduate vacancies.[23]

How is this migration into their work viewed by professionals? Perhaps unsurprisingly, reactions in the LSS closely reflect the broad trend revealed in other sectors. CILEx reported[24] that, when responding to a survey in 2009 in which it was required to identify barriers to career progression, a 'staggering' 35 per cent identified their colleagues' attitudes towards them and their qualification. James O'Connell of IOP finds 'that young lawyers have contradictory attitudes towards paralegals at a time when there are concerns about jobs in the legal profession' and speaks of 'the old prejudices against non-solicitors'.[25] These attitudes are mirrored in comments provided by paralegals to The Lawyer2B's recent Paralegal Healthcheck Survey, on their worst experience as a paralegal, including 'Being treated like something the qualified lawyers have trodden in. Until they need their backside hauling out of the fire in a rush.'[26]

Again, the issue becomes one of distinguishing between paraprofessional and professional work. Every development appears to make the task harder. In 2009, CILEx launched a Graduate Fast Track Diploma to offer law graduates an opportunity to secure CILEx status and, through this, recognition as a lawyer.[27] The introduction of the graduate programme raises, in conceptual terms, a significant issue in terms of distinguishing between professional and paraprofessional work. In the case of graduates qualifying, on the one hand, through this CILEx diploma and, on the other, as solicitors, individuals in both groups will be (i) qualified to practise, (ii) have work experience and (iii) possess a law degree containing the core subjects required by the Solicitors Regulation Authority (SRA). Can the difference between them be explained solely by their separate experience between graduating and qualifying? Is the content of the Legal Practice Course (undertaken by aspiring solicitors) and the experience gained under the training contract sufficient to make

19 Richard Simmons, 'Hill Dickinson ringfences training contracts for its own paralegals' (2016) <http://l2b.thelawyer.com/hill-dickinson-ringfences-training-contracts-for-its-own-paralegals/?cmpid=wedit_2391688>; and Richard Simmons, 'Exclusive: Trowers Ups Trainee Intake Size and Ringfences Training Contract Roles for its Own Paralegals' (2015) <https://l2b.thelawyer.com/exclusive-trowers-ups-trainee-intake-size-and-ringfences-training-contract-roles-for-its-own-paralegals/>.

20 Alex Aldridge, 'The Rise of the Paralegal' Law Society (30 July 2012) <http://communities.lawsociety.org.uk/junior-lawyers/advice-and-features/rise-of-the-paralegal/5046486.fullarticle>.

21 Kathleen Hall, 'Number of Legal Executives to Grow 17% in Next Decade' *Law Society Gazette* (London, 6 June 2014) <www.lawgazette.co.uk/practice/number-of-legal-executives-to-grow-17-in-next-decade/5041562.article>.

22 Jonathan Clifton, Spencer Thompson and Craig Thorley, *Winning the Global Race? Jobs, Skills and the Importance of Vocational Education* (Institute of Public Policy Research 2014) <www.ippr.org/files/publications/pdf/winning-global-race_June2014.pdf?noredirect=1>.

23 CFE Research, *The AGR Graduate Recruitment Survey 2015 Winter Review* (2015) <www.agr.org.uk/CoreCode/Admin/ContentManagement/MediaHub/Assets/FileDownload.ashx?fid=143118&pid=11533&loc=en-GB&fd=False>.

24 Institute of Legal Executives Group, 'Fair Access to the Professions: Progress Report' (2011) <www.cilex.org.uk/pdf/ILEX%20Milburn%20Report%20for%20email.pdf>.

25 Aldridge (n 20).

26 Richard Simmons, 'Lawyer 2B's Paralegal Healthcheck' (2016) <http://l2b.thelawyer.com/paralegal-health-check-survey-2/?cmpid=wedit_2391688>.

27 Jonathan Rayner, 'ILEX Fast Track Route Proves Popular' *Law Society Gazette* (London, 31 March 2011) <www.lawgazette.co.uk/news/ilex-fast-track-route-proves-popular/59785.fullarticle>.

this distinction? The development of higher-level apprenticeship qualifications at levels five to seven[28] as part of an additional non-graduate pathway into qualifying as a solicitor further muddies this particular water. In a policy statement, the SRA has said: 'there may not be a need for us to specify, or even recognise, pathways to qualification',[29] and it is currently exploring this idea through the proposed Solicitors Qualifying Examination.[30] However, that policy statement continues to refer to the paralegal as distinct from a qualified solicitor. Paraprofessionals may well feel able to construct a strong case to argue that, in their current role, they already meet the outcomes set out in the SRA's recent Statement of Solicitor Competence[31] and should be reclassified as qualified solicitors. The Law Society noted that the statement 'leaves open the question of what competence should look like when the person is a solicitor as opposed to a legal executive or paralegal';[32] the SRA has stated that regulation of paralegals is not within its remit.[33] On 18 July 2014, CILEx announced it was launching an enquiry[34] to understand whether paralegals could meet the market needs of the future.[35]

Part One indicated that one possible way of distinguishing between professional and paraprofessional is the supervisory role of the professional. The LETR Report noted that the issue of 'supervision of paralegals within regulated entities was frequently raised'.[36] It sets out an analysis[37] of the workload of solicitors in 2012 compared to 1991. It reveals that, in 1991, solicitors would spend 7 per cent of their time engaged in 'supervision, being supervised or discussion with co-workers'. By 2012 this activity represented 8 per cent of their time. Neither the percentage of time spent nor the increase in this percentage suggests that this can currently form the basis for the distinction. Francis[38] notes that 'in practice, the legal executives interviewed reported that they undertook comparable work to solicitors, headed up departments, are treated as quasi-partners, supervise trainee solicitors and generally operate with what they describe as ninety per cent autonomy, with little control exercised by supervising solicitors'. In The Lawyer2B survey, 14 per cent of paralegals said their work was not properly supervised by qualifying lawyers.[39]

An underlying assumption when considering the role of the professional is that professional level work is more complex and demanding than that of the paraprofessional. There is, however, little in the workload analysis undertaken by the LETR to support this. For example, in 1991, solicitors spent 2 per cent of their time on 'legal research'; by 2012, a period of rapid expansion in the deployment of paraprofessionals and, presumably, a

28 Law Society, 'Routes to Qualifying' (2016) <www.lawsociety.org.uk/law-careers/becoming-a-solicitor/routes-to-qualifying>.

29 SRA (n 3).

30 SRA, 'SRA proposes a Solicitors Qualifying Examination for All New Solicitors' (7 December 2015) <www.sra.org.uk/sra/news/press/sqe-consultation-2015.page>.

31 SRA, 'Statement of Solicitor Competence' (2015) <www.sra.org.uk/solicitors/competence-statement.page#>.

32 Law Society, *SRA Training for Tomorrow: A Competence Statement for Solicitors. Response of the Law Society of England and Wales* (2015) <www.lawsociety.org.uk/policy-campaigns/consultation-responses/competence-statement-for-solicitors>.

33 Laura Clenshaw, 'Paralegal Paradox: A Lawyer by Any Other Name?' *Solicitors Journal* (London, 18 July 2014).

34 Ibid.

35 CILEx, 'Paralegal Enquiry' <www.cilex.org.uk/about_cilex/paralegal_enquiry.aspx>.

36 LETR Report (n 2) para. 3.56

37 Ibid 38, table 2.6.

38 Andrew Francis, *At the Edge of Law: Emergent and Divergent Models of Legal Professionalism* (Ashgate 2011).

39 Simmons (n 26).

corresponding movement of professionals to **A-team** work, that percentage had risen by 0.5 per cent. An anonymous paralegal writing in The Lawyer2B states: 'I do the exact same work as a solicitor but for half the pay.'[40] The recent survey by the same publication found that 'on a day-to-day basis, half of all paralegals surveyed said the work they are asked to do is essentially the same as that of a trainee'.[41]

It is difficult to resist the notion that the current distinguishing feature of legal professionals is simply that they share the same 'cultural capital'[42] of having accessed the profession through the university – law school – training-contract route. Despite some notable attempts to move away from this,[43] it is likely that the elite firms will continue to recognise this model, defined by a marked preference for certain universities or for first-class honours degrees. It is not uncommon for firms to accept applications only from candidates with a minimum of 300 UCAS points[44] which, in effect, can dismiss those who emerge from a foundation degree route. CILEx notes that 81.5 per cent of its members do not have parents who attended university and only 2 per cent of its members have a parent who is a lawyer.[45] Yet The Lawyer2B's survey reveals that 86 per cent of paralegals surveyed did have a degree,[46] suggesting many are first-generation graduates. Should cultural capital distinguish the professional from the paraprofessional? If not, what distinguishing characteristic will replace it?

ABSs have potential to pose a significant challenge to existing entities. Not only may they utilise hierarchies of paralegal staff to reduce unit cost, but they also have considerable potential, through economies of scale, to deploy capital (Strategy Three). At times this may be intellectual capital, enabling the development of new structures (such as the training partnership created by Co-operative Legal Services and Manchester Metropolitan University, noted by the LETR Report).[47] More often, however, it will be the introduction of sophisticated IT systems to substitute for labour and reduce further unit cost.

The deployment of IT may be the Achilles' heel of the professionals. It has been noted that one-third of the paraprofessional workforce is deployed in the conveyancing function. Perhaps it should also be noted that this is an area where consumer complaints are high;[48] it is the second most complained-about area of law.[49] The Legal Ombudsman concluded that keeping to agreements over cost, ensuring delays are kept to a minimum and maintaining good lines of communication with consumers are key. A scan of consumer comments on the internet will reveal that these are the very issues on which

40 Anonymous, 'I Do the Exact Same Work as a Solicitor but for Half the Pay' (2016) <http://l2b.thelawyer.com/issues/l2b-online/my-paralegal-story-i-do-the-exact-same-work-as-a-solicitor-but-for-half-the-pay/?cmpid=wedit_2391688>.

41 Simmons (n 26).

42 Francis (n 38).

43 R Garner, 'Exclusive: Law Firm Clifford Chance Adopts CV Blind Policy to Break Oxbridge Recruitment Bias' *The Independent* (London, 9 January 2014) <www.independent.co.uk/student/news/exclusive-law-firm-clifford-chance-adopts-cv-blind-policy-to-break-oxbridge-recruitment-bias-9050227.html>.

44 Chambers Student, 'Application and Selection Criteria' (2016) <www.chambersstudent.co.uk/law-firms/getting-a-training-contract/application-and-selection-criteria>.

45 CILEx (n 9).

46 Simmons (26).

47 LETR Report (n 2) para. 3.69

48 SRA, 'Supervision and Enforcement Strategy for Conveyancing' (19 April 2011) <www.sra.org.uk/sra/strategy/sub-strategies/supervision-enforcement-strategy.page>; Clenshaw (n 33).

49 YouGov plc for the Legal Ombudsman, *Consumer Experiences of Complaint Handling in the Legal Services Market* (2012) <www.legalombudsman.org.uk/downloads/documents/publications/Part-A-First-Tier-complaints-YouGov-180912-Final.pdf>.

consumers 'go public', with no reluctance to name firms. These complaints may or may not be justified, but they are highly visible and have the capacity to draw out managing partners who invite complainants to contact them to address problems. Whilst commendable in the short term, this is unlikely to be an appropriate long-term approach to quality control. The deployment of paraprofessionals in conveyancing has been supported by investment in IT. How do the professionals assure themselves that the process adopted is sound and flexible? (For example, if a firm is used by a bank and sometimes it represents bank and purchaser and sometimes bank only, does its process differ in the latter case to avoid delay?) Where is the intervention capacity to address system failure in individual cases? Some of these issues involve tactical supervision, some involve a more strategic supervision and management oversight. Are these skills currently deployed in the LSS? Were they deployed by NHS professionals to ensure that NHS Direct achieved its policy goals?

At a higher level of deployment of IT, will new entrants to the LSS be able to utilise their capacity to align with the knowledge sector (see above) and to deploy capital to be able to promote system-changing innovation? Susskind recognises that emerging systems are now able 'to outperform paralegals and junior lawyers when reviewing and categorizing large bodies of documents'.[50] The LETR Report noted that professionals in the LSS recognised the benefits of *automation* (doing things faster or easier), but were drawn less to *innovation* (doing things differently).[51] There are, here, obvious dangers for legal professionals.

The LSS: conclusion

The LSS clearly shares the public sector management agenda. The pressing nature of the relationship between professionals and paraprofessionals and the relationship between labour and capital create issues which are no less acute. The LETR Report provides a timely opportunity to address the issues in a rational and transparent manner.

The shared management agenda

From the outline provided above it is now possible to articulate the components of the shared management agenda and to contemplate the manner in which some of them may be addressed.

1 *Managers must design, monitor and modify strategies for service delivery which ensure appropriate supervision, provide for flexibility of approach and allocate responsibility for system improvement.*

It is clear that long-term imperatives for major increases in efficiency cannot be accommodated by the adoption of Strategy One. Although this strategy is, invariably, the initial short-term reaction to change (particularly before the true significance of the change has been recognised), it is impossible to sustain. There is, however, a risk (possibly fundamental) of abandoning a strategy without a full appreciation of its strengths. Whatever its limitations, the underlying feature of Strategy One is that it continues to deploy professionals within a regime which has been designed or has evolved with this in mind. The professional will have been assumed to be, within limits, a self-starter requiring little *supervision*. Professionals have sufficient expertise to develop, with experience, the *flexibility of approach* which enables them to modify or disregard parts of a process they consider unsuitable to a particular case. They are, therefore, able to deliver a *bespoke* service within an individual transaction. This is the approach expected of lecturers, doctors,

50 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (OUP 2013).

51 LETR Report (n 2) para. 3.88

solicitors and barristers. What is less expected of the professional, because it is less apparent, is their *system improvement* role: however, they do deliver it. Professionals encounter difficulties, experience delay, face opposition, become frustrated and, sometimes, fail to deliver. These experiences shape their future approach. This behavioural change, whilst intuitive and informal, is, nevertheless, an expertly considered and managed change to the system and an active, if subconscious, role of the professional.

When Strategy One is set aside, the supervision, flexibility of approach and system improvement features are rarely, if ever, formally considered and provided for in the new model. The new regimes for service delivery must be expressly designed, and subsequently monitored, to incorporate these features. Without this, the new model will not be fit for purpose and will not be capable of delivering the full range of business objectives. This will reveal itself in different ways across the sectors. FE students will make clear their resentment in using materials with flaws they have highlighted repeatedly. Managing partners may find they are corresponding on the firms' websites with complaining clients.

This system improvement role is not to be confused with the narrow technical function of ensuring that equipment is efficient and guidance is up to date. Rather, it is one of constantly evaluating the functioning of the entire approach to service delivery to ensure that it is capable of achieving business objectives.

2 *Managers in areas of activity which involve the deployment of paraprofessionals need to identify the risks to the system and to business objectives inherent in an aversion to individual risk-taking by the workforce. They need to establish criteria for determining acceptable risk and make clear the individual accountability for both risk-taking and for avoiding risk-taking. They need to devise reward and support structures which are compatible with the organisation's overt approach to risk-taking.*

The FE management agenda raised the need to empower paraprofessionals to react, in a timely manner, to system shortcomings to maintain customer satisfaction. (This need is an articulation at a tactical level of the strategic requirement set out above.) Moreover, it was recognised that addressing this need involved risk to the integrity of the system. The NHS is clearly identifying areas of activity which will succeed in achieving their objectives only if individuals can be encouraged to accept levels of risk-taking they have not previously experienced. It has also experienced policy objectives not being achieved because of an in-built aversion of staff to take limited risks in one transaction in order to provide a better level of support to the totality of transactions.

The LSS approach to risk has been to set express limits to the authority of an individual to, for example, undertake a 'reserved legal activity'. Less attention has been given to identifying the risk-taking a firm is prepared to countenance; instead a pattern of risk-taking can emerge simply as the aggregation of the activities of a group of individuals. Being overt and clear about the levels and nature of risk-taking is, of course, difficult to achieve the more innovative and less routine the transaction. In the case of encouraging paraprofessionals to be more flexible, more willing to make decisions for which they are accountable and able to balance the relevant priorities of individual transactions against the totality of transactions, it is, however, essential that this clarity be created.

3 *Managers will need to establish a clear rationale for the deployment of professional staff. Having done so, they will need to ensure professionals are prepared, and resourced, for their allocated role. The cost of providing this resource will require managers to secure a return by ensuring professionals are not competed into non-professional work.*

Inevitably the deployment of paraprofessional staff has brought with it a need for clarification of the role of the professional. It has proved difficult to establish the

defining differences between them, but certain common approaches have been identified. Whilst these approaches will not be universal, they do point to a major change in the way professionals have operated previously. Where a professional is to become, or continue to be, the person who undertakes the most complex transactions (**A-team** work), they will need to be equipped to undertake this work through training, which is likely to be subject-based, and by access to the time and resources necessary to undertake research. Those responsible for their deployment will need to recover these costs by ensuring they are not competed away into lower-order transactions and will, equally, need to reduce risk by ensuring that paraprofessionals do not stray into **A-team** work. To enable these deployments to be made, there needs to be a common understanding of the identifying characteristics of this more complex area of activity. If this common understanding cannot be achieved, it may be possible to conclude, albeit controversially, that in specific areas of activity **A-team** work does not exist. In such a case, it may be possible to conclude that these areas are a new form of 'reserved activity' where a professional is *not* to be deployed, on the basis that the opportunity cost is too high. Susskind describes this ability to identify work that can be routinised and undertaken more efficiently as 'the great opportunity for change'.[52]

Should the professional be the person who supervises the paraprofessionals, the level and nature of the supervision needs to be established. It is clear that there are *hierarchies* of paraprofessionals. This hierarchy is clearly capable of delivering routine, domestic supervision (such as time-keeping, holiday arrangements, workload allocations, throughput measurement). The supervisory role of the professional has to be determined in this context to ensure, yet again, that they are undertaking **A-team** work. It is likely to result from the strategy for service delivery referred to above and from the strategic supervision, flexibility and system-improvement requirements of the strategy.

4 *Managers need to secure the role of professionals in the operation of IT systems. They need to ensure their primacy in the specification, evaluation and modification of the systems and in the commissioning of alternative systems where the desired service cannot be delivered entirely through IT. To enable the professionals to undertake this role, they will require personal development and the utilisation of protocols which prevent their disempowerment.*

The deployment of capital across the sectors has revealed a range of needs. Where IT is to deliver core services, its design cannot be delegated to technical support managers, software suppliers or consultants. The system has to be capable of delivering the defined service. This, in turn, requires the service to be clearly specified and for managers to be capable of identifying the features of service delivery where no compromises can be made. This is a role for the professional. To enable this role to be performed, some degree of personal development will be required. However, it will not be an objective to transform the professional into an IT expert and protocols will need to be established to ensure documentation is comprehensible to the professional. Bespoke IT systems are expensive and, by definition, untested. Consequently, it is likely that generic systems will often be adopted. The clearly specified service requirement is even more essential in these circumstances, for only a close reconciliation of the specification and the technical capacity of the delivery system will reveal areas of service delivery which cannot be delivered through the system. Alternative means of delivering these areas will then need to be identified. Only in this way can the manager ensure that the core service is not defined by the nature of the IT product.

52 Susskind (n 50).

In addition to the use of professionals to secure the integrity of service delivery when IT systems are introduced, there is a need for high-level monitoring and evaluation of the continuing use of the system. Often this is delegated to a technical support manager. Invaluable though these managers may be in ensuring the technical reliability of the delivery system, they cannot be expected to ensure its continued relevance to determine the need for modifications following an assessment of customer satisfaction or the outcome of strategic supervision interventions. The professionals need to 'own' the system, which implies control of the system.

The performance by professionals of these high-order functions, as a routine and significant part of their duties or, indeed, as their sole or primary occupation, is not currently a feature of professional life. It seems certain that the NHS would be in a better place in relation to IT if it had been.

5 *Managers will need to deploy an HR strategy designed to support staff, at all levels, affected by a period of profound change. The strategy will need to secure support for essential changes and reveal opportunities as well as threats. As part of this strategy managers will need to maximise opportunities for career progression.*

The deployment of very large numbers of paraprofessional staff is likely to lead to a demand for clear career progression routes. Without these routes, large numbers of people will have no opportunities for advancement in circumstances in which they see themselves as performing to the same level, or at a higher level, than their better-remunerated professional colleagues. The effect on workplace morale is predictable. (The Lawyer2B survey[53] revealed 'numerous paralegals complained that the most demoralising thing about their job was "not earning as much as the qualified solicitor sat next to me doing the same work"'.) All of the features of the strategies for improving efficiency outlined above have, within them, the risk of alienating and demoralising the workforce. Opportunities abound, but they will not be apparent or welcome to all. The management of profound change is extremely difficult for both those being required to change and for those called upon to lead and manage the change.

Conclusion

The LSS faces an immense challenge to embrace the changes it is facing and emerge strong and with integrity into the new marketplace. Rather than reinventing the wheel, this paper recommends that the LSS learns from the public sector. This paper has analysed and expressed, generically,[54] strategies for change employed in the public sector and finds that the changes facing the LSS can be usefully analysed using these strategies. The paper concludes that there exists a shared management agenda, which it has sought to reveal and articulate clearly and which can inform the current debate on LSS management. There is, now, the opportunity for further analysis of specific areas that resonate most with managers in the LSS.

53 Simmons (n 26).

54 See Table 1 above.

NILQ 67(2): 251–55

Case notes

Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School) [2016] NIQB 52

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Introduction

For almost 120 years the legal doctrine of *in loco parentis* has been recognised by some judges as providing a useful benchmark for the standard of care owed by teachers to pupils under their charge.[1] In the recent case of *Murray v McCullough*,[2] the opening argument of counsel for the plaintiff/claimant 'contended that the duty of a schoolteacher is *to take such care of his pupils as would a reasonably careful parent of the children of the family*'.[3] The High Court judgment, delivered on 8 June 2016, cites with approval commentary on this issue from *Charlesworth and Percy on Negligence*,[4] the authorities highlighted drawn from a chapter more generally focused on 'Persons Professing Some Special Skill'.[5] Significantly, Stephens J makes plain the limitations of referring to a 'parent' or 'prudent father' when defining the scope of the duty incumbent upon (specialist) teachers. This straightforward approach, by concentrating on the 'fundamental and simple proposition that the standard is *to take reasonable care in all the circumstances*',[6] will be contended to be sensible, instructive and, consistent with more recent decisions of the higher courts. Nonetheless, in the specific context of sports negligence cases, identifying the crucial material factors 'in all the circumstances' may prove challenging and problematic. Accordingly, this case note suggests that in unpacking and scrutinising the totality of circumstantial considerations, application of legal principles derived from 'sports law' jurisprudence provides courts in such cases with valuable and necessary guidance.

Facts

Whilst representing her school in a first-eleven match on 6 December 2008, the plaintiff suffered serious dental injuries, and a cut to her lip, when she was struck with a hockey stick. Following medical evidence, the court accepted that had the plaintiff been wearing a mouth guard, the damage to her teeth would have been prevented. The plaintiff's case

1 E.g. *Williams v Eady* (1893) 10 TLR 41; *Wilkin-Shaw v Fuller* [2012] EWHC 1777, [39] per Owen J.

2 *Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School)* [2016] NIQB 52.

3 Ibid [4].

4 C T Walton (ed), *Charlesworth and Percy on Negligence* 13th edn (Sweet & Maxwell 2014) [9-187].

5 Ibid [9-01]–[9-343].

6 *Murray* (n 2) [5].

was that the wearing of mouth guards ought to have been mandatory; that she was not sufficiently warned of the risks of not wearing a mouth guard; and that her parents were not sufficiently warned regarding the risks of not wearing a mouth guard. The defendants contended that they had discharged their obligation to take reasonable care in the circumstances by recommending to the plaintiff and her parents the use of mouth guards and by giving sufficient warnings. Common practice in other schools, guidelines published by responsible bodies, including various National/International Governing Bodies for Hockey (NGBs), and content from the 'Safe Practice in Physical Education and Sport' publication were called in aid by the defendants to demonstrate that they had fulfilled the appropriate standard of care.

Legal principles

In short, the determinative legal issue in this case concerned the law of negligence's control mechanism of breach, requiring the court to establish the standard of reasonable care (and skill) required in the specific circumstances. Consistent with the legal doctrine of *in loco parentis*, counsel on behalf of the plaintiff submitted that the test adopted in *Williams v Eady*, that of the careful parent, should be regarded as informative.[7] In forcefully dismissing this submission, Stephens J insightfully observes:

> . . . for my own part I would prefer that the standard of the duty of a schoolteacher should not be expressed as taking such care of his pupils as would a reasonably careful *parent* of the children *of the family* but rather taking reasonable care in all the circumstances. The yardstick is reasonable care; it is not some notional standard as to what a reasonably careful and prudent *parent of the family* would or would not do in relation to his *own children*.[8]

The High Court regarded the circumstances ordinarily to be considered in such a case, when fashioning the legal test to be applied, as typically including: the age and maturity of the plaintiff;[9] the tendency for children to sometimes fail to appreciate the magnitude of risk and ignore/forget safety advice, it being necessary to balance such factors against the fostering and growth of personal autonomy and the cost of preventative measures;[10] and the standard practice adopted in other schools and whether this might be viewed as universal and logically justifiable.[11] Arguably, a particular circumstance perhaps worthy of more pronounced acknowledgment by the court, since it further contextualises and distinguishes the respective duties of parent(s) and physical education (PE)/sport teacher(s), would have been explicit recognition that the case before it was an instance of (alleged) professional negligence.[12] Moreover, application of legal principles derived from 'sports law' jurisprudence may have been of considerable practical utility to the court when unpacking the crucial material factors from the full circumstances of this individual case.

Decision

The court accepted that the defendants had sent the plaintiff a 'School Uniform Code' every year which recommended the wearing of mouth guards by pupils for their own

7 Ibid [4].

8 Ibid [5].

9 Ibid [6]–[7].

10 Ibid [8]–[9].

11 Ibid [10]–[11].

12 See Walton (n 4) [9-187], recognising that the standard of care in such cases is typically approached by reference to the *Bolam* test (see n 17). See further, N Partington, 'Professional Liability of Amateurs: The Context of Sports Coaching' (2015) 4 Journal of Personal Injury Law 232.

protection, as advised by the (International) Hockey Federation (FIH). Indeed, there appeared a consensus on the guidance issued by NGBs, and the Safe Practice Publication, there being no requirement for the mandatory wearing of mouth guards in 2008. Accordingly, in finding the approach of the defendants to be consistent with the standard procedure at schools in Northern Ireland, it fell for the court to decide 'whether the standard generally applied was sufficient to discharge the duty of care in relation to the plaintiff who was 15 at the time of the incident'.[13] On this, Stephens J ruled in the affirmative, the judgment ultimately concluding that sufficient warnings had been made to bring the dangers of not wearing a mouth guard to the attention of both the plaintiff and her family. There were no grounds for a finding of liability in negligence against the defendants.

Comment

Sports negligence cases are highly fact-sensitive and context specific.[14] Emphasis by the court on the particular circumstances of this individual case is to be expected. More specifically, robust recognition of the unsuitability and considerable limitations of the doctrine of *in loco parentis* in such a case is both welcome and necessary, not least, given the emerging case law in this area.[15]

The teaching of PE, and coaching of sport, requires a specialist skill not ordinarily possessed by the average reasonable parent.[16] The test for negligence in such circumstances 'is the standard of the ordinary skilled man exercising and professing to have that special skill'.[17] Simply applied, *Murray v McCullough* represents an instance of professional liability. Subsequently, careful consideration of what might amount to regular practice, approved by a responsible body and being capable of withstanding logical scrutiny, underscores application of legal principles derived from professional negligence by the court.[18] This is a fundamental circumstance of this particular case. Moreover, it makes problematic reference to a 'prudent parent' when defining the standard of care incumbent upon the defendants. As succinctly articulated by Lord Justice Croom-Johnson when *Van Oppen v Clerk to the Bedford Charity Trustees*[19] was considered by the Court of Appeal:

> The background to the case is that the duty of care which the school owes to its pupils is not simply that of the prudent parent. In some respects it goes beyond mere parental duty because it may have special knowledge about some matters which the parent does not or cannot have. The average parent cannot know of unusual dangers which may arise in the playing of certain sports, of which rugby football may be one. That is why the school undertakes to see that proper coaching and refereeing must be enforced. It might know that some types of equipment in, for example, gymnastics have their dangers. But this is all part of

13 *Murray* (n 2) [20].

14 N Partington, 'Legal Liability of Coaches: A UK Perspective' (2014) 14(3–4) International Sports Law Journal 232, 241–42.

15 E.g. *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135; *Mountford v Newlands School* [2007] EWCA Civ 21; *Woodbridge School v Chittock* [2002] EWCA Civ 915; *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA).

16 N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) Sports Coaching Review 1–21, 6 DOI 10.1080/21640629.2016.1180860.

17 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB), 586 per McNair J.

18 E.g. ibid; *Bolitho (Deceased) v City of Hackney Health Authority* [1998] AC 232 (HL).

19 *Van Oppen* (n 15).

> the duty placed on the school to take reasonable care of the safety of the person and property of each pupil.[20]

More recently, Lady Hale in the Supreme Court in *Woodland v Swimming Teachers Association*[21] reinforced the limitations of attempts to apply the notion of *in loco parentis* in the educational context when stating, 'it is not particularly helpful to plead that the school is *in loco parentis*. The school clearly does owe its pupils at least the duty of care which a reasonable parent owes to her children. But it may owe them more than that.'[22]

These dicta offer considerable support to the approach adopted by Stephens J in *Murray v McCullough*. The teaching and coaching of hockey requires the exercise of a special skill. This demands a higher standard of care or, in adopting the words of Lady Hale, 'more than' what might be expected of a reasonable parent. A reasonable parent would not generally be required to possess the necessary level of competence, qualifications and/or experience to operate properly and safely in the same circumstances. Accordingly, in endorsing the reasoning of the High Court in *Murray v McCullough*, it is submitted that reference to terminology embracing the concept of the reasonably careful parent, in instances of professional negligence, is somewhat artificial, restrictive and, ultimately, out-dated and best resisted.[23]

More generally, *Clerk and Lindsell on Torts* highlights the judiciary's avoidance of reducing 'to rules of law the question whether or not reasonable care has been taken',[24] with citation of authority discouraged as a means of clarifying reasonable care given the uniqueness of particular situations.[25] Indeed, as noted by Judge LJ in the sports negligence case of *Caldwell v Maguire*, 'the issue of negligence cannot be resolved in a vacuum. It is fact specific.'[26] By mainly concentrating on the 'Factual Background' in *Murray v McCullough*,[27] the approach of Stephens J appears to largely concur with these observations. Nonetheless, it has been suggested that '[i]n law context is everything',[28] there being a body of relevant and well-established 'sports law' jurisprudence intended to prove instructive when sports negligence cases come before the courts.[29]

For instance, when sitting in the same High Court of Justice in Northern Ireland in 2012, (the then) Gillen J, in *Morrow v Dungannon and South Tyrone BC*,[30] framed determination of the standard of care required by a fitness instructor as follows:

> In arriving at the standard appropriate in any given case the court will take into account the prevailing circumstances including the sporting object, the demands made upon the participant, the inherent dangers of the exercise, its rules, conventions and customs, the standard skills and judgment reasonably to be expected of a participant and the standards, skills and judgment reasonably to be

20 Ibid 414–15 Croom-Johnson LJ.

21 *Woodland v Swimming Teachers Association* [2013] UKSC 66.

22 Ibid [41].

23 See generally Partington (n 14).

24 M A Jones (ed), *Clerk and Lindsell on Torts* 21st edn (Sweet & Maxwell 2014) [8-143].

25 Ibid.

26 *Caldwell v Maguire* [2001] EWCA Civ 1054, [30].

27 *Murray* (n 2) [12]–[27].

28 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [28] per Lord Steyn.

29 E.g. *Caldwell* (n 26); *Smolden v Whitworth* [1997] PIQR P133 (CA); *Vowles v Evans* [2003] EWCA Civ 318; *Condon v Basi* (1985) 2 All ER 453 (CA).

30 *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50.

> expected of someone such as the defendant and Mr Taffee in instructing monitoring and supervising the plaintiff.[31]

Whilst it is clear that the above propositions, originally fashioned in *Caldwell v Maguire*,[32] require appropriate amendment to reflect often quite different sporting circumstances,[33] they undoubtedly afford guidance to courts in sports negligence cases by focusing on crucial material factors derived from the totality of circumstances. Simply applied, they allow for a more nuanced and precise legal test by more effectively contextualising sports negligence cases. As such, by explicitly accounting for the interaction between the law of negligence and sport, particular propositions directly in point in *Murray v McCullough* would appear to include: the inherent dangers of hockey; the rules, conventions and customs involved in playing hockey at first-eleven school standard for under-16s in 2008; the standard skills and judgment reasonably to be expected of the plaintiff with regard to wearing a mouth guard and appreciating the risks of not doing so; and the standards, skills and judgment reasonably to be expected of the defendants in instructing, monitoring, supervising and warning the plaintiff of the general risks involved in playing hockey and the specific dangers generated by not wearing a mouth guard. In future possible sports negligence cases, these propositions will likely prove instructive to courts when crystallising the standard of care incumbent upon PE teachers, fitness instructors and/or sports coaches. By continuing to explicitly recognise and account for the application of ordinary tort law principles in the special circumstances of sport, this would no doubt further contribute to the emerging and distinctive body of 'sports law' jurisprudence.

31 Ibid [20].

32 *Caldwell* (n 26) [11].

33 Significantly, *Caldwell* relates to the duty of care owed by professional jockeys to fellow athletes in elite competitive sport. Therefore, although the legal duty of reasonable care is applicable, as noted by Lord Bingham in *Smoldon v Whitworth* when distinguishing between the duties of a referee in relation to the players and that of a participant in a contest in relation to a spectator: 'the practical content of the duty differs according to the quite different circumstances' (*Smoldon* (n 29) 139).

NILQ 67(2): 257–61

Case notes

Publication of children's images, privacy and Article 8: judgment in the matter of *An Application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42

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Identified as contemporary 'folk devils',[1] children who are allegedly involved in rioting and disorder at interface areas in Northern Ireland have become the targets of stereotypical media portrayals.[2] Ongoing issues relating to the legacy of over 30 years of conflict in Northern Ireland include contestation of space, the formal and informal policing of children and young people, and the persistence of paramilitary punishment attacks.[3] This context raises significant issues in relation to children's rights. One contentious formal policing response to disorder, described as 'the worst rioting in years',[4] was publication by the the Police Service of Northern Ireland (PSNI) of the images of children and young people whom they wanted to question, under the code name Operation Exposure.[5] The images had been captured on closed-circuit television (CCTV) during incidents of interface violence in the summer of 2010. This policing tactic became the subject of protracted legal proceedings.

As a result of the internal circulation of CCTV within the PSNI, a 14-year-old boy referred to as JR38, who had a previous caution for riotous behaviour, was arrested on 1 July 2010. Following arrest, JR38 did accept that the CCTV placed him at the interface, but it did not show him engaging in criminal activity. The applicant submitted an application for judicial review in relation to the PSNI's decision to release the images to the local media and their publication in a leaflet, on the single ground that 'the use of . . . Operation Exposure to identify and highlight children and young persons involved in criminal activity as part of a name and shame policy without due process is in breach of the applicant's rights pursuant to Article 8 of the European Convention on Human

1 Stan Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Martin Robertson 1972).

2 Faith Gordon, *A Critical Analysis of the Print Media's Representation of Children and Young People during Transition from Conflict in Northern Ireland* (Queen's University Belfast 2012).

3 *Northern Ireland NGO Alternative Report, Submission to the United Nations Committee on the Rights of the Child for Consideration during the Committee's Examination of the United Kingdom of Great Britain and Northern Ireland Government Report* (Children's Law Centre and Save the Children NI 2015).

4 *New York Times* (13 July 2010). In April 2010, the devolution of policing and justice powers saw decision-making on criminal justice policies and practices return to the Northern Ireland Assembly, following a period of 38 years of direct rule on these matters by the UK government. During the riots in the summer of 2010, pressure was placed on the PSNI and the new Justice Minister to respond to the escalating disorder.

5 PSNI, *Operation Exposure Leaflet* (PSNI 2010). The PSNI in Derry/Londonderry printed and distributed 35,000 leaflets in August 2010. The leaflets contained 21 numbered images of 23 children and young people to whom the PSNI wanted to speak regarding sectarian disorder.

Rights' (ECHR).[6] In September 2010, Treacy J in the High Court granted leave for a judicial review application. In March 2013, the Divisional Court (Morgan LCJ, Higgins and Coghlin LLJ) dismissed the application and concluded that any interference with the applicant's rights was necessary for the administration of justice, the prevention of disorder and crime and to protect society, within the meaning of Article 8(2) of the ECHR.[7] Following an appeal, on 1 July 2015, the Supreme Court gave its judgment in the matter of *JR38*.[8]

The appeal to the Supreme Court considered two core legal issues. Firstly, did the publication of the image amount to an interference with the appellant's right to respect for a private life under Article 8 of the ECHR and, secondly, if there was an interference, was it justified? The respondent argued that the appellant could not be said to have any reasonable expectation of privacy where he had willingly engaged in acts of disorder in public.[9] Counsel for the appellant submitted that reasonable expectation of privacy was not in general a prerequisite for engagement of Article 8 and particularly not in the case of a child or young person. Counsel for the appellant suggested that, while reasonable expectation was a factor that could be taken into account, it should not be treated as determinative of the issue of whether Article 8 was engaged.[10]

There was disagreement between the justices on the first issue of whether the appellant's Article 8 rights were engaged. The question which divided the justices was whether Article 8 is only engaged where the alleged victim has a legitimate expectation of privacy or a reasonable expectation of protection and respect for his private life.[11] Three justices (Lord Toulson, Lord Clarke and Lord Hodge) felt that, because the appellant was engaged in criminal activity in a public place when his image was captured, he could not have a reasonable expectation of privacy and that this was 'the touchstone' of whether Article 8 was engaged.

Lord Toulson, with whom Lord Clarke and Lord Hodge were in agreement, referred to several matters outlined by the Strasbourg Court in *Von Hannover v Germany*,[12] including the purpose of Article 8, what it seeks to protect, and the need to examine the particular circumstances of the case in order to decide whether the applicant had a legitimate expectation of protection.[13] In particular, Lord Toulson was concerned with one of the qualifications set out by Laws LJ in *R (Wood) v Commissioner of Police of the Metropolis*,[14] namely the touchstone of whether the claimant enjoyed on the facts a 'reasonable expectation of privacy' or 'legitimate expectation of protection'.[15] Lord Toulson also referred to Sir Anthony Clarke MR in *Murray v Express Newspapers plc*[16] and his application

6 Case *Re JR38 Application* [2013] NIQB 44, paras 1, 16–21. Article 8 of the ECHR states: '(1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of . . . public safety . . . for the prevention of disorder or crime.'

7 *Re JR38* (n 6) para 38.

8 [2015] UKSC 42.

9 Ibid judgment para 33.

10 Ibid.

11 Ibid para 105. Lord Toulson took the expressions to be synonymous.

12 (2004) 16 BHRC 545.

13 Supreme Court judgment (n 8) para 85.

14 [2009] EWCA Civ 414, [2010] 1 WLR 12.

15 Supreme Court judgment (n 8) para 87.

16 [2008] EWCA Civ 446, [2009] Ch 481, para 35.

of *Campbell v MGN Ltd*,[17] which indicated that the question of whether there is a reasonable expectation of privacy is a broad one and must take into account all of the circumstances of the case.[18] Lord Toulson was of the opinion that the fact that the applicant was a child at the time was not a reason for departing from the test of whether there was a reasonable or legitimate expectation of privacy, though he conceded that it was a potentially relevant factor.[19] In his opinion, the present case was on all fours with *Kinloch v HM Advocate*,[20] in which Lord Hope argued that '[t]he criminal nature of what he was doing . . . was not an aspect of his private life that he was entitled to keep private'.[21] Lord Toulson concluded that the protected zone of interaction between a person and others was not interaction in the form of a riot and that the 'reasonable' or 'legitimate expectation' test was an objective test, to be applied broadly, taking into account all of the circumstances of the case[22] and having regard to the underlying value or values to be protected.

In contrast, two of the justices, Lord Kerr with whom Lord Wilson was in agreement, considered that other factors such as criminalisation of the appellant, the risk of stigmatisation, the lack of consent and how widely his image had been circulated in local newspapers were relevant.[23] In their view, Article 8 was engaged. In examining the Strasbourg jurisprudence on engagement of Article 8, Lord Kerr concluded that a nuanced approach was needed to reach a conclusion on this issue.[24] He stated that engagement of the right must cover a wide field of an individual's activity and that the scope of application must vary according to the conditions in which it is invoked and the circumstances of the individual.[25] In particular, the judgment in *PG and JH v UK*[26] illustrated that an unduly rigorous use of the reasonable expectation test is impossible to reconcile with the breadth of possible application of Article 8 and that the reasonable expectation of privacy was not the sole test of whether Article 8 is engaged.[27] In the situation where someone was engaged in activities such as public disorder, which were liable to be reported or recorded, what is reasonable to expect as to protection of her/his privacy is a factor to be taken into account in deciding whether Article 8 is engaged, but it will not automatically determine the issue.[28] Lord Kerr concluded that to make the 'reasonable expectation of privacy' an inflexible and wholly determinative test would be to fundamentally misunderstand the proper approach to the application of Article 8 and would unjustifiably limit its possible scope.[29]

On the second of the core issues, the appellant took no issue with the respondent's assertion that the interference with his Article 8 right pursued a legitimate aim. However, counsel for the appellant claimed that it was not in accordance with law and was not

17 [2004] UKHL 22, [2004] 2 AC 457.

18 Supreme Court judgment (n 8) para 88; circumstances included the attributes of the claimant, the nature of the activity in which the claimant has been involved, the place where it has happened and the nature and purpose of the intrusion.

19 Ibid para 95.

20 [2012] UKSC62, [2013] 2 AC93.

21 With which the other members of the court agreed.

22 Reaffirming Sir Anthony Clarke's opinion in *Murray* (n 16).

23 As affirmed in *Reklos v Greece* (2009) 27 BHRC 420.

24 Ibid para 55.

25 Ibid para 36.

26 (2001) 46 EHRR 1272

27 Supreme Court judgment (n 8) para 38.

28 Ibid para 39.

29 Ibid para 56.

necessary in a democratic society.[30] All of the justices were agreed that the interface rioting, which was dangerous and unpleasant for residents living in the areas, had to be brought to an end and that it was important that the young people were discouraged from being involved.[31] The justices noted that the police had made extensive efforts to identify the individuals before deciding that the images should be published and, therefore, the interference was justified.[32] The Supreme Court therefore unanimously dismissed the appeal.[33] The Lords agreed that, if there had been an interference with the appellant's Article 8 right, it was necessary for the administration of justice.

The Supreme Court's judgment is illuminating in further demonstrating the limits of privacy, particularly in the exercise of balancing the right to a private life and other specific societal values. Lord Clarke made reference to Lord Steyn's famous phrase, 'in law, context is everything',[34] and in this case it appears that context was relevant not only in the court's consideration of whether an interference was justified, but also in their determination of the first question relating to engagement.[35] The decision is based on a very one-dimensional view of Article 8, in the sense of it being a privacy right only.[36] This is evident in the assertion that the touchstone for the engagement of Article 8 is whether the claimant enjoys on the facts a 'reasonable expectation of privacy'.[37] It is likely, however, that this case will become a leading authority on the context where Article 8 can be engaged by the publication of photographs. In this connection, it is interesting that none of the justices refer to *Weller and Others v Associated Newspapers Ltd*,[38] which also involved the publication of photographs of children taken in a public place. The Court of Appeal's decision in *Weller*[39] was in line with the focus on children's rights as set out in *Murray v Express Newspapers*,[40] which confirmed that intrusions on the right to privacy must be demonstrably justifiable and that the threshold would be particularly stringent in the case of children. Similarly, the rights of children have been of paramount importance and have been protected by the courts in recent cases, such as in the Supreme Court's decision in *PJS v News Group Newspapers Ltd*.[41]

Responses from the children's rights sector in Northern Ireland have criticised the judgment for not being consistent with the UN Convention on the Rights of the Child (UNCRC)[42] and it is somewhat surprising that Lord Kerr is the only justice to engage with international instruments such as the UNCRC and the Beijing Rules.[43] At the 72nd session of the Committee on the Rights of the Child on 23 May 2016, the UN Committee made direct reference to the PSNI's Operation Exposure and asked for commitments that police policy in the future would not 'name and shame' children. This is particularly

30 Ibid para 68.

31 Ibid para 77.

32 Ibid paras 76–77.

33 Released on 1 July 2015.

34 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, para 28.

35 Supreme Court judgment (n 8) para 114.

36 Article 8 of the ECHR is a broad-ranging right and also includes the right to respect for her/his family life, home and correspondence.

37 Supreme Court judgment (n 8) para 105.

38 [2014] EWHC 1163 (QB).

39 [2015] EWCA Civ 1176.

40 [2008] EWCA Civ 446.

41 [2016] UKSC 26.

42 See, for example, <www.niccy.org/media/1653/niccy-ezine-operation-exposure-jr38–2015-uksc-42-oct-15.pdf>.

43 Supreme Court judgment (n 8) 49–52.

significant in instances of mistaken identity and subsequent labelling and stigmatisation, such as in a recent example of an error made by East Cambridgeshire police in England, which saw the distribution of CCTV images of two children, wrongly accusing them of theft from a local store.[44] This demonstrated the far-reaching consequences of police tactics breaching children's rights. This issue remains live and it is concerning that this judgment may be raised in future cases as a demonstration of a new threshold.

44 See 'Police Apologise for Picturing the Wrong Girls in Theft CCTV Footage' *Daily Express* (London, 23 May 2016).