Summer Vol. 76 No. 2 (2025)

NORTHERN IRELAND

LEGAL QUARTERLY

NORTHERN IRELAND
LEGAL QUARTERLY

JOURNAL INFORMATION

The *Northern Ireland Legal Quarterly* is a leading peer-reviewed journal that provides an international forum for articles, commentaries and notes in all areas of legal scholarship and across a range of methodologies including doctrinal, theoretical and socio-legal. The journal regularly publishes special issues within this broad remit.

Established in 1936, the journal has a history and rich vein of legal scholarship, combining distinct publications on the law of Northern Ireland, and prominence within the School of Law at Queen's University Belfast, with leading contributions to the discussion and shaping of law across the common law world and further afield. The School of Law at Queen's University Belfast took over the publication of the journal from SLS Legal Publications (NI) Ltd in 2008, where it has since been published quarterly. The journal became an online-only publication in January 2017.

ISSN 2514-4936 (online) 0029-3105 (print)

AVAILABILITY AND ARCHIVES

The *Northern Ireland Legal Quarterly* is committed to making its contents widely available, to broaden our readership base. At least one article per issue is made available on an open access basis and may be published in advance. All articles become available on an open access basis on our website one year after publication.

All contributions to the journal become available on HeinOnline one year after publication (with issues going back to its launch in 1936) and LexisNexis three months after publication (with issues from 2019). The journal's contents appears on a growing range of indexing and abstracting services.

Since 2018 the journal's contents is promoted via social media and the Contributors' Blog.

In the summer of 2020, we expanded the reach and use of the *Northern Ireland Legal Quarterly* by adding 17 more years of content to the journal's existing archives. These now go back to 1999 (volume 50) and are widely accessed by our readership. Visit our Archive pages for further details.

SUBMISSIONS

The journal welcomes submissions of articles, commentaries, notes and book reviews on a rolling basis. Please see our 'For Authors' section for further details.

If you have any queries about the suitability of your article for the journal or if you have an idea for a special issue, please contact the Chief Editor Professor Mark Flear. For the contribution of commentaries and notes, please contact Dr David Capper. For book reviews, contact Dr Clayton Ó Néill.

SUBSCRIPTIONS

Subscriptions pay for a minimum of three months of exclusive access to the journal's latest contents (and up to one year for those who do not have access to LexisNexis).

NORTHERN IRELAND
LEGAL QUARTERLY

Summer Vol. 76 No. 2 (2025)

Contents

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 151–178
Articles DOI: 10.53386/nilq.v76i2.1171

The challenge of effective 'corporate purpose law' reform

Jonathan Hardman*
University of Edinburgh
Correspondence email: jonathan.hardman@ed.ac.uk.

ABSTRACT

Company law commentary is again considering the company's purpose. Mayer has argued that corporate purpose law in the United Kingdom (UK) should change with an 'embarrassingly simple policy' – requiring companies to state their purposes. The aim of this article is to demonstrate how difficult it would be to enact such a change to UK company law. The UK has no overt corporate purpose law: the most direct provision is hidden in the content of duties owed by directors. Yet, if the reason for corporate purpose law reform is that companies are run too much in the interests of their shareholders, then additional changes to company law are needed to remove the ability for shareholder pressure to be applied following corporate purpose law reform. The result is that changing corporate purpose law requires a number of further incidental changes to company law (indirect corporate purpose law), which necessitates a fundamental rewrite of UK company law. Partial reform is undesirable as it will allow the same dynamics to funnel through alternative routes, will present a veneer of change and will use up legislative bandwidth. Changing corporate purpose law in the UK is hard and involves a fundamental rewrite of company law. Alternative methods of regulation, to achieve the same ends, are more readily available.

Keywords: company law; corporate purpose; corporate law; shareholder rights.

INTRODUCTION

Anglo-American company law discourse is again[1] examining 'corporate purpose',[2] namely what companies exist to do. The options range between the company operating purely for the benefit of shareholders,[3] to it having a wider societal purpose.[4] This debate 'has become one of the hottest public policy issues'.[5] Different jurisdictions take different approaches.[6]

The United Kingdom (UK) has no direct corporate purpose law regime. There is no provision that overtly states what a company's purpose is or should be. For the UK, corporate purpose only appears in law as a duty for directors of companies to act in what they consider to be the best interests of the company for the benefit of its members.[7] In the Anglo-American sphere, any lacuna in overt corporate purpose tends to be filled by the interests of shareholders.[8] Overall, the UK is

1 Eg B R Cheffins, 'The past, present and future of corporate purpose' (2025) 48 Delaware Journal of Corporate Law 387–454; J E Fisch and S D Solomon, 'Should corporations have a purpose?' (2021) 99 Texas Law Review 1309–1346; L M Fairfax, 'Stakeholderism, corporate purpose, and credible commitment' (2022) 108 Virginia Law Review 1163–1241; K J Hopt, 'Corporate purpose and stakeholder value' (2024) ECGI Working Paper Series in Law 690/2023.

2 Eg C Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018) 22, 24; C Mayer, 'What is wrong with corporate law? The purpose of law and the law of purpose' (2022) ECGI Working Paper Series in Law 649/2022.

3 Discussed in (amongst other places) S Bhagat and G Hubbard, 'Should the modern corporation maximize shareholder value?' (2020) AEI Economic Perspectives 1–14; M J Roe, 'The shareholder wealth maximization norm and industrial organization' (2001) 149 University of Pennsylvania Law Review 2063–2081; A Keay and R Adamopoulou, 'Shareholder value and UK companies: a positivist inquiry' (2012) 13 European Business Organization Law Review 1–29.

4 Discussed in (amongst other places) C M Bruner, 'Corporate governance reform and the sustainability imperative' (2022) 131(4) Yale Law Journal 1062–1384; R E Freeman and D L Reed, 'Stockholders and stakeholders: a new perspective on corporate governance' (1983) 25 California Management Review 88–106; W W Bratton, 'Enron and the dark side of shareholder value' (2002) 76 Tulane Law Review 1275–1361; L A Stout, *The Shareholder Value Myth* (Berrett-Koehler 2012).

5 E B Rock, 'For whom is the corporation managed in 2020? The debate over corporate purpose' (2021) 76 Business Lawyer 363–396, 363.

6 B Sjåfjell, A Johnston, L Anker-Sørensen and D Millon, 'Shareholder primacy: the main barrier to sustainable companies' in B Sjåfjell and B J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015); E Elhauge, 'Sacrificing corporate profits in the public interest' (2005) 80 New York University Law Review 733–869, 738.

7 Companies Act 2006, s 172.

8 See J E Fisch, 'Measuring efficiency in corporate law: the role of shareholder primacy' (2006) 31 Journal of Corporation Law 637–674; R J Rhee, 'A legal theory of shareholder primacy' (2018) 102 Minnesota Law Review 1951–2017.

seen as a particularly pro-shareholder corporate purpose regime.[9] As we are situated at one end of this spectrum, any proposal to reform UK corporate purpose law is therefore a proposal to make companies focus less on shareholders and more on other constituencies, who may currently be harmed by our approach.[10] Arguments that have been presented for doing so include to improve sustainability,[11] wider social changes sweeping into corporate law,[12] Covid-19 having fundamentally changed corporate governance,[13] a need to pre-empt future macroeconomic issues,[14] and merely that academic treatment of corporate purpose is cyclical.[15] Overall, Anglo-American corporate law attention has returned[16] to exploring whether company law needs to make a company's purpose be less about shareholders.

Mayer has argued that corporate purpose law should change with an 'embarrassingly simple policy'[17] – making companies state their purposes in their articles of association and disclose how they meet those purposes.[18] Davies argues that Mayer's approach misses the point – shareholders who are interested in prioritising social interests can use existing company law structures and rules to achieve such ends anyway, and those who wanted to retain profit maximisation would

9 Eg see A Johnston, 'Market-led sustainability through information disclosure' in B Sjåfjell and C M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019).

10 Eg from within law, see P Ireland, 'Shareholder primacy and the distribution of wealth' (2005) 68 Modern Law Review 49–81; L A Stout, 'The toxic side effects of shareholder primacy' (2013) 161 University of Pennsylvania Law Review 2003–2023. From other fields, see A Rebérioux, 'Does shareholder primacy lead to a decline in managerial accountability?' (2007) 31 Cambridge Journal of Economics 507–524; F Dobbin and J Jung, 'The misapplication of Mr Michael Jensen: how agency theory brought down the economy and why it might happen again' (2010) e30B Markets on Trial: The Economic Sociology of the US Financial Crisis 29–64.

11 Eg Bruner (n 4 above).

12 See L M Fairfax, 'Racial rhetoric or reality? Cautious optimism on the link between corporate #BLM speech and behaviour' [2022] Columbia Business Law Review 118–205.

13 M Gelter and J M Puaschunder, 'Covid-19 and comparative corporate governance' (2021) 46 Journal of Corporation Law 557–629.

14 A Kovvali, 'Countercyclical corporate governance' (2022) 101 North Carolina Law Review 141–205.

15 H Wells, 'The cycles of corporate social responsibility: an historical retrospective for the twenty-first century' (2002) 51 Kansas Law Review 77–140.

16 Eg L L Dallas, 'Is there hope for change? The evolution of conceptions of good corporate governance' (2017) 54 San Diego Law Review 491–564.

17 Mayer (n 2 above) 22.

18 Ibid 23.

find ways around the new regime.[19] Spamann and Fischer have argued that, given the broad discretion already enjoyed by managers, there is no need to amend corporate purpose law, and doing so will achieve nothing.[20]

However, external challenges to corporate purpose reforms do not negate the value of examining how effective corporate purpose law reform would need to work in the UK. This article analyses some implications of the *how* of UK corporate purpose law reform. The article's claim is that reforming corporate purpose law in the UK is actually quite difficult and requires a number of consequential amendments. The overt UK focus means that this article's analysis may not be applicable in other legal cultures.[21]

The reasons proposed for corporate purpose law reform tend to involve concerns that a shareholder-focus of companies harms third parties, in particular challenging sustainability.[22] This focus is thought to arise because either shareholders directly require it by exercising their rights, or directors act in a way calculated to appease shareholders, in order to pre-empt direct shareholder action.[23] The problem of any reform of UK corporate purpose law, though, is that underlying shareholder control of companies is hard-baked into UK corporate law. Whilst we may have limited direct corporate purpose law in the UK, we have numerous factors that indirectly cause the same pressures within a company. From being the beneficiary of duties and ratifying breaches of them, to appointment and removal rights starting and ending companies, to setting the terms of the constitution and relying on it, shareholders have a high degree of control over the company. Cutting them out to the degree necessary to reduce these pressures sufficiently to properly change corporate purpose requires a dramatic rewrite of UK corporate law.

---

19 P L Davies, 'Shareholder voice and corporate purpose: the purposeless of mandatory corporate purpose statements' (2022) ECGI Working Paper Series in Law 666/2022.

20 H Spamann and J Fischer, 'Corporate purpose: theoretical and empirical foundations/confusions' (2022) ECGI Working Paper Series in Law 664/2022. See also M Gatti and C Ondersmam, 'Can a broader corporate purpose redress inequality? The stakeholder approach chimera' (2020) 46 Journal of Corporation Law 1–72.

21 D W Puchniak, 'No need for Asia to be woke: contextualising Anglo-America's "discovery" of corporate purpose' (2022) 4 RED 14–21.

22 Eg Sjåfjell et al (n 6 above); Bruner (n 4 above).

23 G S Crespi, 'Maximising the wealth of fictional shareholders: which fiction should directors embrace?' (2007) 32 Journal of Corporation Law 381–427; D J H Greenwood, 'Fictional shareholders: for whom are corporate managers trustees, revisited' (1996) 69 Southern California Law Review 1021–1104.

This is not to undermine the drive to change corporate purpose. Instead, its aim is to demonstrate how difficult Mayer's policy[24] is to implement. Fail to take all doctrinal steps sufficiently, and you still allow shareholder pressure to force management to act for the benefit of shareholders, so you do not resolve the problem. Worse, you may exacerbate it by providing the *appearance* of resolving it whilst not actually doing so. This will make future reform less likely and remove attention from the problem.[25] Take all necessary steps, and you need to fundamentally rewrite UK company law in a way which may cause downsides. After all, each feature of corporate law that we need to disable to effectively reform corporate purpose law exists for a reason, often to provide a disciplinary restraint on managerial excess. Removing these therefore will remove disciplinary functions of corporate law designed to prevent managers focusing on themselves to the detriment of the company.

Given the complexities of effective corporate purpose law reform, and the potential downsides in doing so, it may be better to explore alternative ways to achieve the same ends. In particular, rather than making companies act in a way that is less focused on shareholders, we may want to re-examine the legal features that incentivise shareholders to act in a way that is perceived to cause such ills.

The rest of this article adopts this argumentation structure, and proceeds as follows. Part 1 ('A UK zone of shareholder exclusion') analyses the core of UK direct corporate purpose law reform. Part 2 ('Indirect corporate purpose law') explores the indirect aspects of corporate purpose law; the myriad of ancillary steps needed to create a UK zone of insulation for directors from shareholder pressure. Part 3 ('The perils of partial reform') argues that partial reforms of corporate purpose law will fail to achieve its policy ends. Part 4 ('Risks of reform and conclusions') argues that there are downsides to taking the various steps required to properly reform corporate purpose law – hinting that we may not want to reform corporate purpose law at all – and that there are alternative ways to achieve the ends desired by those seeking corporate purpose law reform.

---

24 Mayer (n 2 above) 22.

25 This arguably occurred when the UK adopted its current framework – see A Keay, 'Tackling the issue of the corporate objective' (2007) 29 Sydney Law Review 577–612.

A UK ZONE OF SHAREHOLDER EXCLUSION

Zones of insulation and exclusion

We start, then, with exploring how we would achieve corporate purpose law reform in the UK. Mayer proposes mandating that a company must articulate a purpose in its articles of association and then requiring disclosure as to the extent such a purpose is achieved.[26] There are two main reasons to suggest that more is required. First, as discussed in Part 2, articles of association are selected by the shareholders, who are likely to select pro-shareholder purposes.

Second, such purpose clauses are likely to be drafted in a broad and vague way. Companies used to have to state their objects in their memoranda of association.[27] Matters outside these objects were *ultra vires*, so unenforceable against the company.[28] Increasingly clever legal drafting was approved by the courts, steadily reducing the effect of this prohibition. In 1880, the House of Lords upheld the validity of a clause authorising matters incidental to primary objects.[29] In 1918, they upheld the validity of an objects clause that contained a list of alternative objects for directors to choose between.[30] In 1966, the English Court of Appeal approved an objects clause which empowered the directors to do, subjectively, what they thought may further other objects.[31] There are obvious differences between Mayer's proposal and historic objects clauses. The point though is that, however carefully purpose requirements are drafted, if left to the same insiders who currently choose matters, such requirements will be pushed towards greater discretion and greater freedom for those insiders. This will undermine Mayer's reform without some further exclusion of shareholders from selecting corporate purpose.

As such, UK commentators have argued that Mayer's aims will not be met by his solution. Davies argues that any such purpose statements will be used by those shareholders who would be trying to achieve these ends anyway, and ignored by those who would not.[32] Kershaw and Schuster argue that corporate law helps market participants achieve their purposeful ends, and is only one part of the corporate ecology

---

26 Mayer (n 2 above) 23.

27 P J Omar, 'Powers, purposes and objects: the protracted demise of the ultra vires rule' (2004) 16 Bond Law Review 93–116.

28 *Ashbury Railway Carriage & Iron Co Ltd v Riche* [1875] 6 WLUK 39.

29 *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473.

30 *Cotman v Brougham* [1918] AC 514.

31 *Bell Houses Ltd v City Wall Properties Ltd (No 1)* [1966] 2 QB 656.

32 Davies (n 19 above).

which does so.[33] Both refer to the same problem: if shareholders of UK companies truly wished for their financial interests to be subordinated to those of other constituencies, companies they influence through existing shareholder rights would already be doing so, and forcing a purpose to be articulated will not make shareholders do so. Both therefore argue that, to effectively change corporate purpose law, shareholders must be removed from decision-making. Davies argues that effectively achieving any change would require 'an extensive reduction of the shareholders' powers to hold the board accountable'.[34] Kershaw and Schuster state that managers would require a 'zone of insulation' from shareholders to avoid shareholder pressures deviating from a wider social purpose.[35] Insulating managers in this respect is ultimately the same as excluding shareholders.

On how this can be achieved, both sets of commentators are less specific. Davies focuses less on the details of shareholder exclusion, stating that '[t]he myriad legal questions it raises will be ignored by this article as well'.[36] Both Davies and Kershaw and Schuster argue that part of achieving such will be by removing from shareholders two particular disciplinary functions[37] – their ability to remove directors, and the obligations on directors to remain neutral in the presence of a takeover offer.[38] Kershaw and Schuster also point out – as part of the ecology of the corporate landscape – needing to change director power originating from shareholders, that shareholders holding at least 5 per cent of shares can requisition a meeting, and shareholder control over issuing shares.[39] They generally focus, though, on the idea that a zone of insulation is required to allow for mission-purpose if shareholders themselves are not in favour of such purpose.[40] This article explores the implications of these insights – and other ancillary changes required to achieve an effective 'zone of insulation' for directors.

The rest of this part and the next part focus on how to achieve such a zone of exclusion in the UK. It explores the current aspects of direct corporate purpose law in the UK and moves on to indirect aspects of corporate purpose law, including the company's constitution, and the way a company starts and ends. In each case, to create a zone of

33 D Kershaw and E Schuster, 'The purposive transformation of corporate law' (2021) 69 American Journal of Comparative Law 478–538, 538.
34 Davies (n 19 above), 1.
35 Kershaw and Schuster (n 33 above) 499–506.
36 Davies (n 19 above) 6.
37 Ibid 21–24; Kershaw and Schuster (n 33 above) 512–514.
38 See D Kershaw, *Principles of Takeover Regulation* (Oxford University Press 2016) ch 11.
39 Kershaw and Schuster (n 33 above) 507.
40 Ibid 537.

exclusion, a fundamental and holistic rewrite of UK company law is required.

Direct corporate purpose laws in the UK

So, how would we actually effect a change in UK corporate purpose law? Our doctrinal understanding of corporate purpose comes from the duties that directors owe to the company.[41] Section 172(1) of the Companies Act 2006 provides that directors must act in a way that they think (subjectively) is in the best interest of the company, for the benefit of its members as a whole, taking into account various non-shareholder constituencies.[42] This tries[43] to find a middle ground between the two binary approaches to corporate purpose, by adopting 'enlightened shareholder value'.[44] However, the requirement to include non-shareholders in these considerations is weak – directors must 'have regard' to such interests. Having regard is a very low threshold – it is difficult to do deliberate harm to someone without having regard to them. The requirement of section 172, then, is to act in good faith in the way that they consider to be in the best interests of shareholders, whilst being merely cognisant of the harms caused to others in doing so.

Nevertheless, the UK Corporate Governance Code, which applies to listed companies,[45] states that the 'board should establish the company's purpose'[46] and monitor culture to align to that purpose,[47] as should remuneration policies and practices.[48] Kershaw and Shuster have argued that this appears to be in conflict with section 172,[49] and it has been argued that a fundamental flaw with the code is its attempt to push non-shareholders' interests that clash with the basic tenets of UK company law.[50] There is a limit to how far a non-shareholder sheen can be cast on section 172 without reform. Even if the UK Corporate Governance Code could work to reform purpose in the UK,

41 For comparative approaches, see H Fleischer, 'Corporate purpose: a management concept and its implications for company law' [2021] European Company and Financial Law Review 161–189.

42 Companies Act 2006, s 172(1). See discussion in A Keay and T Iqbal, 'The impact of enlightened shareholder value' [2019] Journal of Business Law 304–327.

43 Keay (n 25 above).

44 Keay and Iqbal (n 42 above).

45 Listing Rules, rule 9.2.6.

46 UK Corporate Governance Code 2024, principle B.

47 Ibid provision 2.

48 Ibid principle P.

49 Kershaw and Schuster (n 33 above) 488–490.

50 B R Cheffins and B V Reddy, 'Thirty years and done – time to abolish the UK Corporate Governance Code' (2022) 22(2) Journal of Corporate Law Studies 709–748.

we should not rely on it. This code only applies to listed companies, whereas private companies also cause the harms resulting in proposals to reform corporate purpose law in the UK.[51] Not only will reforming matters for listed companies then only solve half the problem, it is likely to result in more socially harmful business activities moving to private companies, a form of 'sustainability arbitrage'.[52]

Section 172(2) leaves open the possibility that a company's purpose may be something other than shareholder-focused – stating 'where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members', then the replacement wording supersedes the benefit of members.[53] A Mayer-esque corporate purpose statement could therefore dovetail with this, perhaps with a simple mechanism to displace section 172(1) with an alternative, selected purpose.

However, this would not be sufficient on its own as this duty is owed to the company.[54] Shareholder resolution is the only way by which a breach of this, or any UK director duty, can be forgiven, known in company law parlance as the breach being 'ratified'.[55] A breach of duty can only be enforced by the company, but as directors are unlikely to sue one of their lot for a breach, mechanisms exist for shareholders to enforce a breach on behalf of the company.[56] Such mechanisms mean that whatever a company's corporate purpose statement, directors will be incentivised to ignore non-shareholders, and keep shareholders happy.[57]

Should directors ignore a socially optimal purpose to purely divert money to shareholders, the only party able to forgive them will be the shareholders. In such circumstances, they are likely to be lenient. The only parties able to discipline them are their other directors or shareholders on behalf of the company– neither of whom are likely to do so. In other words, merely reforming direct corporate purpose law in the UK will not be sufficient to effectively change

51 A A Gözlügöl and W G Ringe, 'Private companies: the missing link of the path to net zero' (2022) 22 Journal of Corporate Law Studies 887–929.

52 C Veziroğlu and A Kayıklık, 'The climate crisis and private companies: how to address the sustainability arbitrage problem' (2023) 24 European Business Organization Law Review 585–621.

53 Companies Act 2006, s 172(2).

54 Ibid s 170(1). See R Goddard, 'Directors' Duties' (2008) 12 Edinburgh Law Review 468–472.

55 Companies Act 2006, s 239.

56 See discussion in J Armour, 'Derivative actions: a framework for decisions' (2019) 135 Law Quarterly Review 412–436; J Hardman, 'An institutional analysis of UK ostensible minority shareholder protection mechanisms' (2023) 23 Journal of Corporate Law Studies 397–436.

57 J Hardman, 'The plight of the UK private company minority shareholder' (2022) 33 European Business Law Review 87–124.

any corporate behaviour in the way desired by those in favour of corporate purpose law reform. Any corporate purpose requirement baked in law would need to ensure that this purpose could not be enforced by shareholders. It would also need to ensure that it *could* be enforced by the targeted beneficiaries, something not currently facilitated under UK company law.

Overall, then, even if we manage to bake corporate purpose into the UK existing scheme, the basics of our directors' duties will need to change. The way in which breaches are ratified and wrongdoing punished would need to be reworked to avoid any purpose being ignored and the *status quo* perpetuated. To ensure a zone of insulation, we would need to stop shareholders having the dominant voice through any of these mechanisms. We could achieve this either by allowing others rights of enforcement and ratification,[58] or removing these rights from shareholders. Either option is a major rewrite of UK company law. Neither will be sufficient, either. Even if we manage to insulate directors' duties from shareholders, the latter have a statutory ability to remove the former by ordinary resolution.[59] Shareholders do not have to justify their votes for doing so, so would be free to trigger this right if, say, directors focused more on the company's wider purpose and less on maximising the dividend stream to shareholders.

As such, in addition to removing shareholder power to launch derivative claims, a proper zone of insulation for management would need to remove shareholder power to remove them. It would not be sufficient to purely carve out breaches of purpose from this right. Longer forms of notice need to be given to remove a director,[60] and directors are entitled to have written statements circulated on any such resolution,[61] and to attend and make representations at the meeting.[62] However, shareholders do not need to provide a reason *why* they wish to remove a director, and are able to vote their shares as they see fit.[63] As such, it would be possible for shareholders to circumvent such a carve-out for only 'purpose breaches' by removing a director and simply being silent as to why. To make such a carve-out work, rationales for removal would need to be provided, but it would be very difficult to

58 Eg N Safari and M Gelter, 'British Home Stores collapse: the case for an employee derivative claim' (2019) 19 Journal of Corporate Law Studies 43–68.

59 Companies Act 2006, s 168. See D D Prentice, 'Removal of directors from office' (1969) 32 Modern Law Review 693–696.

60 Companies Act 2006, s 168(2).

61 Ibid s 169(3).

62 Ibid s 169(2).

63 *North-West Transportation Company Limited and Other v Beatty and Others* (1887) 12 App Cas 589 (PC). See E Lim and J Lowry, 'Reconsidering the rule on shareholders' exercise of voting powers' [2020] Journal of Business Law 645–667.

ascertain their veracity. As such, to ensure a proper zone of insulation for management, shareholder abilities to remove directors – whether contained in statute or in the company's constitution – would need to be removed.

Accordingly, even if we manage to embed broader corporate purposes in UK corporate law, further changes are required to ensure that it is done so meaningfully. These changes involve fundamental rethinking of the basics of how we enforce and ratify breaches of directors' duties, and disapplications of shareholder abilities to remove directors. Immediately, then, there are three knock-on effects that need to change in UK company law to ensure that a direct corporate purpose enactment is meaningfully protected from shareholder pressure. We need to also change rules which appear to have nothing to do with corporate purpose, but would allow the same *ex ante* pressures to be applied by shareholders on management: indirect parts of corporate purpose law. Ensuring that corporate purpose law is changed in the UK is therefore already not simple. However, as we shall see, there are a raft of other parts of UK corporate law that need to be amended in order to ensure that corporate purpose law reform would be effective, a number of other indirect areas of corporate purpose law that would need to be modified in order to meaningfully alter corporate purpose law in the UK. Indeed, the more you start looking at these matters, the greater the domino effect is in respect of the need to fundamentally rewrite UK corporate law to effectively achieve corporate purpose ends.

INDIRECT CORPORATE PURPOSE LAW

The company's constitution

Mayer's proposal is to ensure that a purpose be included in the articles of association, the company's main constitutional document.[64] The articles of association are set by its shareholders and contain the internal rules which govern the operation of the company. The UK Government creates a default set of rules for the company's constitution,[65] which apply unless other articles are selected upon incorporation.[66] Once selected, articles can only be amended by shareholder vote of at least 75 per cent.[67] It is possible to 'entrench' articles of association, so that an even higher percentage of shareholder vote is required to change them in the future.[68] As entrenchment of articles is undertaken by

64 Companies Act 2006, s 17(a).
65 Ibid s 19; Companies (Model Articles) Regulations 2008, SI 2008/3229.
66 Companies Act 2006, s 20.
67 Ibid s 21.
68 Ibid s 22.

shareholder unanimity, it has obvious limitations for protecting other parties.[69] A change of articles of association can be proposed by either directors or shareholders. Articles can be changed at shareholder meetings (for public and private companies) or by written resolution (for private companies only).[70] Directors can summon meetings,[71] or circulate written resolutions.[72] Shareholders can do either if they represent 5 per cent of shares (or lower if stipulated in the company's articles) on their own, or with others in favour of proposing the motion.[73] As such, directors can propose changes to articles of association, and shareholders can not only propose such changes but also are the only parties entitled to vote on such changes. No other constituency has the power under UK law to propose, or vote on, changes to articles of association. Shareholders thus control what the articles are: by deciding on any changes, and with power to propose changes. Purpose statements included in the articles of association are therefore subject to shareholder capture – to ensure a purpose statement that transcends pure shareholder interests, this will need to be enforceable, and only changeable, by parties other than shareholders. It will need to be outside the company's articles of association.

Purely pulling corporate purpose statements out of the company's articles of association will not mitigate the importance of the articles of association in respect of the influence shareholders have over the company's activities. A lot of the UK internal dynamics of the company are provided for in the articles of association. They contain the powers that directors have in their capacity as directors, and the reasons such powers are given.[74] These have an important role in setting the content of the duties that directors owe: directors must act within their powers, and use those powers for proper purposes.[75] Shareholder ability to set this balance means that the boundaries of director power are set by shareholders: they always have the ability to change it should directors act in a way that they do not like. This, in turn, makes directors more likely to act in a way that they consider shareholders will want in

69 For the same point in respect of minority shareholder protection and entrenchment, see R Cheung, 'The use of statutory unanimous shareholder agreements and entrenched rights in reserving minority shareholders' rights: a comparative analysis' (2008) 29 Company Lawyer 234–241.

70 Companies Act 2006, s 288.

71 Ibid s 302.

72 Ibid s 291.

73 Ibid s 292 in respect of written resolutions and s 303 in respect of company meetings.

74 S M Watson, 'The significance of the source of the powers of boards of directors in UK company law' [2011] Journal of Business law 597–613.

75 Companies Act 2006, s 171. See discussion in S Worthington, 'Directors' duties and improper purposes' (2016) 75 Cambridge Law Journal 213–216.

order to protect their powers.[76] This shareholder ability is stated to have occurred by accident,[77] and has been highly criticised: the New Zealand Law Commission called it 'entirely unsatisfactory' and 'an anachronism which is misleading'.[78] Nevertheless, even if you pull a purpose statement out of the articles of association, to make purpose reforms work effectively you must also remove shareholder ability to set director powers. Otherwise, directors are likely to – perhaps just out of sheer appeasement to retain their powers – act in a way that benefits shareholders.

The articles of association also control the process for declaring dividends,[79] the process for appointing directors,[80] how directors undertake their meetings,[81] whether directors can obtain insurance in respect of personal liability,[82] and many other features. The articles of association are thus an important part of the framework of any company and of company law. They are directly controlled by shareholders. If corporate purpose law reform needs to insulate managers by excluding shareholders, then the articles of association wholesale must be part of this zone. There are two ways by which this could be achieved. Another constituency – such as directors – could select and amend the articles of association. Given that the articles currently delimit director power, this may well be sub-par. Alternatively, a lot of features that are left to the articles of association could be brought into the mandatory rules of the company regime. Certainly none of those points listed above for the articles of association need to be default rules rather than mandatory rules. Making these, and others, part of the mandatory UK framework rather than default rules to be established by the articles would be a major rewrite of UK company law, which would be needed to effectively ensure a zone of insulation.

---

76 Hardman (n 57 above).

77 Watson (n 74 above); L A Walcott, 'The conundrum: resolving the statutory contract in the Commonwealth Caribbean' (2017) 38 Company Lawyer 248–252.

78 New Zealand Law Commission, *Company Law: Reform and Restatement* (NZLC R9, 1989) paras 155–156.

79 For private companies, see Companies (Model Articles) Regulations 2008, sch 1, paras 30–35. See discussion in J Rickford, 'Legal approaches to restricting distributions to shareholders: balance sheet tests and solvency tests' (2006) 7 European Business Organization Law Review 135–179.

80 For private companies, see Companies (Model Articles) Regulations 2008, sch 1, para 17. See discussion in P Watts, 'Why as a matter of English-law principle directors do not owe a duty of loyalty to creditors upon insolvency' [2021] Journal of Business Law 103–121, predicated upon the power of directors' appointers.

81 For private companies, see Companies (Model Articles) Regulations 2008, sch 1, paras 7–16.

82 For private companies, see Companies (Model Articles) Regulations 2008, sch 1, para 53.

In addition to choosing what the articles are, shareholders are one of the few parties who are able to enforce them. The company's articles bind the company and its members:[83] each shareholder in respect of each other shareholder, each shareholder in respect of the company, and the company in respect of each shareholder. The articles bind no one else. No other party can (a) be sued in respect of a breach of a UK company's constitution (other than a director through a breach of their duties), or (b) sue in respect of a breach of these duties. For example, when articles of association provided that an individual had a right to be a company's solicitor for life, the Court of Appeal held that this person could not enforce the articles when sacked.[84] Thus even if the articles of association clearly stated that the purpose of the company was to maximise the number of employees, and it then clearly breached this by, say, making all employees redundant, the only party able to sue to enforce this provision under the corporate contract would be shareholders. Should shareholders benefit from this decision, then they are unlikely to enforce the breach against the company.

To create a zone of insulation for management, we would need to remove sole shareholder ability to enforce the contract, and increase it for those other constituencies who may be beneficiaries of a wider corporate purpose. The point stands even if purpose is moved out of the articles of association – then shareholder exclusion would still be required from enforcing articles to avoid the threat of attempted enforcement creating tacit pressure on managers, in addition to exclusion from the purpose mechanics themselves. Such exclusion would, once again, necessitate a dramatic rewrite of UK company law.

Corporate life and death

Shareholder control goes beyond merely the constitution. Shareholders are needed to set up UK companies.[85] All initial proposed shareholders need to sign the company's memorandum of association.[86] As such, if you set up a company limited by shares in the UK (the most popular type of company)[87] you need the proposed shareholders to sign

83 Companies Act 2006, s 33.

84 *Eley v Positive Government Security Life Assurance* (1876) 1 Ex D 88 CA. See discussion in K W Wedderburn, 'Shareholders' rights and the rule in Foss v Harbottle' (1957) 15 Cambridge Law Journal 194–215.

85 In practice, most UK companies are set up by promoters and then sold on to end users: see J Hardman, 'Articles of association in UK private companies: an empirical leximetric study' (2021) 22 European Business Organization Law Review 517–557.

86 Companies Act 2006, s 8.

87 J Hardman and G Ramírez Santos, 'Empirical evidence for the continuing need to "think small first" in UK company law' (2023) 24 European Business Organization Law Review 117–165.

documentation and confirm the number of shares that they will take in the company upon its establishment.[88] Proposed initial shareholders also sign the incorporation form, a form IN01, as do proposed initial directors.[89] It is therefore those who will become its directors and shareholders who decide whether or not to set a company up. They will only do so if they consider it to be in their interests to do so.[90] This is particularly pertinent in relation to corporate groups, where shareholders are able, through their disciplinary control noted above, to push for companies to be created which isolate liability in places away from corporate assets.[91] This transcends the theoretical: group structures tend to have a higher debt to equity ratio than equivalent activity taking place within a unified corporate form.[92]

Proposed initial shareholders and managers are the only entities who provide such direct control over the start of the company's life. Proposed shareholders will only be willing to start a company (or acquire shares if it is already started) if they obtain comfort that management will run the company in a way which furthers their interests. Thus in addition to the risk that shareholders push for the proliferation of companies where it benefits them to do so, they may only be interested in helping to create a company if it is run according to their interests. This creates a risk that shareholders *only* establish companies when they perceive that it is advantageous to them to do so. To counter such risk and create an effective zone of insulation for management, then, we need to explore how to remove shareholders from the decision to incorporate a company.

It may be argued that no other stakeholders are needed to start a company's life. Should an unincorporated business transfer to a company, then all existing voluntary stakeholders (eg trade creditors, employees, suppliers, customers) need to consider whether to continue to interact with the new legal vehicle (and can refuse to do so if they dislike the change in legal form). All future voluntary stakeholders must agree to the business being a company in order to contract with it,[93] and should they consider it to be a more risky form, can

88 Companies Act 2006, s 10.

89 Registrar's Rules 2009, vol 2, sch 2 issued under Companies Act 2006, s 117.

90 J Hardman, 'The nexus of contracts revisited: delineating the business, the firm, and the legal entity' (2022) 34 Bond Law Review 1–33.

91 Either directly or through shareholder pressure: R Squire, 'Strategic liability in the corporate group' (2011) 78 University of Chicago Law Review 605–669.

92 T Paligorova and Z Xu, 'Complex ownership and capital structure' (2012) 18 Journal of Corporate Finance 701–716.

93 In the context of limited liability, see S E Woodward, 'Limited liability in the theory of the firm' (1985) 141 Journal of Institutional and Theoretical Economics 601–611; F H Easterbrook and D R R Fischel, 'Limited liability and the corporation' (1985) 52 University of Chicago Law Review 89–117.

charge a premium for such risk.[94] Thus their ongoing engagement with a business after it has transferred to a company is evidence of tacit agreement to its establishment, but until it is established, there is nothing to tacitly agree to. Involuntary creditors do not choose to interact with the company in the first place, so cannot provide *ex ante* approval to its establishment. As such, there is no evident category of stakeholders to *replace* proposed shareholders in the formation of companies. There are, though, two options to create a zone of exclusion of shareholders in the incorporation decision. First, it is possible to follow the UK partnership model, which holds that partnerships are automatically created should the incidents of partnership (carrying on business together for a profit) be met.[95] Similar incidents of being a company could be found and allow for objective ascertainment of the boundaries of the corporate form.[96] Doing so would remove the risk that companies are only established when it is in the interests of shareholders to do so, and thus be a way to create an effective zone of insulation for the initial decision to establish a company.

Second, proposed directors alone could decide when to establish a new company. This appears to be the easiest to achieve, as it merely involves the removal of one party who must sign the incorporation form. Directors would then need to obtain subscriptions from shareholders to the company. There remains a danger, here, that directors may seek to utilise corporate forms as a way to aggrandise their own interests.[97] As such, it may be that similar issues remain, albeit caused by a different constituency. This would manifest in different ways to current shareholder issues and be a distinct problem. Removing shareholders from the incorporation of companies somehow is needed to adequately establish a full zone of inclusion, to remove them from deciding whether to start the company's life. Of course, even then, shareholders would need to be attracted subsequently. How attractive a new company is for shareholder investment is likely to be a function of predicted financial return for shareholders.[98] This means that directors will have to establish a form of company that

94 In the context of secured debt, see T H Jackson and A T Kronman, 'Secured financing and priorities among creditors' (1979) 88 Yale Law Journal 1143–1182.

95 Partnership Act 1890, ss 1 and 2.

96 J Hardman, 'Fixing the "misalignment" of the concession of corporate legal personality' (2023) 43 Legal Studies 443–460, 454-460.

97 Eg W J Baumol, 'On the theory of expansion of the firm' (1962) 52 American Economic Review 1078–1087; Y Amihud and B Lev, 'Risk reduction as a managerial motive for conglomerate mergers' (1981) 12 Bell Journal of Economics 605–617.

98 J J Park, 'From managers to markets: valuation and shareholder wealth maximisation' (2022) 47 Journal of Corporation Law 435–486.

shareholders are interested in investing in – one that presents them with a strong predicted financial return. As such, there are inherent natural limitations to achieving a zone of managerial insulation/shareholder exclusion in the incorporation decision. Nevertheless, let us continue to try to obtain as strong a zone as possible: this involves changing the role of shareholders in the start of the company's life.

Shareholders also enjoy a privileged role at the death of the company. Whilst all creditors can petition to wind up a company on the grounds that it is unable to pay its debts,[99] shareholders are the only private party automatically able to resolve to wind the company up when it is meeting, and is able to meet, its debts at any time and for any reason.[100] The Secretary of State is able to petition to wind up the company on public interest grounds.[101] Shareholders and creditors are also able to petition to wind up the company on just and equitable grounds.[102] Courts are very reticent to utilise this heading generally,[103] and it is very rare for creditors to use this ground rather than winding up under the heading of inability to pay debts. As a result, shareholders are the only private constituency effectively able to end a company which is not facing financial difficulty.[104] They must utilise a number of ritual steps to do so and utilise a court and an insolvency practitioner.[105] The decision to end a company's life is dramatic, and a nuclear option. However, the threat to do so, or desire to avoid such a threat, could well encourage directors to follow the interests of shareholders over others who do not have such a power. Effecting proper change to the law of corporate purpose will thus require equalising such power with other constituencies. This could involve removing the power from shareholders to resolve to wind up the company, or it could give similar powers to other constituencies. Either would insulate management from pressure to treat shareholders differently to other constituencies. Once more, though, this is a dramatic change to UK company law: either removing a major power that shareholders enjoy, or extending this right to other constituencies makes a fundamental change to UK company law.

---

99 Insolvency Act 1986, s 122(1)(f).

100 Ibid s 122(1)(a).

101 Ibid s 124A.

102 Ibid s 122(1)(g).

103 See B Clark, 'Just and equitable winding up: wound up?' [2001] Scots Law Times 108–111.

104 See also Insolvency Act 1986, s 84.

105 See the discussion of rituals in S Wheeler, 'The corporate way of death' (1996) 7 Law and Critique 217–244.

A fundamental rewrite

The foregoing indicates that changing corporate purpose law in the UK involves a fundamental rewrite of UK company law. From the simple list set out above, effective UK corporate purpose law reform needs to amend (in order discussed) the ability to ratify director breaches, the ability to launch derivative claims, the ability to remove directors, the subject matter left to articles of association, who chooses the articles of association of the company, who can enforce the articles of association of the company, who is involved in starting companies, and who can resolve to wind up companies. In each case, to take purpose seriously we need to ensure that shareholders are balanced with other constituencies to avoid the shareholder voice maintaining dominance and so continuing exactly the same pressure as existed before corporate purpose law reform. This can occur either by giving these rights also to other constituencies, or removing them from shareholders. No change on its own is minor, and each needs to be fully worked through. In aggregate, they involve a dramatic change to UK company law. These are merely the company law rules, and so do not include wider changes needed to specific rules applicable as part of stock exchange requirements, or other sub-sets of companies, such as the application of the board neutrality rule in takeovers.[106]

This article does not advocate that such changes *should* be made. As discussed below, there are reasons to question each change: excluding shareholders risks leaving directors and managers unaccountable to anyone,[107] exacerbating the risk of managerial opportunism at the expense of the venture.[108] Any insulation from shareholders would therefore need to be coupled with an alternative disciplinary mechanism. However, the foregoing is sufficient to evidence that changing corporate purpose law in the UK is complicated. To ensure that it is done properly, fundamental root-and-branch reform of UK company law is needed. Due to a requirement to insulate managers, each of the foregoing changes ultimately disempowers shareholders, either by removing their rights or watering them down by providing similar rights to other constituencies. Properly reforming corporate purpose law in the UK therefore has the inevitable consequence of disenfranchising shareholders *en masse*. Not only is the core of purpose

106 Takeover Code, general principle 3.

107 Eg L A Bebchuk and R Tallarita, 'The illusory promise of stakeholder governance' (2020) 106 Cornell Law Review 91–177; L A Bebchuk, 'The myth that insulating boards services long term value' (2013) 113 Columbia Law Review 1637–1694.

108 Eg L A Bebchuk, 'The case for increasing shareholder power' (2005) 118 Harvard Law Review 833–914. These may be mitigated by certain market forces: see E F Fama, 'Agency problems and the theory of the firm' (1980) 88 Journal of Political Economy 288–307.

reform about making companies do things beyond simply maximising shareholder value, but the swathe of ancillary rights (listed above and others) currently enjoyed by shareholders need to be removed or widened to others, too. It is therefore axiomatic that reforming corporate purpose law in the UK makes life considerably worse for shareholders of UK companies: corporate purpose law reform for us needs to amend all methods through which shareholders can apply pressure to directors to maximise their lot.

THE PERILS OF PARTIAL REFORM

The foregoing has outlined some of the more major steps needed to achieve corporate purpose properly, and the scale of the rewrite of UK corporate law necessary to fully effect corporate purpose change. It is tempting to conclude that this makes it worthwhile doing *something* to amend corporate purpose laws, but not the complete raft of changes needed to fully embed such amendment. After all, perhaps doing something that fell short of full reform but did not require a major reconceptualisation of all of UK company law would be better than doing nothing. Perhaps a small reform could be utilised, such as that proposed by Mayer, on its own, without the entire raft of legal changes needed to effectively embed it. Unfortunately, there are three reasons why doing so not only will not achieve the ends of amending corporate purpose law, but will actively hinder them. First, doing so leaves the ability for shareholders to pressure management. Second, doing so presents a veneer of resolution to an issue that would not be resolved. Third, law reform time is limited, and so there is probably only one chance to get this right in the UK.

First, as noted above, the UK's current legal corporate purpose landscape is inherently pro-shareholder. This applies in respect of the basic direct rules of corporate purpose, but also the raft of indirect rules that exist to buttress these direct rules. Shareholder-focused indirect corporate purpose rules allow shareholder pressure to be inflicted upon directors to achieve a pro-shareholder outcome. The rights enjoyed by shareholders have long been in place, including when managerialism was considered to be in the ascendency.[109] These rights are blunt tools, lacking nuance[110] and which shareholders were traditionally

109 A Johnston, A Hatchuel and B Segrestin, 'From balanced enterprise to hostile takeover: how the law forgot about management' (2019) 39 Legal Studies 75–97.

110 V Brudney, 'Corporate governance, agency costs, and the rhetoric of contract' (1985) 85 Columbia Law Review 1403–1444.

passive about.[111] Yet shareholders are more likely to use them in modern times. These rights are now supported by a vast corporate governance machine to coordinate their deployment.[112] This pressure may be direct – such as activist investors pushing voting decisions in certain directions, or otherwise overtly influencing management.[113] It may also be indirect – directors may well rationally act in a way to avoid these ancillary rights being triggered by pre-emptively acting in a way that they think will be what shareholders want.[114] Whether commentators argue for additional shareholder rights[115] or for protecting the board from shareholder pressure,[116] they agree that these ancillary rules providing rights to shareholders influence management behaviour. So much so, that if you leave one part of the edifice in place, the same pressures can still be brought to bear.

Leave but one of those ancillary rights enjoyed by shareholders in place, and it can act as a funnel to bring the same pressures on directors. In the order discussed above: leave shareholder ability to ratify director breaches, and directors will act in a pro-shareholder way to ensure that such ratification occurs if needed. Leave shareholders the ability to launch derivative claims, and they will threaten to do so if they are not appeased. Leave shareholders with the ability to remove directors, and they will remove those who do not act in their interests. Leave shareholders with the ability to choose the articles of association, and they will draft them to most benefit themselves. Leave shareholders with the sole ability to enforce the articles of association, and they will enforce the parts that protect them, and threaten to tie the company up in litigation even if their claim is not particularly strong. Leave shareholders to choose who establishes a company, and they will do so when and where it advantages them. Leave shareholders the sole ability to wind up a solvent company, and they will use this ability

111 D Attenborough, 'The vacuous concept of shareholder voting rights' (2013) 14 European Business Organization law Review 147–173; B S Black, 'Shareholder passivity reexamined' (1990) 89 Michigan Law Review 520–608.

112 D S Lund and E Pollman, 'The corporate governance machine' (2021) 121 Columbia Law Review 2563–2634.

113 See R J Gilson and J N Gordon, 'The agency costs of agency capitalism: activist investors and the revaluation of governance rights' (2013) 113 Columbia Law Review 863–927; I Anabtawi and L S Stout, 'Fiduciary duties for activist shareholders' (2008) 60 Stanford Law Review 1255–1308; J C Coffee and D Palia, 'The wolf at the door: the impact of hedge fund activism on corporate governance' (2016) 41 Journal of Corporation Law 545–607.

114 For majority/minority dynamics see Hardman (n 57 above).

115 Eg Bebchuk (n 107 above); Bebchuk (n 108 above).

116 Eg W W Bratton and M L Wachter, 'The case against shareholder empowerment' (2010) 158 University of Pennsylvania Law Review 653–728; K J M Cremers and S M Sepe, 'The shareholder value of empowered boards' (2016) 68 Stanford Law Review 67–148.

to threaten companies with a nuclear option unless appeased. More likely, leave any of these in place, and directors will act in a way to *avoid* shareholders threatening to use such rights. If your reason for advocating for corporate purpose law reform is that corporate managers need to be freed from direct shareholder pressure and the perception of shareholder pressure, then undertake any reform piecemeal and it will not meet your objectives.

It is tempting to dismiss this on the grounds that other jurisdictions provide some limitations on these shareholder rights, whilst allowing others. It therefore seems as if some form of partial reform must be possible without triggering such a funnel of shareholder pressure. For example, Germany is stated to be a jurisdiction which focuses less on shareholders than the UK does, whilst still providing considerable shareholder rights (such as setting the company's constitution).[117] Yet looking at Germany rather illustrates the risk of such funnel than undermining it. Germany operates against the backdrop of EU company law, itself stated to be based on the assumption of shareholder primacy.[118] The types of problems associated with shareholder focus – short-term push for profits[119] – have been evident recently in German companies. The Volkswagen (VW) emissions scandal[120] has been attributed to shareholder pressure.[121] This is not the only issue within German corporate law – the Wirecard scandal is generally seen as being caused through a failure of regulation of financial reporting.[122]

117 See K J Hopt, 'Comparative corporate governance: the state of the art and international regulation' (2011) 59 American Journal of Comparative Law 1–73, 28-30.

118 Eg M Hossl-Neuman and A Baumgartner, 'Dealing with corporate scandal under European market abuse law: the case of VW' (2019) 16 European Company and Financial Law Review 484–534.

119 See discussions in I Anabtawi, 'Some skepticism about increasing shareholder power' (2006) 53 UCLA Law Review 561–599; J C Stein, 'Efficient capital markets, inefficient firms: a model of myopic corporate behaviour' (1989) 104 Quarterly Journal of Economics 655–669; Bratton and Wachter (n 116 above); A Keay, 'Risk, shareholder pressure and short-termism in financial institutions: does enlightened shareholder value offer a panacea?' (2011) 5 Law and Financial Markets Review 435–448.

120 See B W Jacobs and V R Singhal, 'Shareholder value effects of the Volkswagen emissions scandal on the automotive ecosystem' (2020) 29 Production and Operations Management 2230–2251.

121 See C M Elson, C Ferrere and N J Goossen, 'The bug at Volkswagen: lessons in co-determination, ownership and board structure' (2015) 27 Journal of Applied Corporate Finance 36–43.

122 See S Mock, 'Wirecard and European company and financial law' [2021] European Company and Financial Law Review 519–554; C P Buttigieg, L G Witzel and B B Zimmermann, 'Soft regulatory capture and supervisory independence: a case-study on Wirecard' [2023] European Company and Financial Law Review 623–659.

Yet the VW example demonstrates the ability for shareholder pressure to funnel into other routes if more direct routes are removed. If any push to reform corporate purpose law arises out of a desire to stop shareholder pressure on the company, the VW and other German examples illustrate that direct corporate purpose law reform on its own will not be effective. With the culture and tradition of shareholder dominance in the UK, such funnelling is even more likely.

Second, doing something but not undertaking all the reforms identified above will create the impression of resolving underlying problems, without actually resolving them. A simple and superficial change to the UK's corporate purpose rules will provide a veneer of social probity to companies, whilst leaving problems unchecked. Companies not only exist in a legal context and a profit-generating context, they also exist in a social context. Sometimes this is referred to as companies being subject to the 'court of public opinion',[123] and sometimes it is referred to as the company's 'social license to operate'.[124] Either way, the point is that profit-making and legal forms do not exist in a vacuum, but as a wider part of society. To make profit using your legal form, you need people to trade with, to work for you, etc. Their willingness to do so – and the terms on which they are willing to do so – are partially a function of their attitude to the relevant business. This is sometimes worded in terms of risk – that increased prices will be charged for increased risk.[125] It is part of a bigger aspect, though, that the better your business is regarded, the better terms it will get.

This contributes to the need for strong branding – and the tendency to use whatever tools (including corporate law) at your disposal to boost that branding.[126] Complaints have been legitimately raised about greenwashing, where companies highlight eco-friendly policies and ignore their negative policies to present a misleadingly positive picture,[127] and rainbow-washing, where the same occurs in respect of LGBTQ+-friendly policies.[128] Each of these is a complaint that companies portray themselves in a way which makes themselves look

123 Eg S Wheeler, 'Global production, CSR and human rights' (2015) 19 International Journal of Human Rights 757–778.

124 Eg H A Sale, 'The corporate purpose of social licence' (2021) 94 Southern California Law Review 785–842.

125 Jackson and Kronman (n 94 above).

126 See V Fleischer, 'Brand new deal: the branding effect of corporate deal structures' (2006) 104 Michigan Law Review 1581–1637; L A Heymann, 'Metabranding and intermediation: a response to Professor Fleischer' (2007) 12 Harvard Negotiation Law Review 201–223.

127 See M P Vandenbergh, 'Private environmental governance' (2013) 99 Cornell Law Review 129–200.

128 J T Rice, 'Rainbow-washing' (2023) 15 Northeastern University Law Review 285–357.

best, even if that does not reflect full reality. A partially reformed corporate purpose law will be treated the same way: portrayed as companies acting in a more socially responsible way, even though nothing will change. Indeed, this may in part be caused by dominant investors pushing the company to position itself as socially advantageous without ultimately changing anything.[129]

It has been argued that corporate law discourse tends to follow underlying social attitudes.[130] So it seems to be with the recent focus on corporate purpose.[131] Purporting to make a change in respect of corporate purpose law which does not actually solve all issues can still be portrayed as doing so by those who benefit from the *status quo*. In other words, not only will nothing be solved, the social pressure to solve problems will likely be minimised. Not only will doing something that falls short of fully reforming corporate purpose not do so, it will make it look like it has done so, reducing pressure for effective change. This will not resolve existing issues driving change, but will hide them below the surface. If your intention is to obscure existing corporate dynamics and portray the impression that they cause no problems, then this may be a success. However, if you actually want to change corporate practice in the UK through corporate purpose law reform, you need to avoid partial reform.

Third, any change – even a minor one such as Mayer's – requires primary legislation to be passed by the UK Parliament. The UK Parliament has been very busy in respect of company law matters, mostly in providing minor tweaks to corporate law processes.[132] However, its time is finite – and some company law matters that were proposed have still not been enacted.[133] A new Government took power in 2024, with its own set of priorities. The last time that the UK company law regime was holistically changed, it took eight years, from 1998 to 2006.[134] Even then, not all aspects of the 2006 regime have

129 J E Fisch and J Schwartz, 'How did corporations get stuck in politics and can they escape?' (2024) ECGI Working Paper Series in Law 2024/757.

130 See L M Fairfax, 'The rhetoric of corporate law: the impact of stakeholder rhetoric on corporate norms' (2006) 31 Journal of Corporation Law 675–718.

131 Eg C Mayer, 'Who's responsible for irresponsible business?' (2017) 33 Oxford Review of Economic Policy 157–175.

132 Eg Economic Crime and Corporate Transparency Act 2023.

133 Eg nothing further has happened on corporate re-domiciliation since B Hannigan and J Hardman, 'Corporate re-domiciliation: regulatory policy and technical challenges' (2022) 26 Edinburgh Law Review 427–433.

134 See R Goddard, '"Modernising company law": the Government's White Paper' (2003) 66 Modern Law Review 402–424; J Loughrey, A Keay and L Cerioni, 'Legal practitioners, enlightened shareholder value and the shaping of corporate governance' (2008) 8 Journal of Corporate Law Studies 79–111, 82–87.

been applied to older companies.[135] Changes have been made since then – such as the introduction of a regime to ensure the recording of each company's 'persons of significant control',[136] changes to reform corporate transparency[137] and UK governmental control (for national security reasons) over shareholders in strategically important companies passing certain percentage ownership thresholds.[138] The overall picture is clear: the basic scheme is set, with political points of particular relevance being added onto that basic scheme. This basic scheme of UK company law is incredibly pro-shareholder, and this is a fundamental feature of the development of UK corporate law.[139] Corporate purpose law reform is likely to only get just one bite of the cherry – a sub-par reform will prevent, or at least delay, more meaningful law reforms later.

Effective corporate purpose law reform therefore cannot be achieved by a half-reform. Attempts to make a simple change will not act to change existing core pressures which appear to cause dissatisfaction with the company, but will provide a veneer of respectability over corporate activities which will hide this, and will delay or prevent future reforms in this area. Those serious about effectively changing corporate purpose law in the UK need to grasp the nettle and reform indirect corporate purpose law as well as direct corporate purpose law. Any way of doing so will need to require companies to make a credible commitment to wider purposes,[140] and remove the raft of ancillary rules that buttress the current narrow approach to corporate purpose.

RISKS OF REFORM AND CONCLUSIONS

So far, then, it has been argued that changing corporate purpose law in the UK requires a fundamental rewrite of large amounts of company law, and that this cannot be partial to avoid the same dynamics funnelling through other legal routes.

This part advances two arguments. First, all of the mechanisms identified as needing change for effective corporate purpose law reform exist for their own reasons, and removing them may do more harm than

135 Eg J Hardman, 'The Companies Act 2006: it's time to complete the transition' (2020) 41 Company Lawyer 93.

136 Introduced by the Register of People with Significant Control Regulations 2016, SI 2016/339.

137 Economic Crime and Corporate Transparency Act 2023.

138 National Security and Investment Act 2021, ch 4.

139 See J Armour, S Deakin and S J Konzelmann, 'Shareholder primacy and the trajectory of UK corporate governance' (2003) 41 British Journal of Industrial Relations 531–555.

140 Fairfax (n 1 above).

good. Second, corporate purpose law reform may be targeted in the wrong direction – rather than making companies think about others than shareholders, we should change the structure of shareholder incentives within the company.

First, the legal features reviewed exist for a reason. The 'master problem of research' in company law[141] has, for a long time, been how to deal with issues arising in respect of managerial excesses.[142] The ability to remove directors arose as a deliberate disciplinary function.[143] The concern is that managers act in a way that is in their own interests, and not in the interests of the company.[144] It has been argued that the best party to monitor any group endeavour is the holder of the residual claim in that endeavour,[145] which in the case of a company is the shareholders.[146] Thus the ability to remove directors is stated to have an important disciplinary function to the benefit of the company.[147] In addition to the direct benefits, it causes indirect disciplinary benefits in the case of listed markets: dissatisfied shareholders will sell their shares rather than try to exercise their right to remove directors,[148] pushing down the share price. This opens the company up to opportunistic buyers who can immediately increase value by sacking management.[149] This 'market for corporate control' mechanism disciplines directors who avoid this happening by acting more optimally *ex ante*.[150]

---

141 R Romano, 'Metapolitics and corporate law reform' (1984) 36 Stanford Law Review 923–1016, 923.

142 Caused by separation of ownership and control identified by Berle and Means: A A Berle and G M Means, *The Modern Corporation and Private Property* revised edn (Harcourt, Brace & World 1967) 5.

143 See discussion in A Keay, 'Company directors behaving poorly: disciplinary options for shareholders' [2007] Journal of Business Law 656–682.

144 E F Fama and M C Jensen, 'Separation of ownership and control' (1983) 26 Journal of Law and Economics 301–325; E F Fama and M C Jensen, 'Agency problems and residual claims' (1983) 26 Journal of Law and Economics 327–349.

145 A Alchian and H Demsetz, 'Production, information costs, and economic organisation' (1972) 62 American Economic Review 777–795.

146 N Wolfson, 'A critique of corporate law' (1980) 34 University of Miami Law Review 959–994.

147 Prentice (n 59 above).

148 A R Admati and P Pfleiderer, 'The "Wall Street walk" and shareholder activism: exit as a form of voice' (2009) 22 Review of Financial Studies 2645–2685.

149 H G Manne, 'Some theoretical aspects of shareholder voting: an essay in honor of Adolfe A Berle' (1964) 64 Columbia Law Review 1427–1445.

150 H G Manne, 'Mergers and the market for corporate control' (1965) 73 Journal of Political Economy 110–120; F S McChesney, 'Manne, mergers, and the market for corporate control' (1999) 50 Case Western Reserve Law Review 245–252.

Similar issues arise in respect of derivative claims – which exist because directors are notoriously reticent to enforce breaches of duty against other directors.[151] The derivative claim is thus a disciplinary function to allow shareholders to hold directors to account.[152] The raft of changes needed to effectively reform UK corporate purpose law by creating a zone of insulation around managers also insulates them from being held accountable for their own wrongdoing. This disarming of disciplinary functions will have the effect, at least at the margins, of encouraging worse behaviour from management.

All of which is to say that the corporate law features that we need to disable for corporate purpose law reform all exist for specific purposes. Not only is a dramatic rewrite of UK company law required to effect corporate purpose law seriously, each step should only be taken after its own cost–benefit analysis to see whether the benefits of corporate purpose law reform outweigh the harms.

Second, it is time to stop hoping that corporate purpose law reform will be a quick fix to the corporate system. If we are unwilling to undertake the major rewrite of UK company law necessary to effectively reform corporate purpose law, then we are unwilling to reform corporate purpose law. That does not mean that we have no option to regulate. Here, we have two options. First, we can regulate the company from the outside. Milton Friedman is often blamed for the current pro-shareholder landscape, somewhat unfairly.[153] He stated that business had a social responsibility to make as much money as possible 'while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom'.[154] If we are unwilling to change the player, we could change the game. If we identify corporate behaviour that is sub-optimal, and we are unwilling to change internal company law rules to amend it, then we could provide additional external regulation.[155]

Second, we can look at the underlying causes that drive the need for corporate purpose law reform. These all ultimately relate to allegations

151 D D Prentice, 'The theory of the firm: minority shareholder oppression: sections 459–461 of the Companies Act 1985' (1988) 8 Oxford Journal of Legal Studies 55–91.

152 A Reisberg, 'Shareholders' remedies: the choice of objectives and social meaning of derivative actions' (2005) 6 European Business Organization Law Review 227–268; C Riley, 'Derivative claims and ratification: time to ditch some baggage' (2014) 34 Legal Studies 582–608.

153 B R Cheffins, 'Stop blaming Milton Friedman!' (2021) 98 Washington University Law Review 1607–1644.

154 M Friedman, 'The social responsibility of business is to increase its profits' *New York Times Magazine* (New York 13 September 1970) 32, 33.

155 A K Sundaram and A C Inkpen, 'The corporate objective revisited' (2004) 15 Organization Science 350–363.

of shareholder short-termism driving the maximisation of corporate profits, and pushing for all profit to leave the company, in both cases at the expense of others.[156] Whether this is the case or not has been debated,[157] as has whether we can produce a simple, universal answer to the question of whether shareholders are forces for 'good' or 'bad'.[158] Yet, if we assume that the reason we need to change corporate purpose law is because shareholder dominance somehow causes wider harms, corporate purpose law reform still tacitly accepts shareholders setting alternative corporate purposes, whilst hoping that the company so heavily shaped by them can ultimately prioritise other interests over theirs. Most of the individuals involved in companies tend to be relatively normal, and not fundamentally evil.[159] Perhaps, then, engaging with a company 'refracts' your incentives to allow companies to undertake activity that individuals themselves find egregious.[160]

This argument has been put in a number of ways, but at the heart of it is that the current corporate law rules can encourage activity by the corporate form which is seen as socially sub-optimal. For example, limited liability has been argued to push shareholders to invest in riskier businesses and riskier ways of undertaking business, causing 'externalisation of risk'[161] or 'moral hazard'.[162] Everyone enjoys limited liability in respect of each other person's interactions,[163] so limited liability on its own cannot be the only reason for causing

156 Eg Sjåfjell et al (n 6 above).

157 Eg M J Roe, *Missing the Target: Why Stock-Market Short-Termism is Not the Problem* (Oxford University Press 2022).

158 J G Hill, 'Good activist/bad activist: the rise of international stewardship codes' (2018) 41 Seattle University Law Review 497–524.

159 Y Feldman, A Libson and G Parchomovsky, 'Corporate law for good people' (2021) 115 Northwestern University Law Review 1125–1186.

160 J Hardman, *The Limits and Logic of Agency Theory in Company Law* (Routledge 2024) ch 5. There are a series of expectations as to how individuals should fulfil their allotted roles in the company. This has been likened to an 'iron cage' that sets expectations as to how everyone should behave – eg P J DiMaggio and W W Powell, 'The iron cage revisited: institutional isomorphism and collective rationality in organizational fields' (1983) 48 American Sociological Review 147–160. The result is often that individuals can experience surprisingly little personal agency when engaging with the company: see P P M A R Heugens and M W Lander, 'Structure! Agency! (And other quarrels): a meta-analysis of institutional theories of organization' (2009) 52 Academy of Management Journal 61–85. For example, directors often act in ways that they *expect* shareholders would want them to act, based on certain expectations as to shareholder priorities (see sources cited at n 23 above).

161 H Hansmann and R Kraakman, 'Towards unlimited shareholder liability for corporate torts' (1991) 100 Yale Law Journal 1879–1934.

162 C A E Goodhart and R M Lastra, 'Equity finance: matching liability to power' (2020) 6 Journal of Financial Regulation 1–40.

163 Easterbrook and Fischel (n 93 above).

the corporate form to appear to provide greater risk to third parties compared to organisational alternatives. Instead, this arises because limited liability is coupled with a variable return[164] and voting powers to effect major changes in the company.[165] Together these cause an incentive to utilise the company to push risk onto a third party. Remove any part and the incentive is neutered: no limited liability will not encourage above-equilibrium risk (as shareholders will have to pay for corporate failure); no variable return means shareholder return would not increase with riskier activity; and no voting rights mean that nothing could be done about it. It is the confluence of these three features that, if it happens at all, push shareholders to push the company into riskier activities. Corporate purpose reform does not tackle any of these core features that create such an incentive. If corporate purpose reform is a major undertaking and has downsides, then perhaps re-examining the corporate law features that combine to create this incentive may be an easier, and less dangerous, way to achieve meaningful change.

The purpose of this article is to identify that changing corporate purpose law in the UK is complicated rather than 'embarrassingly simple'.[166] It involves a dramatic rewriting of UK company law. This rewriting will involve removing important disciplinary restrictions on management. The medicine of effectively changing corporate purpose law in the UK is bitter and its side effects strong. It may be that we are unable or unwilling to take it, especially when more palatable remedies could achieve the same ends, potentially more easily and with fewer risks. But unless we are willing to holistically rewrite UK company law to effectively reform direct and indirect corporate purpose law, we should stop discussing reform of UK corporate purpose law and explore other mechanisms for changing the incentives faced by shareholders.

164 Called the 'residual claim': T S Ulen, 'The Coasean firm in law and economics' (1993) 18 Journal of Corporation Law 301–332.

165 Hardman (n 160 above) ch 5.

166 Mayer (n 2 above) 22.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 179–212
Articles DOI: 10.53386/nilq.v76i2.1115

Investment arbitration and the autonomy of the EU's legal order: a rule of law perspective

Radosveta Vassileva
Adjunct Senior Research Fellow, UCD Sutherland School of Law
Correspondence email: radosveta.vassileva@ucd.ie

ABSTRACT

Steps taken by the European Union (EU) towards putting an end to intra-EU investment arbitration have attracted much criticism, which ranges from accusations of legal imperialism to observations that the notion of autonomy of the EU's legal order, which is the primary tool weaponised against intra-EU arbitration, is politically malleable. Nevertheless, those supporting the EU's position argue that in a legal community like the EU, it is expected to litigate against state authorities before national courts. This article informs the debate from a rule of law lens – it contends that the concerns for the EU's legal order with respect to intra-EU investment arbitration resonate dual standards and undermine article 2 of the Treaty on European Union (TEU). First, it analyses the inconsistencies of the European Commission's position considering its failure to protect judicial independence in the EU. Then, it explains why the politicisation of the principle of the autonomy of the EU's legal order in the Court of Justice of the European Union's case law, which reflects the court's commitment to self-increasing its jurisdiction and to prioritising procedure over substantive human rights, leads to tension with article 2 TEU. After shedding light on concrete cases illustrating why the EU's stance on intra-EU investment arbitration hampers investors' rights, it contemplates what solutions could be envisaged to ensure more adequate investor protection in the EU.

Keywords: intra-EU investment arbitration; autonomy of the EU legal order; rule of law; judicial independence; article 2 TEU; CJEU jurisdiction; judicial activism; investor rights; ICSID arbitration; defending investor rights at the ECtHR.

INTRODUCTION

After the end of the Cold War, many Western European countries entered bilateral investment treaties (BITs) with Eastern European countries in the hope of promoting trade. As Eastern European countries started acceding to the European Union (EU),[1] these BITs, which created the framework of what is now commonly referred to as 'intra-EU investment arbitration', became a major source of concern for EU institutions.

1 Chechia, Estonia, Hungary, Poland, Latvia, Lithuania, Slovakia and Slovenia acceded to the EU in 2004; Bulgaria and Romania in 2007; and Croatia in 2013.

Suffocating intra-EU investment arbitration

In the past decade, there has been a peculiar ping-pong game between the European Commission, the Court of Justice of the European Union (CJEU), and some EU member states aimed at suffocating intra-EU investment arbitration. In 2015, the European Commission launched infringement proceedings against five EU members in order to have intra-EU BITs repealed, arguing that these BITs were 'incompatible with EU law'.[2] Since 2018, the CJEU has also started closing the door to intra-EU investment arbitration via a series of judgments.[3] The CJEU invokes the principle of autonomy of the EU's legal order which it developed in its own prior case law and whose effects primarily secure the CJEU's authority to interpret EU law as a final instance.[4] In 2020, 23 EU members signed the Agreement for the Termination of Bilateral Investment Treaties between EU members,[5] which the European Commission has also been aggressively seeking to enforce via infringement procedures.[6]

The EU's recent steps towards putting an end to intra-EU investment arbitration have induced heated debates. Some critics have accused the CJEU of 'legal imperialism'.[7] Others are convinced that intra-EU BITs 'accelerate the internal market' – hence the EU's stance on intra-EU investment arbitration impedes EU integration.[8] There are scholars who are troubled by the vagueness and fluidity of the notion of autonomy in CJEU case law on which the same court relies to justify its attack against intra-EU arbitration.[9] Moreover, the CJEU's conception of autonomy leads to tension between EU law and international law.[10]

---

2 European Commission, 'Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties' Press Release IP/15/5198 (European Commission 18 June 2015).

3 For instance, C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018; C-741/19 *République de Moldavie v Komstroy LLC*, 2 September 2021; C 109/20 *Republiken Polen v PL Holdings Sàrl*, 26 October 2021; Case C-638/19 *P Commission v European Food SA and Others*, 25 January 2022.

4 N N Shuibhne, 'What is the autonomy of EU law, and why does that matter?' (2019) 88(1) Nordic Journal of International Law 1–32, 9.

5 OJ L 169, 29 May 2020, 1–4.

6 European Commission, 'December Infringements Package: Key Decisions' (European Commission 2 December 2021).

7 D Müller, 'EU law and arbitration under international investment instruments: the (never-ending) story of incompatibility' (*Jus Mundi* 27 September 2021).

8 C I Nagy, 'Intra-EU bilateral investment treaties and EU law after *Achmea*: "Know well what leads you forward and what holds you back"' (2018) 19(4) German Law Journal 981–1016.

9 P Koutrakos, 'The autonomy of EU law and international investment arbitration' (2019) 88(1) Nordic Journal of International Law 41–64, 41–42.

10 Ibid.

Yet, it has also been noted that there is 'some merit' in the CJEU's position against intra-EU investment arbitration:

> In a community of law, there is little reason not to submit such disputes before regular courts … It is not, and it should not be *shocking* to litigate against State authorities in front of State courts within the EU.[11]

Why a rule of law reading?

This article purports to inform the debate on intra-EU investment arbitration from a rule of law lens. Its main argument is that EU institutions' recent policy towards investment arbitration seems to undermine article 2 of the Treaty on European Union (TEU):

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The principle of the rule of law was mentioned for the first time in the case law of the European Court of Justice (ECJ), which referred to the then European Economic Community as a 'community based on the rule of law' in 1986.[12] The rule of law was formally recognised as a principle in primary EU legislation in the Maastricht Treaty of 1992.[13] The current version of article 2 TEU identifying the rule of law as a 'value' made its way to primary EU legislation via the Treaty of Lisbon in 2007.[14]

Definitions of the rule of law may vary, but its key features include legal certainty, prevention of abuse and misuse of powers, such as arbitrariness, equality before the law and non-discrimination, and access to justice.[15] Judicial independence is seen as a 'fundamental aspect of the rule of law'.[16] As put by the CJEU:

> [The] requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of

11 Müller (n 7 above) emphasis added.

12 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament*, 23 April 1986, para 23.

13 On the evolution of the notion of 'rule of law' in the EU context, see generally L Pech, 'The rule of law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* 3rd edn (Oxford University Press 2021) 307–338.

14 Ibid.

15 See Venice Commission, Rule of Law Checklist Adopted at the 106th Plenary Session (Venice 11–12 March 2016) CDL-AD(2016)007-e.

16 See Council of Europe, *Judges: Independence, Efficiency and Responsibilities*, Recommendation CM/Rec(2010)12 and Explanatory Memorandum (2010) 7.

> cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[17]

In this light, it is often said that 'arbitrators serve as a ... safety valve, impartial, objective and independent' and thus help shield from unlawful state interference with property rights.[18] The soar of BITs since the 1950s is recognised as a major step forward towards building the international rule of law – these BITs put in place 'rules and procedures ... where power play and uncertainty reigned before'.[19] BITs reduce the political risks associated with rogue states, too. In such states expropriation may involve unlawful or even criminal conduct by public officials. Meanwhile, the local courts are not independent, so there is no opportunity for fair legal proceedings leading to just compensation for the expropriation. The breaches of investors' rights often amount to breaches of human rights – namely, the violation of the right to a fair trial (due process) and the right to (private) property.[20]

Thus, in many cases, contrary to the romanticised perspectives on the EU mentioned above, it may indeed be 'shocking' to be forced to litigate before national, albeit EU, courts, and be deprived of the opportunity to bring the dispute before an arbitral tribunal, especially if a BIT was in force when the investment was made. First, some EU member states face unprecedented rule of law backsliding which the European Commission has failed to curtail via the available mechanisms at the EU level – the independence of its courts can be questioned, which means that *a priori* some intra-EU investors will have access to independent and impartial courts in states respecting the rule of law while others will be forced to defend their rights in captured courts. When confronted with compromised national courts,[21] which is the

17 Joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa, CP, DO v Sąd Najwyższy*, 19 November 2019, para 120.

18 M Waibel, A Kaushal, L K H Chung and C Balchin, 'The backlash against investment arbitration: perceptions and reality' in M Waibel, A Kaushal, L K H Chung and C Balchin (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) xlvii.

19 P T Stoll, 'International investment law and the rule of law' (2018) 9(1) Goettingen Journal of International Law 267–292, 276.

20 See art 6(1) of the ECHR and art 1 of protocol 1 to the ECHR; see arts 47 and 17 of the EU Charter of Fundamental Rights.

21 Courts can be compromised for different reasons which point to failures of external or internal judicial independence – they may be captured by the executive, they may be known for corrupt practices, judges may be subjected to undue influence or even overt pressures by colleagues, etc. In some cases, judges may simply be unwilling to respect EU law because of legal cultural or political reasons.

case in some EU countries, intra-EU investors will be primarily left with the questionable remedy of submitting an application before the European Court of Human Rights (ECtHR), which is not only notoriously slow in delivering its judgments, but which itself has been under fire for tampering with admissibility and for being susceptible to political influences (see section 4 below, 'The aftermath').

Moreover, there are a number of International Centre for Settlement of Investment Disputes (ICSID) cases,[22] which arose from controversial final judgments by national courts of EU members (see section 4 below). Had these intra-EU investors been deprived of access to investment arbitration, they would have been left without an effective remedy for the breaches of their rights. Furthermore, in one of the cases that will be examined, disputes arose on the same facts between the host state, on the one hand, and non-EU investors and local investors, on the other. Hence, we are confronted with the sad conclusion that non-EU investors have more and better protected rights than EU investors in identical circumstances.

The article begins by critically analysing the European Commission's hostility towards intra-EU BITs which is troublesome in view of the rule of law backsliding in EU member states that it has failed to curtail (section 2 'Unpacking the EU Commission's stance on investment arbitration'). Then, it examines what seems to lurk behind the CJEU's concerns that investment arbitration threatens the autonomy of EU's legal order – it argues that the court's formalistic approach is self-serving because it prioritises the *illusion* of protecting its own jurisdiction over the protection of the rule of law (section 3 'The CJEU, investment arbitration and the autonomy of the EU'S legal order'). Afterwards, the article studies several ICSID and ECtHR cases to illustrate the consequences of EU policy – in all of them, national courts in the EU have handed down controversial judgments and can be criticised for compromising the principle of the rule of law (section 4 'The aftermath'). Finally, the article concludes by examining what solutions could be envisaged to ensure more adequate investor protection in the EU (section 5 'Conclusions and recommendations').

22 ICSID is an institution under the chapeau of the World Bank which was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

UNPACKING THE EUROPEAN COMMISSION'S STANCE ON INVESTMENT ARBITRATION

The anti-investment arbitration attitude in the EU is not an isolated phenomenon – the past few decades have seen a backlash against investment arbitration worldwide.[23] Criticism focuses on both procedural issues, such as the need for better transparency, and substantive matters, such as rigid or controversial interpretations of investment law by some tribunals.[24]

It has been argued, however, that the change in the attitude towards investment arbitration by governments has primarily a pragmatic explanation. The rise of treaty-based investment arbitration claims in the 1990s showed the effectiveness of the global investment arbitration system – notably, 'states were ordered to pay substantial sums to foreign investors'.[25] The European Commission, nevertheless, has tried to portray its anti-investment arbitration stance in a noble light – namely, enforcing EU law and levelling the playing field for investors. The European Commission's arguments not only seem to ignore the reality of adjudication in courts in the EU, but also disregard the rule of law backsliding in some EU member states. This is worrisome because the ultimate result of the European Commission's policy is that intra-EU investors would have no choice but to defend their rights in national courts, unless they restructure their investments and put on the hat of a non-EU investor, of course.[26]

The beginnings of the attack

Before analysing the European Commission's arguments, it should be clarified that the EU's anti-investment arbitration stance has an external and an internal dimension. Following the adoption of the Treaty of Lisbon which listed foreign direct investment as a matter falling under the common commercial policy, the EU articulated its position on BITs with third countries in a regulation.[27] The European Commission's position against investment arbitration with third parties became more prominent during the negotiations for the Transatlantic Trade

23 See generally Waibel et al (n 18 above).

24 L Wells, 'Backlash to investment arbitration: three causes' in Waibel et al (n 18 above) 341.

25 A Uzelac, 'Why Europe should reconsider its anti-arbitration policy in investment disputes' (2019) 1(2) Access to Justice in Eastern Europe 6–30, 8 and 16.

26 It is questionable, however, if such restructuring may be a durable solution because there may be challenges at the enforcement stage. One may envisage a scenario in which national courts pierce the corporate veil.

27 Regulation (EU) No 1219/2012 of the European Parliament and Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351.

and Investment Partnership, the proposed trade agreement between the EU and the United States, which did not see the light of day.[28]

EU institutions managed to deliver the first successful blow against investment arbitration with third parties with the EU–Canada Trade Agreement (CETA) adopted in 2017.[29] While articles 8.18 and subsequent of this agreement refer to the resolution of investment disputes by a 'tribunal', it has been noted that this tribunal is 'everything but an arbitral body' because it does not bear the features of such body.[30] In parallel, the European Commission launched an attack against intra-EU arbitration which is more covert in nature and which is the focus of this article.

The European Commission's initial concerns

In the 2000s, reports about the European Commission's scepticism towards the lawfulness of intra-EU investment arbitration expressed on different occasions had started multiplying amidst the arbitration community.[31] Thanks to a partial arbitral award rendered under the auspices of the Stockholm Chamber of Commerce (SCC) in 2007, which has been made public, one can take a glimpse at a letter which the European Commission sent to the Economic and Financial Committee, a consultative body of the EU, in 2006.[32] The European Commission maintained:

> Investors could try to practice 'forum shopping' by submitting claims to BIT arbitration instead of … national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with *unequal treatment* of investors among Member States as a possible outcome.[33]

This statement is revealing of the Commission's naiveté regarding 'forum shopping' and the reality of adjudication in the EU's national courts. First, nothing impedes investors from restructuring their investments and benefiting from BITs, which are not intra-EU. Second, in some EU

28 Ibid 9.

29 [2017] OJ 11/23.

30 See the discussion in Uzelac (n 25 above) 9–10; it should be noted that since 2015, the European Commission has been working towards establishing a Multilateral Investment Court (MIC) which would replace the bilateral investment court systems included in EU trade and investment agreements, such as CETA. It is hoped that the MIC will adjudicate disputes between EU members and third parties. See 'Multilateral Investment Court Project' (Official Website of the European Commission).

31 C von Krause, 'The European Commission's opposition to intra-EU BITs and its impact on investment arbitration' (*Kluwer Arbitration Blog* 28 September 2010).

32 *Eastern Sugar v The Czech Republic*, 27 March 2007, SCC No 088/2004.

33 Ibid, para 126, emphasis added.

member states, national judges notoriously ignore the case law of the CJEU.[34] Furthermore, many national judges completely disregard the existence of the preliminary reference mechanism envisaged in article 267 TEU. For instance, empirical analysis of preliminary references from Bulgaria carried out by Aleksander Kornezov, current judge at the EU's General Court, showed that between 2007 and 2017 most preliminary references came from the same small group of judges.[35] Moreover, in countries experiencing rule of law backsliding, judges may face diverse forms of harassment for daring to approach the CJEU under the preliminary reference mechanism – from tarnishing media campaigns and threats by government officials[36] to disciplinary proceedings aimed at intimidating them.[37] Such policy overtly threatens judicial independence and induces public mistrust in the court system.

Politically motivated infringement proceedings?

It has been alleged that by 2011 the European Commission hoped to quietly pressure EU member states to repeal intra-EU BITs, which in itself speaks of a political agenda.[38] However, as there was some resistance, in 2015 the European Commission decided to show its teeth and launch infringement procedures against Austria, the Netherlands, Romania, Slovakia and Sweden in an attempt to force them to comply with this new policy.

The European Commission's press release dedicated to these infringement proceedings merits unpacking for it paints an even more biased picture of BITs than the Commission's earlier statements.[39] It is noteworthy that the European Commission makes general remarks about intra-EU BITs. It alleges that at the time these were concluded investors might have 'felt wary about investing in [East European] countries' because of 'historical political reasons'.[40] Thus, the BITs provided assurances for investment protection. Nevertheless, these BITs have served their purpose:

---

34 R Vassileva, 'Autonomous interpretation of uniform commercial law: the east–west European divide' (2018) 29(6) European Business Law Review 885–906, 902.

35 A Kornezov, 'Ten years of preliminary references – a critical review and appraisal' (2017) Evropejski praven pregled.

36 Bulgarian Judges Association, 'Open letter to Parliament, the Supreme Judicial Council and the European Commission' (*Clubz* 4 April 2018).

37 P Bard, 'The sanctity of preliminary references: an analysis of the CJEU Decision C-564/19 IS' (*Verfassungsblog* 26 November 2021).

38 A Ross, 'Killing off intra-EU BITs: how the European Commission plans to level the playing field for investors' (*Global Arbitration Review* 17 October 2011).

39 European Commission (n 2 above).

40 Ibid.

> Since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules …[41]

Sadly, the European Commission's point is nothing more than a political statement. Mere EU membership provides limited comfort to international investors and observers of the investment climate. For example, the Investment Climate Statements, country reports prepared by the State Department of the United States, tell a more nuanced story. In 2022, 'unpredictable decision-making', 'low institutional quality' and 'corruption' were deemed as 'factors eroding investor confidence' in Romania,[42] and 'rule of law' and 'endemic corruption' troubled investors looking into opportunities in Bulgaria.[43] The Worldwide Governance Indicators by the World Bank, which measure six categories, including the rule of law, in more than 200 countries and which are released every five years, show profound divides within the EU. In the World Bank's latest 2021 release, some EU members were placed in the highest percentiles in the area of the rule of law,[44] while others were placed slightly above the median percentile having similar scores to developing countries.[45]

In the same press release dedicated to the infringement procedures mentioned above, the European Commission also asserts that intra-EU BITs confer rights on a bilateral basis, which would allegedly lead to 'discrimination based on nationality', which, in turn, is 'incompatible with EU law'.[46] Without substantive analysis of the BITs in force, such statements may appear as unsubstantiated assumptions. Moreover, modern BITs normally contain most favoured nation (MFN) clauses binding states to provide investors with treatment no less favourable than the treatment under other investment treaties.

More importantly, there is no guarantee that national courts would not engage in discriminatory practices – this is a serious risk both in EU members experiencing rule of law backsliding and EU members having historic rule of law deficiencies. It is difficult to imagine that a captured court in a country with rule of law deficiencies will take a stand against abuses of power by the executive or the legislative

41 Ibid.

42 State Department of the United States, 'Investment Climate Statements: Romania' (State Department of the United States 2022).

43 State Department of the United States, 'Investment Climate Statements: Bulgaria' (State Department of the United States 2022).

44 Finland was placed in the 100th percentile; Denmark in the 99th; the Netherlands in the 95th. See World Bank, 'Worldwide governance indicators: interactive data access tool' (World Bank 2021).

45 Bulgaria was placed in the 53rd percentile with a score comparable to China's. See ibid.

46 Ibid.

branch, which may be at the origin of breaches of investors' rights (see section 4 'The aftermath' below).

For the sake of clarity, it should be noted that in literature on the rule of law, rule of law backsliding is regarded as a distinct issue from the inability to achieve the rule of law:

> These are states in which the rule of law had in fact been achieved and is now being systematically dismantled, which is a different sort of problem from not being able to achieve the rule of law in the first place. Backsliding implies that a country was once better, and then regressed.[47]

Irrespective of the diagnosis, however, the outcome for those willing to litigate to defend their investor rights will be similar – they may find themselves in a captured court incapable of delivering justice.

Mishandling rule of law deficiencies and backsliding

To this end, the European Commission's attack against intra-EU investment arbitration seems to disregard the serious threats to the rule of law in many EU member states. Even worse, there are ample concerns that the European Commission itself has contributed to this sad state of affairs in the EU through its omissions and reluctance to serve as a proper guardian of the treaties, often prioritising political considerations over legal obligations.[48] First, the European Commission can be criticised for turning a blind eye to rule of law deficiencies in the EU accession process. Second, it has failed to put a halt to the rule of law backsliding in member states which had allegedly achieved the rule of law at the time of accession.

The politicised accession process

Because of the European Commission's political optimism, the EU has admitted countries which do not respect the rule of law as members. It should be clarified that with the fifth wave of enlargement,[49] the EU accession process was transformed from political to politico-legal in view of concerns about the young, fragile East European democracies – the benefits of EU membership were made an incentive to conform with accession criteria, including the rule of law. This is known as pre-accession conditionality. Nevertheless, critics assert that:

---

47 L Pech and K L Scheppele, 'Illiberalism within: rule of law backsliding in the EU' (2017) 19(3) Cambridge Yearbook of European Legal Studies 3–47, 11–12.

48 Art 17(1) TEU specifies that the European Commission 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'.

49 Estonia, Latvia, Lithuania, Poland, Chechia, Hungary, Slovakia, Slovenia, Cyprus and Malta acceded to the EU in 2004.

> the application of the principle of pre-accession conditionality was marked by resounding failure, if it was applied at all.[50]

The problem became more visible in the sixth wave of enlargement (2007) as the European Commission unequivocally recognised that Bulgaria and Romania did not fulfil the accession criteria on the rule of law. That is why it included unprecedented safeguard clauses in these countries' Accession Treaty.[51] By 2008, the European Commission was still unconvinced that Bulgaria and Romania had made satisfactory progress – that is why it put the countries under a special mechanism, known as the cooperation and verification mechanism (CVM), which was supposed to help Bulgaria and Romania catch up with other EU member states in the area of rule of law.[52] Fifteen years of experience with this mechanism show its lack of effectiveness and point to the disturbing conclusion that so many years after EU accession, Bulgaria and Romania still do not fulfil the accession criteria on the rule of law.[53] In fact, in 2020, the European Parliament adopted a striking resolution on the rule of law decay in Bulgaria.[54] It stressed that it:

> deeply regret[ted] the fact that the developments in Bulgaria have led to a significant deterioration in respect for the principles of rule of law, democracy and fundamental rights, including the independence of the judiciary, separation of powers, the fight against corruption and freedom of the media.[55]

Failure to curtail backsliding

Not only has the European Commission engaged in dual standards in the accession process, thus enabling countries which have not achieved the rule of law to accede to the EU, but it has also shown lack of sober judgment in using the available tools to curtail rule of law backsliding in countries such as Poland and Hungary. The rule of law crises in these EU member states have been deemed to threaten 'the very fabric of EU constitutionalism'.[56]

---

50 D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 300.

51 Arts 37–39 of the Accession Treaty [2005] OJ L 157.

52 On the origin and development of the CVM, see R Vassileva, 'Threats to the rule of law: the pitfalls of the cooperation and verification mechanism' (2020) 26(3) European Public Law 741–768.

53 Ibid. Sadly, the mechanism was terminated in 2023 for political reasons.

54 P9_TA(2020)026; European Parliament Resolution of 8 October 2020 on the Rule of Law and Fundamental Rights in Bulgaria.

55 Ibid s X(1).

56 D Kochenov, 'Article 7: a commentary on a much talked-about "dead" provision' in A von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 129.

For years, those concerned about the dire situation in Poland and Hungary waited for the European Commission to activate article 7 TEU. In 2013, this provision was referred to as a 'nuclear option' by the then President of the European Commission José Manuel Barroso who worried about 'challenges to the rule of law' in EU members in his state of the union speech.[57] Article 7(1) is known as the preventative limb of article 7 TEU, allowing EU institutions to establish 'a clear risk of a serious breach' by a member state of the values referred to in article 2 TEU. The European Commission, nonetheless, chose to delay triggering article 7(1) by relying on mechanisms with less bite, such as infringement procedures, and the newly developed Rule of Law Framework. The latter mechanism, which supposedly helps assess whether a member state has threatened the rule of law to such extent that article 7 TEU should be activated, was a political compromise.[58] It has been argued that the Rule of Law Framework did not achieve anything – therefore it

> considerably undermined not only the legitimacy of the [EU] Commission, but also that of the entire rule of law oversight mechanism.[59]

Moreover, the European Commission engaged in dual standards in similar circumstances delivering a further blow to its own credibility. In 2017, it triggered article 7(1) TEU against Poland, citing among others 'grave concerns as regards judicial independence', but not against Hungary.[60] Rule of law scholars quickly saw political biases:

> ... [the] diagnosis that Poland is worse than Hungary is surprising considering the easily available and multiple studies documenting *many years of systematic attacks* on the rule of law in Hungary.[61]

---

57 President of the European Commission, 'State of the Union Address', Plenary Session of the European Parliament, Speech/13/683 (European Commission 11 September 2013).

58 European Commission, 'A New EU Framework to Strengthen the Rule of Law', COM(2014)158 final (11 March 2014).

59 G Halmai, 'The possibility and desirability of rule of law conditionality' (2019) 11 Hague Journal on the Rule of Law 171–188.

60 European Commission, 'Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law', COM(2017) 835 final (20 December 2017).

61 K L Scheppele and L Pech, 'Why Poland and not Hungary?' (*Verfassungsblog* 8 March 2018).

Indeed, in the case of Hungary, article 7(1) TEU was activated by the European Parliament in the end, and not without pressures from civil society.[62]

Critics encouraged the European Commission to look for mechanisms with more bite than article 7 TEU since it had become a 'dead provision' because of the delay in its application.[63] When the much-anticipated EU Conditionality Regulation, which ties the state of the rule of law to EU funds,[64] entered into force, however, the European Commission took steps to delay its application, which led to a highly critical resolution by the European Parliament threatening to sue the European Commission before the CJEU due to its refusal to comply with the regulation.[65] Surely, this raises further concerns that the European Commission's decisions prioritised political considerations over concerns for rule of law backsliding.

More recently, the European Parliament and critics alike were disappointed that the European Commission missed an opportunity to promote the rule of law in Poland via the country's national recovery plan, which could have been used as an incentive to persuade the country to comply with the CJEU's and ECtHR's case law against it.[66] The EU's Recovery and Resilience Facility purports to mitigate the economic and social impact of the coronavirus pandemic – under this initiative, EU member states which have been severely hit by the pandemic can submit recovery plans to the European Commission to obtain funding in the form of loans and grants. It was hoped that the European Commission would use its leverage to encourage reforms on a national level. Nevertheless, in Poland's case, the European

62 European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union is Founded, P8_TA(2018)0340: on the background of the Sargentini report which informed the European Parliament's vote, see N Köves, 'The Sargentini Report – its background and what it means for Hungary and for the EU' (Heinrich Böll Stiftung 18 September 2018).

63 Kochenov (n 56 above) 127.

64 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I, 1–10.

65 European Parliament Resolution of 25 March 2021 on the Application of Regulation (EU, Euratom) 2020/2092, the Rule-of-Law Conditionality Mechanism, P9_TA(2021)0103, para 14.

66 European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan, P9_TA(2022)0240, paras 1–14.

Commission 'cede[d] its crucial leverage' despite 'meek assurances about improvements to its rule-of-law situation'.[67]

Overall, in view of the grim picture of the rule of law in some member states of the EU, it is certainly striking that the European Commission insists that investors defend their rights in national courts whose independence cannot be guaranteed despite the available tools at the EU level. Instead of fighting discrimination, this policy potentially fosters abuses of human rights, which can hardly promote trust among the investor community – after all, judicial independence is an inherent feature of the right to a fair trial and, more broadly, the rule of law.

THE CJEU, INVESTMENT ARBITRATION AND THE AUTONOMY OF THE EU'S LEGAL ORDER

While the European Commission, as an executive body, is entitled to make political decisions – the Juncker Commission explicitly prioritised the 'political' over the 'technocratic'[68] – it is striking that the CJEU has supported its position on investment arbitration. Sadly, it seems that the CJEU has used the occasion primarily to serve its own agenda – it has given precedence to the defence of its own illusory territory over the cardinal value of the rule of law.

As mentioned in the introduction, the CJEU's main argument against intra-EU investment arbitration is the protection of the autonomy of the EU's legal order. The CJEU first advanced this view in *Achmea*:

> … the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.[69]

The choice of legal 'weapon' against intra-EU investment arbitration merits unpacking for there is no reference to a principle of autonomy of the EU's legal order in primary EU legislation. While it has gained ground to the extent that some claim that it forms part of '*extra-Treaty primary law*',[70] one should not forget that it developed in the ECJ's case law thanks to the court's activism.

After explaining how the principle of autonomy appeared on the EU's legal stage thanks to the ECJ's bold, yet self-serving interpretation moves, this section highlights how its application in *Achmea* illustrates

---

67 W Sadurski, 'The European Commission cedes its crucial leverage vis-à-vis the rule of law in Poland' (*Verfassungsblog* 6 June 2022).

68 H Kassim and B Laffan, 'The Juncker presidency: the "political" commission in practice' (2019) 57(S1) Journal of Common Market Studies 49–61.

69 C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018, para 33.

70 Shuibhne (n 4 above) 20.

the heavy politicisation of this principle, which leads to tension with article 2 TEU.

A bold or a self-serving court?

It has been emphasised that:

> The question of the legal status of norms of European Union law within the legal order of the Member States of the European Union is an evergreen in European legal studies.[71]

It is often forgotten, however, that the EU's legal order that we know today was shaped by judicial activism.

The remarkable evolution of ECJ's jurisdiction

The ECJ was originally modelled after the French Conseil d'Etat.[72] The Conseil d'Etat, in its judicial role, ensures that the French Government stays faithful to legislation – similarly, the ECJ, as seen by the Treaty of Rome of 1957, was initially conceived as a court which would keep check on the powers of supranational institutions.[73] It has been asserted:

> The preliminary ruling mechanism did not authorize the ECJ to review the compatibility of national law with European law ...[74]

This was a role meant for the European Commission under its infringement proceedings prerogative (article 89 of the Treaty of Rome).

Nevertheless, through bold interpretation of article 177 of the Treaty of Rome, which then defined ECJ powers to render preliminary rulings, the ECJ self-increased its jurisdiction. Namely, from the 1960s onwards, the ECJ started creating tools which not only helped it to transform the EU legal system, but also to encourage national courts to monitor compliance with EU law on a national level.[75] One of these tools is the principle of 'direct effect' which emerged from the *Van Gend En Loos v Administratie der Belastingen* judgment.[76] It provides that: 'Union law may provide rights and obligations to individuals, as well as Member States, which may be enforceable before national courts.'[77]

---

71 B de Witte, 'Direct effect, primacy and the nature of the legal order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* 3rd edn (Oxford University Press 2021) 187.

72 K J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 6.

73 Ibid.

74 Ibid 10.

75 Ibid 17.

76 Case 26/62 *Van Gend En Loos v Administratie der Belastingen*, 5 February 1963.

77 K Davies, *Understanding European Union Law* (Routledge 2019) xxviii.

A second tool in the rich arsenal, which the ECJ developed for itself, is the doctrine of supremacy which emerged from the *Costa v ENEL* judgment.[78] According to this principle, 'where Union law and national law conflict, Union law will take precedence'.[79] In *Costa* itself, the ECJ stressed that 'domestic legal provisions, however framed' could not override EU law.[80] Professor Weatherill has highlighted the rigidity of this formulation: 'Even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm.'[81] The *Van Gend En Loos* and *Costa* judgments are seen as the harbingers of the 'new legal order' which the ECJ committed to developing and protecting.[82]

The role of the principle of autonomy

In the above context, one can better appreciate that, initially, the principle of autonomy had an 'internal dimension' aiming to shield the developing EU legal order from national challenges.[83] From the 1990s onwards, however, the ECJ started developing the 'external dimension' of this principle whose purpose is to defend the EU's mature legal order from international interferences.[84] The rationale behind the principle of autonomy is the uniform interpretation of EU law:

> ... no other court may be given jurisdiction to interpret EU law in a manner which would be binding on the European Union or its institutions.[85]

It has been contended, however, that this relatively new external dimension of autonomy is heavily politicised.[86]

Finally, the Treaty of Lisbon, which entered into force in 2009, broadened the jurisdiction of the CJEU in primary EU legislation.[87] Yet, the CJEU's bold interpretation moves continued. While arbitration lawyers have already accused the CJEU of 'legal imperialism',[88] some constitutional lawyers also argue that this court could indeed be

78 Case 6/64 *Flaminio Costa v ENEL*, 15 July 1964.
79 Davies (n 77 above) xxxiii.
80 *Flaminio Costa v ENEL* (n 78 above) para 3.
81 S Weatherill, *Law and Integration in the European Union* (Oxford University Press 1995) 106.
82 Alter (n 72 above) 186.
83 Koutrakos (n 9 above) 44.
84 Ibid.
85 T Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) 80.
86 Koutrakos (n 9 above) 42.
87 Pech (n 13 above) 316–317.
88 Müller (n 7 above).

'selfish'.[89] What once appeared to be bold interpretation moves may now also be seen as self-serving manoeuvres since the ultimate result is that the CJEU prioritises the protection and even expansion of its jurisdiction over the defence of foundational values, such as the rule of law.

Achmea: did politics enter the courtroom?

In this context, *Achmea* can be seen as one the culminations of the politicisation of the principle of autonomy in CJEU case law. The case concerns a dispute between a Dutch insurance company, Achmea, and the Slovak Republic. Achmea offered private sickness insurance via a subsidiary on the Slovak market, but subsequently suffered damage after the Slovak Government changed policy and took measures to reverse the liberalisation of the Slovak insurance market. Achmea instituted arbitration proceedings in Germany pursuant to the Netherlands–Czechoslovakia BIT signed in 1991. An arbitral award was rendered in 2012, but the Slovak Government sought to set it aside in Germany – the German court made a preliminary reference inquiring about the compatibility of articles 267 (the preliminary reference prerogative) and 344 TEU (the monopoly on the application and interpretation of EU treaties) with the BIT in question.

There are particularities of context which indicate that the CJEU's conclusions may have been politically motivated. Notably, leading arbitrators, such as Emmanuel Gaillard, have accused the CJEU of succumbing to lobbying:

> It is hardly credible that such a decision was not influenced by NGOs after they vehemently criticised the investor–state dispute settlement system in place for the last decade. The court would have found other ways to deal with the issue before it if it had not been for their lobbying.[90]

While the CJEU is not bound by the opinions of Advocate Generals, it is also thought-provoking that in the *Achmea* case Advocate General Wathelet expressed profoundly different views from the court.[91] He argued that 'no arbitral award can be enforced without the assistance of the State'.[92] Essentially, at the enforcement stage, national courts can review the compliance of the award with EU law. In case they do

89 B de Witte, 'A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing 2014) 46.

90 E Gaillard, 'The myth of harmony in international arbitration' (*Lalive Lecture* 5 July 2018)

91 Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slowakische Republik v Achmea BV*.

92 Ibid para 238.

not, the European Commission can initiate infringement procedures against the member state in question.

More importantly, Wathelet diplomatically referred to the inexplicable radical change in attitude demanded by the European Commission. He reminded that in earlier case law concerning the compatibility of arbitral awards with EU law, neither the European Commission nor member states showed concern about the arbitrability of the matters in question.[93] Meanwhile, in those earlier cases, the CJEU did not consider the arbitrability of the dispute, but directly answered the questions raised by national courts.[94]

Indeed, while the European Commission or EU member states are entitled to change their political views, it may, at first glance, appear striking that the CJEU played along by hiding behind a seemingly sophisticated European constitutional wrapping. The CJEU ruled that the BIT in question had 'an adverse effect on the autonomy of EU law'.[95] It was troubled that the jurisdiction of the arbitral tribunal envisaged by the BIT related to the interpretation of EU law while the arbitral tribunal was not part of the judicial system of the EU. Thus, in the eyes of the court, the BIT called into question the principles of mutual trust and sincere cooperation.[96] The CJEU clarifies:

> EU law is thus based on the *fundamental premise* that each Member State shares with all the other Member States, and recognises that they share with it, a set of *common values* on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of *mutual trust* between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the *principle of sincere cooperation* set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.[97]

Critics have deemed that the CJEU's legal reasoning in *Achmea* is 'formalistic' and 'hostile to the harmonious co-existence between EU and international law'.[98] They have also asserted that:

---

93 Ibid paras 242–243; Wathelet refers to C-536/13 *Gazprom*, 3 May 2015 and C-567/14 *Genentech*, 7 July 2016.

94 *Gazprom* and *Genentech* (n 93 above).

95 C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018, para 59.

96 Ibid para 58.

97 Ibid para 34; emphasis added.

98 Koutrakos (n 9 above) 42.

> In essence, the judgment may appear to suggest that every time an EU law issue pertains to a dispute before any international tribunal, the autonomy of the EU legal order would be at stake and the Court's *exclusive* jurisdiction should be triggered.[99]

Below we argue that the reasoning can be criticised from a rule of law standpoint, too. The 'fundamental premise' that EU members share the same values is an ideal that member states aspire to – mere joining the EU does not guarantee that member states enforce these values in practice. If one can draw a parallel with contract law – the mere signing of a contract neither means that the promissor intends to perform it, nor that it will perform it. The good faith of the promissor is evaluated based on facts rather than based on presumptions. To this end, it is important to stress that the ECtHR has warned that there should be limits to mutual trust in EU law when fundamental rights are at stake in order to respect the European Convention on Human Rights (ECHR).[100] Thus, for instance, mutual recognition should not be applied 'automatically and mechanically'.[101]

Overall, if there are serious grounds to suspect that an EU member state does not respect the principle of sincere cooperation, insisting on the enforcement of the principle of mutual trust may be deemed to undermine article 2 TEU.

The CJEU's stance and the rule of law

It is well-established that:

> primacy of EU law is a legal reality only to the extent that national courts accept the role allocated to them by the ECJ, and the practice shows that this acceptance, so far, is selective and generally based on the national courts' own constitutional terms.[102]

Beyond the tension between national constitutions and EU law, the primacy of EU law may be ignored for an array of mundane issues with which young democracies struggle and which would not be familiar to constitutionalists analysing mature democracies – from disinterest in EU law by national judges to court capture (see section 2 above).

Sadly, the protection of the CJEU's jurisdiction and its pretence for purity of interpretation of EU law is illusory. An impartial and lawfully composed arbitral tribunal is better placed to apply EU law in good faith than incompetent, partial or corrupt national judges. Yet, in practice, the CJEU often prefers maintaining appearances rather than protecting fundamental rights and defending judicial independence.

---

99 Ibid 51.

100 *Avotiņš v Latvia* Application no 17502/07, 23 May 2016, para 114.

101 Ibid para 116.

102 de Witte (n 71 above) 227.

The sad reality: procedure often trumps substantive human rights

The CJEU has already faced burning criticism by rule of law scholars Professor Kochenov and Professor Bard for its

> astonishingly short-sighted approach chronically valuing procedural EU law above the essence of substantive human rights.[103]

These academics lament the advancement of diverse standards of judicial independence depending on context by the CJEU,[104] which not only dilute and undermine the conception of judicial independence itself, but which are also lower than the gold standard stemming from the ECHR – namely the 'tribunal established by law' one envisaged in article 6 of the ECHR and further developed in ECtHR case law.[105]

Indeed, some cases which are not directly related to *Achmea*, are revealing of the values of the EU order which the CJEU purports to develop. One of the most striking examples showing how far the CJEU is willing to go to defend mutual trust at the expense of the protection of fundamental rights and judicial independence is *L and P*,[106] which concerned a preliminary reference by a Dutch court in relation to the execution of a European arrest warrant issued by Polish authorities. At the material time, the rule of law crisis in Poland was clearly identified by the European Commission, too (section 2 above). Despite this, the CJEU held that the existence of 'systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State' does not affect the execution of every request for extradition for this would mean extending the limitations placed on mutual trust beyond exceptional circumstances.[107]

Legitimising non-judges

Relatedly, *Getin Noble Bank* may be seen as an illustration of the CJEU's unhealthy obsession with the promotion of judicial dialogue via preliminary references.[108] The court held that 'irrespective of composition', '[i]n so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed'[109]

103 D Kochenov and P Bard, 'Kirchberg salami lost in Bosphorus: the multiplication of judicial independence standards and the future of the rule of law in Europe' (2022) Journal of Common Market Studies 150–165, 159.

104 The CJEU has considered judicial independence in different contexts – in relation to European arrest warrants, judicial appointments, disciplinary proceedings against judges, etc.

105 Kochenov and Bard (n 103 above); for the ECtHR's standard, see *Astradsson v Iceland*, Application no 26374/18, 12 March 2019.

106 Joined Cases C-354/20 PPU and C-412/20 PPU *L and P*, 17 December 2020.

107 Ibid paras 41–43.

108 C-132/20 *Getin Noble Bank*, 29 March 2022.

109 Ibid para 69.

that requirements, such as 'established by law', applying the rule of law, and being independent, are met.[110] Even more problematic is the conclusion that such a statement can only be rebutted:

> where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law.[111]

In this case, the CJEU gladly accepted a request for a preliminary reference by a Polish supreme court judge appointed by a procedure marked by manifest irregularities identified by the CJEU itself in C-824/18,[112] despite protests by the Polish ombudsman who intervened in the case to argue that the judge in question was not 'a "court or tribunal" within the meaning of EU law'.[113]

The 'non-judge' in question was clearly abusing the preliminary reference procedure to attack the independent Polish judges who had ruled at the appeal level – he asked provocative questions, including whether a judge appointed during communism could be deemed independent. His request was clearly part of a political agenda seeking to legitimise the 'non-judges' appointed by the Polish Government as part of its controversial law reform aimed at capturing the courts. As put by Professor Pech:

> the fake judges [that the Polish Government] unlawfully put in place can … seek to legitimise themselves by seeing their (bogus) requests for a preliminary ruling heard and decided by the ECJ.[114]

What can the above cases tell us about the future of investment disputes taken to national courts? The fact that the CJEU is willing to sacrifice fundamental rights in a sensitive area, such as criminal law, at the altar of the presumption of mutual trust gives a taste of what fruit preliminary references in relation to investment disputes taken to courts in countries with severe rule of law deficiencies might bear in the future. For instance, if an independent judge in a country with rule of law deficiencies relies on the preliminary reference procedure to ask if a seemingly captured lower court was a tribunal established by law, one can reasonably assume that mutual trust will prevail. Meanwhile, the CJEU may be tempted to legitimise other 'non-judges' in the future by declaring their requests for preliminary rulings

110 Ibid para 66.

111 Ibid para 72.

112 C-824/18, *AB, CD, EF GH, IJ v Krajowa Rada Sądownictwa*, 2 March 2021.

113 C-132/20 *Getin Noble Bank*, 29 March 2022, para 62.

114 L Pech, 'Polish ruling party's "fake judges" before the European Court of Justice: some comments on (decided) Case C-824/18 AB and (pending) Case C-132/20 Getin Noble Bank' (*EU Law Analysis* 7 March 2021).

admissible. It is questionable if these perspectives may inspire trust in the EU's legal order amidst the investment community. Rather, it is clear that litigating before national courts is not a viable alternative to investment arbitration. As explained in the introduction, the main role of BITs is to reduce political risk and to provide aggrieved parties with an impartial mechanism for dispute resolution in lieu of non-independent local courts.

THE AFTERMATH

Achmea served as a basis for subsequent case law throwing down bolder gauntlets to investment arbitration. In its *Komstroy* judgment of 2021,[115] the CJEU demonstrated its activism yet again – while the dispute in question did not concern EU member states, it used the opportunity to elaborate further on *Achmea*'s implications and held that the arbitration system under the Energy Charter Treaty (ECT) was incompatible with EU law.[116] In *Commission v European Food SA and Others*,[117] the CJEU set aside a judgment by the General Court to overtly expose the ICSID Convention as incompatible with EU law.[118]

Meanwhile, *Achmea* also provided an impetus for an even more aggressive attack against intra-EU investment arbitration by the European Commission which pushed EU member states to sign an Agreement for the Termination of Bilateral Investment Treaties, which essentially puts an end to intra-EU investment arbitration.[119] Not only is *Achmea* explicitly mentioned in the Agreement's preamble, but it is also emphasised that:

> investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties.[120]

---

115 C-741/19 *République de Moldavie v Komstroy LLC*, 2 September 2021.

116 Ibid para 66. This judgment was handed down at a time when the European Commission was already tired of trying to negotiate the modernisation of the ECT in view of climate policy considerations. Subsequently, in 2023, the Commission put forward a proposal for the EU's withdrawal from the ECT based on a number of policy grounds, including the protection of the autonomy of the EU's legal order. The EU formally withdrew from the ECT in 2024. See European Commission, 'Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty', COM(2023) 447 final (7 July 2023). See also Council of the EU, 'Energy Charter Treaty: Council gives final green light to EU's withdrawal' (Website of the Council of the EU 30 May 2024).

117 Case C-638/19 *P Commission v European Food SA and Others*, 25 January 2022.

118 Ibid para 142 and subsequent.

119 [2020] OJ L 169, 1–4.

120 Ibid emphasis added.

Furthermore, it is noteworthy that the preamble reminds that:

> every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection …[121]

This section discusses several cases from Croatia and Bulgaria, which gave rise to ICSID and ECtHR proceedings, to show how detrimental the consequences of the EU's policies vis-à-vis intra-EU investment arbitration may be for investors in the future. It is worth noting that both of these countries face challenges in the area of judicial independence years after their EU accession. According to the findings of the 2023 EU Justice Scoreboard, 38 per cent of Croatians rate the independence of national courts as 'fairly bad' while 35 per cent rate it as 'very bad'.[122] Meanwhile, 31 per cent of Bulgarians rate the independence of national courts as 'fairly bad' and 27 per cent of them rate it as 'very bad'.[123] Beyond subjective perceptions of context, the concrete court decisions that gave rise to the above-mentioned proceedings may be criticised for being politically motivated and for disregarding the principle of the rule of law.

Lessons from ICSID and the Croatian Swiss franc saga

The unravelling of the Swiss franc controversy in Croatia is one of the fascinating examples which show that investment arbitration can indeed be a safety valve when national governments take politically motivated decisions inflicting severe damage on investors, or when national courts hand down controversial judgments depriving investors of any remedy. In fact, these cases also reveal that investors may rely on ICSID arbitration as a last resort, after having exhausted all or most remedies at the national level and after having exposed the incapacity of the justice system to defend investor rights.

This section briefly outlines the huge challenge which the Swiss franc controversy dealt in Central and East European (CEE) countries and then explains why, at the end, ICSID arbitration was the only effective defence against Croatia's radical policies.

The Swiss franc controversy

The Swiss franc controversy emerged as a result of the decision by the Swiss National Bank (SNB) to unpeg the Swiss franc from the euro

121 Ibid.

122 See Eurobarometer, 'Flash Eurobarometer 519: perceived independence of the national justice systems in the EU among the general public' (*Eurobarometer* June 2023).

123 Ibid.

in 2015.[124] This caused a significant appreciation of the Swiss franc which, in turn, affected hundreds of thousands of citizens in CEE countries who had taken out loans, including mortgages, denominated in Swiss francs or loans denominated in the local currency with a currency clause in Swiss francs.[125] Taking out loans in Swiss francs was popular in these jurisdictions for many reasons, including the lower interest rates on such mortgages compared to the interest rates on mortgages in euros or in the local currency. Following SNB's decision, these borrowers experienced financial shock – many of them were threatened with losing their housing and were driven to psychological despair.

Yet, it is interesting that different countries reacted to this challenge in distinct ways. This can be explained with the uncertainty regarding the *nature* of the issues which arose due to the unpegging of the Swiss franc. For some, what happened is a failure of financial regulation – the European Central Bank (ECB), for instance, had been warning about the dangers of accumulation of foreign-denominated loans for years.[126] Others considered solutions in general contract law (change of circumstances, mistake, negotiations in good faith, etc) and consumer law (unfair terms).[127]

The initial chaotic response by national institutions showed that the answers were not clear cut. In Serbia, for instance, the central bank quickly intervened in early 2015 with a decision obliging banks to offer borrowers four options – two of them involved the conversion of the loans in question into euros and two of them involved offering better conditions on the same loans.[128] In Bulgaria, by contrast, the central bank remained silent – instead the Commission for the Protection of Consumers looked for compromise solutions.[129]

The solution crafted by Croatia may be viewed as radical because lenders were delivered blows by both the Croatian Parliament and the Croatian court system. In 2015, the Croatian Parliament enacted legislative amendments allowing borrowers to convert their loans into euros *retroactively* despite severe warnings by the ECB that such

124 For an overview, see R Vassileva, 'Monetary appreciation and foreign currency mortgages: lessons from the 2015 Swiss franc surge' (2020) 28(1) European Review of Private Law 173–200, 174–175.

125 For estimates, see E Miscenic, 'Currency clauses in CHF credit agreements: a "small wheel" in the Swiss loans' mechanism' (2020) 9(6) Journal of European Consumer and Market Law 226–235, 234.

126 Vassileva (n 124 above) 181.

127 Ibid 176–182.

128 National Bank of Serbia, 'Decision on measures to preserve the financial stability related to loans indexed in foreign currencies' (*National Bank of Serbia* 24 February 2015).

129 Vassileva (n 124 above) 182.

an approach not only violates the principles of legal certainty and legitimate expectations, but may also affect the financial stability of the country.[130] The ECB was especially worried that Croatia attributed losses of more than €1.1 billion to the banks.[131] Moreover, one may suspect that this solution was meant to make up for failures of Croatia's central bank to take adequate measures to reverse the accumulation of such loans. In January 2015, when the SNB unpegged the Swiss franc, the public stance of the Croatian National Bank itself could be deemed a case of Pontius Pilate washing his hands – it issued a statement presenting various policy options but concluded that the choice between such options was 'primarily … *political* … due to the nature of such decisions'.[132] Affected banks and other interested parties tried to challenge the retroactive conversion before Croatia's constitutional court, which, however, declared the requests for constitutional review inadmissible citing 'social justice' as a primordial value of Croatia's Constitution and attacking the ECB's stance.[133]

The second blow to banks was delivered via litigation initiated by consumers. It should be noted that in many CEE countries, borrowers sought relief before national courts in view of the Unfair Terms Directive, arguing that the indexation clauses in their agreements constituted unfair terms, individually or in class action suits.[134] A detailed account of the nine-year long saga before the Croatian courts is beyond the scope of this article;[135] however, it is worth pointing out that the aftermath is that the interest rates in these foreign-denominated loans were deemed to be unfair terms, so they were struck out. Hence, in addition to the retroactive conversion, the loans ended up being 'free' for borrowers, inflicting further losses on the lenders.

ICSID as the only hope for justice

Undoubtedly, challenges which have *huge social repercussions* invite political solutions. However, what is specific about the Croatian case is that the country did not seek a balanced solution considering the

130 European Central Bank, Opinion on the Conversion of Swiss Franc Loans CON/2015/32 (18 September 2015) 4–5.

131 Ibid 5.

132 Croatian National Bank, 'Some facts about loans in Swiss francs and some options for government intervention' Press Release 21 January 2015, 12, emphasis added.

133 Constitutional Court, 4 April 2017, U-I-3685/2015 et al. Constitutional Court, 4 April 2017, U-I-4455/2015.

134 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

135 For details, see E Miscenic, 'Croatian case "Franak": effective or "defective" protection of consumer rights?' (2016) Harmonius Journal of Legal and Social Studies in South East Europe 184–209. See also Miscenic (n 125 above).

interests of both lenders and borrowers – rather it imposed all negative consequences on all the foreign banks, thus attempting to transfer the hot potato abroad. Moreover, the national constitutional court supported the Government's radical policies regarding retroactive conversion, while violating the principle of legal certainty, which is a key facet of the rule of law.

Relatedly, the legal reasoning in the court judgments ultimately declaring that the indexation clauses in the loan agreements constituted unfair terms may be questioned, too. Scholars have already pointed out that these judgments show prejudices against banks, including a lack of understanding of how banks find foreign currencies on the interbank market, unrealistic expectations that banks should run on empathy rather than financial logic, and idealistic hopes that banks should acquaint their customers with simulations in academic papers.[136]

It is thus not surprising that many of these banks initiated proceedings against Croatia before ICSID stepping on intra-EU BITs. Three of these cases have already been discontinued – *OTP Bank plc v Republic of Croatia invoking the Croatia-Hungary BIT*,[137] and *Erste Group Bank AG and Others v Republic of Croatia*[138] and *UniCredit Bank Austria AG and Zagrebačka Banka dd v Republic of Croatia*,[139] both of which invoke the Austria–Croatia BIT. At the time of writing of this article, three of them are still pending – *Adria Group BV and Adria Group Holding BV v Republic of Croatia*[140] invoking the Croatia–Netherlands BIT, *Société Générale SA v Republic of Croatia*[141]

136 Vassileva (n 124 above) 188–189 and 192; For example, the Commercial Court of Zagreb held that banks could have foreseen the appreciation of the Swiss franc as early as 1997 because of a paper published on the website of the International Monetary Fund (IMF), which discussed the possible effects of the European Monetary Union on Switzerland and in which the appreciation of the Swiss franc was one of the scenarios examined. According to the court, this proved that banks as well as their parent banks knew of the existence of such forecasts, but did not inform their customers of such scenarios when they took out their loans. See Commercial Court of Zagreb, 4 July 2013, P-1401/12, at 138–140: 'such claims by the court are purely speculative because the paper has a formal disclaimer that it does not present the views of the IMF. Moreover, the scenarios advanced by the authors are based on simulations – the paper stipulates that all simulations represent deviations from the baseline forecast in the IMF's World Economic Outlook 1996.' See D Laxton and E Prasad, 'Possible effects of European monetary union on Switzerland: a case study of policy dilemmas caused by low inflation and the nominal interest rate floor' (1997) IMF Working Paper No 97/23, 1 and 20.

137 ICSID Case No ARB/20/43.

138 ICSID Case No ARB/17/49.

139 ICSID Case No ARB/16/31.

140 ICSID Case No ARB/20/6.

141 ICSID Case No ARB/19/33.

invoking the Croatia–France BIT, *Addiko Bank AG* and *Addiko Bank dd v Republic of Croatia*[142] invoking the Croatia–Austria BIT.

The first three cases were discontinued pursuant to ICSID's (former) arbitration rule 43(1), which provides:

> If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

It is important to note that while the parties to these disputes did not choose to embody their settlement as an award as allowed by (former) arbitration rule 43(2), it is very likely that a confidential settlement on the financial terms of the discontinuance of proceedings was reached elsewhere.

In this light, the Croatian Minister of Finance has made public statements that 'the agreement reached [with the claimants] did not imply any further costs to the government'.[143] He also has stressed that the banks agreed to discontinue the proceedings because they 'recognized the government's efforts to improve the business environment and further align national legislation with EU standards and directives, as well as the steps taken towards adopting the euro'.[144]

However, to those acquainted with governments' tactical manoeuvres following ICSID settlements, this appears like a mere face-saving campaign designed to appease the general public given the strong anti-bank sentiment that had developed in light of the Swiss franc controversy.[145] An investor with a solid claim against a government would surely not be charitable, especially so late in the proceedings. Moreover, nothing prevents compensation to be made by a third party, thus avoiding the possibility of leaving traces of payment in the national budget which could lead to public backlash in such politically sensitive situations. As regards the motivation of the investors to settle, considering the timing, one may suspect that article 9 on 'Structured dialogue for pending arbitration proceedings' of the Agreement for the

142 ICSID Case No ARB/17/37.

143 Croatian Government, 'Croatia and six banks reach deal over CHF loan-related arbitration proceedings' (*Website of the Government of Croatia* 3 February 2021).

144 Ibid.

145 On concealed ICSID settlements and states' traditional tactical manoeuvres aimed at deceiving the public about the outcomes in ICSID cases, see generally R Vassileva, 'Investment arbitration and the rule of law: how transparency impacts on domestic accountability' in M Andenas and M Heidemann (eds), *From Assignments to Unfair Terms in Commercial Contracts and Arbitration* (Routledge 2024) 46–77.

Termination of Bilateral Investment Treaties was used by the Croatian Government as an arm-twisting tool.

Finally, as visible in the procedural details of the pending cases, Croatia has disputed ICSID's jurisdiction following the *Achmea* judgment.[146] Enforcing an ICSID award in a post-*Achmea* environment may already prove difficult. Thus, one may wonder if these investors would not be motivated to seek settlements in view of article 9 of the Agreement for the Termination of Bilateral Investment Treaties, too. Whatever the development, however, in all these cases investment arbitration was the last ray of hope for investors who were affected by imbalanced political decisions by the executive and who were left without effective remedies by the courts of an EU member state whose decisions seem politically motivated.

Lessons from the ECtHR

Without the possibility of recourse to investment arbitration, intra-EU investors will be in the shoes of local investors. The only remedy against arbitrary violations of their rights by national courts is an application to the ECtHR. Depending on circumstances, investors may argue a breach of their right to property[147] and/or a breach of their right to a fair trial (lack of due process).[148] However, the mounting criticism that the ECtHR tampers with admissibility when confronted with politically sensitive cases, the ECtHR's notoriously slow examination of applications, as well as its propensity to hand down judgments with a Pontius Pilate effect raise doubts as to whether an application to the ECtHR constitutes an effective remedy at all.

Admissibility hurdles and slow justice

The ECtHR has already been denounced for using admissibility as a façade for politically motivated decisions – it seems that the political considerations, including geopolitical imperatives, may be prioritised over flagrant human rights violations, and that this issue is not isolated.[149] Moreover, the recent entry into force of protocol 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms[150] has made it easier for judges to declare a

146 Procedural details on *Adria*; Procedural details on *Société Générale*; Procedural details on *Addiko*.

147 Art 1 of protocol 1 ECHR.

148 Art 6(1) ECHR, known as the civil limb of the right to a fair trial.

149 See, for instance, L Spencer, 'The ECtHR and post-coup Turkey: losing ground or losing credibility?' (*Verfassungsblog* 17 July 2018); B Thavard, 'The admissibility hurdle: an evolving façade for politically motivated application rejections by the ECtHR' (*Verfassungsblog* 27 May 2021).

150 On 1 August 2021.

case inadmissible. For instance, in article 35(3)(b) of the ECHR, the safeguard principle stipulating that 'no case may be rejected … which has not been duly considered by a domestic tribunal' was deleted. The current version of the article states that an application may be deemed inadmissible if the court establishes that 'the applicant has not suffered a significant disadvantage'.

Yet, decisions on admissibility are taken by a single judge who is not obliged to provide proper legal reasoning for their decision – such decisions are not subject to appeal, either.[151] Furthermore, the new criterion of 'a significant disadvantage' not only potentially delivers a blow to victims who were denied access to justice on a national level, but also seems malleable. Hence, it is not surprising that the reform implemented by protocol 15 has been criticised for undermining human rights.[152]

Beyond the admissibility hurdle, applicants are confronted with slow justice. Marketing materials published by the ECtHR diplomatically say that '[i]t is not possible to say how long it will take the Court, on average, to examine an application'.[153] Two pivotal cases from Bulgaria – *Capital Bank v Bulgaria*[154] and *Korporativna Targovska Banka v Bulgaria*[155] – concerning arbitrary withdrawals of banking licences by Bulgaria both took six to seven years to examine on the merits. Another case concerning a similar arbitrary expropriation of a bank – *International Bank for Commerce and Development v Bulgaria*[156] – took 11 years to examine.

Lessons from a case which gave rise to both ECtHR and ICSID proceedings

Korporativna Targovska Banka v Bulgaria is particularly interesting because it is illustrative of Bulgaria's long-standing rule of law challenges. The ECtHR admits that the case is almost identical to the other two earlier cases mentioned above – '[the bank's] situation was

151 Art ECHR; according to art 52A of the Rules of Court, such decision only contains 'summary reasoning'. In practice, the ECtHR has developed a habit of issuing 'single-judge rejections that are threadbare, with little to no reasoning included'. See J M Loveland, 'European Court of Human Rights single-judge decisions (still) deny justice and risk weakening UN treaty body system' (*Strasbourg Observers* 10 November 2020).

152 N Vogiatzis, 'The admissibility criterion under article 35(3)(b) ECHR: a "significant disadvantage" to human rights protection?' (2016) 65(1) International and Comparative Law Quarterly 185–211.

153 ECtHR's Public Relations Unit, 'Your application to the ECHR: how to apply and how your application is processed' 7.

154 Application no 49429/99, 24 November 2005.

155 Applications nos 46564/15 and 68140/16, 30 August 2022.

156 Application no 7031/05, 2 June 2016.

thus effectively the same as those of the applicant banks [in *Capital Bank* and *International Bank for Commerce and Development*]'.[157] Namely, 'the withdrawal of the licence was not surrounded by any safeguards against arbitrariness'.[158] Three similar cases seem to indicate a systemic problem in Bulgaria's justice system, which the country has failed to address.

In the *Korporativna Targovska Banka* judgment, the ECtHR established a dual violation of article 6(1) of the ECHR and a violation of article 1 of protocol 1 to the ECHR because Bulgarian courts neither allowed the bank's directors, nor its shareholders, nor its depositors to appeal against the licence withdrawal by Bulgaria's central bank, contrary to the established ECtHR case law against Bulgaria. Regrettably, however, the ECtHR assumed the role of a Pontius Pilate when it came to the remedy. In the eyes of the court, proceedings examining the legality of the licence withdrawal had to be reopened if the applicant requested them,[159] thus subjecting the applicant's fate to the whims of the same national court that had deprived it of any remedy and that has a history of stubbornly violating the ECHR on the same facts, most probably because of political considerations.

Even more importantly for our study, the facts of *Korporativna Targovska Banka* also gave rise to ICSID arbitration proceedings – *State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria*.[160] Specifically, the largest shareholder in the bank was a Bulgarian entity, so it could contest the arbitrary decisions by Bulgarian courts only before the ECtHR, while the second largest entity was the sovereign wealth fund of Oman which could step onto the Bulgaria–Oman BIT and initiate proceedings before ICSID.

While both the ECtHR and the ICSID proceedings were initiated in the same year (2015), there are notable differences between how they unravelled. First, the ICSID proceedings were completed faster – in 2019 – while the judgment in the *Korporativna Targovska Banka* case was handed down only in 2022.[161] Second, while the procedural details do not overtly mention this, the fact that *State General Reserve Fund* ended with an award before hearings were even conducted indicate that the case was discontinued pursuant to (former) arbitration rule 43(2)

157 Applications nos 46564/15 and 68140/16, 30 August 2022, para 187.
158 Ibid.
159 Ibid para 201.
160 ICSID Case No ARB/15/43.
161 Ibid.

on 'Settlement and discontinuance'.[162] Third, following the conclusion of the ICSID proceedings, Bulgaria engaged in a large-scale marketing campaign trying to deceive the public that the arbitral tribunal had decided in its favour while the tribunal had not ruled on the merits at all, as visible from the excerpts that were subsequently published on ICSID's website.[163] It seems likely that a confidential settlement was reached between the ICSID claimant and Bulgaria elsewhere. In other words, while it is very likely that the ICSID claimant has already received compensation for the damage it suffered as a result of the arbitrary actions of Bulgarian institutions, the applicants in *Korporativna Targovska Banka* are still litigating before Bulgaria's compromised national courts following the ECtHR's judgment paving the way to the reopening of the proceedings examining the legality of licence withdrawal.

The important divergences in outcome between the ECtHR and the ICSID proceedings in this case illustrate why the ECtHR may not effectively protect investor rights. They also seem to give a foretaste of what lies ahead. In the future, intra-EU investors may share the same ill fate as local investors in countries with rule of law deficiencies – this prospect on its own may deter investment. Moreover, to ensure equality, non-discrimination and access to justice, which are intrinsic facets of the rule of law, one cannot be satisfied with levelling the playing field by subjecting investors to the same ill treatment as local investors. Rather, it seems that there is a palpable need to craft solutions that provide effective protection against institutional arbitrariness and deprivation of property rights to all investors, irrespective of their nationality.

CONCLUSIONS AND RECOMMENDATIONS

The concerted attack against intra-EU investment arbitration by EU institutions ignores the complex political reality in the EU. It delivers a blow to the EU's own rule of law by leaving the rights of EU investors in the hands of national, albeit EU, courts whose impartiality and freedom from *political* interferences may be questioned.

While the European Commission argues that its policy aimed at putting an end to intra-EU arbitration counters discrimination and levels the playing field, the ultimate effect is the opposite. The European Commission has, unfortunately, shown that it gives precedence to

162 Ibid; rule 43(2) stated: 'If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.'

163 See Excerpts of Award in ICSID Case No ARB/15/43.

political rather than legal considerations in the accession process, and has a history of supporting the accession of EU member states which do not fulfil the criteria on the rule of law. Moreover, it has failed to prevent and curtail rule of law backsliding and assaults on judicial independence in some EU members.

In parallel, the CJEU, which utilised the principle of the anatomy of EU's legal order as a weapon against intra-EU arbitration, not only has a track record of opportunistically self-increasing its jurisdiction, but also seems to prioritise procedural EU law over substantive human rights, going as far as legitimising and empowering judges not appointed according to law. This neither fosters compliance with article 2 TEU, nor promotes confidence amongst the investment community that investor–state disputes will be handled by an impartial tribunal.

Moreover, an examination of ICSID cases concerning CEE countries shows that investors often opt for investment arbitration as a last resort, after having exhausted all national remedies and after having been confronted with biased national courts. Absent such recourse to investment arbitration, intra-EU investors will only be left with the opportunity to submit applications to the ECtHR, which, as explained above, does not necessarily constitute an effective remedy against arbitrariness.

Hence, it seems high time to consider developing impartial adjudicative mechanisms for intra-EU disputes or even disputes between local investors and their state, instead of dooming these investors to confront compromised national EU courts. Such mechanisms do not have to rival EU's legal order.

The need for a new roof immune from political interference

Critical voices from within the arbitration community have already raised awareness of the necessity to find a new roof for intra-EU investment arbitration. It has been suggested that it can take the shape of 'specialised courts within the judiciary' of EU member states.[164] Alternatively, one can envisage a 'European investment court', which is either a chamber at the EU's General Court, or a separate EU court.[165] Both of these ideas, however, suffer from shortcomings from a rule of law lens.

One of the main ways in which rogue states compromise judicial independence is by appointing and promoting (non-)judges through captured judicial councils or flawed procedures – as seen in section 3

164 E Leikin et al, 'The future of intra-EU investment protection: an urgent call for a new roof and a level playing field' (*Kluwer Arbitration Blog* 7 November 2020).

165 As noted above, since 2015, the European Commission has been working towards establishing a MIC which will adjudicate disputes between EU members and third parties.

above, the CJEU does not shy away from legitimising non-judges by accepting to examine preliminary references from them. Meanwhile, the European Commission struggles to curtail the implementation of national policies aimed at capturing the judiciary which compromise the fairness of trials.

Even if specialised investment courts are set up in EU member states, they will not be immune from capture and political interference in states facing rule of law deficiencies. Hence, the idea of a European investment court, part of the EU's legal order, is more appealing. However, care should be taken as to how such a body is conceived to avoid the promotion of dual standards which undermine article 2 TEU.

Designing a new home for intra-EU investment arbitration

While the design of such a new home for investment arbitration requires careful study and attention going beyond the scope of this article, several recommendations can be made considering our findings. First, such a body, be it a separate court or a chamber of the EU's General Court, should respect the principle of equality before the law.[166] Namely, one should prevent a situation in which a local investor in a state with rule of law deficiencies is forced to appeal before compromised national courts and then be stuck in proceedings at the ECtHR for nearly a decade (as seen in section 4), while intra-EU investors in the same problematic state benefit from better protection in a specialised chamber or court at the EU level. If a new home is built, it should have jurisdiction to examine individual complaints against EU member states by EU citizens/EU legal entities, irrespective of their nationality.

Second, it seems that a separate court rather than a chamber at the EU's General Court is the better way forward because it can be built from scratch. It has already been pointed out that '[m]ost investor–state disputes are highly sophisticated, both legally and technically, and need specialist knowledge in the respective field'.[167] While undoubtedly one cannot have the same expectations about specialist knowledge vis-á-vis judges as vis-á-vis arbitrators, one can set more specific requirements about the credentials and experience of judges in

166 In steady case law, the CJEU has held: 'Equality before the law, set out in Article 20 of the Charter, is a general principle of European Union law which requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified.' Case C-101/12, *Herbert Schaible v Land Baden-Württemberg*, 17 October 2013, para 76. See also Case C-540/16, *Spika*, 12 July 2018, para 35.

167 Uzelac (n 25 above) 24.

such a specialised body than the rather broad requirements for CJEU judges.[168]

Finally, it is vital to dispel worries about judicial independence at the supranational level, too. For instance, it should be remembered that by virtue of article 26(4) of the ECHR the national judge elected in respect of the state being sued always sits in the chamber examining the case at the ECtHR, which raises doubts about conflicts of interest and even about the possibility of political interference.[169] Relatedly, the Statute of the Court of Justice of the European Union does not allow the challenging of a judge on the basis of their nationality.[170] However, the CJEU has already faced criticism for 'attracting political appointees'.[171] Moreover, some member states have been denounced for prioritising 'personal connections to the appointing executive and party credentials' when selecting their candidates.[172] These particularities of appointing judges do not inspire much trust. To alleviate fears of conflict of interest, especially given the nature of investment disputes and the size of claims, the procedural rules of a new body adjudicating disputes between investors and states should provide opportunities for parties to demand the recusal of judges based on nationality.

168 The requirements of art 253 of the Treaty on the Functioning of the European Union for the qualifications of judges are rather vague: such candidates should 'possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence'.

169 In early 2023, Turkish political refugees raised concerns about the perceived biases of the Turkish national judge at the ECtHR.

170 The last paragraph of art 18 stipulates: 'A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the court or from the chamber of a Judge of the nationality of that party.'

171 A H Zhang, 'The faceless court' (2016) 38(1) University of Pennsylvania Journal of International Law 71–135.

172 Ibid.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 213–246
Articles DOI: 10.53386/nilq.v76i2.1201

Sentencing policy reform in post-conflict Northern Ireland: charting a distinctive response to penal populism

Kevin J Brown*

Queen's University Belfast
Correspondence email: k.brown@qub.ac.uk.

ABSTRACT

Northern Ireland's sentencing policy, while sharing commonalities with other Anglo-American jurisdictions, remains distinct due to its complex socio-political history and post-conflict legal framework. In response to evolving public expectations, the Department of Justice has recently undertaken a comprehensive review of sentencing policy, resulting in proposed reforms that reflect the unique challenges of a small jurisdiction with a legacy of sectarian violence. This article provides a socio-legal analysis of these reforms, critically evaluating their contextual drivers, practical implications, and potential long-term impacts. A central theme of this analysis is Northern Ireland's restrained approach to penal populism, which has set it apart from significant parts of the common law world, including the United States, Great Britain, and Australia, where punitive attitudes have led to escalating incarceration rates. Drawing on the concept of 'penal populism' developed by Bottoms and Pratt, this article explores how Northern Ireland has, to date, resisted the widespread adoption of punitive rhetoric in criminal justice policymaking. However, recent trends suggest a shifting landscape, including a rising prison population and an emerging 'tough on crime' public discourse. This article examines key proposals from the sentencing review, including the introduction of formal sentencing principles and purposes and the decision to reject a sentencing guidelines council in favour of enhanced judicial discretion through the Court of Appeal. It argues that these reforms reflect both caution and inadvertent radicalism as policymakers attempt to balance increasing demands for harsher sentencing with the enduring complexities of Northern Ireland's legal and political environment.

Keywords: penal populism; policy reform; post-conflict society; Northern Ireland; sentencing; rehabilitation.

INTRODUCTION

Northern Ireland's sentencing policy, while sharing similarities with its neighbouring jurisdictions, is marked by its distinctive socio-political history. In recent years, the Department of Justice (DOJ) has conducted a comprehensive review of adult sentencing

* Professor of Criminal Law. With thanks to Aoife O'Donoghue, Colin Murray, and the anonymous reviewers for comments on earlier drafts.

policy, culminating in a series of recommendations for inclusion in an upcoming sentencing Bill.[1] These proposed reforms are deeply embedded within the polity's post-conflict legal and political framework, reflecting the challenges of balancing evolving public expectations, international obligations, the constraints of being a small jurisdiction and the legacy of sectarian violence. This article provides a socio-legal exploration of the most contentious reforms, examining their contextual underpinnings, practical implications, and potential impacts. It critically analyses the under-researched issue of sentencing policy within post-conflict Northern Ireland. The article provides valuable insights for scholars of Northern Ireland and comparative researchers examining sentencing reform across jurisdictions.

A key focus of this article is exploring how the complex post-conflict milieu has, to date, mitigated against penal populism becoming the dominant criminal justice narrative and policy driver in Northern Ireland, in contrast to many other Anglo-American jurisdictions. Writing in 1995, Bottoms devised the term 'populist punitiveness' 'to convey the notion of politicians tapping into and using for their purposes what they believe to be the public's generally punitive stance'.[2] The concept later became more commonly referred to in the literature as 'penal populism'. According to the influential work of Pratt:

> *Penal Populism* speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general. It feeds on expressions of anger, disenchantment and disillusionment with the *criminal justice* establishment. It holds this responsible for what seems to have been the insidious inversion of commonsensical priorities: protecting the well-being and security of law-abiding 'ordinary people', punishing those whose crimes jeopardize this.[3]

Such approaches have dominated criminal justice policy in the United States, Great Britain, Australia and elsewhere, leading to increasing rates of incarceration and prisons operating at more than full capacity.[4] Even in countries that have not fully embraced a populist punitive approach of high rates of incarceration, such as the Republic of Ireland, 'tough talk' on 'law and order' is common in the public and

---

1 DOJ, *Sentencing Policy Review Consultation: Way Forward* (2021).

2 Anthony Bottoms, 'The philosophy and politics of punishment and sentencing' in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995) 40.

3 John Pratt, *Penal Populism* (Routledge 2007) 12.

4 Julian V Roberts, Loretta J Stalans, David Indemaur and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press 2003).

political discourse, with politicians seeking to avoid being seen as out of touch and soft on crime.[5]

A common feature of penal populism is the challenge to judicial discretion in sentencing.[6] However, in post-conflict Northern Ireland, judges have retained more independence than many other common law jurisdictions. This can be attributed partly to the region's post-conflict legacy, where judicial independence has been crucial to maintaining fairness and legitimacy in a politically sensitive environment.[7] This article examines the tensions within the proposed sentencing reforms as they attempt to balance this respect for judicial autonomy with more populist concerns over perceived leniency and a lack of transparency.

Prison rates in Northern Ireland reflect its distinct approach to penal policy, setting it apart from the rest of the United Kingdom (UK). Post-conflict Northern Ireland consistently imprisons a smaller proportion of its population than the rest of the UK, with rates more comparable to the average for Western Europe. Since 2000, when comparable statistics were released, Northern Ireland has maintained the lowest percentage prison population in the UK.[8] Figures from 2024 show 140 prisoners per 100,000 in England and Wales, 150 per 100,000 in Scotland, and 99 per 100,000 in Northern Ireland.[9] However, Northern Ireland's prison population has been trending upwards of late. The average daily population rose by 11.4 per cent in 2023/2024 to 1877, with the male population increasing from 1607 to 1787 and the female population from 78 to 90.[10] During the same period, the average daily immediate custody population rose 10.1 per cent to 1176 – the highest since 2015/2016.[11] These figures provide essential context for the forthcoming penal reforms discussed in this article.

This article contends that, nearly 30 years after the Good Friday Agreement, Northern Ireland's growing societal normalisation has brought with it a more conventional punitive populism in public discourse and, to a lesser extent, in political and legal circles. It examines how this trend poses a challenge for DOJ policymakers, who must balance such pressures with professional caution and sensitivity

5 Liz Campbell, 'Criminal justice and penal populism in Ireland' (2008) 28(4) Legal Studies 559–579.

6 Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan 2014).

7 Kieran McEvoy and Alex Schwartz, 'Judges, conflict, and the past' (2015) 42(4) Journal of Law and Society 528–555.

8 Georgina Sturge, *UK Prison Population Statistics* (House of Commons Library 2024).

9 Northern Ireland Statistics and Research Agency (NISRA), *The Northern Ireland Prison Population 2023/24* (DOJ 2024).

10 Ibid.

11 Ibid.

to the region's unique post-conflict context. The article analyses key sentencing review proposals – such as introducing formal sentencing principles and rejecting a guidelines council in favour of enhancing the Court of Appeal's role – and concludes that these reforms reflect a mix of caution and inadvertent radicalism.

THE UNIQUE CONTEXT OF CRIMINAL JUSTICE POLICYMAKING IN POST-CONFLICT NORTHERN IRELAND

Northern Ireland, with a population of 1.9 million, was established in 1921 as a distinct UK legal jurisdiction as part of Ireland's partition.[12] Over the past century, it alternated between self-government and direct rule from London.[13] From the late 1960s to 1998, the region endured the Troubles, a prolonged ethnic-sectarian conflict that destabilised the area, causing over 3600 deaths and 50,000 injuries.[14] During this period, the justice system prioritised managing intercommunity violence over broader criminal justice policies for 'ordinary crime'.[15] The 1998 Good Friday Agreement marked a turning point, largely ending the conflict and creating a power-sharing government to foster cooperation between nationalist/republican and unionist/loyalist communities.[16] This framework continues to shape Northern Ireland's justice system, balancing security normalisation, post-conflict reconciliation, and persistent sectarian tensions.

Under the peace agreement, Northern Ireland's criminal justice agencies underwent significant reform to gain cross-community support.[17] The Royal Ulster Constabulary, active from 1921 until 2001, was replaced by the Police Service of Northern Ireland (PSNI), and the

12 Brice Dickson, *Law in Northern Ireland* 4th edn (Hart Publishing 2022); Marc Mulholland, *Northern Ireland: A Very Short Introduction* 2nd edn (Oxford University Press 2020); NISRA, Mid-Year Population Estimates Northern Ireland: 2023 (2023).

13 Mulholland (n 12 above).

14 David McKittrick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 2004); David McKittrick and David McVea *Making Sense of the Troubles: A History of the Northern Ireland Conflict* (Penguin Books 2012).

15 Aogán Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Willan 2006).

16 Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018).

17 Brice Dickson, 'Criminal justice reforms in Northern Ireland: the agents of change' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing 2015).

Public Prosecution Service (PPS) was established in 2005.[18] Reforms were also implemented within the prison service and the judiciary.[19] These changes were designed to enhance fairness and transparency and build legitimacy in a post-conflict society where trust in justice institutions had been deeply fractured. Whilst ultimately receiving broad support, these changes have been a source of political tension across the sectarian divide.[20] Nationalist parties have tended to push for increased institutional reform and oversight. Unionist parties have advocated greater deference to existing institutions, making them more sceptical of reforms.

The Northern Ireland Executive, a mandatory coalition, oversees justice policy. Most ministerial roles are distributed based on party representation, except the Justice Minister, who must secure cross-community support. Since 2010, the Justice Ministry has usually been led by members of the constitutionally neutral, liberal Alliance Party, except for one year under an independent (Unionist) Assembly member.[21] This arrangement gives the Alliance Party, with electoral support ranging from 5.2 per cent to 13.5 per cent since 2010, an outsized influence on criminal justice policy.[22] The party's liberal and social democratic ethos has been one of the restraints on a more punitive 'law and order' approach.[23] Furthermore, given the unlikelihood of most other political parties aligned with either nationalism or unionism holding the justice portfolio in the Executive, there appears to be reduced motivation for them to prioritise criminal justice issues. However, that is not to say that the other parties do not have views on criminal justice. It would be fair to say that a legacy of the conflict is that unionist parties are more likely to support tougher law-and-order approaches to crime, with nationalist parties more sceptical of

18 Ibid.
19 Ibid.
20 Ibid.
21 David Ford (Alliance Party) (2010–2016), Clare Sugden (Independent Unionist) (2016–2017), Naomi Long (Alliance Party) (2020–2022 and 2024–). Gaps indicate a period where there was no Minister in place.
22 John Tonge, Máire Braniff, Thomas Hennessy et al, *The Alliance Party of Northern Ireland: Beyond Unionism and Nationalism* (Oxford University Press 2023).
23 Ibid.

the state's coercive power and more likely to endorse alternatives to punitive measures.[24]

Since 2010, the Northern Ireland Assembly has introduced several reforms to the criminal justice system, typically receiving broad political support and backing from criminal justice professionals. Most legislation has focused on revising criminal procedures rather than creating new offences or overhauling sentencing laws.[25] These reforms have been mainly reactive, often inspired by legislation already passed in Westminster for England and Wales.[26] When the Assembly has pursued distinct criminal justice reforms, they have tended to originate from Private Members' Bills rather than the Executive. Notably, this includes being the only part of the UK to adopt the Nordic model approach to prostitution, which involves criminalising those who pay for sex.[27]

Legislation, though lacking an overarching statutory framework of sentencing principles, reveals several guiding themes – especially when viewed alongside successive Programmes of Government.[28] These emphasise managerialism – efficiency, performance, and cost-effectiveness – while recognising the harm crime causes to individuals and communities. There is a clear scepticism of punishment as a long-term solution, with greater emphasis on addressing root causes and promoting rehabilitative and restorative approaches, particularly for youth. Northern Ireland's youth justice system is notable for its statutory commitment to restorative justice, with youth conferencing

24 A useful contrast can be seen in the most recent Assembly manifestos, with the two larger unionist parties – the Democratic Unionist Party and Ulster Unionist Party – dedicating chapters setting out traditional law and order policies. In contrast within nationalism, Sinn Féin references criminal law reform at various points throughout its manifesto but does not include a dedicated section, whilst the SDLP focuses on promoting restorative justice and rehabilitation as more effective responses to crime: Democratic Unionist Party, *Our 5 Point Plan for Northern Ireland Real Action on the Issues that Matter to You* (2022) 44–48; Sinn Féin, *Time for Real Change* (2022); SDLP, *People First* (2022) 33; Ulster Unionist Party, *Build a Better Northern Ireland* (2022) 35–37.

25 All legislation passed by the Northern Ireland Assembly can be found at its website: Northern Ireland Assembly.

26 For example, the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 which was inspired by the Domestic Abuse Act 2021.

27 Graham Ellison, 'Criminalizing the payment for sex in Northern Ireland: sketching the contours of a moral panic' (2017) 57(1) British Journal of Criminology 194–214.

28 Northern Ireland Executive, *Programme for Government 2011–2015: Building a Better Future* (2011); Northern Ireland Executive, *Draft Programme for Government Framework 2016–2021* (2016); Northern Ireland Executive, *Programme for Government 2024–2027: Our Plan: Doing What Matters Most* (2025).

established under the Justice (Northern Ireland) Act 2002 as a key mechanism for addressing offending through dialogue and reparation. Elements of progressive punitivism also appear, such as proposals to expand hate crime laws.[29] Explicitly punitive rhetoric from the DOJ or its ministers is rare, typically reserved for emotive offences like child abuse or sexual violence.[30]

In attempting to discern the governing philosophy of criminal justice reform, it is essential to note that civil servants play a particularly influential role in the law reform process in Northern Ireland. Since establishing the Assembly in 1998, its political institutions' inherent instability has meant several periods of suspension, totalling approximately 10 years, have occurred.[31] During these periods, civil servants have continued to operate without oversight from local politicians, including, at times, with the authority granted by London to manage a technocratic government.[32]

That is not to say that civil servants operate in a policy vacuum. Northern Ireland's small size and close-knit professional networks create a unique dynamic in the UK when considering law reform in the justice system and other areas of policymaking. Unlike larger jurisdictions, where policymakers, legal professionals, and civil servants operate within broader, more anonymous structures, Northern Ireland's legal and political communities are relatively compact, with many key figures knowing each other personally or professionally. For example, Northern Ireland's small population fosters a close-knit judiciary, with just 15 judges in the Court of Appeal and High Court, compared to 118 in England and Wales.[33]

The relatively small size of the jurisdiction leads to a heightened concern about maintaining professional relationships and avoiding conflict when discussing or implementing reforms.[34] Judges, lawyers, politicians, and civil servants often work closely together over extended

29 DOJ, 'Written ministerial statement – update on hate crime legislation' (2024).

30 For a recent example see: DOJ, 'Justice Minister Naomi Long has commented following the conclusion of the Alexander McCartney case' (2024).

31 Colin Murray, 'Northern Ireland's post-Brexit governance crisis: what to do when the post-1998 centre cannot hold' (2024) 75(3) Northern Ireland Legal Quarterly 584–612.

32 Andrew McCormick, 'The UK Government approach to the Northern Ireland impasse is an affront to democracy' (*UK in a Changing Europe* 2 December 2022).

33 Conor McCormick and Brice Dickson, *The Court of Appeal in Northern Ireland* (Bristol University Press 2024).

34 Max Everest-Phillips and Marcus Henry, 'Public administration in small and very small states: how does smallness affect governance?' (2018) 3(2) International Journal of Civil Service Reform and Practice 1; Tiina Randma-Liiv, 'Small states and bureaucracy: challenges for public administration' (2002) 6(4) Trames Journal of the Humanities and Social Sciences 374–389.

periods, sometimes across multiple roles, which can create a reluctance to propose or support controversial changes that might strain professional ties. This interconnectedness fosters cautious, consensus-driven decision-making, balancing the need for reform with potential professional discord.[35] While this can encourage collaboration, it also leads to slower, incremental legal reform, as decision-makers are wary of alienating colleagues or disrupting established relationships.[36] However, the recent legal aid dispute between the legal profession and the DOJ demonstrates that tensions and open disagreement can still arise, particularly when long-standing frustrations reach a tipping point, challenging the norms of quiet consensus that usually shape legal policymaking in Northern Ireland.[37]

Northern Ireland's size also limits the presence of alternative sources of reform proposals typically available in larger jurisdictions. A striking example is that, with only two universities in the region containing only a handful of criminal law or justice scholars, significant policy areas are left with minimal academic critical exploration.[38] Another notable absence is that Northern Ireland currently lacks a law reform commission. From 2007 to 2015, Northern Ireland operated a law commission, which was disbanded due to budgetary constraints, with its responsibilities absorbed by the DOJ.[39] In contrast, statutory law commissions in England and Wales, Scotland and the Republic of Ireland have influenced legislative reforms, including sentencing policy.[40]

Traditional and new media both shape the political agenda, including on criminal justice. In Northern Ireland, crime reporting remains influenced by the conflict, with unresolved legacy cases and paramilitary activity drawing attention – and sometimes threatening journalists' safety.[41] Day-to-day coverage, however, centres on routine crime, often highlighting official reports or victim criticisms of justice

35 Ibid.
36 Ibid.
37 John Breslin, 'Justice Minister Naomi Long disappointed on eve of criminal barristers' four week "strike"' (*Irish News* 6 January 2025).
38 Queen's University Belfast and Ulster University.
39 Dickson (n 12 above) 78–80.
40 See for example: Law Commission, *The Sentencing Code* (Law Com No 382 2018); Law Reform Commission, *Report on Sentencing* (LRC 53–1996).
41 Flávia Gouveia and Jonathan McCambridge, '"I've had death threats and a device exploded in my street' *Belfast Telegraph* journalist tells MPs of paramilitary intimidation' *Belfast Telegraph* (Belfast 5 February 2025).

system failings, as in the wider UK and Ireland.[42] While concerns about sentencing leniency do surface, they generally lack the personalised attacks on judges found in some British tabloids.[43] Media consumption from Britain and Ireland also blends local concerns with broader law-and-order narratives.[44]

Even when locally driven, most criminal justice reforms in Northern Ireland rely on policy transfer from other jurisdictions, particularly England and Wales. Reforms are often adopted after having been in place elsewhere for some time, allowing DOJ officials to assess their perceived success before adapting or replicating the legislation to suit the local context.[45] Adapting legislation from jurisdictions like England and Wales requires care, given Northern Ireland's post-conflict context and the political sensitivity surrounding perceptions of fairness. To avoid politicisation, criminal justice reform tends to be consensus-driven, aiming to protect institutional independence and public confidence. Proposed sentencing reforms have emerged within this delicate landscape.

THE COMPLEX PATH TO REFORMING SENTENCING IN NORTHERN IRELAND

As with many policy reforms in Northern Ireland, due to the polity's complex and often unstable governance arrangements, the journey to a sentencing Bill has been anything but straightforward. In June 2016, the then Justice Minister, Clare Sugden, an independent unionist Assembly Member, announced a major review of sentencing policy, stating that:

> Concerns … have been expressed from time to time about sentencing in some individual cases. While such cases represent a very small part of the everyday work of the courts, they can have a significant impact on public perception and confidence in the justice system and the

42 For recent examples, see: Katie Andrews, 'Families affected by drugs tell government officials that dealers should get tougher sentences' (*UTV News* 27 March 2024); Alison Morris, 'The 42 females who have been killed in NI in the last eight years' *Belfast Telegraph* (Belfast 21 October 2024).

43 For a particularly striking example from England, see: Chris Pollard, 'WEAK BEAKS: Britain's softest judges exposed amid calls for courts to get tougher on criminals' *The Sun* (London 16 June 2019).

44 Ofcom, *News Consumption in the UK 2024 – Northern Ireland* (2024); Ofcom, *Media Nations Northern Ireland 2024* (2024).

45 Anne-Marie McAlinden and Clare Dwyer, '"Doing" criminal justice in Northern Ireland: "policy transfer", transitional justice and governing through the past' in Anne-Marie McAlinden and Clare Dwyer (eds), *Criminal Justice in Transition: The Northern Ireland Context* (Hart Publishing 2015).

> sentencing process. That is why I have decided that a comprehensive review of sentencing policy is needed.[46]

It seemed that the first and, to date, only non-Alliance Party politician to hold the Ministry would adopt a more traditional 'law and order' approach to policy. However, before the review could be formally established, political deadlock on other issues caused the government to collapse, and the Minister of Justice and her colleagues had to vacate their positions.[47]

A review team was established by the civil servants in the Department over a year after the initial announcement by the then Minister.[48] The review team included civil servants, a retired member of the judiciary, two academics based outside of Northern Ireland, representatives from Victim Support, probation and an offender welfare charity.[49] In 2019, a consultation paper based on the review's recommendations was published.[50] That a consultation on such a contentious subject as sentencing reform could proceed without direct political oversight underscores the singular nature of Northern Ireland's governance at the time.[51]

The Assembly resumed in early 2020, allowing a new Justice Minister, Naomi Long, from the liberal-orientated Alliance Party to oversee the final review.[52] In 2021, the DOJ published the 'Way Forward' document, a pivotal report outlining recommendations to overhaul sentencing policy.[53] However, by 2022, another political stalemate disrupted progress, delaying the proposed reforms until the Assembly's restoration in 2024.[54] The Executive has now committed to introducing a sentencing Bill by late 2025, almost 10 years after the review commenced, making it the first comprehensive sentencing reform since justice powers were devolved in 2010.[55]

---

46 DOJ, 'Justice Minister announces sentencing review' (Press Release 9 June 2016).

47 Deirdre Heenan and Derek Birrell, 'Exploring responses to the collapse of devolution in Northern Ireland 2017–2020 through the lens of multi-level governance' (2022) 75(3) Parliamentary Affairs 596–615.

48 News Letter, 'Ex-minister "frustrated" by year long delay on sentencing review' (25 January 2018).

49 The list of core members can be found in appendix two of the following document: DOJ, *Sentencing Review Northern Ireland: A Public Consultation* (2019).

50 Ibid.

51 Heenan and Birrell (n 47 above).

52 DOJ (n 1 above).

53 Ibid.

54 Jayne McCormack, 'NI's Government has returned Stormont – what you need to know' (*BBC News* 3 February 2024).

55 DOJ, 'Justice Minister reflects on past year' (Press Release 3 February 2025).

The *Way Forward* document acknowledges the public perception that sentences are often viewed as 'too lenient' or 'soft on offenders'.[56] However, it explicitly challenges this attitude, asserting that there is 'little evidence that tougher sentencing helps to rehabilitate offenders or reduce further offending'.[57] This willingness to confront popular punitivism is a recurring theme throughout the papers on sentencing reforms.[58] A key component of the *Way Forward* proposals involves challenging populist punitiveness by promoting public education on sentencing practices and enhancing transparency.[59] This includes initiatives such as introducing the broadcasting of sentencing decisions in appropriate cases to improve understanding and trust in the justice system, as currently happens elsewhere in the UK.[60]

Despite its overarching scepticism of punitivism, the *Way Forward* document incorporates several reforms to address criticisms of leniency or inadequate sentencing. A number of these directly respond to local campaigns for change. In recent years, the media has played a crucial role in amplifying public campaigns advocating for justice system reform. Often led by either victims or relatives of victims or third-sector organisations with a particular interest in that area, these moral entrepreneurs have effectively gained widespread attention for their causes.[61] High-profile campaigns have called for tougher sentences for those who kill while driving, assault emergency workers, or harm vulnerable groups like the elderly.[62]

The proposal includes two new statutory aggravating factors: targeting vulnerable victims, particularly the elderly, and assaults on frontline workers.[63] It also recommends increasing maximum sentences for driving offences that cause death or serious injury and providing tariff guidance for judges in murder cases.[64] Additional reforms would widen the range of sentences eligible for appeal on grounds of undue

56 DOJ (n 1 above) para 29.
57 Ibid.
58 DOJ (n 49 above); DOJ (n 1 above).
59 Ibid.
60 DOJ (n 1 above) para 35.
61 Niall Deeney, '"He was left lying on the road" – NI man backs campaign after son killed by drink driver' (*BelfastLive* 26 January 2025); James McNaney, 'Victim of spiking says experience "spurred" her on to start campaign for introduction of new criminal offence' *Belfast Telegraph* (Belfast 5 August 2024); Christopher Woodhouse, '"Struggle for justice is not over": hundreds demand end to anti-women violence at Belfast rally' *Belfast Telegraph* (Belfast 25 November 2023).
62 *Belfast Telegraph*, 'Northern Ireland backs tougher laws for crimes against the elderly' (Belfast 29 June 2017); Rebecca Black, 'Call for stronger sentences for attacks on emergency service staff' *Belfast Telegraph* (Belfast 20 March 2023); Deeney (n 61 above).
63 DOJ (n 1 above) chs 8 and 9.
64 Ibid chs 4 and 10.

leniency.[65] Several of these proposals represent reworked, less punitive versions of reforms implemented in neighbouring jurisdictions.[66] The Department expressed concerns that these comparators impose overly rigid constraints on judicial discretion, especially regarding minimum sentencing.[67]

The remainder of this article focuses on two of the proposals that will have the most significant impact on sentencing practice: first, the establishment of Northern Ireland's first set of statutory principles and purposes of sentencing to provide more precise guidance for sentencers; and second, a reform of the process by which sentencing guidelines are developed within the jurisdiction.[68]

ESTABLISHING PRINCIPLES AND PURPOSES OF SENTENCING

Northern Ireland lacks formal principles and purposes to guide sentencing policy and procedure. While England and Wales legislate for these, and Scotland relies on its sentencing commission, Northern Ireland's recent sentencing review sought to fill this gap by proposing a statutory framework.[69] Initially, the proposals presented during the consultation phase were more ambitious, with a scope that suggested a deliberate rejection of punitiveness in sentencing.[70] However, the final recommendations adopted by the DOJ represent a more measured stance, reflecting an effort to balance a non-punitive emphasis with the need to respond to public understandings of the role of sentencing.[71] This section traces the development of these proposals, their implications for Northern Ireland's legal context, and the challenges of crafting principles suited to its unique socio-political landscape.

In proposing a set of principles and purposes for sentencing, the DOJ set out the following motivations:

- improved awareness, understanding and clarity in how sentencing decisions are reached including improving transparency and public confidence;

65 Ibid ch 5.
66 For example, in England and Wales, the maximum penalty for an assault on an emergency worker is two years.
67 This includes on tariffs for murder and the penalties for death or serious injury by driving offences.
68 DOJ (n 1 above).
69 Sentencing Act 2020, s 57(2); *Scottish Sentencing Council, Sentencing Guideline: Principles and Purposes of Sentencing* (2018); DOJ (n 1 above) ch 1.
70 DOJ (n 49 above) ch 1.
71 DOJ (n 1 above) ch 1.

- the provision of a definitive benchmark of the qualities that all sentences should incorporate and reflect;
- facilitating consistency in sentencing; and
- ensuring compliance with international obligations.[72]

Concerning the final point, no mention is made in the consultation or subsequent review documents of the international obligations that the Department has in mind. Given the broader context of Brexit and its destabilising effect in Northern Ireland, there perhaps was a decision to avoid explicitly referencing international obligations, especially those emanating from Europe.[73]

The obligations would undoubtedly include the European Convention on Human Rights (ECHR), which binds the actions of the Assembly, Executive, and criminal justice system agencies.[74] The text of the ECHR is likely to have a limited impact on the development of sentencing principles and purposes in Northern Ireland, as the ECHR primarily establishes broad human rights standards rather than specific sentencing frameworks.[75] While the ECHR requires that sentencing practices avoid inhuman or degrading treatment (article 3), uphold the right to liberty and security (article 5), and involve a fair and public hearing (article 6), it offers limited guidance on the specific aims and principles of sentencing.

Although not binding in Northern Ireland, the Council of Europe Guidelines and Recommendations on sentencing and sanctions provide a comprehensive framework for developing sentencing principles.[76] Key documents, such as the European Prison Rules and the Recommendation on Consistency in Sentencing, emphasise proportionality, transparency, and alternatives to imprisonment.[77] The guidelines advocate prioritising rehabilitation and reintegration of offenders into society, with imprisonment used only as a last resort, favouring alternative sanctions to minimise the social harms of incarceration.[78]

---

72 Ibid para 1.

73 Murray (n 31 above).

74 Human Rights Act 1998, s 6; Northern Ireland Act 1998, s 6(2)(c).

75 Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Bloomsbury 2021).

76 Council of Europe, *Compendium of Conventions, Recommendations and Resolutions Relating to Prisons and Community Sanctions and Measures* (Council of Europe 2020).

77 Council of Europe, *Recommendation No R(92)17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing*; Council of Europe, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*.

78 Ibid.

While the DOJ's sentencing review did not reference the Council of Europe guidelines directly, it may have drawn on them. The consultation proposed four principles: proportionality, fairness, transparency, and the sparing use of punishment.[79] The first three received unanimous support, but the fourth was more contentious.[80] Though consistent with Council of Europe standards and the DOJ's ethos of resisting populist punitivism, the explicit rejection of a punitive approach was always likely to provoke debate.

The inclusion of both proportionality and the sparing use of punishment raises important questions about how these principles interact. Proportionality requires that sentences correspond to the seriousness of the offence and the offender's culpability, and it can justify either lenient or severe penalties depending on the context. By contrast, the principle of sparing use of punishment introduces a normative tilt toward restraint – implying that where multiple proportionate sentences are available, the least severe should be preferred. While this subtle distinction is not fully articulated in the consultation document, it aligns with a tradition of penal parsimony reflected in earlier policy texts, such as the 1990 Westminster White Paper *Crime, Justice and Protecting the Public*.[81] It is also embedded in Northern Ireland's legislative framework, which establishes a clear hierarchy of sentencing options – ranging from imprisonment to community orders, fines, and discharges – and stipulates that custody should be used only when the offence is serious enough to warrant it.[82]

Ultimately, aligning the principle of sparing punishment with proportionality requires careful legislative and judicial framing. If poorly articulated, it risks generating confusion about whether restraint is a general presumption or a directive tied to particular sentencing purposes. It also conflicts with other proposals within the review – such as increasing maximum sentences for certain offences – which reflect more punitive tendencies. Nonetheless, if clearly expressed, the principle could serve as a constructive counterweight to punitive drift – guiding sentencing towards moderation without compromising the fundamental requirement that penalties remain proportionate to the offence.

In the original consultation, the justification for the principle of using punishment sparingly is addressed in only two brief paragraphs, which includes an assertion that there is an 'increasing understanding that harsher punishment does not necessarily help to address offending

79 DOJ (n 49 above) ch 1.

80 DOJ (n 1 above) ch 1.

81 Home Office, *Crime, Justice and Protecting the Public* (White Paper, Cm 965 1990).

82 Criminal Justice (Northern Ireland) Order 2008, art 5.

behaviour' and further claims that 'this principle is supported by the findings of worldwide research, which indicates that it is not the severity of punishment that contributes to deterring offenders, rather it's the certainty of punishment'.[83] While a consultation document is not expected to meet the rigorous standards of academic discourse, the lack of a more detailed argument suggests perhaps an initial misplaced confidence that the proposal would not face challenge.

The consultation claims that using punishment sparingly reflects a societal shift in Northern Ireland toward a more rehabilitative approach.[84] However, this is questionable and contradicted by other parts of the review. The DOJ's *Way Forward* document itself notes that sentences are often viewed as too lenient, and it has supported reforms that introduce harsher penalties for certain offences.[85] Public surveys also suggest continued support for a punitive approach. In the most recent DOJ survey, the most endorsed sentencing rationale was public protection, followed by reparation, deterrence, and rehabilitation.[86] In earlier versions, 'punishment' topped the list when offered, and most respondents rejected the idea that prison should be reserved for dangerous offenders.[87] Confidence in sentencing also remains low, with 'tougher sentences' consistently cited as the most popular way to improve trust in the justice system.[88] While recent survey revisions omit such questions, this does not indicate a shift in public sentiment.[89] Although public opinion can appear punitive in the abstract, it tends to soften when people are presented with contextual information.[90] This undermines the reliability of existing survey data, suggesting that the DOJ lacked a solid evidential basis for its claim of a rehabilitative shift – rather than that such a shift is clearly refuted.

A proposal to enshrine a principle advocating the sparing use of punishment would be politically toxic in neighbouring jurisdictions like England and Wales, Scotland, or even the Republic of Ireland, despite the latter's lower incarceration rates. Such a principle would likely face media backlash and opposition portrayals of being 'soft on crime'. Its inclusion in Northern Ireland's consultation likely reflects the unique

83 DOJ (n 49 above) paras 1.16 and 1.17.

84 Ibid para 1.16.

85 Ibid.

86 M Beggs, *Cyber Crime, Modern Slavery and Sentencing: Findings from the 2021/22 Northern Ireland Safe Community Telephone Survey* (DOJ 2023).

87 K Ross and M Beggs, *Perceptions of Sentencing: Findings from the 2019/20 Northern Ireland Safe Community Survey* (DOJ 2022).

88 P Campbell, A Rice and K Ross, *Perceptions of Policing and Justice: Findings from the 2018/19 Northern Ireland Safe Community Survey* (DOJ 2020).

89 DOJ, Perceptions of Sentencing Questions (2024).

90 Kareen Gleb, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (Sentencing Advisory Council 2006).

political context at the time, as the consultation was developed during the Assembly's suspension, leaving civil servants to explore ideas that might not have withstood scrutiny in a more politically charged environment. This highlights a tension between evidence-based sentencing approaches and the political realities of policymaking, where public opinion and media often push for harsher measures.

In its review of consultation responses, the Department acknowledged 'some concern' about the sparing use of punishment principle.[91] Critics noted that the principle equated incarceration with punishment, overlooking other forms like fines or community penalties.[92]

Concerns were also raised about inadequate investment in rehabilitation programmes, which often leaves punishment as the only short-term option for protecting society.[93] The Department's response did not address these concerns and ultimately dropped the sparing use of punishment principle while retaining the other three.[94] Retaining the principle would likely have led to its removal during the legislation's passage, given expected opposition from more conservative Executive parties. However, that may have been a debate worth having, rather than pre-emptively avoiding.

The DOJ rejected the inclusion of mention of victims in the principles, citing concerns that it could elevate victims' interests above defendants' rights.[95] This reflects a broader assumption that victims uniformly support punitive measures – a view often invoked in penal populist rhetoric. However, Pemberton challenges this narrative, arguing for a more nuanced understanding of victims' needs that does not equate victim support with punitiveness.[96] Other reforms in Northern Ireland, such as the appointment of a Victims' Commissioner and the use of Victim Personal Statements, show efforts to strengthen victims' roles in the justice system.[97]

In addition to principles, the Northern Ireland review proposes sentencing purposes (or rationales) – punishment, public protection,

---

91 DOJ (n 1 above) 5.

92 DOJ, *Summary of Responses: Sentencing Review Northern Ireland Consultation* (2021).

93 Ibid.

94 DOJ (n 1 above) 6.

95 Ibid 5–6.

96 Anthony Pemberton, 'Too readily dismissed? A victimological perspective on penal populism' in Hans Nelen and Jacques Claessen (eds), *Beyond the Death Penalty: Reflections on Punishment* (Intersentia 2022).

97 See the Commissioner's website for further information; Luke Moffett, 'Victim personal statements in managing victims' voices in sentencing in Northern Ireland: taking a more procedural justice approach' (2017) 68(4) Northern Ireland Legal Quarterly 555–575.

crime reduction (including deterrence), rehabilitation, and reparation – mirroring those in the Sentencing Code for England and Wales.[98] This list blends both retributive and consequentialist aims.[99] Punishment, as included here, is typically associated with retributive justice – imposing a proportionate response to moral wrongdoing. In contrast, rehabilitation, deterrence, and public protection reflect consequentialist reasoning, aiming to reduce future harm through behavioural change or risk management. Reparation, too, serves both functions – restoring victims and reaffirming norms. Without clear guidance on how to prioritise or balance these purposes in practice, sentencers are left to navigate potentially conflicting goals – such as imposing a punitive sentence that may hinder rehabilitation – on a case-by-case basis, raising questions about consistency and transparency.[100]

The final report from the DOJ acknowledges unease among some consultees about including punishment, particularly from those favouring a restorative approach and questioning the long-term effectiveness of punitive measures.[101] Despite these concerns, the Department appears to adopt a pragmatic stance, arguing that omitting punishment would prevent the purposes from gaining general acceptance, presumably from the public and politicians.[102]

A notable absence from the proposals for new legislation is any explicit reference to restorative justice. A practice commonly employed in post-conflict societies, restorative justice emphasises repairing the harm caused by criminal behaviour through processes that involve engagement between victims, offenders, and sometimes the wider community.[103] It seeks to foster accountability, reconciliation, and healing rather than focusing solely on punitive measures.[104] This approach has been integral in transitional justice efforts in South

98 Sentencing Act 2020, s 57(2).

99 Andrew von Hirsch, 'Proportionality in the philosophy of punishment' (1992) 16 Crime and Justice 55–98.

100 Andrew Ashworth and Elaine Player, 'Criminal Justice Act 2003: The sentencing provisions' (2005) 68(5) Modern Law Review 822–838.

101 DOJ (n 1 above) 6.

102 Ibid.

103 Kathleen Daly, 'What is restorative justice? Fresh answers to a vexed question' (2016) 11(1) Victims and Offenders 9–29; Gerry Johnstone, 'The agendas of the restorative justice movement' in Holly Miller (eds), *Restorative justice: From Theory to Practice* (Emerald Group 2008).

104 Daly (n 103 above); Johnstone (n 103 above).

Africa, Rwanda, and Colombia, providing mechanisms for rebuilding fractured communities and addressing historical injustices.[105]

In Northern Ireland, restorative initiatives emerged after the Good Friday Agreement as a response to the need for non-violent, community-backed alternatives to paramilitary policing and punishment within the two divided communities.[106] This approach was formally recognised in section 43 of the Justice and Security (Northern Ireland) Act 2007, which empowers the Minister of Justice to maintain a public register of accredited community-based restorative justice schemes. Nearly 30 years on from the conflict, these schemes have sought to offer locally rooted forms of accountability, facilitating dialogue and mediation between offenders, victims, and communities. While their ethos aligns with post-conflict reconciliation and social repair, such schemes remain small in scale, inconsistently applied, and insufficiently integrated into the wider criminal justice system – factors that continue to limit their transformative potential.

By contrast, restorative justice has achieved far greater institutional traction in the youth justice system. Following recommendations from the 2011 Youth Justice Review, Northern Ireland embedded restorative principles within statutory youth justice processes, including through youth conferencing.[107] This model brings together the young person, their family, victims (where appropriate), and justice professionals to agree on reparative actions and to address the underlying causes of offending.[108] The model has drawn international praise for its outcomes: high victim satisfaction rates, reduced rates of reoffending, and a more constructive engagement with young people

105 Isabella Bueno, Stephan Parmentier and Elmar Weitekamp, 'Exploring restorative justice in situations of political violence: the case of Colombia' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016); Jennifer Llewellyn and R Howse, 'Institutions for restorative justice: the South African truth and reconciliation commission' (1999) 49(3) University of Toronto Law Journal 355–388; Jonas Musengimana, 'Restorative justice and post-genocide reconciliation: ethical implications and community healing in Rwanda' (2024) 5 Journal of Ethics in Higher Education 241–261.

106 Anna Eriksson, 'Challenging cultures of violence through community restorative justice in Northern Ireland' in H Ventura Miller (ed), *Restorative Justice: From Theory to Practice* (Sociology of Crime, Law and Deviance, vol 11) (Emerald Group 2008); Kieran McEvoy and Harry Mika, 'Restorative justice and the critique of informalism in Northern Ireland' (2002) 42(3) British Journal of Criminology 534–562.

107 DOJ, *Equality and Law Reform: A Review of the Youth Justice System in Northern Ireland* (2011).

108 Brendan Marsh and Shadd Maruna. 'Desistance and restorative justice: learning from success stories of Northern Ireland's Youth Justice Agency.' (2016) 4(3) Restorative Justice 369–387.

in conflict with the law.[109] This stands as one of the more distinct and progressive elements of Northern Ireland's post-conflict justice landscape and contrasts sharply with more cautious approaches in adult sentencing policy.

While reparation is included in the proposed sentencing principles, it arguably does not adequately capture the broader scope of restorative justice. Reparation in criminal justice systems, including in the UK, typically focuses on material or symbolic restitution. In contrast, restorative justice encompasses a more comprehensive process to address harm, foster dialogue, and rebuild relationships.[110] Explicitly including referral to restorative justice, perhaps by further explaining the term reparation, would signal a more profound commitment to healing and reconciliation. However, doing so might have increased the risk that sceptics of restorative justice, particularly within the unionist parties, might have objected.

Ultimately, while the proposed framework claims to promote fairness and individualised sentencing, it exposes unresolved tensions – particularly between punitive and rehabilitative or restorative aims. The retreat from the more reformist tone of the consultation phase to a noticeably more cautious final report reflects a failure to coherently reconcile these competing rationales. The resulting ambiguity risks creating not flexibility, but incoherence, offering no clear guidance on how conflicting objectives should be prioritised. In practice, it delegates these unresolved tensions to the judiciary, empowering individual judges to determine – consciously or otherwise – whether to resist or reflect more populist penal tendencies. While this judicial discretion may offer some protection from political pressure, it also weakens the framework's ability to promote transparency, consistency, or public confidence. Rather than articulating a clear sentencing ethos, the final proposals reflect a compromise shaped more by institutional caution and political ambivalence than by principled direction.

THE PRODUCTION OF SENTENCING GUIDELINES IN NORTHERN IRELAND: A UNIQUE APPROACH

Having proposed reforms to the principles underpinning sentencing policy, the Northern Ireland review also addresses the mechanisms for implementing these principles through sentencing guidance development and the creation of a sentencing guidelines council. This is potentially the most controversial aspect of the proposed reforms.

109 Ibid.

110 Council of Europe, *Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States Concerning Restorative Justice in Criminal Matters*.

Again, the post-conflict settlement has shaped the trajectory of policy and practice, leading to proposals for a unique sentencing guidance mechanism.

Traditionally, judges in Northern Ireland, as elsewhere, have exercised significant discretion in sentencing, tailoring penalties to the circumstances of each case by balancing aggravating and mitigating factors. However, reliance on judicial discretion has faced growing scrutiny in recent decades across the common law world. Criticism has emerged from both ends of the political spectrum, with the right advocating for sentencing guidelines to ensure tougher penalties. At the same time, the left views them as a means to address disparities, including racial or other biases, inconsistency, and a lack of proportionality.[111] Both perspectives underscore the broader debate over judicial discretion and the need for greater transparency and fairness in sentencing.

In response to these criticisms, many jurisdictions, including Northern Ireland, have adopted sentencing guidelines to enhance consistency and transparency.[112] The level of detail and prescriptiveness in these guidelines and the rules on judicial deviation vary across jurisdictions, reflecting differing legal traditions and institutional priorities.[113] At a high level of abstraction, we can say they tend to outline benchmarks for offences or offence categories, aiding judges in weighing aggravating and mitigating factors to determine appropriate sentences.

In some systems, including Northern Ireland's Crown Court guidelines, appellate courts establish sentencing guidance through rulings in specific cases.[114] They set benchmarks and provide interpretive guidance on statutory provisions and sentencing principles by leveraging their authority and expertise. However, this reactive approach – reliant on appropriate cases reaching the senior courts – can delay responses to emerging sentencing challenges and leave gaps, particularly for less frequently litigated offences. This issue is pronounced in smaller jurisdictions, such as Northern Ireland, where a limited appellate caseload constrains the development of sentencing precedents.

Transparency can also be problematic, as it is not always clear what evidence judges considered when framing the guidance. Additionally, variations in the detail and structure of judgments can lead to

111 Julian V Roberts, 'The evolution of sentencing guidelines in Minnesota and England and Wales' (2019) 48(1) Crime and Justice 187–253.

112 Arie Freiberg and Julian V Roberts, 'Sentencing commissions and guidelines: a case study in policy transfer' (2023) 33 Criminal Law Forum 87–129; Roberts (n 111 above).

113 Freiberg and Roberts (n 112 above).

114 Ibid.

inconsistencies. Ambiguity over which aspects of a ruling constitute binding guidance further complicates its application by lower courts, particularly when judgments do not explicitly state their intent or identify the relevant sections.

Increasingly, jurisdictions have established sentencing councils or commissions to develop and maintain guidelines – a trend dating back to Minnesota's first commission in 1978.[115] While structures vary, these bodies typically produce comprehensive, evidence-based frameworks supported by research, stakeholder consultation, and data analysis. Their processes are generally more transparent than judicial deliberations and involve a more diverse membership, including judges, legal professionals, academics, and public representatives, designed to promote more responsive and informed sentencing policy.

In England and Wales, policymakers moved toward a sentencing council model with the creation of the Sentencing Guidelines Council in 2003, shifting from reliance on appellate judgments.[116] In 2010, its functions were merged into the Sentencing Council, which no longer requires Court of Appeal approval for guidelines.[117] The 14-member Council includes eight judges and six non-judicial members, such as the Director of Public Prosecutions (DPP), senior police and probation officers, a defence barrister, and a legal academic.[118] Judicial appointments are made by the Lord Chief Justice with the Lord Chancellor's agreement; non-judicial members are appointed by the Lord Chancellor, also with the Lord Chief Justice's agreement, following open competition.[119]

Scotland and the Republic of Ireland have also adopted sentencing council models. The Scottish Sentencing Council, operational since 2015, drafts guidelines subject to High Court of Justiciary approval.[120] In the Republic of Ireland, the Sentencing Guidelines and Information Committee, established in 2020, drafts guidelines for approval or amendment by the Judicial Council's Board.[121]

---

115 Ibid.

116 Julian V Roberts and Andrew Ashworth, 'The evolution of sentencing policy and practice in England and Wales, 2003–2015' (2016) 45(1) Crime and Justice 307–358.

117 The governing legislation is the Coroners and Justice Act 2009, pt 4 and sch 15. See Sentencing Council for England and Wales' website.

118 A current list of members is available: Sentencing Council members.

119 Coroners and Justice Act 2009, sch 15(1)(a).

120 The governing legislation is the Criminal Justice and Licensing (Scotland) Act 2010, pt 1. See Scottish Sentencing Council's website.

121 The governing legislation is the Judicial Council Act 201,9 ss 23–29 and ss 91–92. See Sentencing Guidelines and Information Committee webpages.

The choice between appellate courts and sentencing councils reflects a jurisdiction's legal culture and priorities. Appellate courts safeguard judicial independence and legal expertise but often lack the capacity to engage with broader policy and societal concerns. Sentencing councils offer a more structured and participatory model but must navigate tensions between independence and external pressures.[122] This is not a binary choice, as Northern Ireland's trajectory illustrates. Judicial oversight varies widely: in Scotland, the High Court of Justiciary retains final authority over guidelines, while in England and Wales, the council operates with greater independence.[123] Each model presents distinct trade-offs in delivering justice, transparency, and accountability.

Using sentencing councils instead of appellate courts to issue guidelines holds a complex position within penal populism.[124] Sentencing councils sometimes arise from political and public demands for greater accountability, responding to perceptions of leniency and/or judicial arbitrariness.[125] However, sentencing councils are also seen as a way to counterbalance such punitive tendencies by promoting evidence-based policymaking, diversifying the voices of those who input into sentencing guidelines and ensuring consistency rooted in objective principles.[126] The extent to which councils are successful in these aims differs across jurisdictions.[127]

Following the 2010 devolution of justice powers under the Hillsborough Agreement, it initially appeared that establishing a sentencing council would become a flagship justice policy for the Northern Ireland Executive.[128] Previously, policing and justice had remained under Westminster due to mistrust between communities. The Hillsborough Agreement marked a breakthrough, with cross-party consensus on devolving justice and identifying key priorities for the new DOJ – including a sentencing council to build public confidence.[129] Its inclusion signalled political support and suggested the potential for the Assembly to demonstrate its capacity to legislate on sensitive justice issues, reflecting the broader normalisation of local politics.

The newly formed DOJ launched a public consultation within months, though it remained noncommittal and presented alternative options. In his foreword, newly installed Justice Minister David Ford of the Alliance Party rejected penal populism, attributing

122 Freiberg and Roberts (n 112 above).
123 Ibid; Roberts and Ashworth (n 116 above).
124 Freiberg and Gelb (n 6 above).
125 Ibid; Freiberg and Roberts (n 112 above).
126 Freiberg and Gelb (n 6 above); Freiberg and Roberts (n 112 above).
127 Freiberg and Roberts (n 112 above); Roberts and Ashworth (n 116 above).
128 Hillsborough Castle Agreement (2010).
129 Ibid.

low public confidence in sentencing to media sensationalism and misunderstanding. He also stressed the need to protect judicial discretion.[130] The consultation outlined three reform options without expressing a preference.[131] The first proposed a statutory sentencing council, mirroring England and Wales; the second, a statutory advisory panel drafting guidelines for Court of Appeal approval; and the third, requiring no legislation, involved a judicially led Sentencing Group under the Lord Chief Justice. This last option built on proposals from a judicial working group established by the Lord Chief Justice a year earlier.[132]

The consultation received only 24 responses, many incomplete, and just one from a member of the public – indicating limited outreach or public interest.[133] Respondents included political parties, criminal justice bodies, government agencies, and third-sector organisations. Despite minimal public input, most favoured the more ambitious option of establishing a sentencing council, while the judiciary-led option attracted the least support.[134] Critics of the latter noted its narrow focus, lack of external input, limited independence, weaker impact on public confidence, and absence of any mechanism to improve public understanding of sentencing.[135]

Given the consultation results and the direction of policy in other parts of the UK at the time, a decision to create a sentencing council might have been an expected outcome. However, given the Minister's foreword to the consultation, it is not perhaps surprising that option three was chosen.[136] In doing so, the Minister stated that he was influenced by the Lord Chief Justice's well-timed initiative, which he described as 'unique to Northern Ireland'.[137] He also expressed concerns, reflected in the consultation responses, about whether establishing a new sentencing guidelines mechanism would represent good value for money.[138] This was during the era of the Conservative–Liberal Democrat austerity budgets, which impacted the

130 DOJ, *Consultation on a Sentencing Guidelines Mechanism* (2010).
131 Ibid.
132 Sentencing Work Group, *Monitoring and Developing Sentencing Guidance in Northern Ireland: A Report to the Lord Chief Justice from the Sentencing Working Group* (Lord Chief Justice's Office 2010).
133 DOJ, *Consultation on a Sentencing Guidelines Mechanism: Summary of Responses* (2011).
134 Ibid.
135 Ibid para 2.37.
136 Ibid 2–3.
137 Northern Ireland Assembly Plenary Debate 11 June 2012.
138 Ibid.

money available for the devolved administrations.[139] The Minister's arguments in favour of the more limited reforms closely mirrored the findings of the report of the judicial working group established by the Lord Chief Justice.[140]

The then Lord Chief Justice Declan Morgan articulated his opposition to a sentencing council model in a judgment in an appeal case where it was suggested that English Sentencing Guidelines could be used in Northern Ireland to guide sentencers:

> [The Sentencing Guidance model in England and Wales] reflects the fact that the jurisdiction is very large, that the opportunity for discussion between experienced judges about sentencing issues is consequently limited and that, although sentencing is often carried out by some of the most experienced criminal judges in the United Kingdom, there is also a long tradition of sentencing being carried out by Recorders and Deputy Judges who have had no or limited experience in the criminal law.
>
> In Northern Ireland we have a small Crown Court judiciary who have the benefit of regular meetings with colleagues where sentencing issues can be discussed both formally and informally. Sentencing is carried out exclusively by full-time judges most of whom have had considerable experience of criminal law before going on the Bench. We recognise the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but we have discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance.[141]

This passage reflects a deeply held judicial ethos that prizes local expertise, collegial discussion, and professional discretion over externally imposed frameworks. It also helps explain the judiciary's resistance to formalised sentencing structures – such as a council – on the grounds that they may be ill-suited to the scale and character of Northern Ireland's justice system. In a 2025 public lecture the current Lady Chief Justice echoed these points, stating 'for a more compact and much less populous jurisdiction such as ours which operates on a different footing my view is that a similar approach to England and Wales would be overly rigid and constricting'.[142]

With the DOJ deciding not to introduce a statutory-based council, the judiciary in Northern Ireland developed its distinctive approach to producing sentencing guidelines, reflecting the unique legal and

---

139 Chris Gilligan, 'Austerity and consociational government in Northern Ireland' (2016) 24(1) Irish Studies Review 35–48.

140 LCJSG, *Report by the Lord Chief Justice's Sentencing Group* (Lord Chief Justice's Office 2012).

141 *The Queen v Thomas McVaughey and Martin Smyth* [2014] NICA 61.

142 Connor Beaton, 'Sentencing Council for Northern Ireland would have 'huge impact'' (*Irish Legal News* 29 May 2025).

political context. Currently, in Northern Ireland, the Judicial Studies Board (JSB) established by the then Lord Chief Justice in 1994 to oversee judicial training publishes sentencing guidelines supported in the task by the Lady Chief Justice's Sentencing Group (LCJSG) established in 2012.[143]

Both the JSB and LCJSG's membership are at the discretion of the Lady Chief Justice rather than the Government, with both organisations predominately made up of judiciary members. The JSB also includes one of Northern Ireland's three coroners and two senior law academics (one from each local university).[144] The LCJSG has several non-judicial members. Currently, it comprises, in addition to members of the judiciary, three court service civil servants, two law academics, and the Victim's Commissioner Designate for Northern Ireland.[145]

The LCJSG's stated functions include advising the Lady Chief Justice on Magistrates' Court sentencing guidelines, assessing appellate and Crown Court judgments for use as guidelines, liaising with the JSB on judicial training and guideline dissemination and assisting the Lady Chief Justice with her programmes of action in areas where there is a perceived gap in sentencing guidance.[146]

Comprehensive Magistrates' Guidance is developed by a judicial-only subcommittee of the LCJSG/JSB.[147] Whilst at the Crown Court level, the LCJSG reviews and recommends to the Lady Chief what it considers suitable Court of Appeal judgments as sentencing guidelines, which, if confirmed, are published on the JSB's website.[148] It is important to note that the group does not draft guidelines for the Crown Court but rather determines whether the Court of Appeal or Crown Court judgments qualify as guideline judgments.

The LCJSG's programme of actions primarily focuses on compiling relevant guideline judgments and Magistrates' Courts Guidance on specific matters (eg road traffic offences), occasionally supplemented by judicial training provided by the JSB.[149]

Given the *ad hoc* nature of the development of the sentencing guideline mechanisms in Northern Ireland and the lack of a statutory framework, the guidelines are not currently legally binding on a

143 LCJSG (n 140 above).

144 See current membership list.

145 See current membership list. The author of this paper is a former academic member of the Sentencing Group.

146 LCJSG (n 140 above).

147 See up-to-date version of the guidelines.

148 Ibid.

149 LCJSG, Report by the Lady Chief Justice's Sentencing Group 2017–2022 (Lady Chef Justice's Office 2024) annex D.

sentencing judge.[150] This differs from Northern Ireland's neighbouring jurisdictions where there is a statutory obligation on sentencers to either 'have regard' (Scotland and the Republic of Ireland) or 'follow' (England and Wales) relevant guidelines unless the court is satisfied that it would be either 'contrary to the interests of justice to do so' (England and Wales and the Republic of Ireland) or 'unless the court considers and states the reasons for departing from the guideline' (Scotland).[151]

The creation of the LCJSG in 2012 has been pivotal in deflecting calls for a sentencing guidance council in Northern Ireland. Despite this, the DOJ acknowledges that there has yet to be a review of the effectiveness of the sentencing guidelines arrangement since its establishment.[152] The Department stating that due to the ongoing consultation on sentencing and pressures on the criminal justice system caused by Covid, conducting the review is not a priority.[153] However, it is peculiar that in planning an overhaul of sentencing, the Department has not considered it essential to understand how effective the current system is at achieving its aims.

Nevertheless, support for a sentencing council model in Northern Ireland remains. In 2012, during an emotionally charged Assembly debate on the sentencing of those responsible for the terrorist murder of a police officer, an amendment to a motion advocating for the establishment of a sentencing guidelines council was proposed by the Social Democratic and Labour Party (SDLP) (one of the nationalist parties). Both nationalist parties, Sinn Féin and the SDLP, supported the amendment. The motion was defeated due to opposition from the unionist parties and the Alliance Party.[154] The debate involved the somewhat unusual position of the Irish nationalist parties advocating for what some termed the 'British' approach, with unionists objecting to it.

Rather than advocating for a council based on punitive populist reasoning, the nationalist parties argued that a council would create a fair, equitable, open, and transparent framework for sentencing reform, ultimately enhancing public confidence in the justice system. The reasons that unionist representatives opposed the amendment were not as clear but included from some that they feared a sentencing council would constrain the Assembly's ability to legislate to introduce harsher

150 DOJ (n 1 above) 18.

151 In England and Wales, see the Sentencing Act 2020, s 59; in Scotland, see Criminal Justice and Licensing (Scotland) Act 2010, s 6; in the Republic of Ireland, see Judicial Council Act 2019, s 92.

152 DOJ (n 1 above) para 68.

153 Ibid.

154 Northern Ireland Assembly Plenary Debate 11 June 2012.

sentences and that there was limited evidence of the effectiveness of such bodies. The Alliance Party, including the Minister of Justice, primarily cited concerns over the financial costs of establishing a council.[155] Notably, concerns about the council restricting judicial discretion were not key to the opposition's reasoning.

In 2018, Sinn Féin, an all-island party, played a pivotal opposition role in securing a political agreement with the then government to introduce a form of sentencing council in the Republic of Ireland – advocating for it as a means to address what it described as 'inadequate and inappropriate sentencing'.[156] In the recent 2024 election in the Republic of Ireland, Sinn Féin called for enhanced powers for the sentencing body along the lines of England and Wales.[157] This marked a more traditional 'law and order' stance than the party typically adopts in Northern Ireland. The contrast reflects differing political contexts: in the Republic, Sinn Féin has increasingly positioned itself as a party of government-in-waiting, responding to public concerns about crime and justice. In Northern Ireland, however, its legacy as a party historically sceptical of the state's coercive power, combined with the sensitivities of post-conflict policing and justice, has encouraged a more cautious and reform-oriented approach to criminal justice policy.

Given that the unionist parties in Northern Ireland tend to take a stricter law-and-order approach to crime than nationalist parties, one might have expected unionist parties to support a sentencing council based on more punitive populist arguments of reducing judicial discretion, especially given the existence of such institutions in the rest of the UK. Here, the nationalist/unionist divide on the subject needs to be viewed in the context of the legacy of the conflict, where it has generally been nationalist parties advocating for reforms to state institutions, including creating oversight bodies for criminal justice agencies, with unionist parties more likely to support the *status quo* and professional independence.[158] However, in May 2025, the justice spokesperson of the Ulster Unionist Party, Doug Beattie, announced his support for a Sentencing Council for Northern Ireland expressing concerns that sentencing in Northern Ireland was 'very lenient' with a 'lack of transparency [and] openness' arguing that a sentencing council could have 'a huge impact'.[159] At the time of writing it is unclear

155 Ibid.

156 Paul Hosford, 'Judges to get new sentencing guidelines after Sinn Féin deal with government' (*The Journal* 22 May 2018).

157 Sinn Féin, 'Fine Gael's deflection tactics cannot hide failings on sentencing – Pa Daly TD' 7 August 2024.

158 Mulcahy (n 15 above).

159 Beaton (n 142 above).

whether this will influence the views of the larger Democratic Unionist Party; in a recent Assembly debate on the issue, the party appeared non-committal.[160]

The ultimate views of the parties on a sentencing council may be influenced by recent developments in England and Wales, where a public dispute emerged between the Labour Government and the Sentencing Council over proposed guidelines that would have required courts to consider pre-sentence reports for defendants from specific backgrounds, such as ethnic minorities, when sentencing.[161] The row could deepen Alliance and possibly unionist concerns that a sentencing council might become a political lightning rod or undermine judicial autonomy.

The 2021 consultation informing the *Way Forward* document did not directly ask whether a sentencing council should replace existing guidance but focused on updating current mechanisms.[162] The DOJ addressed the council model only in response to unsolicited support during the consultation, citing high costs and limited economies of scale in a small jurisdiction, along with a lack of political consensus among Executive parties.[163] Further concerns centred on the role of criminal justice stakeholders, such as the PSNI and PPS. Unlike in England, Wales, and Scotland – where senior police and prosecution figures sit on sentencing councils – Northern Ireland's post-conflict context creates heightened sensitivity around maintaining professional boundaries.[164]

Despite rejecting a sentencing council, the *Way Forward* document does more than endorse the *status quo*. It seeks to balance public concern with a rejection of punitive populism and a drive for efficiency, resulting in a distinct policy approach. Notably, it proposes expanding the Court of Appeal's role in developing sentencing guidelines – powers usually reserved for sentencing councils – marking a unique shift within the common law world.[165]

The Department proposes that forthcoming legislation should empower the Court of Appeal to issue sentencing guidelines independently, without waiting for an appropriate criminal case to

160 Northern Ireland Assembly Plenary Debate 23 June 2025, Private Members' Business. Motion: Improving Sentencing Practices in Northern Ireland.

161 Lucy Fisher, Alistair Gray and Suzi Ring, 'Sentencing Council to suspend guidelines at centre of "two-tier" justice row in England and Wales' *Financial Times* (31 March 2025).

162 DOJ (n 49 above).

163 DOJ (n 1 above) 17.

164 See Sentencing Council in England and Wales membership; and Scottish Sentencing Council membership.

165 DOJ (n 1 above) 14–19.

come on appeal.[166] In addition to granting the court the authority to act on its initiative, the *Way Forward* document recommends allowing the Attorney General or the DPP to apply to the Court for a guidelines judgment.[167] According to the Department, these changes address the existing delays in producing guidelines for the Crown Court.[168]

While this reform may initially seem straightforward and uncontroversial, it raises several significant issues. If the Court of Appeal begins issuing dedicated, statutorily authorised guidance rather than providing a few paragraphs of *obiter dicta* within judgments, it effectively assumes a role closer to that of a sentencing guidance council than a traditional appellate court. This shift prompts several critical concerns, and while the *Way Forward* document seeks to address some, others remain unresolved.

A question raised by the reforms is whether this statutorily authorised guidance binds lower courts, and if so, to what extent. The *Way Forward* document recommends imposing a statutory duty on the judiciary to 'have regard' to sentencing guidelines or guideline judgments, requiring courts to provide reasons for any departure.[169] This change would align Northern Ireland's practice more closely with neighbouring jurisdictions.[170] This would mark an enhancement of the powers of the Court of Appeal in influencing sentencers.

Another question is what should be the format of Court of Appeal guidance. If the guidelines were to reflect the structure in England and Wales or even the current Magistrates' Guidelines in Northern Ireland, they would be in tabular form, a significant departure from the current brief *obiter* text in Court of Appeal judgments. The *Way Forward* document proposes that legislation guides the Court of Appeal regarding the content of guideline judgments, though it offers no specifics.[171] It is reasonable to assume that they may include a basic framework outlining mitigating and aggravating factors, along with thresholds for sentencing. This would improve consistency and the level of detail in the guidance but would again mark a significant expansion of the current powers of the Court of Appeal.

Sentencing councils can typically gather evidence from interested parties, such as victim advocacy groups, when drafting guidelines, which is a resource that courts lack.[172] The *Way Forward* document proposes allowing the Court of Appeal the discretion to receive

166 Ibid 14–15.
167 Ibid 15.
168 Ibid 14–15.
169 Ibid 18–19.
170 See earlier discussion on pages 237 and 238.
171 DOJ (n 1 above) 15.
172 Freiberg and Roberts (n 112 above).

representations, with the Attorney General or the DPP acting as gatekeepers – a novel approach not modelled on other jurisdictions.[173] Granting the Attorney General and DPP gatekeeping powers looks to be a safeguard, but it risks less favoured advocacy groups being excluded from making representations. The consultation informing the *Way Forward* document did not highlight the proposals' unique and potentially controversial aspects.[174]

Sentencing councils typically rely on empirical evidence to draft guidelines, conducting or commissioning primary research and using existing studies.[175] In contrast, courts generally base guidelines on evidence presented by litigants. The DOJ proposes empowering the Court of Appeal to consider 'relevant information' on sentencing, mentioning statistical data but offering little detail on what this would include.[176] The proposals stop short of granting the Court of Appeal authority to commission primary research, but the ability to independently collate existing research would significantly enhance its role. The Department notes that no similar provisions exist in neighbouring jurisdictions.[177]

The current model in Northern Ireland already raises concerns about the lack of diversity among those drafting sentencing guidelines – concerns likely to be amplified under the proposed reforms. The Court of Appeal comprises only four judges, including the Lady Chief Justice and three Lord Justices of Appeal, with the 11-member High Court bench also participating in appeal cases.[178] It remains unclear whether the latter would contribute to guideline development. In any case, such a small and senior judicial group lacks the demographic, professional, and experiential diversity found in sentencing councils elsewhere.

The document endorses continuing – and possibly expanding – the Lady Chief Justice's Sentencing Group (LCJSG), citing its alignment with priorities such as transparency, consistency, and public confidence.[179] However, the LCJSG's limited profile, remit, and resources cast doubt on its capacity to deliver on these aims, particularly in public engagement. The proposals appear to sideline its role in recommending Court of Appeal guidelines, while preserving its

173 DOJ (n 1 above) 15.
174 DOJ (n 49 above).
175 Freiberg and Roberts (n 112 above).
176 DOJ (n 1 above) 14–15.
177 Ibid 15.
178 See up-to-date list of the Northern Ireland judiciary; McCormick and Dickson (n 33 above).
179 DOJ (n 1 above) 16–18.

function in issuing Magistrates' Court guidance.[180] If implemented, the reforms would consolidate sentencing guideline development under exclusive judicial control.

In summary, the proposed reforms to sentencing guidelines in Northern Ireland build on an already distinctive process, aiming to enhance efficiency and consistency in decision-making without incurring significant costs. While stopping short of establishing a sentencing council, the reforms leave unresolved questions concerning the expanded role of the Court of Appeal, the transparency of guideline development, and the availability and forum for appeals. Given these uncertainties and a growing level of support for a sentencing council amongst lawmakers, it is perhaps unsurprising that, in June 2025, the Minister for Justice announced yet another consultation – this time on proposals for a dedicated sentencing review mechanism.[181] This consultation has the potential to bring judicial priorities into tension with those of most elected representatives, placing the DOJ in a difficult position.

CONCLUSIONS

At the heart of the proposed sentencing reforms for adults in post-conflict Northern Ireland are two interwoven tensions shaping the debate. The sentencing proposals seek to reconcile these tensions to achieve consensus on the forthcoming sentencing Bill.

The first tension lies in the competing rationales for sentencing, often framed as a conflict between punitive and rehabilitative or restorative approaches. This tension was starkly reflected in the trajectory of sentencing reform proposals for the creation of statutory sentencing principles and purposes. The DOJ initially proposed the principle of using punishment sparingly – aligned with a parsimony ethic and consistent with international guidance – but ultimately removed it following consultation. This retreat suggests a reluctance to provoke political opposition by appearing to favour one sentencing philosophy over another. Adopting the sentencing purposes set out in the English Sentencing Code, without critical adaptation or clarification, compounds this ambiguity by importing a framework already criticised for its conceptual confusion and lack of normative coherence.

While such inconsistencies between retributive and consequentialist aims are not unique to post-conflict settings, the drivers differ. In Northern Ireland, the legacy of conflict, the political sensitivities surrounding criminal justice reform, and the need for cross-community

180 Ibid 18.

181 Assembly Official Report: Monday 2 June 2025: Questions to the Justice Minister.

consensus contribute to a cautious and often ambiguous approach. It is regrettable that, as a post-conflict society, there has not been greater ambition to develop a distinct and coherent sentencing framework that reflects its particular context. A more explicit acknowledgment of Northern Ireland's internationally recognised leadership in restorative justice – both in community-led schemes and within the youth justice system – could have provided a firmer foundation for articulating a sentencing ethos shaped by reconciliation, repair, and reintegration. In the absence of such clarity, much will fall to the judiciary to navigate these competing principles and purposes when sentencing in individual cases.

The second tension centres on judicial independence versus greater accountability demands. While judicial discretion has traditionally been a cornerstone of Northern Ireland's legal system, within the public discourse, there have been criticisms that sentencing decisions can appear inconsistent or overly lenient. This has led to calls for more precise guidelines, increased oversight, and public scrutiny commonly associated with penal populism. However, many within the judiciary, legal profession and DOJ caution that excessive constraints on judicial discretion risk undermining fairness, proportionality, the ability to tailor sentences to individual cases and, ultimately, legitimacy in a divided society. The DOJ has sought to balance these competing visions in its proposals. Several of the proposed reforms, including the introduction of statutory guidance, statutory aggravators and the expansion of the use of the undue leniency procedure, are an attempt to recognise the calls for greater accountability. However, those favouring judicial discretion appear to have won their case on the most far-reaching suggestion in the rejection of calls for a sentencing council.

Judicial scepticism toward political interference in sentencing has played a role in shaping the reforms. Such scepticism is not unique to Northern Ireland; it is a common feature across the common law world. Ultimately, policies such as sentencing councils involve the judiciary relinquishing some discretion and accepting greater external oversight. In many common law jurisdictions, political demands for reform have overridden judicial resistance. In contrast, while acknowledging calls for greater guidance and harsher sentences in certain areas, Northern Ireland's sentencing proposals primarily seek to uphold judicial independence.

This outcome can be attributed to Northern Ireland's distinct post-conflict governance dynamics. Unlike elsewhere in the UK and Ireland, judicial and civil service leadership exerts a stronger influence, often compensating for political instability and legislative inertia. The small size of the jurisdiction further discourages reforms that could strain professional relationships between criminal justice professionals

and civil servants or impose high relative budgetary costs, such as establishing a sentencing commission.

Additionally, the political landscape plays a crucial role. The Justice Ministry is typically held by a party sceptical of populist reforms and orientated more towards managerialist concerns, such as the costs associated with establishing such a body. In contrast, despite their traditionally more punitive stance, unionist parties tend to be wary of institutional changes in the justice system, especially in the context of significant changes since the Good Friday Agreement that have tended to be viewed as a concession to nationalism. Conversely, nationalist parties, historically more sceptical of law-and-order politics, are often more open to institutional reforms to a system in which they were traditionally inherently distrustful. Until recently, the absence of political consensus has hindered progress toward establishing a new statutory body. However, this may be shifting, with the Ulster Unionist Party now expressing support for a sentencing council and the Democratic Unionist Party signalling a willingness to engage in discussions about whether to endorse such a proposal.

In aiming to adopt a consensus-driven approach to modernise the tools that guide sentencers, the reforms deliberately avoid the guideline council model adopted in neighbouring jurisdictions, instead favouring statutory guidance and an enhanced role for the Court of Appeal. This decision represents an act of accidental radicalism, as it significantly redefines the Court of Appeal's traditional role within the justice system, effectively positioning it as a quasi-sentencing council. Granting the Court of Appeal greater authority to take evidence and proactively issue guidelines significantly enhances its authority and is not based on experience elsewhere. The DOJ has not yet addressed the implications of such an innovative approach, and this will require further consideration during any subsequent consultation and when the sentencing Bill is introduced to the assembly.

To date, the experience in other parts of the UK has been that the introduction of sentencing principles and purposes and sentencing councils has accompanied an increasing trend towards punitivism in sentencing. Notably, in England and Wales, the Sentencing Council has often struggled to counteract political and public demands for harsher sentencing, contributing to rising prison populations. Although Northern Ireland has historically had a lower incarceration rate than the rest of the UK, its prison population is also increasing, reflecting trends in penal expansion. This raises questions about how any sentencing framework – judicially led or council-based – can insulate decision-making from broader penal populist trends. Time will tell whether Northern Ireland's decision to eschew the sentencing

council mechanism and implement its unique approach to sentencing guidelines will militate against penal populism.

Ultimately, these consensus reforms attempt to satisfy campaigners who have expressed longstanding concerns regarding transparency, consistency, and public confidence whilst avoiding embracing a full-throated penal populist approach to sentencing policy. This compromise position creates an overarching philosophical incoherency, but then politics is the art of the possible, especially in the context of the post-conflict governance structures of Northern Ireland. Such an incoherency in sentencing policy is not unique to Northern Ireland, but how it has manifested itself in the proposed package of reforms is. The durability of these reforms will depend on how effectively they bridge the gap between protecting expert-led sentencing and public perceptions of justice.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 247–276
Articles DOI: 10.53386/nilq.v76i2.1202

Fantasy legal exhibitions

Amanda Perry-Kessaris

University of Kent

Victoria Barnes

Queen's University Belfast

Correspondence emails: a.perry-kessaris@kent.ac.uk and v.barnes@qub.ac.uk.

ABSTRACT

This article explores the potential of 'fantasy exhibition' as a novel, speculative and prefigurative, legal research method. What might legal scholars gain, and what might they lose, from asking what if, and then acting as if, they were to exhibit some aspect of their research? It draws on insights from a design-driven, experimental academic workshop, held across multiple locations in central London in 2023. We place the concept of fantasy exhibition in the context of wider trends in legal research and museum practices; detail the designerly methods that we deployed to prompt and facilitate our participant collaborators to engage in fantasy exhibition; present the prototype exhibitions that emerged from the project; and identify lessons learned along the way. We draw throughout upon insights from our participant collaborators.

Keywords: exhibition; curation; law and design; speculation; prefiguration; research impact.

As we reflect on those two days in early summer, what we remember is not so much the substance of our conversations (we don't need to, we can find this in our notes) but the feeling of the beginnings of imaginative community, a community that explores the opportunities of fantasy, that encourages asking 'what if …' or 'why not …?'[1]

I found during the workshop that being unseriously-serious is very productive for envisioning real possibilities. I find there is huge critical potential in that.[2]

1 Erika Rackley and Sharon Thompson, Refection Statement.
2 Renske Vos, Reflection Statement.

INTRODUCTION

This article explores the potential of 'fantasy exhibition' as a novel, speculative and prefigurative, legal research method.[3] We use the term 'legal exhibition' to refer to attempts to curate legal phenomena in such a way as to make them available to others. By 'curate' we mean to systematically select and present artefacts. By 'legal phenomena' we mean broadly to refer to concepts, propositions, evidence, norms, and/or perspectives that relate to law. By 'available' we mean perceptible intellectually, and/or by any and all the senses – that is, legible, visible, tangible, audible, olfactible and/or taste-able. We use the concept of 'fantasy' to accentuate the speculative and prefigurative potential of exhibition as a research practice. To work speculatively with exhibition is to ask 'what if' we were (able) to use exhibition as a device to enhance legal research? To work prefiguratively with exhibition is to act 'as if' we were already using exhibition as a device to enhance legal research.[4]

We begin by placing fantasy exhibition in the context of wider trends in legal research and museum practices. We then set out the design-driven methods that we deployed throughout the project in order to prompt and facilitate our participant collaborators to engage productively in fantasy. Next we introduce the prototype exhibitions that emerged from the project. We end with a reflection on the lessons we learned along the way. We draw throughout upon insights from our participant collaborators.

LEGAL EXHIBITION

Some expertly curated exhibitions explicitly centre on law.[5] When they do not, lawyers will nevertheless tend to find law lurking among the artefacts and curatorial texts. This article focuses on why, how, and

---

3 Some material is reproduced from Amanda Perry-Kessaris and Victoria Barnes 'Fantasy Legal Exhibitions Workshop' (*SLSA Blog* nd); and Amanda Perry-Kessaris 'Fantasy legal exhibitions' (*Approaching Law Blog* 25 September 2023). This event would not have been possible without funding from the Socio-Legal Studies Association and Kent Law School; the expertise and warmth of Susannah Coster, Archivist at the Postal Museum, and Barnaby Bryan, Archivist at Middle Temple; and the generous engagement of our participant collaborators Favour Bọrọkìní, Lilian Moncrieff, Fred Motson, Erika Rackley, Helen Rutherford, Almas Shaikh, Sharon Thompson, Renske Vos and Clare Williams. We are also grateful to Jenny Williams for her contributions and assistance; and to our anonymous reviewers for their useful suggestions.

4 Amanda Perry-Kessaris, *Doing Sociolegal Research in Design Mode* (Routledge 2021) 80–84.

5 For example, Anon, 'The Evolution of the Law Report' (Middle Temple Library 2024).

to what effect legal scholars might themselves engage in exhibition design as a research method.

The most obvious purpose of an exhibition is to make legal ideas available to 'publics' – that is, those who are (expertly or amateurishly) interested in a given legal phenomenon, as well as those who, in the words of pragmatist John Dewey, are 'affected by' its 'indirect consequences' to such an extent that those 'consequences ought to be systematically cared for'.[6] However, as Bruno Latour and Peter Weibel have demonstrated in a series of experiments in the early 2000s, it is also possible to use the device of exhibition to create publics: to draw attention to a phenomenon and, in so doing, to proactively gather around it those are affected by it.[7]

In recent years, legal scholars have increasingly reached for exhibition as a way of sharing insights and activating publics. One example is a collection of souvenirs, toys and other products that 'engage with international law', which was exhibited in the rare books section of a library.[8] Sometimes these exhibitions are part of a wider performance. For example, 'Four Legs Good', was 'a contemporary revival of the medieval animal trials which took place in Britain and throughout Europe, where animals who had been accused of committing crimes were brought to court, provided defence counsel and prosecuted in full hearings before a judge'. It included an exhibition of designed artefacts detailing the fictional history of the institution.[9] Sometimes exhibition and performance are intertwined, as in a 'show' in which undergraduates exhibited material representations – performances, artefacts – of their 'journey' through their undergraduate law degree programme, as a form of assessment and celebration.[10]

This rising interest in exhibition should be seen in the context of (at least) five wider trends in legal scholarship which point towards a desire to, as Margaret Davies puts it, 'unlimit our understandings of

6 John Dewey, *The Public and its Problems*, Melvin L Rogers (ed) (Swallow Press 1927) 69.

7 Peter Weibel and Bruno Latour, 'Experimenting with representation: iconoclash and making things public' in Sharon Macdonald and Paul Basu (eds), *Exhibition Experiments* (Blackwell 2007) 100–1. See further Amanda Perry-Kessaris, 'Living methods for living law: Eugen Ehrlich meets Bruno Latour via adversarial exhibition design' (5 May 2023) prepared for 'Colloque Ehrlich: L'actualité de la pensée d'Eugen Ehrlich pour les méthodes empiriques du droit', Université Paris 1 Panthéon-Sorbonne, 22–23 September 2022.

8 Emily Crawford and Jacqueline Mowbray, 'At the vanishing point: encounters with the souvenirs, merchandise, and memorabilia of international law' (Sydney Law School 2023).

9 See Jack Tan, 'Four Legs Good'.

10 Stephen Bunbury and Andreas Philippopoulos-Mihalopoulos, 'The law school degree show: law, materiality, decolonization and authentic assessment' (2023) 57(2) The Law Teacher 187–200.

law': to develop 'a more open, dynamic and responsive understanding of law' – one which sets aside the traditional jurisprudential obsessions with 'defining it, or finding its essence … or showing how it is different from non-law' and, instead, 'start[s] with the presumption that law is connected and relational' and, therefore, 'mobile, plural, and material'.[11] First, there is a sense that legal scholars must look 'beyond text' and begin to take account of the visual and material dimensions of all legal phenomena.[12] Second, attention is increasingly paid to the temporal dimensions of law – to the interplays between past, present, and future realities and imaginaries.[13] Third, law itself is increasingly conceptualised as a form of exhibition or performance. For example, Stacy Douglas has argued that constitutions, like museums, can be understood as 'curating' conceptions of actual and potential communities;[14] Julie Stone Peters has explored the roles of 'theatricality' and 'spectatorship' in law-making across different historical periods;[15] and Andreas Philippopoulos-Mihalopoulos has argued that these days law is 'as image-conscious and volatile as media or politics, relying more and more on its ability to "show off" (rather than actually to prove through its actions) its relevance'.[16] To truly unlimit law requires that we be more open, less determinate, not only in our theories about law, but also around how we approach the process of theorisation, as well as around who is included in those processes.[17] So we see (fourth), a rising confidence that we can go beyond highlighting the visual and material dimensions of law. We can activate them. For example, Máiréad Enright and Tina Kinsella have shown how we can

11 Margaret Davies, *Law Unlimited* (Routledge 2017).

12 Zenon Bankowski, Maksymilian Del Mar and Paul Maharg (eds), *The Arts and the Legal Academy: Beyond Text in Legal Education* (Routledge 2012); Zenon Bankowski and Maksymilian Del Mar (eds), *The Moral Imagination and the Legal Life: Beyond Text in Legal Education* (Routledge 2016); Emily Allbon and Amanda Perry-Kessaris (eds), *Design in Legal Education* 1st edn (Routledge 2022).

13 Elen Stokes, 'Wanted: professors of foresight in environmental law!' (2019) 31 Journal of Environmental Law 175–186; Elen Stokes, 'Beyond evidence: anticipatory regimes in law' (2021) 43 Law and Policy 73–91.

14 Stacy Douglas, *Curating Community: Museums, Constitutionalism, and the Taming of the Political* (University of Michigan Press 2017).

15 Julie Stone Peters, *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe* (Oxford University Press 2022).

16 Andreas Philippopoulos-Mihalopoulos, 'Law is a stage: from aesthetics to affective aestheses' in Emilios A Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 201.

17 Amanda Perry-Kessaris, '"Unlimiting" legal conceptualisation in designerly ways' prepared for 'Edinburgh Centre for Legal Theory Seminar', 16 November 2023 (2 November 2023).

combine material culture with experiential methods, such as dance, to 'mak[e] law palpable'. In so doing we can open pathways to empathy and imagination, as distinct from mere 'reaction'.[18] Shaun McVeigh has gone further to suggest that an exhibition can actively 'reali[se] a jurisprudence'.[19] We return to this point in our conclusion. Relatedly (fifth), there is some interest in the idea that such openness can prompt and facilitate a widening of participation in legal theorisation. One example is the 'Pop-Up Museum of Legal Objects', a digital collection of legal commentaries about curated artefacts and statues on public display across the world. The collection emerged out of a series of collaborative events designed to attract and embrace a wide range of scholars, and in which experiential process such as tours, model-making, and lo-fi exhibition played a central role.[20]

At the same time, those working in cultural institutions are coming to understand exhibitions as a form of research.[21] 'Museums and exhibitions are increasingly being referred to as "laboratories" [and] "experiments" respectively' – that is, as institutions and events that do 'not simply mirror the world', but rather 'work as a particular way of … exploring the world', of 'construct[ing] new perspectives and ideas' and 'different ways of knowing'.[22] This characterisation of museums and exhibitions implies a move on the part of curators towards both 'intellectual experimentation' and 'social experimentation'.[23] Sharon McDonald and Paul Basu present this move as a kind of recovery. They 'trace the history of the museum back to the scientific theatres, where experiments were carried out in front of an audience' and 'suggest that the contemporary museum might profit from' once again centring 'experiment and process rather than finalised displays'.[24] The Fantasy Legal Exhibition project builds on and advances each of these trends.

---

18 Máiréad Enright and Tina Kinsella, 'Legal aesthetics in the touching contract: memory, exposure and transformation' (2023) 19 Law, Culture and the Humanities 297–319, 318.

19 Shaun McVeigh, 'Jurisprudent of London: arts of association' (2016) 20 Law Text Culture 189–215, 199.

20 See the website Pop-Up Museum of Legal Objects; Amanda Perry-Kessaris, 'The Pop-up Museum of Legal Objects project: an experiment in "socio-legal design"' (2017) 68 Northern Ireland Legal Quarterly 225–244.

21 See Peter Bjerregaard (ed), *Exhibitions as Research: Experimental Methods in Museums* 1st edn (Routledge 2019); 'Beyond the Academy: Research as Exhibition' Symposium, Tate Britain. 10 May 2010 – audio recording.

22 Bjerregaard (n 21 above) 1–2. See further Sheetal Prajapati, 'Museum as Laboratory: Artists Experiment' (Museum of Modern Aart 2014) Martin Heller, Andrea Scholz and Agnes Wegner, *The Laboratory Concept: Museum Experiments in the Humboldt Lab Dahlem* (Nicolaische Verlagsbuchd 2015).

23 Bjerregaard (n 21 above) 4.

24 Ibid 4. Citing Sharon Macdonald and Paul Basu, 'Introduction' in Sharon Macdonald and Paul Basu (eds), *Exhibition Experiments* (Blackwell 2007) 1-24.

FANTASY LEGAL EXHIBITION

The Fantasy Legal Exhibition project methodology was guided by insights from a wider investigation into the potential of design-based methods to enhance all aspects of legal research – that is, not only dissemination, but also conceptualisation, data collection and analysis, reflection and evaluation; as well as the, rarely remarked upon, relational dimension of research.[25]

Design-based practices, such as architecture, social design, graphic design and system design, tend to be distinguished by five interconnected characteristics. First, designers tend to emphasise processes of experimentation, both in the relatively creative sense of generating and provisionally exploring a wide range of ideas; and in the relatively scientific sense of testing those ideas and then discarding, adapting, or retaining and pursuing them. Second, designers tend to make ideas visible and/or tangible in the here and now, so that they become more, or differently, available to those working with or encountering them. Third, designers generally try to centre the needs and wants of those who will use as well as those who may be indirectly affected by that which they design. In combination these ways can (fourth) generate 'structured-yet-free' enabling ecosystems within which we are prompted and facilitated to be simultaneously practical (how can we make things happen?), critical (what is wrong?), and imaginative (what could be?). Finally, they also enable collaboration.[26]

As noted above, we use the concept of 'fantasy' to accentuate the speculative and prefigurative potential of exhibition as a research practice. Speculation and prefiguration are deployed in a wide range of spheres, including science fiction and political activism. We pursued a specifically design-driven approach to speculation and prefiguration in the sense that project activities emphasised experimentation, making ideas visible and tangible, and centring users (both participant collaborators and exhibition visitors).

This designerly, structured-yet-free, approach was evident in the fact that we planned every aspect of the event well in advance, but also continuously adjusted to changing circumstances, to our evolving understanding of exhibition as a practice, as well as to the intellectual, physical, logistical, and psychological needs and wants of our participant collaborators. This approach was also evident in the primary device through which we generated this ecosystem: a series of 'briefs' circulated before, during, and after the core workshop. These were designed to generate a sense of structured freedom around

25 Amanda Perry-Kessaris, 'Legal design for practice, activism, policy, and research' (2019) 46 Journal of Law and Society 185–210; Perry-Kessaris (n 4 above).

26 Perry-Kessaris (n 4 above).

each element of the workshop; as well as a coherent narrative for the project as a whole. The following participant feedback is indicative of the success of this strategy: 'I found the [briefs] really useful as a way to start thinking about how I was going to interact with the exhibits that we visited. I didn't always agree that these were the questions we should be considering, but that was in itself a provocation that helped inspire fresh thinking.'[27]

We hypothesised that engaging in a (design-driven) process of fantasising about exhibition might enhance researchers' abilities to see exhibition as research: as a way of working out how to (practically) explain legal ideas, and their wider significance; (critically) unsettle dominant legal ideas; and (imaginatively) generate new legal ideas. We further hypothesised that it might enable legal researchers to experiment towards instantiating a (potentially impactful) actual exhibition, including by prompting and facilitating them to identify, and improve the balance of, associated risks and rewards. Finally, we hypothesised that engaging in (design-driven) fantasising about exhibition would prompt and facilitate collaboration between researchers, with associated benefits to research quality and to researcher relations.

The following sections set out the project activities in detail, supported by our photographs and notes, as well as participant responses to briefs, especially the Reflection Statements, written feedback to peers, prototype exhibition slides and transcripts, and presentation session discussion transcripts.

BEFORE THE WORKSHOP

The first pre-event brief took the form of an atypical call for participation. Applicants were invited to respond to three prompts which were designed to surface something of their experiences and ambitions around exhibition: describe how a particular exhibition or exhibited artefact has impacted upon how you think about law, or legal research; identify one legal concept, actor, event or relationship to which you could draw attention through a 'fantasy' exhibition; and describe one visitor that might come to your exhibition, and how they would differ from those who might read your scholarly publications. Participants from diverse career stages, ethnicities, dis/abilities, and institutions (although, notably, only one male) were selected on the basis of those responses.

Selected participants were then asked to complete a further pre-event brief, including a virtual tour of items in the British Museum

27 Fred Motson, Reflection Statement.

on the theme of 'the rule of law'; and engaging with a selection of literature ('sparks') on curation, visual and material culture, and law and design.[28]

DURING THE WORKSHOP

The core workshop was held across two days, in multiple central London locations, in July 2023. In each location, participants completed briefs and design prompts facilitated them to engage with artefacts, spaces, concepts, curatorial and archival practices, and/or experts. These locations were the British Museum, as an example of a museum of international repute showcasing rare artefacts and high culture; the Postal Museum, to showcase the historical records created through the course of a business that had a strong relationship with its workers and the trade union; Spa Fields Park and Playground, to represent an open space orientated towards fun and families; and, finally, Middle Temple, to present the more traditional materials that are associated most commonly with law, legal culture and the legal profession. After these visits, participants then shared and discussed their outcomes at the Institute of Advanced Legal Studies (IALS).

At the British Museum

We began at the always crowded British Museum, which 'opened its doors in 1759' as 'the first national museum to cover all fields of human knowledge', and which today holds at least 8 million objects, the status of some of which is hotly 'contested', representing '2 million years of history, across six continents' (Image 1).[29] Brief 1 invited participants to, among other things, choose one room, treat it as an 'exhibition', explore it spatially using mapping and photography, draw one artefact from the room, and consider to what the exhibition was drawing attention, as well as to what might be missing or erased, uncomfortable or unclear. Reflecting on the experience of 'throw[ing]

28 These 'sparks' were: Adrian George, *The Curator's Handbook: Museums, Commercial Galleries, Independent Spaces* illustrated edn (Thames & Hudson 2015) ch 7; Hans Ulrich Obrist, *Ways of Curating* (Farrar Straus & Giroux 2014) 22–35; Victoria Barnes and Lucy Newton, 'Corporate identity, company law and currency: a survey of community images on English bank notes' (2022) 17 Management and Organizational History 43–75; John Berger, *Ways of Seeing* 1st edn (Penguin Classics 2008) ch 5; Leonie Hannan and Sarah Longair, *History through Material Culture* (Manchester University Press 2017) ch 5; Sophie Woodward, *Material Methods: Researching and Thinking with Things* 1st edn (Sage 2019) ch 5; Perry-Kessaris (n 4 above) ch 1; Perry-Kessaris (n 20 above); Perry-Kessaris (n 7 above).

29 British Museum website.

ourselves into the cavernous exhibits of the British Museum', one participant remembered:

> feeling completely overwhelmed when I started around my (anxiously) chosen room (time, technology). However, I was soon amazed about the capacity of the tasks that were assigned to me (mapping, labelling, drawing artefacts) to bring calm and order to my thinking, amidst the encouragement that came from meeting other workshop participants in the rooms.[30]

Another observed that 'having time and space to explore one exhibit was a pleasure' and '[d]rawing the object meant that I had to concentrate'.[31]

At the Postal Museum

After lunch, on the first day, we visited the Postal Museum. This institution began life in 1969, was paused in the late 1990s, reappeared in its present form in 2004, and today holds 'over 60,000 objects and thousands of records detailing 500 years of postal history', including 'stories of innovation, engineering, design and social history' (Image 2).[32] Archivist Susannah Coster introduced us to the archival practices of the Postal Museum, then led a tour of the archive, and finally invited us to handle artefacts which participants had selected as part of pre-event Brief 0. Participants then completed Brief 2 which, among other things, invited them to caption an artefact for a lay visitor, for a legal practitioner, and for a legal academic; to reflect on what kinds of archives they are naturally drawn to; and to consider what might be the similarities and differences in the relationships between a curator and their exhibition versus a researcher and their publication. Several participants remarked on the power of the captioning exercises which 'encouraged [us] to explain our research concepts and exhibition ideas to (legally) informed but also unfamiliar audiences'. One found this to be 'a good entry point into thinking more deliberately and proactively about the notion of the research "audience," and then "visitor", a term that I came to love during the workshop. For me, it conveys distinct practicalities of building an exhibit', including publicising it; and then ensuring that it is 'something worth visiting', that audiences can actually 'move through' it, and can 'take their thoughts through a door' into the next room. These practical questions could be 'transformative' when deployed in relation to legal research.[33] Another reported that captioning:

---

30 Lilian Moncrief, Refection Statement.
31 Helen Rutherford, Reflection Statement.
32 The Postal Museum website.
33 Lilian Moncrieff, Reflection Statement.

> has become a valuable tool that I now use regularly in my writing. It provides a starting point to reel somebody into my research (lay visitor caption); expand the research's contours (legal academic caption) and showcase the way in which my research can be used (legal practitioner caption). It is a great starting point to summarise my research in abstracts and introductions.[34]

At Spa Fields Park and Playground

We ended the second day at Spa Fields, a park which is today home to trees, shrubs, benches, children's play equipment, but which was previously the site of a burial ground, a bone house, and extreme social deprivation in the late 1700s; and of riots in 1816 (Image 3).[35] Here participants completed Brief 3, which invited them to, among other things, consider how they might adapt a particular piece of play equipment to form an interactive or experiential component in their Fantasy Legal Exhibition; and reflect upon the differences and similarities between 'looking at' and 'interacting with', as well as between 'playing' and 'teaching–learning'. One participant was 'surprised by how generative it could be to spend time in a physical location and imagine siting and narrating my research in and around that setting', and used that setting as the inspiration for her exhibition concept and layout.[36] Another observed that, by 'mapping exhibits in the British Museum' and 'paying attention to the layout of the Spa Fields playground, I [have become] more aware about what is shown, where it is shown, and why it is shown in that place'; and have a better 'understanding [of] my research's relationship to the society in which it exists'. She said that she is now 'constantly aware of' the question:

> what space am I working in? Is it a constitutional law space? Is it a theory space? And what does that mean in terms of the information that I'm putting forward? I don't know if that translates into good research, but it translates into good thinking.[37]

A third participant found that Spa Fields 'allowed me to engage my habit of testing legal concepts and ideas in new contexts (looking at play equipment instead of [the usual] sword and scales)'; and it 'made me think about adequately controlling or detailing [conceptual] abstractions for an exhibition, to clearly communicate research ideas (if playfully allowing for more than one interpretation)'.[38] Similarly,

---

34 Almas Shaikh, Reflection Statement.

35 Spa Fields Playground website; 'A Brief History of the Bone House & Graveyard (Spa Fields Park)' (Plaque nd); the Spa; 'The Spa Fields Burial Ground' (Cove nd).

36 Clare Williams, Refection Statement and Presentation Session Transcript.

37 Almas Shaikh, Reflection Statement and Presentation Session Transcript.

38 Lilian Moncrief, Reflection Statement.

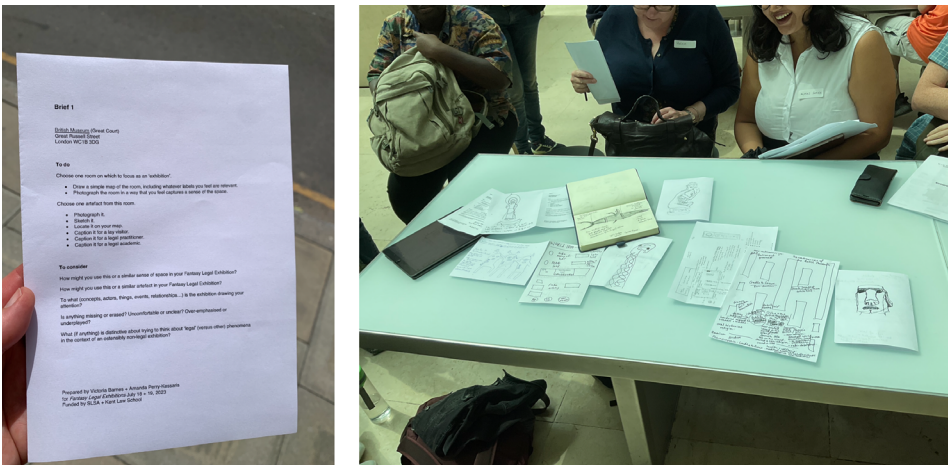

Image 1: Brief 1 instructions printed on right side of A4 sheet, folded to form a 'notebook' (left), and sharing Brief 1 outcomes in the Great Court (right) at the British Museum © Amanda Perry-Kessaris 2023.

Image 2: Touring the archive with archivist Susannah Coster (left) and handling artefacts for Brief 2 (right) at the Postal Museum © Amanda Perry-Kessaris 2023.

another participant 'concluded that it is vital to involve the audience' in the exhibition, 'not merely [to] present an exhibition as a "finished product"'; and the trip to Spa Fields 'underscored' the fact that '[a]n element of play encourages learning (almost) by accident'.[39]

39 Helen Rutherford, Reflection Statement.

Image 3: Sky, trees, play (left) and sharing Brief 3 outcomes (right) at Spa Fields Park and Playground © Amanda Perry-Kessaris 2023.

At the Honourable Society of the Middle Temple

The second day of the Workshop began with a tour of the Honourable Society of the Middle Temple (Image 4). One of four Inns of Court, which is entitled to call its members to the Bar of England and Wales, Middle Temple has 'provide[d] support, education and accommodation to barristers at every stage of their careers' since 1608; and, more broadly, has acted as 'an important hub for socialising and networking, the setting for feasts and duels, politics and literature, courtly spectacle and academic discourse since the mid 14th Century'.[40] Archivist Barnaby Bryan led us through the main Hall and Bench Apartments – rooms that are used by members, for events, and as film locations. We then moved on to the Archive, which is 'responsible for … acquir[ing], preserv[ing] and mak[ing] available' the digital and physical 'records and archives created by the Inn', in order 'to provide members … with a direct and tangible connection with and understanding of the rich and diverse history, heritage and culture of their Inn of Court'.[41] Our tour of the Archive included the environmentally controlled Repository and Conservation Studio areas. There Conservator Siobhán Prendergast introduced us to some of the technical strategies and pragmatic considerations that shape archival and curatorial practices of Middle Temple, where the collection forms part of the fabric of everyday life, and is very much in use.[42] We ended in the library, where librarian Renae Satterley guided us through a special exhibition on 'Islam,

40 See the Middle Temple website.
41 'Archive – Information & Access' (Middle Temple nd).
42 'Conservation at the Inn' (Middle Temple nd).

Image 4: Touring the Bench Apartments (left) and Conservation Studio (right) at Middle Temple © Amanda Perry-Kessaris 2023.

Astronomy and Arabic Print'.[43] Here participants completed Brief 4, which invited them to reflect on the similarities and differences between the various exhibition spaces we had encountered, and their anticipated audiences; as well as between tours and free explorations of exhibitions spaces.

Middle Temple was the last of the formal collections that we visited, so this is an opportune moment to note that, reflecting back after the workshop, several participants compared the expert practices evident in the various archival and curatorial settings. For example, the British Museum was generally experienced as 'formal', 'overwhelming and unimaginative'; whilst Middle Temple was perceived as 'freer', 'very cool, and unexpectedly welcoming'.[44] For some these contrasting practices prompted thoughts around accessibility and communication in relation to cultural heritage and, by extension, to law.[45] Others were moved to consider themes of care, value, and change, in relation to exhibition and to law. For example, one participant observed that whilst '[t]he Postal Museum archives might not seem the most valuable documents in monetary terms', they were 'very carefully preserved'; and, by contrast, the priceless artefacts in Middle Temple had been subjected to gravy spills, and the team didn't seem concerned about the prospect of a 150kg [powered wheelchair] barrelling around the place', which is 'very rare'.[46] For a second participant '[t]he absence of curators at the British Museum … seemed to give off an uncaring air about the artefacts'; whilst the relative 'protectiveness of the Postal

43 'Islam, Astronomy, and Arabic Print: A Collection Showcase at Middle Temple Library' (Middle Temple nd).

44 Clare Williams, Reflection Statement; Helen Rutherford, Reflection Statement.

45 Lilian Moncrief, Reflection Statement; Helen Rutherford, Reflection Statement.

46 Clare Williams, Reflection Statement.

Museum's archivists was a jarring, yet familiar, contrast' which 'closely mirror[ed] traditional attitudes of lawyers towards the institution of the law and legal practice'. For her, the Middle Temple 'seemed to be … in-between – the library … reminded me of a luxurious hotel lobby … But the curator [and archivists] … seemed to care in a personal, un-detached way.' This led her to wonder whether:

> [p]erhaps there is something to learn from archivists and curators about how law should be presented. Not as an icon to be frozen away and fiercely guarded but not common and open to multiple, conflicting interpretations either. Maybe we can learn from the curators and archivists at Middle Temple. How to preserve legal culture whilst remaining welcoming of change.[47]

At the Institute of Advanced Legal Studies

The final afternoon of the workshop was spent in a spacious, quiet room at IALS – a research institute established by the University of London in 1947 which holds one of the world's leading collections of British, foreign and international legal texts, ranging from sixteenth-century printed treatises to contemporary electronic resources.[48] Here participants completed Brief 5, a series of tasks designed to focus attention on some key curatorial themes which we had formally introduced via the Brief 0 'sparks'.

First, we focused on the theme of 'collecting'. Participants were invited to identify an object that it would be desirable, but impossible, to include in their Fantasy Legal Exhibition – because, for example, it never existed, or no longer exists; and then to make a clay model of it to exhibit alongside those of other participants (Images 5 and 6). One participant remarked 'While I found modelling frustrating due to my own complete lack of artistic ability, the physicality of it was really interesting.'[49]

Our attention then shifted to the theme of 'visiting'. Participants were invited to generate 'personas' to capture one intended and one unintended type of visitor to their Fantasy Legal Exhibition; and to identify their interests and standpoints, hopes and fears (generally, and in relation to the proposed exhibition). One participant found this difficult because 'I (perhaps naively) think that my exhibition is for everyone, the more unintended the better.'[50]

Next, we focused on 'narrative'. Participants were invited to map the anticipated journey, and accompanying sensations, emotions, and insights, to be experienced by visitors before, during and after a visit

47 Favour Bọrọkìní, Reflection Statement.
48 IALS website.
49 Fred Motson, Reflection Statement.
50 Almas Shaikh, Reflection Statement.

Image 5: Making fantasy legal objects at IALS © Amanda Perry-Kessaris 2023.

Image 6: Exhibiting fantasy legal objects by (a) Favour Bọ̀rọ̀kìní, (b) Lilian Moncrieff, (c) Fred Motson, (d) Almas Shaikh, (e) Helen Rutherford, (f) Erika Rackley and Sharon Thompson, (g) Renske Vos, and (h) Clare Williams at IALS © Amanda Perry-Kessaris 2023.

Image 7: Mapping exhibition narratives by (a) Sharon Thompson and Erika Rackley, (b) Fred Motson, (c) Renske Vos, (d) Lilian Moncrieff, (e) Favour Bọ̀rọ̀kìní, (f) Almas Shaikh, (g) Helen Rutherford, and (h) Clare Williams at IALS © Amanda Perry-Kessaris 2023.

to their Fantasy Legal Exhibition (Image 7). One participant observed that it 'was particularly inspiring to hear everyone's ideas evolve over the two days, from something unformed into something that you could imagine walking around'.[51] For another participant this exercise generated an overarching concept and title for their exhibition.[52]

Finally, we considered the theme of 'promotion'. Participants were invited to capture the focus and spirit of their own Fantasy Legal Exhibition in a single phrase or sentence; and then to do the same in relation to the exhibition of another participant, and to gift it to them. For one participant this exercise produced the title of their exhibition.[53]

One participant observed that this set of tasks was 'enabling and constructive. It forced me to make "impossible" suggestions that could still be produced by hand, or indicated on a map, and visited by members of the public (at least)'.[54]

IALS was the last location that we visited together, so this is an opportune moment to consider two sets of general insights about the

51 Clare Williams, Refection Statement.
52 Fred Motson, Prototype Exhibition Transcript.
53 Helen Rutherford, Presentation Session Transcript.
54 Lilian Moncrieff, Refection Statement.

core workshop. The first is an experiential overview of the two days offered by one pair of participants. They noted the distance we had travelled during the workshop (over 30 kilometres) and that each site 'offered something different'; that '[w]hile some venues were quiet and understated, others were large and showy'; that 'in some places we felt slightly awkward and (sometimes literally) "in the way", our presence and conversation unintentionally forcing others to change direction', elsewhere 'our conversations took place away from public view'; that whilst sometimes the 'newness of place and activities inspired' or 'unsettled', sometimes the 'familiarity of subject matter or location' generated 'a feeling of warmth and relaxation'; but that '[u]niting each site ... was a sense of place and connection, of networks that were global, historical, current, chosen, imposed, institutional, personal'.[55] Second, two participants emphasised how the core workshop activities helped them to think beyond the question of what information they wished to communicate, to focus on anticipating and shaping the experience of their potential audience. One participant found themselves 'trying to make sense of my own, and the group's, affective response to each of the archives/exhibitions and understand why, and then work out how I can integrate elements of best practice that we experienced into my own exhibition'.[56] Another participant 'was struck by conversations (often sparked by the initial prompts) about engaging visitors in different ways, including engaging different senses'. For example, '[a]t the British Museum, I was particularly taken with a room (mainly relating to the Sutton Hoo Anglo-Saxon hoard) which had four different entry points', so 'that visitors could come to the exhibits from different directions, having taken a different (literal and figurative) journey'. Whereas for a visitor 'coming from a room on Roman Europe, this was "the future"', for one 'coming from late medieval Europe, this was "the past"', and for one 'coming from a completely different culture (from memory, the Arabian peninsula in that era)'. Then at the Postal Museum and Middle Temple, this participant noted 'the importance of touching and walking through history – seeing (and handling) original archive documents, or walking through rooms that had been used for centuries'. And in Spa Fields, 'the venue I was expecting to be least relevant', but which 'actually taught me the most' – he 'noticed a sign board explaining the (macabre) history of the area as a burial ground where bones were burned, and this immediately gave me a sense of place that I wanted my own exhibit to promote' and 'made me seriously consider [including] an outdoor element' in his exhibition.[57]

55 Erika Rackley and Sharon Thompson, Reflection Statement.
56 Clare Williams, Reflection Statement.
57 Fred Motson, Reflection Statement.

After

Participants completed four additional briefs in the six months following the workshop.

First, they produced a reflection statement detailing insights gained, enjoyments had, and agonies sustained, during the workshop.

Second, participants produced an initial 'prototype' of their Fantasy Legal Exhibition in the form of five slides plus accompanying narration notes. Here, they were encouraged to consider the aim, intended audience and location of their exhibition, and with whom they might want/need to collaborate to make it happen. Third, participants provided written feedback on the prototype of a peer. That feedback addressed, for example, the clarity and scope of the exhibition concept, typography and images, physical and narrative flow, ethical challenges around the involvement of vulnerable collaborators and sensitive subject matter, and practical challenges of making an actual exhibition happen. Outcomes from each of these tasks were shared with all participants. Finally, participants pre-recorded a five-minute video introducing a refined prototype of their Fantasy Legal Exhibition. Here, they were encouraged to incorporate a sense of what visitors to their exhibition might experience, learn, interact with, feedback on and why and to whom their exhibition might matter. We asked for pre-recorded presentations in an attempt to get participants to focus on quality and to give them an opportunity to be a visitor at their own exhibition. The videos were watched and discussed at a private online session held six months after the workshop, and are now available online via the project website.[58] This iterative process proved effective. One participant observed that 'the whole process of doing it once, having a second pair of eyes on it [via peer feedback], and then having to go back and rethink it a few weeks later was really helpful – to just revisit the process and realize that my thoughts have evolved a bit'.[59] One participant reported that:

> it allowed me to go back and think about what exactly would the process of that exhibition look like? How can I think about the vulnerabilities [of contributors and visitors]? I even added a new room to my exhibition which wasn't there in my first presentation.[60]

The following sections introduce each of these prototype exhibitions and highlight the ways in which they, and their proponent's relationship with legal research, have been influenced by the project activities.

---

58 Fantasy Legal Exhibitions website.

59 Clare Williams, Presentation Session Transcript.

60 Almas Shaikh, Presentation Session Transcript.

EXHIBITION PROTOTYPES

'Law Round About', by Fred Motson, explores the geography of the common law. It does this though an interactive digital map, which links legal cases to specific geographical locations; as well as 'concise', 'jargon-free', 'accessible' summaries of the cases and photographs of the location in question. In so doing it aims to encourage visitors to come at law from wherever they happen to be; and so to contribute to making law more 'open to people, places, and ideas'.[61] During the presentation session discussion, Motson remarked:

> I'm still sort of torn between the tension of very curated, specific exhibition, and a digital artefact that perhaps the whole advantage of is that it is quite unlimited … I think probably the fantasy would be that in an ideal world, it would start as something reasonably curated, in terms of getting a certain amount of information on there, and for people to interact with. But then the idea would be to inspire people to go on to write the map themselves, so that eventually it became something made up by the users, rather than by me or the organizer.[62]

'The Corporation in Society', by Lilian Moncrieff, explores (dis)connections between, on the one hand, how corporations are governed; and, on the other hand, their impact on the wider world. It does this by, first, explaining the evolution of the corporation as a legal construct, an economic device, a governance structure, and a social actor; second, exposing how contemporary corporate law tends to emphasise corporations' responsibility to report their impact on, for example, shareholder value or sustainability; and then redirecting attention towards the nature of those impacts by enabling visitors to 'handle' and 'interact' with material representations of the, sometimes 'ruin[ous]', results. In so doing it aims to create a 'dialogue' which might 'unsettle' orthodox understandings of the role of corporations in society, and prompt consideration of how they might meaningfully be held responsible for their impacts.[63] During the presentation session discussion, Moncrieff remarked:

> I guess what I really like about the exhibition space in this context is that it allows us to do something that we wouldn't be able to do in the real world. Because it doesn't make sense to say a company shouldn't do anything for the sustainability or responsibility reports. That's a proposition that you could never really make in real life. But in the exhibition space we can play with the idea that we need to kind of turn things upside down in order to carry out rezoning, and to rethink the

61 Fred Motson, Prototype Exhibition Transcript.
62 Ibid.
63 Lilian Moncrieff, Prototype Exhibition Transcript.

> problem in a way that the real world in public policy circles makes more difficult.[64]

'Whose Death Is It Anyway?', by Helen Rutherford, explores the nineteenth-century Coroner's Court as 'an important piece of the legal jigsaw required to understand fully Victorian justice and administration'; as well as the scholarly and public value of records produced by, and in response to, the court. It does so through displays of items relating to various causes of death, and sources detailing the deaths of named individuals, such as court reports, letters, and newspapers; interactive holograms of key figures, such as coroners and witnesses; and an opportunity to act as a member of the coroner's jury, engaging with evidence around the death of a named person, and deciding on the cause of death. In these ways, the exhibition aims to activate the potential of the written records generated in and around the court, as a resource through which to enhance understanding of the role of the court and to 'co-create community memory' – a memory which includes working-class people, of whom written records are often only to be found in inquest reports.[65] During the presentation session, when asked how the holograms would be programmed, Rutherford replied:

> I have absolutely no idea [but] if Abba can appear on stage in London, I think my coroner could appear and interact in that sort of way. If it wasn't a fantasy, I think you could have actors doing that role with a script. Money no object, the Abba experience in the coroner's court – I think is what I'm going for.

Later, she returned to the theme of fantasy, remarking 'in my fantasy we could put together some stories of [local people], to put them back on the map, and find a little bit more about them'.[66]

'Deconstructing Disability', by Clare Williams, explores the socio-material intersections between ability, work, and value across time. It does this by centring the history of assistive technologies (such as wheelchairs, eyeglasses, hearing aids and prostheses) and by encouraging visitors to engage intensively with examples of those technologies. In so doing it aims to encourage visitors to take up the work of 'destigmatizing' adaptive technologies, and 'rethinking what it means to be human, to be a worker, and to live a good life; as well as to prompt them to speculate about the future'. For example: 'If implants and body modification can enhance ordinary, everyday physical functions, might those who choose to remain unmodified become the

64 Ibid.
65 Helen Rutherford, Prototype Exhibition Transcript.
66 Ibid.

new disabled?'[67] During the presentation session discussion, Williams remarked:

> Representing the links between technology as an enablement for labour market integration for those with physical differences is fairly doable, in a kind of more abstract sense of having explanations, or written explanations, or videos or that sort of thing. But how to make it tangible or experiential, or embodied within the exhibition? That's still something I'm trying to figure out.[68]

'Feminist Constellations', by Erika Rackley and Sharon Thompson, explores 'the concept of feminist legal change'. It is aimed directly at school children aged seven to eleven and, 'taking the title of the Stars in the Sky leaflet produced by the Women of Greenham Common as its inspiration and anchor', it focuses their attention on 'networks, rather than an individual woman or star'. It does this through the device of a series of virtual 'feminist meeting spaces' from the past, such as the offices of Southall Black Sisters 'as they worked … to secure justice for Kiranjit Ahluwalia' in 1989; in these spaces, visitors can 'eavesdrop' 'on the women's conversations, look over their shoulders at their notebooks, campaign leaflets and banners, and read their letters and emails' and 'become immersed in their world'. Visitors will co-design elements of the exhibition, including by creating the digital avatar through which they 'navigate the exhibition', and 'adapt[ing' along the way to connect with, for example, the historical period addressed in each room'. In these ways, the exhibition aims to 'brin[g] … to the fore' both 'often overlooked and orthodox narratives' about the development of law', whist 'creating new opportunities for dialogue between exhibition and community'.[69] During the presentation session, Thompson remarked that an 'underlying subversive element' or 'activism' is also present across the other prototype exhibitions, each of which could be seen as 'reframing how we talk and think about law';[70] and Rackley agreed, adding that there are 'synergies across' the exhibitions because:

> we're [all] doing this for a reason … it's something that's important to us, that we think people should know about, because we then want people to do something with it … [T]hat's part of what exhibitions are for. That's why you have an exhibition.[71]

'Digital Self (Re)Presentation through Avatars', by Favour Bọ̀rọ̀kìní, explores relationships between digital avatars, identity, freedom, performance, and privacy. It is part of a wider investigation into

67 Clare Williams, Prototype Exhibition Transcript.
68 Ibid.
69 Erika Rackley and Sharon Thompson, Prototype Exhibition Transcript.
70 Sharon Thompson, Presentation Session Transcript
71 Erika Rackley, Presentation Session Transcript.

'afrofeminist ethics concerns around the design and use of avatars', which reinterprets avatars as 'masks', and law as performance and which draws on participatory research activities with 50 African women living in the United Kingdom. The exhibition advances that research agenda by displaying some of the avatars generated by participants, supported by the participants' own 'descriptions of the avatar and how it represents them'; as well as by offering visitors the opportunity to engage with those participants, who are present in the room, wearing physical versions of their avatar masks. In so doing the exhibition aims to encourage visitors to consider the possibilities that 'masking and performance can be liberatory', 'empowering', and entertaining', they 'can bring people together', and 'can be a way of establishing or enjoying one's own privacy'.[72] Responding to Bọ̀rọ̀kìní's prototype during the presentation session, one participant observed 'in my research I'm grappling with how fluid the life is, versus how rigid law is'. This exhibition gets at that issue though the comments from the participants such as 'I don't know who I am, and my avatar also keeps changing', and it raises the question 'can we even expect – the law to understand that?'[73]

'Who Do You Think You Are?', by Almas Shaikh, explores the structural and individual dimensions for everyday identify, with a particular emphasis on intersectionality – that is, the idea that identify is multidimensional and dynamic. The exhibition does this by first displaying collections of objects that specific individuals carry with them every day, and encouraging visitors to conjure an impression of the identify of their owner; then revealing the actual identify of the owner through the device of a photographic portrait; then inviting visitors to reflect on any biases that they might have discovered in the process. In these ways, the exhibition aims to encourage public engagement with the idea that our 'perceived identity' is often 'at odds with' our 'group membership'.[74] During the presentation session discussion, Shaikh observed:

> I want this to be a dynamic, evolving exhibition, because intersectionality is also dynamic and evolving and taken from its social context. That is something that I have become really, really aware of.[75]

'Legal Sightseeing', by Renske Vos, is part of a wider project exploring the 'eventization, or even touristification, of international law' – that is, publics increasingly 'encounter' international law through 'spectacular, yet trivial' events, such as photography exhibitions, institutional tours,

72 Favour Bọ̀rọ̀kìní, Prototype Exhibition Transcript.
73 Almas Shaikh, Presentation Session Transcript.
74 Ibid.
75 Ibid.

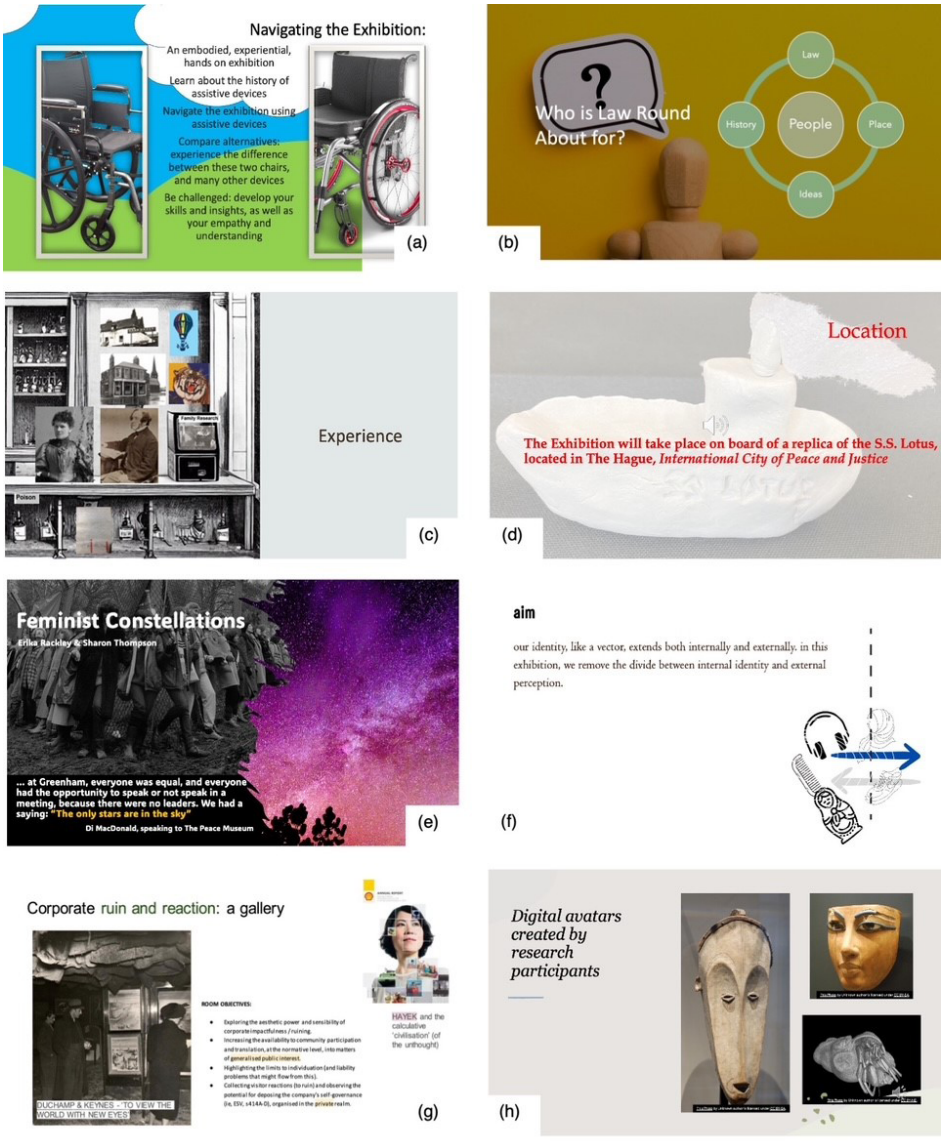

Image 8: Extracts from exhibition prototypes by (a) Clare Williams, (b) Fred Motson, (c) Helen Rutherford, (d) Renske Vos, (e) Sharon Thompson and Erika Rackley, (f) Almas Shaikh, (g) Lilian Moncrieff, and Favour Bọ̀rọ̀kìní © Amanda Perry-Kessaris 2023.

and documentary film festivals. The exhibition advances that research agenda through displays of project photographs capturing public encounters with international law, and commissioned legal artworks responding to that theme; through interactive devices, such as a virtual reality game; as well as though the subversive inclusion of an ice cream stand and selfie opportunities; and by gathering visitor responses to the exhibition. In so doing it aims to create an original public encounter with international law which will not only encourage critical thinking among visitors around international law and its eventization, but also 'generate new insights on that theme to be fed forward into future research'. In her Reflection Statement, Vos observed:

> I massively appreciate the invitation … to think boundlessly about presenting research. The format made me [once again] foreground the concept over perceived limitations … I found that this mode helped me push boundaries. Concretely, I noticed this for example with regards to scale … I ended by pitching for a life-size replica of the SS Lotus as an international legal tourist attraction in itself. At the same time, fleshing out all that I would want to do in an exhibition when given all chances, made the design-choices involved much more apparent to me.[76]

LESSONS FROM AND FOR FANTASY LEGAL EXHIBITION

We hypothesised that engaging in our (design-driven) process, with its emphasis on speculative and prefigurative experimentation, visuality and materiality, might help researchers to see exhibition as research. The above-mentioned feedback and prototype exhibitions suggest that it did. Participants reported an enhanced appreciation for the capacity of exhibition to be not only 'a method of accessing the actual research output', but 'a fundamental part of the project in and of itself',[77] part of the 'longer methodological process of crafting and reflection on the [who, what, when, where, why and how] of the research';[78] as well as 'for how to use (fantasy) curation as method of socio-legal research, both in terms of dissemination and in terms of data collection'.[79] One participant found that the project shed light not only on 'what exhibiting my research demands' but also on what it might take to generate scholarly and wider social impact more generally.[80] We did not anticipate that participants might also adjust their research

76 Renske Vos, Reflection Statement.
77 Fred Motson, Reflection Statement.
78 Clare Williams, Reflection Statement.
79 Renske Vos, Reflection Statement.
80 Almas Shaikh, Reflection Statement.

methods more generally as a consequence of their engagement with the project. Some indicated that they intended to begin to build archival and museum-based components into their future research[81] and to approach such materials in new ways, by, for example, 'employing mixed methods of recording (drawing, photo, mapping, labelling)'; to take a designerly approach to research by, for example, 'assess[ing] the process and not the product'[82] and by '[w]riting briefs' and 'moving through different tasks as a means of managing uncertainty'.[83] One participant now includes 'simple graphics' in most of her written outputs. She intends these graphics to 'act as a caption for a lay visitor drawing them in', which the ensuing 'paragraphs explain the theory behind it (for legal academic) and show its usage in everyday life (for legal practitioner)'.[84] The implication is that any research output can be approached as if it were an exhibition.

We hypothesised that our process might enable legal researchers to work speculatively and prefiguratively towards instantiating an actual (potentially impactful) exhibition; including by prompting and facilitating them to identify, and improve the balance of, associated risks and rewards. Feedback suggests that it did. All participants indicated a commitment to continue to explore exhibition as a research practice. Some participants reported an increased awareness around the 'steps and stakes'[85] involved in curation. For example, one participant remarked:

> I was fascinated in the pre-reading to realise the sheer range of relevant factors that could be considered – one detail that stood out was a detailed discussion of what colour walls should be in an exhibition space. [86]

For another, 'the reading and workshop confirmed that, as with many things in life, experts exist for a reason, and that putting on an exhibition in real life is no small undertaking'.[87] Another explained:

> [W]hen I applied for the workshop, it was very much a mind worm. I hadn't developed the idea it was something like a fun to do activity at that point of time. Instead of an abstract, I could think about the fantasy exhibition. But the more I think about it and the more I'm being pushed to think about, how will you present it, who will you present it to? Who will you collaborate it with? It's becoming less of a fantasy, and I can really see myself in a few years actually trying to present it, which is

81 Clare Williams, Reflection Statement.
82 Helen Rutherford, Reflection Statement.
83 Lilian Moncrieff, Reflection Statement.
84 Almas Shaikh, Personal Communication 19 June, 2025.
85 Renske Vos, Reflection Statement.
86 Fred Motson, Reflection Statement.
87 Clare Williams, Reflection Statement.

> such a great way to think about research – to start from an abstract idea to actually making it possible. That has been an incredible journey.[88]

During the course of the project we identified two risks associated with fantasy exhibition. First, was the risk that a fantasy exhibition might repeat or reinforce the errors of real exhibitions, or other academic events. For example, it is a near certainty that in the course of this event we have come into contact with artefacts that were not, for whatever reason, freely given up by their rightful owners.[89] The very notion of exhibition as research emerged as a kind of 'critique of the critique of the museum' – that is, as an optimistic and productive response to a period of self-estrangement in the late twentieth century, in which museums were criticised for being excessively exclusive, appropriating, and opaque.[90] Such critiques remain valid in relation to many museums, and to them have been added new critiques around the ethics of collection and display. Debates about what museums ought to be for, and how they ought to be, are now commonplace; and it is widely accepted that museums are always normative and, therefore, political spaces.[91] However, this fact presents not only risks but also opportunities. We noted above Shaun McVeigh's observation that an exhibition can actively 'reali[se] a jurisprudence', which he made in response to an exhibition at the Australian National Museum, 'Encounters: Revealing Stories of Aboriginal and Torres Strait Islander Objects from the British Museum'. He writes:

> The stories told in the exhibition set the artefacts back into relation with the people from whom and places from where they were removed. The story of jurisprudence related here is one of repatriation and the return of objects to their proper law and jurisdiction. This is not so much a matter of giving objects a context but of bringing law to life or life back to law.[92]

The second risk that we noticed relates to the loss of structure associated with dematerialisation, which is in turn associated with fantasising. Sometimes it is the 'limitations' of museums – the composition and 'concrete quality' of their collections – that promotes

---

88 Almas Shaikh, Presentation Session Transcript.

89 See, for example, Dan Hicks, *The Brutish Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* (Pluto Press 2020); Sarah Keenan, 'Keeping the Gweagal Shield: property and truth in matters of post-colonial redistribution' (2023) 3 Legalities 136–163; Alexander Herman, *The Parthenon Marbles Dispute: Heritage, Law, Politics* (Hart 2023).

90 Bjerregaard (n 21 above) 3.

91 See, for example, 'Designing democracy exhibitions: Bonn and Dresden 2024–2025' (*Democracy Next* 2023); see Art not Oil Coalition website.

92 McVeigh (n 19 above) 199.

critique and imagination.[93] By bringing objects into a shared material space through exhibitions we can 'sustain a degree of complexity' and openness, making a variety of concepts 'present at the same time' without necessarily implying that they are 'causally related'.[94] However, as Ulrich Rauff has put it, exhibitions often 'bring up problems' and 'ask questions' precisely because they consist of 'material objects put together in juxtaposition or in any other spatial order'. Because the objects themselves are present, and have not 'been reduced to mere descriptions', they 'still possess their full expressiveness, their aesthetic power'.[95] That power was somewhat constrained by the fact that we stopped short of turning digital fantasy into reality.

We hypothesised that our process would generate pathways to collaboration. Feedback suggests that it did. For several participants, the moments of group discussion were especially 'useful'. One participant suggested that these moments offered opportunities for comparative self-reflection 'which can be applied to all learning scenarios' and offered the following example:

> [two other participants indicated that] they were off to look for evidence of women in the British Museum exhibits, at which point I realised that I'd only been looking for the history of disability tangentially because I hadn't expected to find direct evidence or exhibits. I've since reoriented my approach and thinking to search directly first.[96]

For another, the workshop as a whole 'underlined the importance, and pleasure, of collaborating with other people and exchanging ideas in unfamiliar ways (to me)'.[97] Indeed, one participant 'would have liked more opportunity to directly discuss some of the prompts – time was tight'.[98]

It should be noted that an experimental attitude is necessary but not sufficient to support collaboration. Trust is also required. The uncertainty associated with experimentation and play can be stressful, especially in professional contexts. It needs to be carefully managed.[99] For example, one participant observed that: '[w]hen teaching I am

93 Bjerregaard (n 21 above) 6.

94 Ibid 9.

95 Ulrich Raulff, 'Old answers, new questions: what do exhibitions really generate?' in Susanne Lehmann-Brauns, Christian Sichau and Helmuth Trischler (eds), *The Exhibition as Product and Generator of Scholarship* (Max Planck Institute for the History of Science 2010) 70.

96 Clare Williams, Reflection Statement.

97 Helen Rutherford, Reflection Statement.

98 Fred Motson, Reflection Statement.

99 Jarg Bergold and Stefan Thomas, 'Participatory research methods: a methodological approach in motion' (2012) 13(1) Forum Qualitative Sozialforschung/Forum: Qualitative Social Research 4.

used to setting the agenda and, to some extent, directing the narrative. When researching I set the parameters. This was different.' However, she went on to note that in this workshop, '[t]here was no pressure to perform or produce. Discussion, in an inclusive and encouraging space, was supportive and thought-provoking.'[100]

We did not anticipate the extent to which the project would change or validate participants' understandings of what might count as academic practice, or what it might mean to be a researcher or a scholar. All participants commented favourably on the unusual format of the workshop, describing it as 'eye-opening',[101] 'different from any academic event I have taken part in'.[102] Some reported a new sense of possibility around what it might mean to run an academic event. One participant came to see that:

> a 'serious' academic event does not need to involve sitting in a stuffy conference room watching endless powerpoints! I was really inspired by that and ... want to keep this in my own work, both in terms of looking for similar opportunities for more enriching events to attend, and in maybe trying to make the events I organize myself a little 'freer'.[103]

More generally, there was a new willingness and ability to embrace experimentation, 'to think about how to use my research to intrigue, engage and surprise',[104] to be 'excited about my research!'[105] Participant Renske Vos, who has experience of leading non-traditional experiential academic events, observed that her own collaborative research project, 'Legal Sightseeing', tends to draw one of two (related) responses: 'where is the power?' in this method, or 'how can it be so fun?' These questions feel 'like a challenge, like a sign of a certain kind of mistrust almost'. Choosing 'fun' appears to be understood as choosing 'naivety, and this, it seems is alleged, precludes serious critique'. Vos explains how an encounter with a work in the British Museum – a colour screenprint with flocking and glitter by Enrico Baj entitled *The CIA Meeting in the Wood* produced in 1973 in the midst of the Cold War – helped her to push back on that view:

> By depicting CIA agents as glittery and spacey fantasy creatures, they become an object of fun. This releases some of the tension, diminishes some of the prestige and related power of the agents and their organisation, and opens-up the possibility for questioning these institutions. Fantasy Legal Exhibition likewise speaks to a sense of fun, creativity and imagination, as opposed to a buying into the constraints

100 Helen Rutherford, Reflection Statement.
101 Fred Motson, Peer Feedback.
102 Helen Rutherford, Reflection Statement.
103 Fred Motson, Peer Feedback.
104 Helen Rutherford, Reflection Statement.
105 Almas Shaikh, Reflection Statement.

> of existing (power) structures … Adding fantasy works to add a dash of fun, which in turn helps to open-up the imagination.[106]

Participant Helen Rutherford concurred, observing that: 'more "play" and exploration benefits everyone – academic work does not have to be dull'. The workshop:

> gave me permission to continue to try new things … It underlined the importance of experiential learning and 'having a go'… I emerged brimming with plans … Having the freedom to think without limits, in the context of 'fantasy' legal exhibitions, was liberating.

The project created the kind of space-time 'to think and experiment', which 'is lacking in the increasingly overcrowded diary of academia'. It also 'enriched my appreciation of the galleries I [later] visited over the summer. I gathered ideas for the future.'[107] Indeed she did: within two years, Rutherford had repeated the Fantasy Legal Exhibitions experiment with six colleagues in Newcastle and co-curated an exhibition 'Newcastle Gaol' online and in a library.[108]

This project took space, time, and money – resources that could have been deployed elsewhere. So it was important to us that participants found it to be useful: 'a really effective use of our time'.[109] What they took from it – what made it useful – varied. As one pair of participants put it:

> For some the workshop made the move from fantasy to reality more likely, more exciting. For others, it confirmed the freedom and possibilities staying in the realm of fantasy. For us, it was a mistressly exercise in practical feminist legal history.[110]

We hope that this article will be useful to you: encouraging you to consider exhibition, actual and fantasy, as a legal research method. We have tried to make that more possible and probable by being transparent about our process and the experiences that it generated.

At the minimum we hope to encourage you to feel that time in museums and archives is time well spent. There is growing acceptance that cultural institutions contribute to public well-being – that is, to 'feeling good and functioning well'.[111] Academic researchers Helen Chatterjee and Guy Noble have found that when we engage with museums we gain practical benefits, such as 'opportunities for learning and acquiring new skills'; social benefits, such as new relationships and

106 Renske Vos, Reflection Statement. See further the Legal Sightseeing website.
107 Helen Rutherford, Reflection Statement.
108 See Newcastle Gaol website.
109 Fred Motson, Reflection Statement.
110 Erika Rackley and Sharon Thompson, Reflection Statement.
111 Felicia A Huppert, 'Psychological well-being: evidence regarding its causes and consequences' (2009) 1 Applied Psychology: Health and Well-Being 137–164.

networks of community; and psychological benefits, such as increases in 'self-esteem and a sense of identity', 'inspiration and opportunities for meaning making'.[112] This project suggests that engaging with museums can likewise contribute to the well-being of legal scholars, perhaps also practising lawyers.[113]

112 Helen J Chatterjee and Guy Noble, *Museums, Health and Well-Being* (Ashgate 2013). See further Thomas Kador and Helen Chatterjee (eds), *Object-Based Learning and Well-Being: Exploring Material Connections* (Routledge 2020).

113 Caroline Strevens and Emma Jones (eds), *Wellbeing and the Legal Academy* (Springer Nature 2023); Richard Collier, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)' (2016) 23 International Journal of the Legal Profession 41–60.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 277–309
Articles DOI: 10.53386/nilq.v76i2.1234

Views from the coal face: the development of international commercial mediation*

Bryan Clark
Newcastle University, UK
Tania Sourdin
University of Newcastle, New South Wales, Australia
Correspondence emails: bryan.clark@newcastle.ac.uk and tania.sourdin@newcastle.edu.au.

ABSTRACT

Mediation use in the international commercial area has been the subject of some research and discussion over the past two decades. In the past five years, however, a number of significant changes have resulted in an increased focus on the use of mediation to resolve international commercial disputes. One significant area of potential change has resulted from the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation, New York, 2018). Apart from this change, domestic commercial mediation has increased in a number of jurisdictions as a result of an increased domestic focus on mediation and, in some instances, mandatory requirements to use mediation that are fostered by legislative instruments or contractual requirements. This article explores the potential and actual use of mediation from the perspective of international commercial mediators, their perceptions of barriers to use and ways to expedite growth as well as discussing the perceived benefits and concerns about what has been referred to as the juridification of mediation.

Keywords: mediators; international commercial mediation; development; barriers; interviews; empirical research.

INTRODUCTION

As mediation use has grown steadily in a range of jurisdictions and dispute areas over recent years,[1] its potential within the international commercial arena has been increasingly highlighted.[2] The use of mediation in this setting has been promoted as an opportunity for parties to resolve complex, high-value disputes in a more cost-effective,

* First published in NILQ 75.AD1 (2024) 74–106 on 1 November 2024.

1 For a review of developments, see Nadja Alexander, *Global Trends in Mediation* 2nd edn (Kluwer Law International 2017); Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* 2nd edn (Springer 2018).

2 By international commercial disputes, we are referring to disputes arising in a commercial context (broadly drawn) involving parties drawn from different jurisdictions.

flexible, and harmonious fashion than the more traditional steps of litigation and arbitration.[3] Despite this, recent evidence suggests that disputants and their lawyers in a number of international commercial settings remain wedded to more traditional determinative processes with mediation remaining on the fringes.[4] The tide may be turning, however. A range of recent developments has propelled interest in mediation in the international commercial arena, the most significant of which is the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation, New York 2018) that has sought to underpin international commercial mediation with a unified enforcement mechanism for settlements rendered along the lines of the New York Convention for international commercial arbitration.[5]

Mediation's profile in the international commercial arena has advanced in other ways, including through rising interest in investor-state mediation,[6] growth in third-party funding initiatives in this field[7] and the development of common professional standards for mediators operating in and across different jurisdictions.[8] Academics have also increasingly turned their attention to mediation in this setting.[9] Empirical research has also grown of late, shedding important new light on the views and experiences of different players in the field including in-house counsel, external lawyers, users and potential users

3 See S I Strong, 'Beyond international commercial arbitration? The promise of international commercial mediation' (2014) 45(1) Washington University Journal of Law and Policy 11.

4 See, for example, International Institute for Conflict Prevention and Resolution and Centre for Effective Dispute Resolution (CEDR), *Insights into Alternative Dispute Resolution* (Report, Winter 2018–2019); Kim Shi Yin, 'From "face-saving" to "cost saving": encouraging and promoting business mediation in Asia' (2014) 32(10) Alternatives to the High Cost of Litigation 158, 158; S I Strong, 'Realizing rationality: an empirical assessment of international commercial mediation' (2016) 73(4) Washington and Lee Law Review 1973, 2034.

5 UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc A/Res73/198 (20 December 2018), art 14(1).

6 James M Claxton, 'Compelling parties to mediate investor state disputes: no pressure, no diamonds?' (2020) 20(1) Pepperdine Dispute Resolution Law Journal 78; Ignacio de la Rasilla, '"The greatest victory?" Challenges and opportunities for mediation in investor state dispute settlement' (2023) 38(1) ICSID Review 169; Nadja Alexander et al, *International Dispute Resolution Survey* 2nd edn (SIDRA Final Report 2022).

7 Nadja Alexander, 'Ten trends in international mediation' (2019) 31 Singapore Academy of Law Journal 405.

8 Through bodies such as the IMI: see website for further details.

9 Including a new comprehensive text. See Ronán Feehily, *International Commercial Mediation: Law and Regulation in Comparative Context* (Cambridge University Press 2022).

and academics.[10] This article seeks to add to the evidence base around international commercial mediation by reporting on a recent interview-based study conducted with mediators experienced in international commercial mediation.[11]

METHODOLOGY

Nineteen semi-structured interviews were carried out online over Zoom between November 2021 and August 2022.[12] The interviews ranged from 25 minutes to 55 minutes with the average time around 40 minutes. Some recent survey research in the field has included mediators within its pool of respondents.[13] In our work, however, while not claiming to draw statistical generalisations, we made use of semi-structured interviews with our participants to uncover 'thicker descriptions'[14] and gauge international commercial mediators' views as well as lived practical experiences in respect of a range of relevant issues in the field. A semi-structured approach was used to ensure a level of consistency between interviews while allowing interviewees the scope to raise their own issues of concern.

A purposive approach to sampling was taken to ascertain interviewees who were likely to be able to provide information of relevance to the study.[15] Interviewees were therefore drawn from a list of commercial mediators with international experience compiled from the Who's Who 2020 list of mediators with a view to including participants from a wide range of jurisdictions.[16] Some 80

10 Anna Howard, *EU-Cross Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes* (Wolters Kluwer 2021); Alexander et al (n 6 above); Strong (n 4 above); David Weiss and Michael Griffiths, *Report on International Mediation and Enforcement Mechanisms* (Institute for Dispute Resolution IDR (NJCU) School of Business, UNCITRAL Working Group II (Dispute Settlement) 2017).

11 An interview study was recently conducted with civil and commercial mediators in Italy, France and Germany. However, the focus of that study was domestic mediation. See Marco Giacalone and Sajedeh Salehi, 'An empirical study on mediation in civil and commercial disputes in Europe: the mediation service providers' perspective' (2022) 2 Revista Ítalo-española De Derecho Procesal 11.

12 A 20th interview was organised but for practical reasons could not be conducted within the time frame of our study.

13 Anne-Marie Hammond, 'How do you write "yes"?: A study on the effectiveness of online dispute resolution' (2003) 20(3) Conflict Resolution Quarterly 261; Strong (n 3 above); Weiss and Griffiths (n 10 above).

14 Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture* (HarperCollins 1973).

15 Norman K Denzin et al, *The SAGE Handbook of Qualitative Research* 6th edn (Sage 2023).

16 The Who's Who lists have now been taken over by the Lexology Index and are no longer available.

invitations were ultimately sent out to procure the 19 interviews.[17] All interviewees were provided with an information sheet regarding the study and signed a consent form setting out our obligations as researchers around maintaining confidentiality and data handling.

Ethical clearance for the study was gained at both Newcastle University, United Kingdom (UK), and the University of Newcastle, Australia. Interviews were transcribed automatically via Zoom and then manually corrected. The transcripts were subsequently manually coded into relevant themes across each of the categories above prior to the analysis being written up.

Interviewee demographics

Mediators we interviewed operated principally out of the following jurisdictions: England and Wales (4); Scotland (1); Ireland (1); France (2); Sweden (1); Switzerland (1); Hong Kong (1); Singapore (2); Australia (3); New Zealand (2); and Malaysia (1).[18] Of the 19 interviewees, 14 were male, four female and one preferred not to record their gender. Lawyer-mediators were heavily prevalent. Seventeen of the interviewees had a legal background[19] and a minority of those were still practising law alongside their mediation activities. Of the remainder, one had a background as an accountant and business advisor and the other in architecture. All but one of the mediators was over 51, split evenly between the 51–60 range and 61–70 range with 4 over 70.[20] This was a very experienced group of mediators ranging from 11 to 34 years of mediation practice. In terms of their mediation experience in the international commercial field, one interviewee noted that all their mediations were currently of the international commercial variety, two other interviewees putting this at 90 per cent and 67 per cent respectively with the others falling between the range of 15–40 per cent.[21] The number of international commercial mediations conducted over the last three years for the mediators ranged from 100-plus down to '5 or 6'.

---

17 This response rate is fairly typical in this kind of work and sufficient given the qualitative nature of this study,

18 Given the nature of cross-border mediation, some interviewees worked out of more than one jurisdiction. We recognise that there is a slight skew in respondents drawn from (or near to) our own jurisdictions (UK and Australia) and that unfortunately we were unable to procure interviews with mediators drawn from the United States (US).

19 Two of the interviewees held academic positions in law at the time of the interview.

20 One interviewee was between the range of 41–50.

21 Except that one mediator's international commercial mediation work was limited to employment matters, and it was unclear from our demographic return what percentage of their entire workload this entailed.

Mediators as interviewees

Before proceeding to an examination of findings, we should emphasise that the mediator's voice is a distinct one, rooted in their own commercial interest as provider of mediation services and, on that basis, their views may be expected to be broadly favourable relative to the utility of mediation and reflect their own personal interests to some degree.[22] Our interviewees' position as 'elites' in the field may also influence their views in a way that may not be reflective of mediators more generally. It should also be noted that, although we were keen to emphasise to interviewees that our research concerned international commercial mediation specifically, at times mediators may have been responding to questions by drawing on their experience in mediation more broadly. Indeed, some mediators thought that the general demarcation between international and domestic commercial mediation, even if important definitionally for the application of certain instruments such as the Singapore Convention, was largely a false one in practical terms.[23] Most, however, pointed to the distinct nature of cross-border mediation, including particular issues arising in terms of language barriers and the use of interpreters, the cultural differences of participants and their lawyers drawn from different jurisdictions and the complexity, financial scale of the disputes and jurisdictional issues arising in this context which rendered this form of mediation a special case.[24]

Several broad themes, identified from the literature as pertinent in the field, were raised with the interviewees including:

- the distinct nature of international cross-border mediation;
- barriers to development and opportunities for growth;

---

22 It was also apparent to us that some answers were provided on the basis of interviewees' general knowledge of developments and research in the field rather than their direct experience as mediators.

23 Indeed, this may not be surprising given that for some interviewees, the majority of their practice related to domestic mediation.

24 There is no agreed definition of international commercial mediation but the recent Singapore Convention, art 1, ties the definition of 'international' to the settlement agreement. It provides that the agreement is international in that: '(a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State which the subject matter of the settlement agreement is most closely connected.' The term 'commercial' is not defined in the Convention but is defined widely in the amended Model Law. See United Nations, UNCITRAL Model Law on International Commercial Conciliation and Guide to Enactment and Use 2002 (United Nations Report 2004) art 1.

- enforceability issues in respect of mediation settlements and the impact of the Singapore Convention;
- handling lawyers in mediation;
- developing internationally recognised common standards for mediators; and
- the use of online mediation in the cross-border context.

Focus of this article

This article is chiefly concerned with the future development of international commercial mediation, an issue that has been one area of focus in mediation literature and in other fields. Although mediation has become well established in many contexts since its re-emergence as part of the Pound conference-era alternative dispute resolution (ADR) movement,[25] there remains a sense that in many settings it is underused and still lies on the fringes of mainstream legal and disputing cultures. In the European Union cross-border context, for example, there have been recent efforts to help expand the use of mediation.[26] Most governmental initiatives promoting mediation nationally are designed to overcome barriers to uptake.[27] In short, despite well-known critiques of the process,[28] mediation is seen as a 'good thing' leading to greater efficiencies and the durable resolution of disputes and is thus perceived intrinsically as a positive phenomenon. As one might expect, this is a sentiment shared by our interviewees as service providers.

In keeping with the development focus of this article, we thus centre principally on interviewees' responses in the following areas: barriers to mediation's use and ways to expedite growth; and issues around the enforceability of mediated settlements and impact of the Singapore

25 F Sander, 'Varieties of dispute processing' in A Leo Levin and Russell R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future – Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company 1979).

26 See Howard (n 10 above); Giuseppe De Palo et al, *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to increase the Number of Mediations in the EU* (European Parliament and Directorate-General for Internal Policies, Study 2014).

27 See, for example, Ministry of Justice, *Increasing the Use of Mediation on the Civil Justice System* (Consultation Outcome 1 September 2023); and Northern Territory Government, *Community Justice Centre 2020–21 Annual Report* (28 September 2021).

28 Especially those around access to justice barriers and the dangers of private settlement. See Owen Fiss, 'Against settlement' (1984) 93(6) Yale Law Journal 1073.

Convention on Mediation. We do draw on interviewees' responses from some of the other areas above as appropriate.[29]

In terms of the structure of this article, the first part ('Barriers to mediation') examines findings relative to interviewees' perceptions of the barriers to growth of international commercial mediation. The second part ('Supporting mediation in the international commercial setting') then examines interviewees' views on measures that could be implemented to help expedite growth. The third part analyses interviewees' responses relative to the issue of the enforceability of mediated settlements in international commercial disputes and the impact of the Singapore Convention.

BARRIERS TO DEVELOPMENT

As noted above, despite decades of growth, the notion that mediation remains underused in many contexts is a strong one. Equally, a wide range of measures has been adopted with a view to boosting take-up of mediation across a range of dispute contexts and jurisdictions.[30] Evidence also suggests that mediation is not yet seeing its true potential in international commercial matters.[31] Our interviewees, in general, agreed with the need to overcome barriers to further growth in the international commercial context, even if one responded that they were not personally affected:

> my experience includes a huge amount of international commercial mediations. So personally speaking, I don't actually see the roadblocks in that way. They don't affect me personally very much.[32]

At the outset we note that some interviewees took the view that many of the same issues affecting the growth and further use of mediation more broadly, also applied in the international commercial setting. As one mediator put it:

> Just to be provocative, is there any difference in the barriers that we would discuss as domestic?... I would suggest that the same impediments are likely to be present, as we note domestically, and that the same initiatives in terms of education, confidence building, information and re-categorisation [would be useful].[33]

---

29 Our interviewees' experiences with online mediation and views on future trends in this space is discussed in a separate article: Bryan Clark and Tania Sourdin, 'Necessity the mother of invention? International commercial mediators' views on online mediation' (2024) 8(1) Mediation Theory and Practice 53–70.

30 See Howard (n 10 above); De Palo et al (n 26 above).

31 Howard (n 10 above); De Palo et al (n 26 above).

32 Mediator 3.

33 Mediator 4.

As we discuss below, the idea that international commercial mediation's fate is linked closely to development in other areas emerges in our interviewee responses.[34]

Lack of awareness

Although it may seem surprising given the long history of modern mediation in many jurisdictions, many interviewees raised the issue of lack of awareness as a stumbling block to further development in the international commercial field. Typical comments referred to 'generally a lack of awareness of mediation amongst the populace'[35] or 'ignorance of the process'[36]. Another viewed the main barrier as 'awareness of mediation … as a *useful* process' .[37] The latter point may be redolent of misconceptions around what mediation can offer. In this sense, lawyers were cited by some interviewees as lacking a sophisticated appreciation of mediation. Similar sentiments were held regarding potential mediation users. One interviewee noted: 'clients by and large are not familiar with it … [u]nless, they are sophisticated'.[38] In terms of this lack of awareness, as we discuss further below,[39] some interviewees blamed this on ineffective selling and marketing of the mediation process.

Lawyers as gatekeepers

Our data suggests that, to the interviewees at least, commonly held, negative perceptions of mediation were of more significance than mere ignorance. While the jaundiced views of both lawyers and potential users were noted by interviewees as being of import, on balance, they more readily blamed lawyers for erecting barriers to mediation's greater use. For some, this related to the dominant position that lawyers hold relative to their clients in terms of setting out the pathway for resolution of disputes. As one interviewee put it:

> the gatekeepers to mediation tend to be the legal representatives, except in the case of very large multinationals. A client is generally led by their lawyer in terms of litigation strategy and how a case has to be resolved. So, if their lawyer says no, we need to get to go to trial, they'll go to

34 Particularly in the areas of education and practitioner training. See Katia Fach Gómez, 'The role of mediation in international commercial disputes: reflections on some technological, ethical and educational challenges' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019).

35 Mediator 1.

36 Mediator 8.

37 Mediator 15.

38 Mediator 12.

39 See below under headings 'Education for lawyers' and 'Education about the qualitative benefits of mediation'.

> trial. If the lawyer says no, I think we should try and resolve this by negotiation, they'll go down that route …[40]

Another said: 'a lot of users, unless they are sophisticated users or [General Counsels] who have the knowledge and mandate to make decisions on appointments … tend to … go back to lawyers [for guidance]'[41] One interviewee referred to the recent Pound Conference series[42] where 'lawyers identified themselves as did everybody else, by the way, as the greatest [barrier] to change'.[43]

In this analysis it may be that some of our interviewees were in part at least reflecting on their own experience as lawyers and what they have perceived as the attitudes of their fellow legal professionals. Such viewpoints concur with the established view that, in many settings, lawyers remain the principal gatekeepers to mediation's advancement given their influence over clients and role as repeat players in, and 'buyers' of dispute resolution services.[44] As we discuss below, our interviewees saw the need for educational and profile-raising efforts to focus primarily on lawyers.[45]

Negative views of lawyers towards mediation

The negative views of lawyers reported by our interviewees are rooted in a range of different ideas. Reflecting themes noted in the literature,[46] one common issue arising was the traditional paradigm of legal practice and the challenges mediation may be seen to pose in that context. For some, this cultural jarring was fuelled by misunderstanding of the mediation process. One interviewee noted a conflation of mediation with issues germane to more traditional, legal dispute resolution mechanisms:

> lawyers are not up to date yet with … international mediation. And some of them still believe that they cannot go outside of their jurisdiction … We [as mediators] don't care about the jurisdictions, and we don't care whether your contract was in common law and your partner is a civil law party. I think that would be probably the first barrier that we need to waive.[47]

---

40 Mediator 11.
41 Mediator 18.
42 Herbert Smith Freehills and PWC, 'Global Pound Conference Series: Global Trends and Regional Differences' (Global Pound Conference Series 2018).
43 Mediator 10.
44 Bryan Clark, *Lawyers and Mediation* (Springer 2012) ch 2.
45 See Fach Gómez (n 34 above).
46 Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* 2nd edn (UBC Press 2017) ch 3; Clark (n 44 above) ch 2.
47 Mediator 5.

Others referred more generally to the perceived challenges that mediation may pose for lawyers' traditional practice norms. One noted the stifling nature of 'the power of the old paradigm':

> [As lawyers] we are educated, we are taught at law school, we are taught at law firms that this is the way. We litigate, we arbitrate ... you are a trained warrior. And being a trained warrior is good at wartime. But mediation is something completely different. It is a collaboration. And that is like as far as it is between East and West, they don't meet so much.[48]

Another interviewee put it this way:

> [i]t's probably a habit more than anything ... practitioners ... are used to the processes that they typically use whether it be arbitration or maybe negotiation and to change anything takes much more than somebody setting out the advantages ... of the [mediation] process ...[49]

According to another:

> I don't think the barriers are regulatory, I don't think barriers are cultural ... [but rather] the eye-dotting, t-crossing, 'every conflict is about the law' approach that lawyers have. And yet, the law is often just an excuse for a fight that's about something entirely commercial.[50]

Mediation readiness and culture

Some interviewees discussed the varying nature of mediation acceptance in different jurisdictions and the impact that this may have on the use of mediation. According to one:

> [in] some jurisdictions the lawyers are much more resistant to mediation than they are in others. And talking to lawyers in other jurisdictions, I get the feeling that some of them are some way behind where say the UK and the US have got to and Australia in terms of the use of mediation.[51]

Such cultural acceptance can be driven by recognition of mediation in domestic court processes:

> If you're in a domestic jurisdiction which encourages mediation ... the barriers are going to be less ... core process will kind of carry you along ... [such as in] Sydney and some of the New York courts. It's the ones that are cut free from that process where there isn't that the sort of conveyor belt.[52]

---

48 Mediator 9.
49 Mediator 14.
50 Mediator 17.
51 Mediator 11.
52 Mediator 3.

Equally, it was seen that cultural acceptance may stem from the need in each jurisdiction to avoid traditional forms of dispute resolution such as courts:

> In this country [the UK] and in the States, the legal fees are so high and it pushes people to mediation. You know, it brings you back to ... cultural issues. What is the value of it really to the parties? Not least because the risks of litigation are not the same [in Spain, France and Italy].[53]

Another said:

> One also has to look at the question of legal costs ... It's frighteningly expensive to bring a case in the UK ... I don't think costs are such a barrier in a number of European countries in particular. But then you've got other issues, and particularly if you move to South America or India. I think delay becomes a real issue as to getting cases sorted before the courts.[54]

Others pointed to the role of the western philosophy underpinning modern mediation that might represent a barrier in some jurisdictions:

> [S]ome jurisdictions have more exposure to mediation than others. And that might mean many asynchronicities between [them] ... clearly there are issues about ... interpretation of documents, about language, about enforceability which you might elevate ... to be particularly special in international [settings]. So, [it's easier] dealing with people who are habituated as it were, into our Western legal and negotiation culture, who would generally understand positional bargaining and interest-based bargaining and the difference between them.[55]

Another interviewee, pointing to the lack of interest of in-house counsel in mediation, noted that this may be a particularly civil law trait:

> [C]orporate counsel voices are absent. And when I've spoken to ... Corporate Counsel Associations, they don't understand ... You know, their compliance issues, GDPR, or you can come up with ten different issues that they'll rush to a conference to organise. But when it comes to conflict resolution, use of mediation or mixed modes, it doesn't. It's not a hot button for them.[56]

Loss of control and a sense of undervaluing

A perception of mediation undervaluing the worth of lawyers was found in some responses: 'lawyers are not well disposed towards mediation because they don't understand or they feel that it gets in ... [the] way,

53 Mediator 7.
54 Mediator 11.
55 Mediator 4.
56 Mediator 10.

it cuts, it undermines them'.[57] Clearly, mediation (or at least certain models of the process) may entail a more interest-based and client-centric approach than is the case in other forms of dispute resolution. This notion – that lawyers fear mediation as an unknown process that does not fully recognise their own expert role, may limit their control and is incompatible with their core practice beliefs – has been made elsewhere.[58]

Lawyering within mediation

Lawyer obstacles also reportedly occurred *within* the mediation process. When we asked our interviewees about their experiences of managing and working with lawyers within a mediation, many recounted positive experiences of lawyer representatives in mediation and the boon they could provide in working with mediators to effect solutions. Others, however, pointed to the traditional, adversarial practices that still occurred to stifle opportunities to settle cases including the need for lawyers to retain control while silencing their clients.[59] Again this was blamed on the proclivity of some lawyers to treat mediation as another adversarial dispute resolution process with their participation blighted by traditional educational practices and cultural norms.[60]

Financial disincentives

Although it has been argued that international commercial mediation has become more lawyer-centric in recent years and hence may represent a financial boon for the profession,[61] the well-worn idea that lawyers resist mediation because they fear it may not be in their financial interests also arose: 'there are myths that have been around mediation ... that you lose money and certainly you probably earn less money in a mediation than you would in arbitration'.[62] Another said: 'You know, there are many more disputes out here that ... should be

57 Mediator 4.

58 Macfarlane (n 46 above) ch 3. By contrast there is evidence that in some contexts, lawyers may dominate mediation proceedings with clients sidelined in evaluative forms of the process: see Kathy Douglas and Becky Batagol, 'The role of lawyers in mediation: insights from mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) Monash University Law Review 758.

59 For a discussion of lawyer domination in the US context, see Jacqueline Nolan-Haley, 'Mediation: the new arbitration' (2012) 17 Harvard Negotiation Law Review 61.

60 Similar findings identifying unhelpful lawyer activity as a principal reason for failed mediation was found in a recent study of French, Italian and Belgian mediators – see Giacalone and Salehi (n 11 above) 29–30.

61 See Bryan Clark and Tania Sourdin, 'The Singapore Convention: a solution in search of a problem?' (2020) 71(3) Northern Ireland Legal Quarterly 2.

62 Mediator 14.

mediated. The question is why not? Partly, it is the ADR[63] question, dropping revenue and lawyers are reluctant.'[64] One put it bluntly: 'basically, we were taking the bread out of ... [lawyers'] mouths and they didn't like that'.[65]

The related issue of how lawyers charge fees for mediation work was raised:

> they don't know how to build mediation work as a lawyer. And so, because it's true that billing for some waiting time, being silent during a mediation session it's not that easy ... it could be difficult for a lawyer to understand how he or she could build a mediation [practice], particularly because mediation is not integrated in the business model ...[66]

More provocatively, in pointing to the lucrative nature of running cases through traditional means, it was noted that '[lawyers] are obstructive because they see a case that's pretty mouth-wateringly profitable'.[67] Another said: 'you could understand that they have a financial interest in disputes lasting as long as possible'.[68]

Client resistance

Aside from the view that they might be put off by their recalcitrant lawyers, some interviewees referred to the resistance of would-be users themselves. Research has suggested that, with no guarantee of success, doubts about the value of third-party intervention and a perceived incompatibility with a disputant's desire to fight, mediation may be a hard sell in so far as potential participants are concerned.[69] Our interviewees also alluded to such issues.

One interviewee saw the reluctance to mediate as cemented within the business community in general:

> [I] had a discussion last week [with a lawyer] about mediation ... It was clear to all of us on the call that he is frequently in conflict with his business masters and ... the reluctance to mediate, that's not cultural or a country-based thing, that's just the way business people think.[70]

Another emphasised the mismatch between the compromise-based nature of mediation and a disputant's desire to win:

---

63 To which the interviewee referred to as 'Appalling decline in revenue'.

64 Mediator 12.

65 Mediator 11.

66 Mediator 13.

67 Mediator 19.

68 Mediator 1.

69 Craig McEwen, 'Managing corporate disputing: overcoming barriers to the effective use of mediation for reducing the cost and time of litigation' (1998) 14 Ohio State Journal on Dispute Resolution 1.

70 Mediator 4.

> One of the sticking points, I think is that, when people become impassioned it is very hard to talk to them about what you might call a collaborative process of resolution. So, you have to get over the hurdle of the emotional impact, or the emotional entrenchment in order to produce the willingness to mediate.[71]

For another, the resistance to mediate stemmed from the personal nature of many disputes: 'if it is a case in which there is what I call a personal element, it is more difficult to get people to engage'.[72] Similarly, the lack of trust between some disputants was also cited as a barrier to uptake:

> [When] there is a significant lack of trust between the parties, most parties believe that the other is trying to drag out the process ... In circumstances where [one's opponent] is just trying to delay ... [and] is trying to keep me out of my money ... why on Earth should I agree to put things on hold?[73]

The lack of understanding of the value of third-party mediator intervention was also raised: 'I mean ... [clients] are reluctant. I like to think ... they see the value a neutral third party can add, whereas they ... [say], "well, why bother? why have a mediation? What are they going to add?"'[74] On a related note, another interviewee pointed to the difficulty in pinning down what mediation might entail:

> [Mediation] is a slightly an ephemeral process ... [and] very different from litigation or arbitration. There can be no guarantees of the outcome. They will be dealing with a mediator they may have not met before ... [Clients] say, is the mediator a judge? Will I get a result? So why the hell should I do it? what would it cost me? Jesus, you mean his fees are X?[75]

Standards

In many jurisdictions and also internationally, measures have been developed to establish and enhance common standards of mediation practice to aid the professionalisation of mediation and help gain parties' confidence in mediators. In some contexts, however, it has been suggested that a stifling factor for mediation's growth has been a lack of quality assurance, aided by the *laissez faire* approach traditionally taken to regulation in many jurisdictions.[76] Moreover, the Singapore International Dispute Resolution Academy (SIDRA) 2022 survey revealed that, while the panel size, expertise and cultural familiarity

71 Mediator 12.
72 Mediator 12.
73 Mediator 6.
74 Mediator 8.
75 Mediator 19.
76 Fach Gómez (n 34 above).

of mediators were important for parties choosing particular mediation institutions in international commercial mediation, respondents were not always satisfied with those aspects.[77] In our study, very few mediators identified concerns over standards as a barrier to developing mediation in the international commercial context. As one interviewee remarked: 'I think ... most of the law firms ... are pretty sophisticated and they've got a handle on who they use and who they trust and everything else. So, I don't think it's about "we couldn't find a mediator".' Such views are unsurprising. Our interviewees can be seen as elites operating in fields in which they may trade on their reputation in the market and general experience in mediation and related fields such as law.[78] It is also known that such elites may be neutral or indeed hostile towards the imposition of new standards in mediation as an unnecessary encumbrance on their activities.[79]

In respect of a specific question asked as to whether there should be endeavours to develop common standards for mediation practice across borders, while some mediators expressed more neutral or positive viewpoints with a view to helping promote consumer confidence,[80] many took the view that such steps may be impractical due to the disparate cultural practice norms for mediation found across different jurisdictions. One mediator put it this way:

> The work I've done mediating in different cultures has made it so clear to me that the efforts to over-standardize this will really suck the life out of mediation. I've worked with mediators who would not get accredited in this country because ... their approach ... would be regarded as, you know, off the wall or dangerous or whatever. But they're fantastically effective ... I'm not convinced ... that the international standards have found a way of capturing that.[81]

Another[82] said:

> [T]he first example that comes to mind is that conversation I have with my Californian peers. They do not know what a joint session is and I

77 Alexander et al (n 6 above) para 6.15. Similarly, respondents were not always satisfied with the quality of mediators provided in terms of such matters as industry/issue-specific knowledge, para 6.24.

78 All but one of our interviewees held professional accreditation qualifications, however, from bodies such as IMI, CEDR and Singapore International Mediation Institute. Indeed, many held multiple accreditations.

79 See Art Hinshaw, 'Regulating mediators' (2016) 21 Harvard Negotiation Law Review 163.

80 Some interviewees were keen to see uniform 'disclosure' standards develop pertaining to mediator style to help ensure the informed consent of parties to participate in the process, something already in train – see Universal Disclosure Protocol for Mediation.

81 Mediator 3.

82 Drawn from a European civil jurisdiction.

> don't know what a caucus is. So, what kind of standards are we going to have? Are you going to force me to do caucuses or are you going to force them to do a joint session? … So, the plan is to destroy my profession?[83]

SUPPORTING MEDIATION IN THE INTERNATIONAL COMMERCIAL SETTING

In terms of how to expedite use of mediation, a range of ideas were introduced by our interviewees. As one might expect, given the barriers to growth identified, education and profile-raising for mediation were commonly cited.

Education for lawyers

Many of the calls for greater educational developments centred on lawyers – not surprising based on the commonly espoused view that lawyers are the principal gatekeepers to growth.[84] Many interviewees across different jurisdictions focused on entry-level education for legal professionals. Some representative comments here include:

> I think lawyers should be required to have studied ADR or mediation as a condition of entry to the profession and that will then encourage universities to make it a compulsory subject in the law course.[85]

> Law faculties need to be doing more … Not to over sell [mediation] … but nonetheless familiarise people with [it].[86]

Educating in-house lawyers

In-house lawyers have been identified in the literature as central in the development of dispute resolution processes given the rise of their traditional role in many contexts and the bridge they can form between corporate decision-makers and external lawyers.[87] In this sense, some interviewees focused on the need to educate in-house lawyers, in particular. One interviewee noted that:

> the key people are in-house lawyers. They are the gatekeepers as far as I am concerned. If they have an education that starts at university … in conflict resolution, it is going to … grow the take-up of the process in a way which would be transformative.[88]

---

83 Mediator 5.
84 See Fach Gómez (n 34 above).
85 Mediator 1.
86 Mediator 19.
87 Macfarlane (n 46 above); Herbert Smith Freehills and PWC (n 42 above).
88 Mediator 12.

Another called for:

> informing in-house counsel [of] the benefits because … they sort of 'own the disputes' in-house. If they are strong enough in comparison with the external lawyers … they could say … we always start with collaboration and dialogue so that is what I want from you [as external lawyers].[89]

Education about the qualitative benefits of mediation

Echoing findings from other research,[90] some comments referred to the idea that mediation was an extension of negotiation and that this should be a focus of education for lawyers:

> We've forgotten that the roots of mediation are in negotiation and that mediation [is] just an extension of negotiation … [Lawyers must be] prepared to master negotiation, and to recognise that the development of repertoire from the negotiation to other facilitated processes is how they can add enormous value to their clients. And unless we can have lawyers doing that, then I think that there are enormous barriers.[91]

Allied to this is the notion that mediation should not just be held up as an antidote to the ills of traditional dispute resolution processes but rather promoted on its own merits: As one interviewee put it, we should:

> [P]ublicise … the fact that mediation is much more than just about closing litigation. It is about restoring relationships, it is much more constructive, it can bring in anything … not directly in the pleadings … It is an awareness of that which might make mediation more appealing. It is a very pragmatic and flexible process, so it can adapt to different jurisdictions … It is very well suited for cross border disputes.[92]

Trends in educating lawyers

There have been significant changes in legal education over recent years with lawyers in many jurisdictions more conversant with mediation. Recent evidence tells us that mediation and dispute resolution courses are becoming more commonly taught in law schools globally. In India, for example, mediation has recently become a compulsory subject for all undergraduate law students.[93] Equally, UK law schools have made strides in teaching mediation and negotiation too.[94] Within Australia,

---

89 Mediator 9.
90 Howard (n 10 above).
91 Mediator 17.
92 Mediator 7.
93 Letter from Bar Council of India to Vice Chancellors, 13 August 2020.
94 For example, the University of Strathclyde, Glasgow, offers free mediation services: 'Strathclyde's mediation services' (*Law School Mediation Clinic*, University of Strathclyde).

the 'civil procedure' subject is now called 'civil dispute resolution' and must include a focus on ADR.[95] Additionally, mediation advocacy and client representation within the process have increasingly been seen as distinct skills in their own right, with the development of new professional training courses, including those by the Standing Committee of Mediation Advocacy[96] and those accredited by the International Mediation Institute (IMI).[97]

Such educational shifts were reflected by some interviewees. One noted that there were, 'a lot of good initiatives going on. And I don't think it's one thing ... I see a completely different generation of lawyers coming out here in Singapore, for example, with very different attitudes to mediating.'[98] Similarly, in respect of their experiences of handling lawyers within mediation, many interviewees recounted positive instances of excellent lawyer advocacy and client representation, with some pointing to the educational gains that had been made in this field.

Educating clients

The need to educate potential users of mediation and to take the mediation message not just to 'law schools, but even business schools'[99] was also raised. According to one interviewee, 'I think it would be great if business schools start teaching about ADR. And people who are running businesses should be told about ADR.'[100] Another said, 'if you were looking to boost mediation, you would ... be doing more education on the client's side to get commercial bodies aware of the benefits of mediation'.[101] This notion of better selling mediation in a meaningful fashion to potential users is not a new one.[102]

Repeated use of mediation

Although there are demonstrable links between education and use, the link between experience and repeat use may be even stronger.[103] Getting people over the line the first time with a process seen as

95 See, for example, *Qualifications and Training*, Victorian Legal Admissions Board.

96 *Mediation Training Courses*, Standing Committee of Mediation Advocates.

97 *Criteria for Mediation Advocacy QAPs,* International Mediation Institute.

98 Mediator 14.

99 Mediator 12.

100 Mediator 16.

101 Mediator 12.

102 Some useful case study examples can be found in Anthony Connerty, 'ADR as a "filter" mechanism: the use of ADR in the context of international disputes' (2013) 79(2) Arbitration 120, 128–133.

103 In the Scottish context, see B Clark and C Dawson, 'ADR and Scottish commercial litigators: a study of attitudes and experience' (2007) 26(April) Civil Justice Quarterly 228, 236

a relatively untried and untested can be a challenge. This was a sentiment shared by some of our mediators in the sense of the importance of gaining the 'confidence of the clients who have experienced it but also again, the lawyers who have used it and they are willing to use it [again]'[104] Another said:

> [Y]ou know people have just got to know about the process ... It's absolutely incredible. If you do a mediation on the international scene and you do it well ... those people will come back.[105]

Mandating mediation

It is against this context of encouraging first use that there has been rising support for mandatory mediation[106] across the globe.[107] Indeed, in many jurisdictions, mandatory mediation has been implemented.[108] While there has been some encouragement of mandatory requirements in the cross-border commercial context,[109] others have noted that many international commercial disputes are often taken out of the formal justice system in any case by reference to arbitration and therefore mandatory court requirements to mediate may have little impact.[110] Nonetheless, in the context of growing general awareness of clients and lawyers of mediation to deal with disputes (many of which will likely occur in the domestic context), then for some interviewees, mandatory mediation holds an attraction:

> [o]ne thing that could help grow it, I think, is ... more mandatory mediation. And you can see from what's going on in the UK at the moment, they're very slowly moving in that direction ... Forcing unwilling parties into the room as distinct from forcing them to reach an agreement can be very helpful.[111]

---

104 Mediator 4.

105 Mediator 8.

106 Mandatory mediation can take a number of forms. It may, for example, entail blanket diversion of cases to mediation as a pre-trial requirement, discretionary referral by a judge or other decision-maker or referral to an opening mediation information session.

107 For Australian examples, see Civil Dispute Resolution Act 2011 (Cth), as well as Retail Leases Act 1994 (NSW).

108 Including recent developments in England and Wales in small claims disputes. See Ministry of Justice Press Release, 'Faster resolution for small claims as mediation baked into courts process' (22 May 2024); and the English Court of Appeal in the case of *Churchill v Merthyr Borough Council* [2023] EWCA Civ 1416 which held that the court had the power to compel parties to engage in ADR processes – for a discussion, see B Clark and Z Kizilyuerk, 'Mediation: time to fly?' (2024) 174(8055) New Law Journal 19.

109 De Palo et al (n 26 above).

110 Howard (n 10 above)

111 Mediator 1.

Another interviewee, arguing for temporary compulsion,[112] said:

> I wanted mandatory mediation ... Let's do it for a period of two years, well, three years ... and after that you don't want to do it, that's fine off you go. But I reckon that would be enough to convince the public, the commercial [world] ... and indeed the lawyers.[113]

Such views support the notion that international commercial mediation is not hermetically sealed from mediation operating in other contexts. The idea follows that lawyers and users commonly deal with domestic disputes, and compulsion (and a positive experience therein) in one context will lead to voluntary uptakes in others.[114]

Other measures

Joined-up approaches

Reflecting the idea that not enough had been done to promote international commercial mediation in a unified manner,[115] interviewees called for joined-up measures to help grow the practice. Such developments are already in train. For example, some interviewees pointed to inter-governmental initiatives such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group 3 meetings and developments in the Energy Charter Treaty field.[116] One interviewee noted that '[t]he best weapon is still the ICC [International Chamber of Commerce] who is doing an extraordinary job'.[117]

Another saw the need to bring all relevant stakeholders together:

> we get everybody to meet regularly ... together ... We need members of the legislature, members of the bench, we need lawyers, we need arbitrators, we need mediators ... We need think-tanks or ...[academics].[118]

---

112 Don Peters, 'Can we talk? Overcoming barriers to mediating private transborder commercial disputes in the Americas' (2008) 41(5) Vanderbilt Journal of Transnational Law 1251.

113 Mediator 2.

114 Other interviewees expressed the view that mediation participation should never be mandatory.

115 One interviewee decried the "lack of networks" (Mediator 9). Another noted that "there is a tendency for mediation to still be very nationalistic in nature ... there's lack of coordination between key stakeholders ..." (Mediator 10).

116 Mediator 14. This interviewee also pointed out the difficulties for states (and at times private entities) of accountability in voluntarily signing-up to settlements and some of the protocols being developed within organisations to handle this issue.

117 Mediator 5.

118 Mediator 10.

Others talked about the role of 'mediation pledges':

> there are a lot of big companies, global companies that are really using mediation ... If they from time to time, make mediation pledges together ... saying 'we do this, it's great, try this', then the medium sized and the smaller ones will do the same.[119]

Contractual requirements to mediate

Interestingly, only one interviewee discussed ADR clauses in contracts.[120] That interviewee also said that in their experience parties were often reluctant to ask for an ADR clause in a contract for fear of being seen as weak, reflective perhaps of the cultural barriers of lawyers and disputants towards mediation.[121] The lack of reference to this mechanism is perhaps surprising given the fact that this idea has gained significant traction elsewhere as a way to normalise recourse to mediation.[122]

Online mediation opportunities

At the time of interviews, all interviewees were engaged in online mediations. Although there were mixed views about the utility of online mediation when compared with in-person settings,[123] most saw that it was likely to remain a key feature of the international commercial mediation landscape.[124] Moreover, some highlighted the opportunities that online mediation developments might hold for promoting mediation in this field given arising efficiency benefits in terms of savings in travel and accommodation as well as the process benefits that could arise, particularly through online pre-mediation activities.[125] Since the Covid-19 pandemic, when much mediation across different jurisdictions through necessity migrated to virtual platforms, online models have expanded rapidly with some seeing this as a way to grow the field.[126]

---

119 Mediator 9.

120 In which parties agree if there is a dispute arising from the contract then they will first attempt mediation prior to engaging in litigation or arbitration.

121 Mediator 16.

122 Clark and Sourdin (n 61 above) 498.

123 Some interviewees did not believe, for example, that the nuances of in-person communication could be adequately captured in the online environment.

124 A full analysis of responses on these issues is available at Clark and Sourdin (n 29 above).

125 Many interviewees also pointed to 'green' benefits of online mediation.

126 CEDR, *The Tenth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom* (1 February 2023); David Sixsmith, 'The Covid-19 response as a mediation blueprint for the future? Mediators' perspectives on the shift to remote mediation in civil disputes' (2022) 7(1) Journal of Mediation, Theory and Practice 35.

THE ENFORCEABILITY OF MEDIATED SETTLEMENTS AND THE IMPACT OF THE SINGAPORE CONVENTION

Some four years in gestation, the Singapore Convention[127] was adopted by the UN General Assembly on 20 December 2018 and signed by 46 countries in Singapore on 1 August 2019. In short, the Convention seeks to undergird international commercial mediation with a unified enforcement regime in a similar vein to the New York Convention for arbitration. At the time of writing, the Convention has been signed by 57 countries although only ratified in 14.[128] The Convention has received a broadly favourable reception from commentators[129] with only a few dissenting voices to be found in the literature.[130] We wanted to specifically explore with all interviewees their perception of the impact of the Singapore Convention on mediation's future development and its underlying basis. We began by asking interviewees if non-enforceability of settlements brokered in mediation – the very issue the Convention seeks to tackle – was an issue they had encountered in practice.

Experience of settlements not enforced

It is clear from the responses that interviewees rarely experienced settlements not being honoured. The highest rate of non-compliance reported by any interviewee was 'in the course of the last five years, maybe twice the most'.[131] Many interviewees said they had never experienced a settlement that had consequently not been adhered to by the parties. Some commented that this related not only to international commercial mediation but all mediation settings within which they operated. One or two qualified these assertions with the caveat 'to my

127 UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation, UN Doc A/Res73/198 (20 December 2018) art 14(1).

128 However, there has been a steady growth since the time these interviews were conducted.

129 See, for example, Eunice Chua, 'The Singapore Convention on Mediation – a brighter future for Asian dispute resolution' (2019) 9 Asian Journal of International Law 195; Gary Birnberg, 'Singapore Convention brings big changes for litigators and arbitrators' (*JAMS ADR Insights* 5 August 2019); Haris Meidanis, 'International enforcement of mediated settlements: two and a half models – why and how to enforce internationally mediated settlement agreements' (2019) 85(1) Arbitration London 49; Robert Butlien, 'The Singapore Convention on Mediation: a brave new world for international commercial mediation' (2020) 46 Brooklyn Journal of International Law 183.

130 Clark and Sourdin (n 61 above); Sherby & Co, Advs, The Singapore Convention: The Emperor's New Clothes of International Dispute Resolution.

131 Mediator 18.

knowledge', suggesting that there may be times when mediators are unaware of settlements subsequently breaking down.

In terms of the circumstances in which settlements had broken down, some mediators recounted rare examples. For one this occurred 'where one company went bankrupt unexpectedly'.[132] Another said, 'I can think of one case … in over 31 years of mediating … The US party was teetering on the edge of Chapter 11, right? The Italian party wanted a system of enforceability that protected against what happened.'[133] One mediator recalled a case of bad faith in negotiations which in their view no enforcement regime would combat:

> In 27 years, have I ever had a case that there was a problem about enforceability? the answer is yes, once … And if there were different enforceability powers, would that have changed it? My answer is no. That wasn't about enforceability. That was about one party simply not going to be bound by the outcome, they were too volatile.[134]

Reasons for compliance with mediated outcomes

Self-enforcing mediated settlements

Critics of the Singapore Convention have also alluded to the inbuilt mechanisms that can be included within agreements reached to ensure enforceability which may render an external enforcement instrument largely superfluous.[135] Some interviewees alluded to the different kinds of measures that can deployed here:

> where there are concerns, it is more often dealt with by way of the inherent structure of the terms [of the settlement] themselves … far more powerful if the terms are in effect reinforcing rather than externally enforced.[136]

> Sometimes we'll talk about security. You know personal guarantees, liens, etcetera.[137]

> if a company … has a concern over whether the other party is going to pay … [t]hey tend to take more formal security … and register that. So, they've got actually a form of enforcement, quite separate from any court process.[138]

---

132 Mediator 10.
133 Mediator 3.
134 Mediator 12.
135 Clark and Sourdin (n 61 above); Sherby & Co (n 130).
136 Mediator 3.
137 Mediator 8.
138 Mediator 11.

> You can always get performance bonds and there are securities that you can get from each other and if proceedings are on arbitral proceedings, then the lawyers will often write into the settlement agreement … that they're not to be discontinued6 until payment has been made or the settlement agreement has been performed.[139]

The role of the mediator in ensuring durable settlements

The role of the mediator in supporting durable, workable settlements was also raised by some interviewees. One noted the importance of a mediator working with lawyers in this regard:

> If you give … [lawyers] very strict instructions and the parameters are narrow, they will [execute those terms] … But if your parameters are wide, they will go around just like a little puppy with a long leash … So, if the parameters are there and the lawyers themselves are drafting it and not the mediator, thank God they're more likely to adhere to it.[140]

Another noted the *responsibility* of mediators to support durable outcomes:

> I take responsibility for seeing in front of me. Is there something here? Is this a robust agreement? … I think it starts with the work that's done in mediation and the strength and the robust nature of the agreement that is set and … getting that commitment between parties.[141]

Another pointed to their preference for getting agreements executed fully in the short term:

> In order to avoid … problems in the execution of a mediation settlement agreement, I'm trying to push the parties to find a settlement which could be executed at once … because if [it] lasts too much you can be sure … that in a few months, few years after the settlement, some dispute will be back.[142]

Using mixed-mode approaches

Some interviewees also pointed to the availability of mixed-mode approaches to render mediated settlements binding, through 'arb-med-arb' approaches if parties, for example, want the protection of the New York Convention.[143]

One noted that:

---

139 Mediator 15.
140 Mediator 16.
141 Mediator 2.
142 Mediator 13.
143 Ivo Deskovic, 'Arb-med-arb: a mechanism for dispute resolution not used enough' (*TaylorWessing* 27 May 2020).

> The other solution we have ... [is] a mediation within or during a pending arbitration ... [where] the Arbitral Tribunal ... suspends the proceedings and we ... appoint a mediator ... We can ask the arbitral tribunal to ... put the settlement agreement in the format of an international award ... in order to have ... international enforcement.[144]

Another interviewee said:

> in Singapore and other places there are protocols such as the Med-Arb-Med protocol and ... this is becoming a very sophisticated space ... Also, with international commercial courts you may be able to have your international mediated settlement take the form of a court order.[145]

Although some interviewees were more negative in their appraisal of these mixed-modes, regarding them as 'messy', others viewed med-arb approaches as straightforward. As one said, 'the way to handle that is really easy. You have agreement ... So, you can appoint an arbitrator to make it into a consensual award. So, what's the big deal?'[146]

Is there a perception issue regarding lack of enforceability of settlements?

Despite their lack of experience of real issues with enforceability in practice, there was some recognition that there may be a *perceptual* problem in that potential users and their lawyers may see possible pitfalls over a lack of enforceability of mediated settlements.

While many interviewees referred to this idea – in the words of one, 'the chilling effect that concerns around enforcement or lack of enforceability has'[147] – most commonly such concerns were thought to be held by lawyers. One interviewee noted that: 'I think there is a perception. I once heard a very senior internal council saying "if only mediation could have a New York Convention we would be using [it]".'[148] Another said, 'If you discuss mediation with a colleague, with a lawyer like a litigator or arbitrator, they say this sounds fantastic, good track record ... But, what about enforceability?'[149] Referencing the recent SIDRA survey,[150] one interviewee remarked that 'most of the concern about mediation and lack of enforceability comes from lawyers. And that's no surprise.'[151]

In terms of the rationale behind such a perception, some interviewees blamed ignorance of the mediation process:

144 Mediator 13.
145 Mediator 14.
146 Mediator 16.
147 Mediator 15.
148 Mediator 8.
149 Mediator 9.
150 Alexander et al (n 6 above).
151 Mediator 14.

> In the endless torturous discussions that led to … UNCITRAL to get to the Singapore Convention there was a lot of chat about this and I regularly heard in the early days, 'oh well there is no take up because the agreement is not enforceable' … The trouble with the whole UNCITRAL process was that … 80% of the people talking about it never had the first idea what mediation was and had no experience of it. 20% who were a mix of people who thought it was a good idea or a bad idea. In the end, it all prevailed and [it was] decided that the Convention would increase the take up.[152]

This notion that the views of potential users and lawyers regarding non-enforceability may arise from an uninformed position and a conflation of the mediation process with arbitration has been made in the literature.[153] The importance of speaking from experience was made by one interviewee:

> [In] studies coming out of Germany … qualitative interviews with … CEO's, decision makers who'd been involved in mediations … what really struck me [was] … they were saying actually we mediate … and we don't have any issue with the absence of a direct enforceability mechanism, right. We know there's a risk with mediating but there's a risk with arbitrating, there's a risk with litigating and even if we get a decision we might not get our money or our assets or whatever it might be. And we have good experiences typically with mediation. The risk is minimal …[154]

The wider benefits of the Convention

Limited impact

A minority of mediators felt that take-up of the Convention was not strong enough for it to be impactful in practice. In the words of one, '[w]ith nine notifications? Forget it.'[155] Another thought that 'the Singapore convention will take 5 to 10 years before its effectiveness can be actually realised. The tipping point I mention, I think is when US and China sign up.'[156] Another described the Singapore convention as:

> Just a baby … it has been implemented in the national legal system of very few countries so it will take a lot years … we have to work on it, hope, and lobby for countries to adopt this new system.[157]

---

152 Mediator 19.
153 Clark and Sourdin (n 61 above).
154 Mediator 14.
155 Mediator 16. Since this interview was conducted there have been a further five ratifications.
156 Mediator 18.
157 Mediator 9.

Assuaging the doubters

Despite the lack of evidence that enforceability of settlements is an issue in practice, most mediators we interviewed were nonetheless in favour of the Convention, principally as a way to win over the doubters. As one put it, 'the easier it is to enforce a settlement, the more attractive the process would be'.[158] Another said: 'I look at it this way, I think it will have two tiers of impact. The first tier probably has already been largely felt and that's giving confidence to [users to recognise] mediation as an international dispute resolution tool.'[159]

Publicity

Harking back to the need for further promotion of mediation in the cross-border setting, many mediators noted the potential boon arising from the publicity and profile-raising the Convention had given mediation. One interviewee, 'a big supporter of the Singapore Convention', noted that 'I think it's really helpful, but not necessarily for the reasons why it's been touted. I think it's great as an awakening, as a discussion, as part of I'd say, the marketing of commercial mediation at an international level.'[160] Another said: 'It is very welcome in the mediator community … Anything that promotes the values of mediation including enforceability, the fact that it works very well cross border is valuable. I welcome it.'[161] A third was 'open to the possibility that it will give mediation a greater profile. It will give [users] something to hang their hats on, maybe to encourage clients or lawyers'.[162]

Legitimacy and credibility

Many interviewees viewed the impact as going beyond mere publicity, however. Rather, they pointed to the increased *legitimacy* and *credibility* that mediation (and mediators) may gain from the Convention. Underlying this view was the sense that mediation has 'grown-up' and can now compete on the international stage with litigation and arbitration. As one interviewee said, the Convention is 'an exercise in credibility'.[163]

For another, this credibility was 'in the eyes of a general counsel who knows nothing about mediation'.[164] Another interviewee recounted a tale in which they:

---

158 Mediator 1.
159 Mediator 18.
160 Mediator 10.
161 Mediator 7.
162 Mediator 4.
163 Mediator 3.
164 Mediator 8.

> Had an e-mail yesterday from a friend … who's doing some work in Kazakhstan and she said the Kazakhs have just ratified [the Convention] … I think the fact that the government have ratified an International Convention, will automatically make you think that mediation is somehow … more built into the … fabric of the system.[165]

Others referenced the power of 'institutionalisation' or 'regulation' of the process. One viewed that the Convention 'has created opening of the mind about mediation. Suddenly, it makes mediation something that is institutionalised. And that probably has drawn a lot of interest for people who were not completely aware of it.'[166] For another, '[i]t's in the nature of things that people like regulation of one sort and another. And they like the ability to be able to point to something.'[167]

Some mediators specifically referred to mediation now standing shoulder to shoulder with more traditional mechanisms:

> I think the Singapore Convention … [is] providing a sense of confidence … particularly for lawyers … I think the impact already is that it's given a lot more visibility, a lot more credibility and a lot more legitimacy … and being … on the same playing field is arbitration and litigation …[168]

Concerns about the Convention

From our interviewees' responses we get a sense that the referencing to lending 'legitimacy' or 'credibility' to mediation or increasing its 'institutionalisation' is designed to appeal primarily to those who remain on the fringes of the process and currently inhabit more traditional forms of dispute resolution. This notion may support the idea that the commonly espoused benefits of informality and flexibility of mediation or its inherent 'lawlessness', seen as attractive by some users of mediation,[169] may in fact be perceived as weaknesses by potential users more comfortable with traditional dispute resolution domains. We caution that, in rushing to embrace legitimacy-raising measures and playing to the concerns of the uninitiated, the qualitative benefits of mediation are not overly compromised. In this sense, a minority of our interviewees referred to negative consequences discussed below.

---

165 Mediator 3.

166 Mediator 5.

167 Mediator 11.

168 Mediator 14.

169 See Lenka Holá, Martina Urbanová and David Fiedor, 'Mediation and the degree of its institutionalization in the Czech Republic within the context of the development of the discipline in Europe' (2021) 38(4) Conflict Resolution Quarterly 387; and Alexander et al (n 6 above).

Challenges to enforcement

Some mediators we interviewed, including those who espoused generally positive views, harboured fears around potential negative impacts of the Convention. Some concerns focused on the potential for parties to seek avoidance of mediated outcomes on the basis of alleged misconduct of the mediator. By dint of Convention articles 55(e) and (f) a court may grant relief pertaining to circumstances in which there has been either a 'serious breach of mediator standards' or 'a failure by the mediator to disclose to parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence'. In this regard, one interviewee noted that, '[a] concern … I have is that one of the grounds for resisting enforcement in the Convention is the alleged misconduct of the mediator. That sort of opens up the mediator to being dragged into a continuing dispute over enforcement.'[170] Another said:

> I think [the Convention] is a very great pity … for a whole variety of … reasons, including … 'how can I get out of it being enforced and sue the mediator for malpractice?' and … just simply opened a Pandora's box of things which shouldn't have been part of where mediation is in the present time …[171]

These grounds for challenging enforcement have been the subject of much discussion in academic circles with some commentators seeing it as a way in which parties and their lawyers may seek to avoid settlements reached in mediation.[172] Other scholars have pointed out that the bar for challenge is high and thus in practice not likely to prove problematic in practice.[173]

One specific problem recognised in the literature is that a scenario may arise where the court of enforcement may seek to apply standards which differ from those applicable to mediators drawn from different jurisdictions.[174] As reflected by one interviewee,[175] there are no commonly accepted international standards, and indeed different mediation practice norms may be found in different jurisdictions.[176] Another said:

---

170 Mediator 1.

171 Mediator 19.

172 Clark and Sourdin (n 61 above)

173 See Feehily (n 9 above); Karl Mackie, 'Another historic step for mediation' (*LinkedIn Pulse* 8 August 2019).

174 See discussion in Ben Kohler, 'Blaming the middleman? Refusal of relief for mediator misconduct under the Singapore Convention' (2023) 19(1) Journal of Private International Law, 42.

175 Mediator 3.

176 Connie Peck, A Manual for UN Mediators: Advice from UN Representatives and Envoys (United Nations Institute for Training and Research 2010).

> [Where] enforcement is being contested … [parties will] be looking for a route out and the likely easy target … is going to be the mediator. So, people are going to say oh well, the mediator was rubbish … If the net effect … [is] that mediators get trashed in front of domestic courts by parties who want out of the deal they willingly did, that doesn't sound to me like a great outcome … I think something like, a sort of robust discussion with the mediator about risk, which … features in a lot of our work and is quite an important part of the process, in some jurisdictions that could easily be construed as inappropriate pressure, being brought to bear. Well, I mean, who's to judge?[177]

Another interviewee made the more general point that the presence of the Convention may concentrate the parties' minds on the possibility of non-enforcement:[178]

> If you said to people going into mediation have you thought about the Singapore Convention? Instantly you are mucking about in people's negotiation positions … They will head off to the undergrowth … concerning themselves with that.[179]

Breaching confidentiality

The potential negative consequences for mediation in terms of breaching confidentiality were also noted:

> I think the issue that will arise [is] … the extent to which jurisdictions say, well, we can actually look into this and breach … confidentiality … The more international mediations take place, the more that's likely to become an issue because different countries have very different concepts of confidentiality … Some countries probably feel they can open up the mediation without any concerns. Others will regard the mediation as sacrosanct.[180]

Creativity of outcomes

Another interviewee referenced the creativity of outcome possibilities in mediation and the implications the Convention may hold for enforcement in this regard:

> we're going to have to be clearer of which parts of the agreement belong in the consent award and which parts of the agreement belong in the settlement agreement. Because one will be enforceable and accepted as kind of subject matter that you will have the authority to decide. So yes, you can put that in your Convention, but there will always be things in the mediations that I've seen where there are some cultural

177 Mediator 4

178 See Clark and Sourdin (n 61 above).

179 Mediator 19.

180 Mediator 11.

> or friendly or kind of other things that the tribunal would say we can't enforce that.[181]

Juridification

Finally, some mediators were concerned more generally about the juridification of mediation that may result from the Convention's further application and the negative implications this may hold for fluidity and flexibility in the process.

One put it this way:

> Be wary of applying legalistic thinking, the structures and institutions of the legal process, the civil justice process to mediation ... [This may] institutionalize mediation yet again as part of the litigation and civil justice culture. And we actually end up ... with mediation losing its way, the baby gets struck out with the bathwater. It actually might lose its shine, and it might lose its attraction for others because of the way it becomes presented.[182]

Another put it more pithily: 'it's just ... more regulation of mediation when we were a free and wild profession'.[183]

CONCLUSION

This article has reported on some aspects of our study into the views and experiences of international commercial mediators with a focus on the future development of mediation in this setting. Our mediators present a diverse range of views on a spate of issues. In short, the main findings are that their perception is one of mediation remaining underused relative to its potential, on the fringes still of mainstream disputing culture, and in the wake of its traditional alternatives of litigation and arbitration. Ignorance or at least a sophisticated appreciation of the wares of mediation is seen to remain of great import, with cultural dissonance with lawyers – as gatekeepers – seen as the main obstacle to proper development. Although recent commentary has cited lack of assured standards as a potential stumbling block to international commercial mediation's growth,[184] few interviewees saw this as an issue, with the market generally being seen as sophisticated enough to ensure recruitment of high-quality mediation practitioners. The majority of interviewees did not support the development of common standards for international mediation practice either, viewing the practice base as too diffuse.

---

181 Mediator 10.
182 Mediator 4.
183 Mediator 8.
184 Fach Gómez (n 34 above)

Education and profile-raising were seen as key for our interviewees in helping to grow the field, with a significant emphasis placed again on awareness-raising for lawyers and would-be participants, including entry-level professional education. In-house counsel were seen as an especially important group in helping drive forward developments in this area. There is some correlation with the views found in other research[185] that lawyer education should focus on the idea that mediation represents assisted negotiation and emphasis placed on the qualitative benefits of the process, rather than selling it as an alternative to traditional means of dispute resolution. Other interviewees saw enhanced roles for government, industry groups and wider constituencies of stakeholders in helping grow the practice base. The data also suggest that international commercial mediation's fate is tightly bound to its journey in domestic matters where familiarity and cultural acceptance of lawyers and users can first take root and then grow into the cross-border domain. In this sense, mediation's journey lies on different trajectories in different jurisdictions. Cultural differences were observed, with some interviewees pointing to the varying levels of receptivity of mediation within different jurisdictions, caused for example, by integration of mediation within the domestic legal system, the need to avoid traditional justice systems (because of costs or delays) or acceptance by local lawyers.

Our mediators did not consider that non-enforceability of settlement was a real barrier to take-up of mediation in this space although many believed that a perceptual barrier in this regard was prevalent, particularly within the legal profession. In this sense, the recent Singapore Convention was largely well received by our interviewees even if most saw it mainly of symbolic significance and a way to greater publicise mediation and imbue the process with more credibility and legitimacy. A minority raised concerns about the potential drawbacks of the Convention, especially around potential challenges to settlements based around mediator misconduct and the general impact of further juridification of the mediation process that the Convention may herald. This is especially relevant in the face of evidence in our study of traditional, adversarial lawyering practices taking place in this realm and the danger that the post-Singapore Convention environment may further encourage this very behaviour. Not many interviewees recognised these potentially negative consequences, but as successful purveyors of mediation services it is perhaps unsurprising that they may focus on the short-term fillip that the Convention may provide in terms of increased demand for their services rather than more negative, potential future impacts.

185 Howard (n 10 above).

In terms of the impact of all these measures, some interviewees reflected the need to create a paradigm shift in which mediation becomes the norm:

One mediator put it this way:

> [A]ll the steps taken for marketing mediation and discussing mediation ... [are] small steps towards bigger steps towards that paradigm shift ... if you compare with the paradigm shift when it comes to electric cars, you have to come to a point where it tips over and all of a sudden everyone wants electric cars. Hopefully, during my lifetime, many companies in dispute, they want mediation because they understand and know the benefits so that's the big thing.[186]

In making that paradigm shift for mediation, we would caution, however, that some of the core essences of the mediation process are not lost along the way. Yes, normalising and legitimising the process and rendering it more palatable to the principal gatekeepers is important. But this is a two-way street. It should be recognised that the lawyer's role within mediation is quite different to that in traditional adversarial processes and calls for a shift in their mindset and a less central role, rather than a tightening of the process to fit their preferred mould. Most of our interviewees expressed the view that mediation was not an homogeneous process. Thus, the field should support varied practice models and resist stringent regulation. It remains to be seen if the increasing juridification of mediation is consistent with this goal.

186 Mediator 9.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 310–337
Articles DOI: 10.53386/nilq.v76i2.1235

Nineteenth-century registers: constituting the market, professions and individuals*

Chris Dent*
Murdoch University, Australia
Correspondence email: c.dent@murdoch.edu.au.

ABSTRACT

The nineteenth century saw the introduction of at least 20 registers into English statutory law. These were used as techniques of governance, in a Foucauldian sense, and they reflect the shifts in the changing relationship between individuals and the state at the time. The registers include the better-known systems for voters, births, companies and some professions. Less well-known registers were introduced for industrial property, coalwhippers and for deserters from ships. Deploying the idea of governmentality allows the registers to be seen in terms of the externalisation of aspects of governance, the facilitation of the internalisation of specific practices by those who sought registration and, to a lesser extent, by the competitors of those who sought registration. As such, their introduction represents a move away from the pre-existing juridical mode of governance.

Keywords: legal history; Foucault; registers; nineteenth century; governance.

INTRODUCTION

In the late twentieth century, Foucault was quoted as saying that the 'law is not what is important'.[1] What has not been made clear in the literature are the conditions of possibility, within the law itself, for the current state of affairs. The examination of past statutory systems allows for an assessment of how changes in legislative frameworks have reflected changes in the processes of governance. The widespread adoption of registration systems in nineteenth-century England provides a useful opportunity to undertake such analysis. Of course, *individual* registers have, in recent times, been the subject of significant

* First published in NILQ 75.AD1 (2024) 107–135 on 1 November 2024.

1 Alan Hunt,' Foucault's expulsion of law: toward a retrieval' (1992) 17 Law and Social Inquiry 1–38, 7.

analysis;[2] however, this research considers all of the nineteenth-century registers. One of the first was the register of Births, Deaths and Marriages;[3] other examples include the registers under the Joint Stock Companies Act 1844, the Patent Law Amendment Act 1852, the Merchant Shipping Act 1854 and the Medical Act 1858. Less well-known examples were for 'coalwhippers' under the Coalwhippers Act 1843 and for deserters under the Merchant Shipping Act 1894. By the end of the century, at least 20 registers had been legislated.[4] There were, of course, a number of pre-existing registers – including the parish registers,[5] the registers of ships[6] and the Stationers' Company register[7] – though these were not centralised. As such, the Parliaments took a known, and accepted, technique, expanded it, and applied it more broadly for the new problems that they were facing.

This fits with Foucault's assessment of practices of governance: 'techniques themselves change and are perfected, or anyway become more complicated'.[8] The registers will be considered through a Foucauldian lens;[9] not to provide a totalising narrative, but to explore key aspects of governance embedded within them. 'Foucauldian-inspired' critiques of registers have been highlighted;[10] however, Smith's analysis considered only 'civil registration'.[11] This article

2 See, for example, Jess Smith, *Law, Registration and the State* (Routledge 2023); Sarah Keenan, 'Making land liquid: on time and title registration' in Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2018); and Marc Trabsky, 'Normalising death in the time of a pandemic' (2022) 12 Oñati Socio-Legal Series 540.

3 Births and Deaths Registration Act 1836.

4 By 1900, a version of all remained on the books – save for the repealed register for coalwhippers.

5 Cromwell ordered, in 1538, that all 'baptisms, marriages and burials' be recorded: John Cox, *The Parish Registers of England* (EP Publishing 1974) 2.

6 The Navigation Act 1660 limited access to certain trade routes to ships registered as English. Following that, in the eighteenth century, the Register Society, later Lloyd's Register of Shipping, established its own registration system.

7 Permission to print a book in England was then subject to the entering of the book into the Stationers' Company register. See, further, Cyprian Blagden, *The Stationers' Company: A History 1403–1959* (Harvard University Press 1960).

8 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Palgrave Macmillan 2007) 8.

9 A simple connection is his notion of 'biopolitics', the 'endeavour, begun in the eighteenth century, to rationalise the problems presented to governmental practice by the phenomena characteristic of a … population: health, sanitation, birth-rate, longevity, race': Michel Foucault, 'Birth of biopolitics' in Paul Rabinow (ed), *Ethics: Subjectivity and Truth* (New Press 1997) 73. Obviously, this applies to the registers of births, deaths and marriages, but also to 'common lodging houses' under the Public Health Act 1875, s 76.

10 Jess Smith (n 2 above) 115.

11 Ibid 2.

engages with the manner in which the detail of the legislation evidences both the early stages of 'governmentality'[12] and the shifts in how this form of governance impacted on the constitution of individuals in society. With respect to the former, this research will show how registers facilitated the operation of the market and the professions as modes of governance – though such 'externalisation' was incomplete. With respect to the latter, the registers facilitated the 'conduct of conduct'[13] for registrants, in line with the expansion of governmentality. As such, the deployment of registers accords with Foucault's assertion that the 'juridical mode of governance ... is increasingly replaced by ... a power that exerts a more positive influence on life, undertaking to administer it, multiply it, and impose upon it a system of regulations and precise inspection'.[14] One specific aspect of the regulated conduct of the parties to be considered is that of morality. That said, the registers had a limited reach. Much of the population was not directly disciplined by them. This analysis of the detail of the statutory systems, then, reflects a focus on the 'material operations' of the law that constitute 'apparatuses of knowledge'[15] and allows for greater insight into the processes of change away from juridical governance.

EXTERNALISATION OF GOVERNANCE

With respect to the role of registers in the externalisation of governance, Miller and Rose characterise this mode as the manner in which the 'state limited itself by designating zones exterior to it ... that had their own density and autonomy' such that the 'political apparatus depended on the activities of multiple governing agents external to it'.[16] The authors refer explicitly to 'the market ... churches, philanthropic organizations, trade unions and friendly societies',[17] however, the focus here will be on the registers that classify the market and delimit the professions. That is, the state retained a role in both areas, with that role focused on knowledge within, and without, the bureaucracy.

---

12 See, generally, Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991).

13 Michel Foucault, 'The subject and power' in James Faubion (ed), *Michel Foucault: Power, the Essential Works Volume* 3 (Allen Lane 2000) 341.

14 François Ewald, 'Norms, discipline, and the law' (1990) 30 Representations 138–161, 138.

15 Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975–1976* (Allen Lane 2003) 34.

16 Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Polity 2008) 17.

17 Ibid. Friendly societies were subject to registration, first under the Friendly Societies Act 1850, charities were not.

Market

The use of registers to organise the market aligns with the rise of the ideas of political economy.[18] Political economy's relevance to the use of registers is threefold: (1) the simple organisation of the market in terms of authorised companies and associations for workers; (2) the attribution of value; and (3) the importance of information to the market. As such, registers are 'constitutive' of the financial individual and 'collective legal identities'.[19] More broadly, though, the technique of governance operated to categorise, to order, to impose 'spatio-temporal' limits,[20] on that which is registered – whether the target be tangible, intangible or human.

The clearest way in which the market evidenced the externalisation of governance was the registration of companies. The market was ordered both through the existence of companies and through the knowledge the state had about them – with knowledge being a key locus of regulation. The registration process allowed competitors, and customers, to know whether a specific firm was in compliance with the law, with respect to registration, and to know the names and addresses of the directors and auditors[21] in case of litigation. While the companies had the imprimatur of the crown, by virtue of registration,[22] the company's compliance with the standards of conduct, and their liabilities, were the responsibilities of those constituted by the (governance) practices of the market. The state could not effectively regulate behaviour and so it was left (externalised) to those who operated in the market to seek

18 For Foucault (n 9 above) 76, following Pierre Rosanvallon, the market 'played' a particular role in the spread of the liberal form of governance, it was 'a 'test', a locus of privileged experience where one can identify the effects of excessive governmentality'. Registers also accord with Adam Smith's ideas in that they are 'public institutions, which … can never be for the interest of any individual, or small number of individuals to erect and maintain': *The Wealth of Nations* vol 2 (Penguin 1999) 274. Foucault, of course, discusses Smith in one of his lectures published in *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (Palgrave Macmillan 2008) 267–289.

19 Jess Smith (n 2 above) 115.

20 Ibid 7.

21 Joint Stock Companies Act 1844, s 7.

22 The company as technique of governance, of course, has a more extensive history. The argument here is that registration allowed for governance at a greater distance than was possible in the early modern period. For a discussion of the way in which governance was more 'personal' in the seventeenth century, see Chris Dent, 'Because I said so? Revisiting the "letters" in early modern letters patent' (2022) 12 Queen Mary Journal of Intellectual Property 47–67.

sanctions for behaviour that was contrary to the law – though, the state, of course, provided the courts as a forum for dispute resolution.[23]

Turning to both tangible and intangible property, the registers included specific limits of protection that allowed others to be (relatively) clear about what was outside that protection.[24] The Land Registry Act 1862, for example, required that 'an exact description' of the land to be registered be provided to the registrar[25] – enabling the registrants' neighbours to know the limits of what was being claimed (it also allowed future purchasers to know the limits of what was being sold). As another example, the requirement to provide a 'specification' of the invention to be patented[26] meant that competitors knew what devices they could not use without potentially being sued for infringement. It has been argued that, with respect to industrial property rights, registration 'determined' the 'boundaries of the property … shifting the focus of attention … away from the essence of the property towards the surface of the document'.[27] These registers, then, set out the limits of the property so that they could more easily be subject to market forces.

Unsurprisingly, one particular link between the discourse of political economy and registers is the notion of 'value in exchange',[28] given that the registers facilitated the exchange of interests.[29] John Stuart Mill considered that the 'institution of property … consists in the recognition, in each person, of a right to the exclusive disposal of what he or she' owns.[30] More specifically, 'exchange value requires to be distinguished from price';[31] perhaps unsurprisingly, then, none of the centralised registers recorded the money paid for an exchanged

23 A related example is the recording by registrars of bankrupts in 'docket books': Bankruptcy Act 1842, s 73. The books were under the jurisdiction of the court and cannot be characterised as a register for the purposes of the present analysis.

24 The qualifier of 'relatively' was included on the basis that trade marks that were 'identical' to an already registered trade mark could not be registered and marks that 'so nearly resembled' a registered mark so 'as to be calculated to deceive' also could not be registered: Trade Mark Registration Act 1875, s 6.

25 Land Registry Act 1862, s 7.

26 Patent Law Amendment Act 1852, s 20.

27 Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press 1999) 185.

28 Adam Smith (n 18 above) vol 1, 131, differentiated 'value in use' from 'value in exchange'.

29 For Hearn, 'some writers have regarded [exchange] as the sole subject of the economic science': William Hearn, *Plutology* (George Robertson & Son nd) 235.

30 John Stuart Mill, *Principles of Political Economy* (Prometheus 2004) 224.

31 Ibid 417. For Foucault, the 'importance of the theory of the price–value relationship is due precisely to the fact that it enables economic theory to pick out something that will become fundamental: that the market must be that which reveals something like a truth': (n 18 above) 31–32.

registrable good.[32] That is, those things to be registered under the commercial registers – designs, companies, patents, land, ships – can be seen to have an innate value, by virtue of their registration, that was unchanging.[33] This value was based, in part, on knowledge. The inclusion of information in the commercial registers facilitated the exchange of goods of value. With respect to land,[34] registration gave a 'certainty of title'.[35] The Register of Patents also recorded the change in ownership of the grants and provided information that assisted prospective purchasers of a patent[36] – with 'knowledge', for Mill, being 'a cause of the state of the production and distribution of wealth'.[37] Finally, for Ricardo, one 'source' of the value of a good is its 'scarcity'.[38] Registration, and the use of the unique identifying features of the registrable interests, if nothing else, reinforces the scarcity of that which is registered.

Finally, mention may be made of two other registrable entities. These were the friendly societies and, from 1871, the capacity for the registration of unions.[39] Each of these forms of organisation allowed for the partial protection of workers within the market dominated by companies.[40] One of the possible purposes of the societies was the

> insuring or making good any Loss or Damage of live or dead Stock, Goods or Stock in Trade, Implements and Tools, sustained by any Member by Fire, Flood, Shipwreck, or any Contingency of which the Probability may be calculated by way of Average.[41]

These, of course, allow workers who have lost the ability to participate in the market to return to work. The societies also offered a degree

---

32 Though the Register of Shareholders did record the price at which each shareholder purchased their shares: Joint Stock Companies Act 1844, s 49.

33 In Mill's terms (n 30 above) 419: 'All commodities may rise in their money price. But there cannot be a general rise of values. It is a contradiction in terms.'

34 Land Registry Act 1862.

35 HL Deb 17 February 1862, vol 165, col 351, Lord Chancellor.

36 The patent register included the specification, the description, of the invention. With that, a potential purchaser would have some idea of the value, or use, of the invention in the market.

37 Joseph Schumpeter, *History of Economic Analysis* (Oxford University Press 1994) 543.

38 David Ricardo, *The Principles of Political Economy and Taxation* (JM Dent & Sons 1911) 5.

39 Under the Trade Union Act 1871, s 6, registration was voluntary.

40 The relationship between friendly societies and trade unions is emphasised by the provisions that held that, with the passing of the Trade Union Act 1871, any registration of a union under Friendly Societies Acts was rendered void (s 5), and that registrars of friendly societies were registrars for trade unions (s 17).

41 Friendly Societies Act 1850, s 2(3).

of disciplining of workers with respect to their finances.[42] That said, charities, set up under the Friendly Societies Act 1875, also included those for the 'relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters'; 'societies for any benevolent or charitable purposes'; and 'societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement and rational recreation'.[43] The breadth of the included purposes, then, reflects their wide-ranging role in governance.[44]

Unsurprisingly, the justification for the application of the technique of governance to workers was not altruistic. For example, the registration of unions was deemed necessary because 'many of [their] rules and byelaws … are framed in defiance of the well-established principles of economical science and tend to restrict the free action of those principles on which depend the well-being and progress of society'.[45] Unions, therefore, needed to be constrained in order to protect the market.[46] Prior to their registration, unions were outside proper governance,[47] bringing them into the regulatory sphere allowed the (partial) disciplining of their members.[48]

---

42 Scrope highlighted the value of the 'working classes … club[bing] their small savings towards the wholesome and beneficial objects of assuring to themselves and each other a provision against destitution, sickness, and death or other calamity': George Poulett Scrope, 'Remarks and Suggestions on the Report of the Commissioners on Friendly Societies' (William Ridgway 1874) 5; and the 'virtues of thrift' on the part of workers (ibid 9). Such an assessment may have been the product of his time as a Member of Parliament and his work as a political economist, focusing on 'welfare economics': Redvers Opie, 'A neglected English economist: George Poulett Scrope' (1929) 44 Quarterly Journal of Economics 101–137, 107.

43 Friendly Societies Act 1850, s 8.

44 It may be noted, further, that the legislative acceptance of the unions and societies accords with Foucault's acknowledgment of the 'domain of collective and politic units constituted by social relations and bonds between individuals that go beyond the pure economic bond' (n 18 above) 307–308.

45 *Eleventh and Final Report of the Royal Commissioners appointed to Enquire into the Organisation and Rules of Trades Unions and other Associations* (1869) 24.

46 For example, the report listed a number of 'objects' of a union that should prevent them from being registered. These included objects 'to prevent the introduction or to limit the use of machinery' and 'to authorise interference, in the way of support from the funds of the union … with the workmen of any other union when out on strike': ibid.

47 Banning them fitted with the assessment that 'clear definitions [in] law' were seen to 'protect the wealth' of the 'urban and industrial middle class': Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* 3rd edn (Cambridge University Press 2014) 25.

48 The requirement that registered trade unions provide copies of their rules (s 14) means that the state, in theory, had the capacity to monitor organised labour, again potentially furthering the interests of the capitalists.

Professions

The rise of professions in the nineteenth century also shows the externalisation of governance. The registration of some – including pharmacists,[49] seamen[50] and veterinary surgeons[51] – but not all professions shows the extent to which externally validated knowledge was used in the regulation of the society. Registration was required in order to practise, however, the purpose of the register was also about delimiting the profession and reflected Foucault's assessment of the 'disciplinarisation of knowledges'.[52] Expressed differently, registers reflected the 'symbiosis of professionalisation and state formation'.[53] The discussion, however, will note the fact that not all Victorian professions were subject to the technique.

As an example of the state designating an exterior governing agent, all the professional registers 'out-sourced' the proof of qualification – a set of minimum standards – to another entity. Unsurprisingly, this is further evidence of discipline: the 'processes of progressive training and permanent control .... establish[ing] the division between those considered unsuitable or incapable and the others'.[54] Under the Solicitors Act 1843, in order to practice, solicitors either had to have been an articled clerk for five years[55] or had to have completed a degree and a clerkship of three years.[56] Further, notwithstanding these requirements, judges could appoint examiners, and set rules of examination, to assess the 'fitness and capacity' of individuals to practise as an attorney.[57] In other words, the interests of the dominant players – the courts and the firms that employ clerks – were maintained.[58] With respect to degrees, only qualifications from specified educational institutions were acknowledged, but even their graduates had to serve significant time as a clerk. Likewise, for medical

---

49 Pharmacy Act 1852.

50 While sailors are not, necessarily, seen as professionals now, merchant seamen were, perhaps surprisingly, subject to the most statutory schemes in the nineteenth century – there was a register for them in, *inter alia*, the Merchant Seamen Acts of 1835 and 1844 and the Mercantile Marine Act 1850.

51 Veterinary Surgeons Act 1881.

52 Foucault (n 15 above) 182. 'Disciplinarisation', here, relates to the controls within the bodies of knowledge and to the way in which individuals are disciplined by the knowledges.

53 Terry Johnson, 'Expertise and the state' in Mike Gane and Terry Johnson (eds), *Foucault's New Domains* (Routledge 1993) 151.

54 Foucault (n 8 above) 57.

55 Solicitors Act 1843, s 3.

56 Ibid s 7.

57 Ibid s 16.

58 Notably, the Act regulated solicitors and not barristers – with the latter remaining under the purview of the Inns of Court.

practitioners, the institutional power of the medical colleges,[59] and of certain universities,[60] was maintained in the Medical Act 1858 through their representation on the 'General Council of Medical Education and Registration of the United Kingdom'.[61] The extent to which registration furthered the position of these external entities is evident in the explicit justifications that the passage of the Pharmacy Act 1852 was to 'increase the powers' and 'influence' of the Pharmaceutical Society.[62]

The externalisation meant that the state had no role in sanctioning behaviour that was contrary to the proper conduct for the profession. There were only penalties for incorrect use of the titles; and there were penalties for falsifying the register[63] and procuring false certificates.[64] The Acts did, however, confirm the charters of pre-existing professional bodies;[65] though such bodies may not have had a significant regulatory role.[66] That said, the learnings of the profession were still acknowledged in law. Even in the eighteenth century, there were cases that referred to the 'usage and law of the surgeons'[67] and the 'situation [of a surgeon] implies skill in surgery'.[68] In the nineteenth century, there were cases

59 Nine institutions were included, such as the Royal College of Surgeons of England, the Faculty of Physicians and Surgeons of Glasgow and the Apothecaries Hall of Ireland.

60 Ten institutions were included, such as the Universities of Cambridge, Durham, Edinburgh, Saint Andrews and Dublin.

61 Medical Act 1858, s 4. In terms of qualifications, a Fellowship, Licentiate or Extra Licentiate of the colleges listed above was sufficient for registration, as was a degree in medicine or surgery from any university: sch A, read in conjunction with s 15. Anomalously, a 'Doctorate of Medicine by Doctorate granted prior to passing of this Act by the Archbishop of Canterbury' was also sufficient for registration: ibid. For an overview of the background to the Act, see Marie-Andrée Jacob and Priyasha Saksena, 'The changing nature of the Medical Register: doctors, precarity and crisis' (2023) 32 Social and Legal Studies 714.

62 HC Deb 17 March 1852, vol 119, col 1219, Jacob Bell. It may also be highlighted that the 'disorganised state of the medical profession' was said, by a pamphleteer, to show a 'public necessity for … an immediate registration of that important body of professional men': 'Emeritus', 'A Letter to Right Hon, Sir George Grey … on Medical Registration' (Jackson and Mann 1852) 3.

63 For example, Pharmacy Act 1852, s 15.

64 For example, ibid s 16.

65 For example, the Veterinary Surgeons Act 1881 confirmed the charter of the Royal College of Veterinary Surgeons: s 14.

66 The original charter of the Royal College of Veterinary Surgeons did not make provision for the disciplining of members – the text of the charter is available from the Royal College of Veterinary Surgeons, Royal Charter 1844. That said, the judges, under the Solicitors Act 1843 maintained a role in the regulation of lawyers that they had fulfilled from medieval times. It was until the 1870s that the 'Supreme Court remained responsible for disciplining solicitors': Richard L Abel, *The Legal Profession in England and Wales* (Basil Blackwell 1988) 249.

67 *Slater v Baker* (1767) 2 Wils KB 359, 362.

68 *Shiells v Blackburne* (1789) 1 H Bl 158, 161.

that considered whether there was a 'want of skill and diligence in his profession as an attorney',[69] and more generally, there was a reference to 'actions against surgeons, attorneys and other professional men, for want of competent skill or proper care in the service they undertake'.[70] So, while the registers themselves did not allow for the sanctioning of registrants, the law already considered their professional knowledge as a standard against which their conduct could be measured. Again, this is an indicator of the law not setting the limits of behaviour in society.

The processes of registration may also be linked with the labour theory of value – the source of value being the 'quantity of labour required to obtain' the commodity in question.[71] *Contra* Smith, the value of a good was 'not ... the wages paid to labour',[72] though Ricardo did not disagree with the assessment that labour included the 'skill, hardship and ingenuity' that went into production.[73] It is arguable that the protection of titles for doctors, solicitors and pharmacists is, in part, an acknowledgment of the 'skill, hardship and ingenuity' that went into the qualification. This, most obviously, applies to those who went through years of study or learning in order to become a doctor, solicitor or pharmacist.[74] Expressed differently, a purpose of the Medical Act 1858 was to protect against those 'who were not members of the medical profession, but who wished to be supposed to belong to it',[75] those who had not earned a qualification. It also had the effect of delimiting the profession (those with the qualification) and justifying public trust in it (the qualification indicates the knowledge that the recipient had).[76] The labour theory can also be applied to the institutions that trained them – Oxford University, for example, had expended skill and ingenuity in the development of reputable courses and, therefore, there is value to be recognised in their offerings and

69 *Godefroy v Dalton* (1830) 6 Bing 460, 467.

70 *Boorman v Brown* (1842) 3 QB 511, 525.

71 Ricardo (n 38 above) 5.

72 Harry Landreth and David Colander, *History of Economic Theory* 2nd edn (Houghton Mifflin 1989) 100.

73 Ibid. The value of a ship, then, is the value of the work that went into creating it – and not the profit to be made by the shipyard, nor the profit to be made by the shipping company that uses the vessel to transport goods.

74 There is further evidence of this in some of the commercial registers. The Designs Act 1839 was established, in part, to afford 'protection to those deserving and ingenious persons who were engaged in inventing designs': HL Deb 29 April 1859, vol 47, col 625, Brougham.

75 HC Deb 2 June 1858, vol 150, col 1406, Cowper. This reason was also given for the registration of solicitors: HL Deb 13 February 1843, vol 66, col 414, Langdale.

76 Larson has noted that professionalisation is an 'attempt to translate one order of scarce resources – special knowledge and skills – into another – social and economic rewards': Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press 1977) xvii.

the different medical colleges had also built up their own expertise and reputations.

The role of the registration of ships and sailors, however, may be seen to perform another function within the market. That the maritime insurance industry was one of those highlighted by Lobban as having grown significantly from the eighteenth century[77] suggests that ships had moved from being objects of trade in the early modern period to being objects of investment in the nineteenth century – when the risks to the owners could be spread. The details, required under the Merchant Shipping Act 1854, of the registered ships, their owners[78] and the name of their masters are all relevant to the decisions of insurers and charterers. Further, it is the owners and masters who benefit from the Register of Pilot's Licences, in that the safety of the ship, its cargo and its crew is enhanced if only qualified pilots guide the ship in and out of port. For the sailors specifically, it was less about the training and more about their responsibilities with respect to their workplace. Even the register of deserters[79] allowed ships' masters to reduce the possibility of sailors with a problematic history serving on their vessel. In sum, the capital that was tied up in the vessels may have meant that knowledge of who was to work on them was seen to be necessary.[80] When away from port, the owners had no capacity to oversee the operation of the ships, therefore the multiple registers operated to ameliorate the risks faced by the capitalists.[81]

Finally, the use of registration was not total. Engineers, despite being part of a key profession for the industrial capitalists, were not required to be registered – notwithstanding the fact that parts of

---

77 Michael Lobban, 'Commercial law' in *Oxford History of the Laws of England: vol XII 1820–1914, Private Law* (Oxford University Press 2010) 674. With respect to the deployment of specialist knowledge, it is notable that it was in the nineteenth century that the courts began to discuss the importance of knowledge for insurers: 'If he conceals anything that he knows to be material, it is fraud … if he conceals anything that may influence the rate of premium which the underwriter may require … such concealment entirely vitiates the policy': *Dalglish v Jarvie* (1850) 2 Mac & G 231, 243.

78 Including the limitations on the number of owners, the fact that owners had to be joint owners and that owners had to be 'qualified' to be an owner of a British ship: Merchant Shipping Act 1854, ss 37–38. Only 'natural-born British subjects', 'persons made denizens by Letters of Denization' and United Kingdom bodies corporate (or those from 'some British Possession') could be owners: s 18.

79 Merchant Shipping Act 1894.

80 The 'qualities' of the sailors were included in the register: Merchant Shipping Act 1854, s 273.

81 Of course, to consider 'risk' in the nineteenth century, from a Foucauldian standpoint, is not new. See, for example, Robert Castel, 'From dangerousness to risk' in Gordon and Miller (n 12 above).

the profession self-organised in the first half of the century.[82] One argument could be that there was an 'extreme diversity [in] their jobs and realizations'[83] – unlike doctors who only have the human body upon which to practise, engineers had a range of technologies, materials and constructions that could be mastered. Importantly, too, the 'profession appeared to maintain itself without the conventional requirements of educational qualifications … [e]ntry to the profession remained severely practical'.[84] At one level, this lack of authoritative educational institutions meant that there was no need to privilege certain universities, and it also meant that the professions themselves facilitated the dispersion of new knowledge.[85]

From a governmentalist perspective, however, engineers performed a different function in society than the registered professions. Doctors, veterinary surgeons, pharmacists and solicitors were, to use more modern parlance, 'public-facing'. They, then, deployed their knowledge to guide the behaviour of the general public – inculcating norms that the members of the community should internalise. With respect to medical knowledge, in the nineteenth century, the 'domestic environment … was constituted as a site subjected to scrutiny and administration'.[86] Lawyers were there to organise their clients' legal affairs, specifically with respect to the conduct of litigation.[87] Engineers, on the other hand, did not have a disciplinary role – there

82 For example, the 'Institution of Civil Engineers' received a Royal Charter in 1828: Garth Watson, *The Civils: The Story of the Institution of Civil Engineers* (Thomas Telford 1988) 20. This, then, was before the granting of the Royal Charter to the College of Veterinary Surgeons.

83 Antoine Picon, 'Engineers and engineering history: problems and perspectives' (2004) 20 History and Technology 421–436, 422. Picon lists the divisions of 'civil, mechanical [and] electrical engineering' as being relevant, even in the nineteenth century: ibid.

84 R A Buchanan, 'Institutional proliferation in the British engineering profession, 1847–1914' (1985) 38 Economic History Review 42–60, 43. That is, entry into the engineering profession was not in the form of examination; instead, it was based on their 'working experience confirmed by the senior engineers in charge' of their work: ibid 46. For engineers, then, the personal assessment of individuals, rather than a centralised system, was what was important

85 According to Berg, professional organisations, such as the Smeatonian Society, were to 'provide a forum for reading practical papers and for assigning professional status': Maxine Berg, *The Machinery Question and the Making of Political Economy 1815–1848* (Cambridge University Press 1980) 154.

86 Nikolas Rose, 'Medicine, history and the present' in Colin Jones and Roy Porter (eds), *Reassessing Foucault: Power, Medicine and the Body* (Routledge 1994) 63. See generally, Michel Foucault, T*he Birth of the Clinic: An Archaeology of Medical Perception* (Vintage 1975).

87 Chancery, when considering evidence of any 'undue exercise of influence', looked at whether 'independent advice was taken': *Kempson v Ashbee* (1874) 10 Ch D 15, 21.

was no governance of individuals *through* them.[88] Registers, then, were a tool to spread valorised knowledge through the community to those who were not directly subject to education in the field. That is, registered professionals would circulate their knowledge to those whom they dealt with – they would conserve the health of workers,[89] the capital bound up in livestock and minimise the risks to ships.

Externalisation as incomplete

The deployment of registers shows that the externalisation of governance was not total. There still was a role for the state. That role required that certain state workers were constituted in a certain way.[90] First, though, it is obvious that the state had an interest in knowledge – this supported the centralisation of data collection. For Bentham,

> [A]ll [legislators] need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require.[91]

As a specific example, there was its interest in the registration of voters (in part, to ensure that only those with a sufficient property interest could vote).[92] The centralisation of the information in the registers gave the state a degree of oversight of the economy and of the professions.[93] The registers did not give them *control* over the registrants (that is, they did not allow direct regulation); instead, the state retained a role

88 With respect to any notion of 'public safety', engineers on canals, roadways and large buildings were part of a team (with some engineers increasingly taking on 'managerial functions': Picon (n 83 above) 426), meaning that any mistake from an underqualified engineer may be rectified prior to it causing harm; and, of course, any architects involved also held a degree of responsibility. Doctors, on the other hand, were more likely to be sole practitioners in the community.

89 As was noted by a later political economist, the 'energy [of a labourer] depends upon the health of the workman, and upon the motives that induce his exertion': Hearn (n 29 above) 37.

90 The organisation of the state machinery in the nineteenth century changed with the establishment of the Civil Service Commission in 1855. See generally, Richard Chapman, *Civil Service Commission 1855–1991: A Bureau Biography* (Routledge 2004).

91 *Influence of Time and Place in the Matters of Legislation*, excerpted in John Hill Burton (ed), *Benthamiana: or Select Extracts from the Works of Jeremy Bentham* (William Tait 1844) 117–118.

92 Noting, too, that there was significant parliamentary discussion about the practicalities of the 10*l* minimum property value for the purposes of s 27 of the Representation of the People Act 1832. See, for example, HC Deb 3 February 1832, vol 9, cols 1234-1268.

93 Miller and Rose note the 'expanded role of state bureaucracy' in the first family of governmentality (n 16 above) 17.

for validating the information – which required a certain expertise within it.[94]

This quest for information can be linked with the work of Malthus. Malthus is best known for his theory on population.[95] Of relevance here is that 'Malthus's main concern was with the supply of labour'.[96] That there were, in the early decades of the nineteenth century, two techniques put in place to measure the population suggests a link between his thought and understandings of the market (though not about its externalised role in governance) – with those techniques being the Register of Births, Deaths and Marriages[97] and the Census. In terms of the latter, the first few censuses only took 'account' of the number of people in each household.[98] It was under the Census Act 1860 that data, such as the occupation or profession of the householders, began to be recorded.[99] Over the course of the century, then, increasingly complex systems were put in place to better 'know' the population and its place in the economy.

With respect to knowledge generally, a register is a technique of governance that records facts.[100] The Register of Births, Deaths and Marriages, for example, records the facts that babies were born, people died (along with the cause of death)[101] and that others were married.[102] Specific procedures were also put in place to correct any errors in registers.[103] The registers also operated as a part of classification

94 Trabsky also has noted the rise of 'new experts' in the context of death registration: (n 2 above) 544.

95 Thomas Robert Malthus, *An Essay on Population* (first published in 1798).

96 Annie Vinokur, 'Malthusian ideology and the crises of the welfare state' in Michael Turner (ed), *Malthus and his Time* (St Martin's Press 1986) 171.

97 One pamphlet made the connection explicit: 'The political economist, anxious to correct his theory of the existence of human life, as well as to ascertain the physical condition of the people, would be content if every birth, and marriage, and burial, were registered.': William Hale, 'Some remarks on the probable consequences of establishing a general registry of births, and legalizing the registration of dissenters' Baptisms' (np 1834) 2.

98 The first census was authorised by the Census Act 1800.

99 Census Act 1860, s 4.

100 Robert Torrens, in a paper to the Congress of the Social Science Association, said 'title by registration is a tangible ascertained fact. The entry in the record is conclusive.': 'Transfer of land by registration of title' (1872) 3.

101 Births and Deaths Registration Act 1836, sch B. Trabsky notes the link between the registration of death and the rise of the use of mortality statistics: Marc Trabsky, 'Counting the dead during a pandemic' in Carl Stychin (ed), *Law, Humanities and the Covid Crisis* (University of London Press 2023) 60.

102 It has been said that a 'general registry of deaths was needed for … statistical information': M J Cullen, 'The making of the Civil Registration Act of 1836' (1974) 25 Journal of Ecclesiastical History 39–59, 45.

103 Trade Marks Registration Act 1875, s 5.

systems. That the Register of Designs[104] was separate to the Register of Patents[105] reinforces the pre-existing division in what was known as 'industrial property'. The register for another category of this form of property, trade marks, introduced a new classification system into law – that of the class of goods to which the marks will be affixed.[106] The register entries, then, delimited that which was protected, particularly for the market and professional registers; the legal framework, as a result, giving 'greater definition to things that are prohibited'.[107]

Further, in many instances, the facts were not just taken at face value.[108] The role of patent examiners, for example, operated as a form of validation of the entered information.[109] As noted by Pottage, to register land requires a 'code of translation',[110] a process undertaken by the registrar. With respect to the professional registers, the verification of the expertise of the registrants was not carried out centrally; nonetheless, the listed universities and courts ensure that those who are registered have the requisite knowledge. Even for the Register of Deserters, a 'superintendent' could only enter a name if the seaman in question had 'to the best of [the superintendent's] knowledge and belief' deserted[111] – implying an obligation to not simply register a person on the basis of hearsay.

In other words, the operation of the nineteenth-century registers themselves required the development of expertise within the government as part of these processes of verification.[112] The use of clerks to 'examine' patent applications meant that a specific set of skills was developed (though until the twentieth century, they only examined

104 Designs Act 1839.

105 Patent Law Amendment Act 1852. There was also a Register of Proprietors instituted under the Act (s 35).

106 Trade Marks Registration Act 1875, s 2.

107 Foucault (n 8 above) 46.

108 But, once an entry was made, the register could be assessed as reflecting 'accurately and completely and beyond all argument the current facts that are material' to the object of registration: Theodore Ruoff, *An Englishman Looks at the Torrens System* (Law Book 1957) 8, citing *Registrar (Victoria) v Paterson* [1876] 2 AC 110, a case under the colonial land registration system.

109 Patent Law Amendment Act 1852, s 5.

110 Alain Pottage, 'The measure of land' (1994) 57 Modern Law Review 361–384, 363.

111 Merchant Shipping Act 1894, s 230.

112 For a discussion of the developing role and expertise of the General Register Office in the production of statistics, see Edward Higgs, *Life, Death and Statistics: A Local Population Studies Supplement* (University of Hertfordshire 2004). For a discussion of the relationship between the Office and the growing role of statistics, see Lawrence Goldman, 'Statistics and the science of society in early Victorian Britain: an intellectual context for the General Register Office' (1991) 4 Social History of Medicine 415.

for procedural matters, rather than the novelty of the invention).[113] With respect to the registration of ships, the Merchant Shipping Act 1854 made provision for the appointment of persons to 'superintend the survey and admeasurement of ships … [and] to make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed'.[114] As a final example, the registration of trade marks also required the establishment of a specialist office for the examination of applications.[115] While not all registers required the development of specific expertise, these examples may be linked with the acknowledgment of the importance of expertise for the professions such as solicitors, medical practitioners and pharmacists. They also can be differentiated from the lack of expertise required for the sixteenth-century parish registers or that of the Stationers' Company.[116]

The recording of certain transactions in the registers enabled a form of their accounting – requiring an implicit relationship between the state and registrants.[117] The Register of Proprietors under the Patent Law Amendment Act 1852, for example, recorded all assignments (but not their price) and changes in interests in patents.[118] The earlier designs system also enabled the registering of changes in ownership of designs.[119] As a final example, the Land Registry Act 1862 required that parties to a transaction of registered land should 'attend at the Registry Office to complete the transaction'[120] – that is, for the changes in interests in the land to be recorded. This is not to say that the government of the time conducted analyses of the transactions in

113 Those who headed up the registers also developed specific expertise – Taylor notes the role that Francis Whitmarsh, the Joint-Stock Companies Registrar, had in proposing reforms to the legislation: James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800–1870* (Boydell 2014) 147.

114 Merchant Shipping Act 1854, s 29.

115 Trade Marks Registration Act 1875, s 7.

116 There was a degree of secularisation alongside the professionalisation – with the early modern registration of baptisms shifting to the nineteenth-century registration of births. This change, however, may simply have been the result of there being no other sixteenth-century institution that could have counted the newborns of the time – and the parishes were only interested if the child was brought into their pastoral care.

117 The process of registration also showed that the registrants were, at least, comfortable with the idea of the state being aware of their economic and/or professional activities. While this is not problematic for most now, it would not have been in the minds of those in the early modern period. This knowledge of sectors of society goes to the assessment of nineteenth-century 'authority arising out of a claim of knowledge': Miller and Rose (n 16 above) 201.

118 Patent Law Amendment Act 1852, 35.

119 Designs Act 1839, s 2.

120 Land Registry Act 1862, s 64.

order to improve policy; however, the mere fact of the recording of exchanges contributed to the 'quantification of everyday life'.[121] The transactions had become something that the state was interested in – the 'science of political economy'.[122] This attention to the minutiae of the economy is in contrast to the early modern systems and mirrors the focus on population inherent in the Register of Births, Deaths and Marriages.[123]

In sum, then, the centralised use of registers reflects an understanding of the state that is distinct from that which existed earlier.[124] In the sixteenth and seventeenth centuries, the parishes and the Stationers' Company were not part of the state but were linked with it.[125] The head of the Church of England was the head of the state and the Stationers' Company was based on a grant of the Crown.[126] The nineteenth-century registers were, on the other hand, centralised and their maintenance by officers was paid for out of consolidated revenue.[127] The content of the later registers was validated by the state. The range of nineteenth-century registers reflects the changing role the state had in governance; it externalised the regulation of the market, it externalised the regulation of professions and, through them, it disciplined members of the wider population.

---

121 Stephen Gaukroger, *The Natural and the Human: Science and the Shaping of Modernity 1739–1841* (Oxford University Press 2016) 287–295.

122 Donald Winch, *Riches and Poverty: An Intellectual History of Political Economy in Britain, 1750–1834* (Cambridge University Press 1996) 398.

123 This register also facilitated the secularisation of information for disputes between individuals. The Register of Marriages enabled the 'security of property' with respect to testamentary dispositions: Cullen (n 102 above) 45. This was seen to be needed given that the 'expansion of cities led to endless disputes over the ownership of land and hereditaments': Edward Higgs, 'A cuckoo in the nest? The origins of civil registration and state medical statistics in England and Wales' (1996) 11 Continuity and Change 115, 118–134.

124 One distinction between the nineteenth century and the earlier registers was the level of knowledge recorded. For example, under the Births and Deaths Registration Act 1836, details of the maiden name of the mother, the profession of the father and the details of the informant were included: s 18. There is no evidence that parishes were required to record this level of detail in the sixteenth century.

125 Keenan also discusses the registration of land in terms of the tension between those involved in the Industrial Revolution and the 'elite class that had traditionally owned estates in land': (n 2 above) 147.

126 It may be noted, however, that it was officers of customs that kept control of the Certificates under the Navigation Act 1660 – with these officers being more closely linked to the state than the parishes and the Stationers' Company. Given that the certificate register was instituted over 120 years after the first parish register, it is not surprising that the later one shares some similarities with the nineteenth-century registers.

127 For example, Patent Law Amendment Act 1852, s 47.

REGISTERS AS CONSTITUTING (SOME) INDIVIDUALS

Registers reflect a particular set of 'overlapping' rationalities of governance.[128] In addition to the externalisation of governance, they also, at least partially, constituted those who were bound by registration. That is, they constituted those who participated in the system, including through the inculcation of certain moral requirements. Registers offered a finer-grained mode of regulation than was available in the law before the nineteenth century. That said, not all members of society were directly regulated by the registers.

Constitution of those governed by registers

Most obviously, the registers see, and constitute, individuals to be self-interested.[129] Under the Land Registry Act 1862, given that there was no obligation to register land transfers, unless the individual saw a benefit to registration, they would not engage in the process.[130] The idea that individuals have a, and know their, financial (and/or reputational) self-interest is linked with the constitution of individuals as having the capacity to choose.[131] However, all registers (save, obviously, the registration of births and deaths) are based on choice. Capitalists choose to form, or exchange, a company (the registrable form is not the only option); an inventor chooses to seek, or exchange, a patent (many inventions are not patented); and voting is not compulsory. Of course, if they wish to get a patent or to vote, then they must engage with the register (unlike in the case of the registration of land); the point here is that the registers provide a formalisation of agency, and an acknowledgment of the subjective value individuals see in their

128 Foucault (n 18 above) 313.

129 For Foucault (ibid 45), 'government is only interested in interests'.

130 On that basis, land registration was not that beneficial – only 113 titles had been registered by 1885: S Rowton Simpson, *Land Law and Registration* (Cambridge University Press 1976). Simpson also noted that it was the 'hostility of solicitors' that was a key reason for the failure of the Land Registry Act 1862: ibid 43. One pamphlet asserts that the 'legal profession have set their faces against Lord Westbury's Reform, not because they suspect its soundness in law, but because it is likely to lessen professional profits': Howard Reed, 'Land: Its Registration and Transfer: A Letter to Landowners' (Effingham Wilson 1864) iv–v.

131 Another example here is the registration of deeds that gave debtors 'protection in bankruptcy': Bankruptcy Act 1861, s 198. There was no requirement that debtors register deeds; however, it may have been in their financial self-interest.

transactions.[132] This, then, raises the concept of *homo œconomicus* – 'someone who pursues his own interest, and whose interest is such that it converges spontaneously with the interests of others' and 'is eminently governable'.[133]

Financial self-interest also applies to professional registers where an individual, if seeking to practise and make money in a field, needed to be registered (instead of working in another profession). Further, members of the professions have reputational interests – to the extent that being a solicitor, doctor or pharmacist demonstrates a particular status in society.[134] They all have to undergo examination to qualify, and, as such can be seen to be disciplined by their writing within their areas of knowledge.[135] More broadly, a registered trade mark was linked with the 'goodwill of the business';[136] and the 'object of a trade mark' was understood then as a means to 'secure to a trader the benefit of his reputation'.[137] On the other hand, the register of newspaper proprietors under the Newspaper Libel and Registration Act 1881 was a double-edged sword for registrants – it protected them from libel claims for reports of 'proceedings of a public meeting';[138] on the other hand, the publicly accessible register[139] meant that it was easier for proprietors to be identified for libel suits arising from other newspaper stories.[140]

---

132 Medieval and early modern systems were not about choice. The Domesday Book was an accounting of the land for William I. The centralisation of records of heraldic arms related to the role of the nobility in society. The registers for ships and books allowed for the regulation, by the Crown, of trade and printed materials for the good of the realm. See, further, Chris Dent, 'Registers of artefacts of creation – from the late medieval period to the 19th century' (2014) 3 Laws 239–281.

133 Foucault (n 18 above) 270.

134 A pamphlet, discussing an earlier proposal for the registration of the medical profession, said 'by registering the members … it formally recognises them, for the first time, as a distinct body': John Forbes, 'A critical examination of Sir James Graham's Bill' (John Churchill 1845) 14.

135 Michel Foucault, P*sychiatric Power: Lectures at the Collège de France 1973–1974* (Palgrave Macmillan 2006) 48.

136 Trade Marks Registration Act 1875, s 2.

137 Henry Ludlow and Henry Jenkyns, *Treatise on the Law of Trade Marks and Trade Names* (William Maxwell 1877) 65.

138 Newspaper Libel and Registration Act 1881, s 2.

139 Ibid s 13.

140 In the debate that preceded the Newspaper Libel and Registration Act 1881, it was said that 'at present, it was very difficult to find out who was the real proprietor of a newspaper, but this registration … would prevent a man sheltering himself under the wing of a man of straw': HC Deb 11 May 1881, vol 261, cols 219–220, Hutchinson.

From a Foucauldian perspective, the voluntary nature of these forms of registration emphasises the lack of 'repression' in this form of disciplinary governance.[141] Even where registration is needed for some other purpose, then self-interest encouraged registration. This applies to the commercial registers, such as where a business owner needed to register their trade mark in order to prevent others from using the same mark.[142] The registrants' competitors are also constituted to be part of the system, even if they do not register anything themselves. For example, that competitors could oppose patent registrations[143] sees non-registrants as self-interested. The key interest of competitors was 'selfish' and related to certainty – a patentee's competitor could see what was in the specification and so they had knowledge of the limits of the patent right, so they could work around it. Overall, then, the choices made by all associated with registration go to the state's answer to the question 'Who are you?'[144] – the individual is, *inter alia*, a patentee, a competitor, a voter, or a professional. The legislation, then, can be seen to reflect the growing role of the individual *qua* individual in the society of the time.

Morality as conduct of conduct

With respect to 'proper conduct' in the nineteenth century, the system of registers can be understood to reinforce moral strictures.[145] There are a number of aspects of the registers that suggest moral purposes underlay, but did not define, the introduction of the registers.[146] The most obvious is the extent to which individuals were to be protected as a result of registration. This morality, of course, was limited to the externalised modes of governance: the market and the professions – to

141 Foucault (n 15 above) 40. Expressed differently, registration was an act of 'freedom' and not the result of a 'legislative straight jacket': Foucault (n 18 above) 68.

142 Trade Marks Registration Act 1875, s 7.

143 Patent Law Amendment Act 1852, s 12. Under this provision, interested parties could oppose an application for registration on the basis that, for example, the invention was not novel. This meant that, should a competitor already be using a machine that matched the invention described in the patent application, then the patent should not be granted – allowing the competitor to keep doing what they had been doing.

144 Tadros highlights the links between the question and Foucault's understanding of biopower: Victor Tadros, 'Between governance and discipline: the law and Michel Foucault' (1998) 18 Oxford Journal of Legal Studies 75–103, 102.

145 Even the labels used import normative obligations. 'Certificates of Conformity' were issued for those who had ended their period of bankruptcy: Bankruptcy Law Consolidation Act 1849, s 198.

146 That said, there was the claim that the principles of land registration were 'to make land transfer simple, and simplicity has an intrinsic virtue': Ruoff (n 108 above) 12.

a large extent, then, the only morals that mattered were economic. For Foucault, the 'problem' was 'one of the moral training of populations: their manners must be reformed so as to reduce the risks to bourgeois wealth'.[147]

Unsurprisingly, the purpose of the institution of registered companies was to limit fraud. For example, the 'great object of the Committee which sat on this subject was to prevent the formation of fraudulent companies'.[148] More specifically, the

> ... principal object of the [Joint Stock Companies] Bill was, that there should be established a public office ... in order to know the real history of these companies ... [to] put a stop to the system that had been so long carried on of attaching the names of hon. Members, and men of importance and property, to schemes in order to entrap the unwary.[149]

Of course, there is an economic aspect to fraud – the loss of money – however, the use of language such as 'entrap' reinforces the moral component.[150] The registration of land titles was also, in part, to 'prevent fraud and forgeries'.[151] As a final example, one justification for the introduction of registration for friendly societies was that the capacity to sue, as a result of registration, was seen as 'necessary to prevent embezzlement of the funds by officers, or the withholding the sums due to rightful claimants'.[152] Registration, therefore, was seen as a mechanism to protect populations of individuals in society from immoral and illegal actions.

There is also a morality, in the sense of normative standards,[153] that limited access to that which was regulated by registration. The most obvious example is the property requirement for registering to vote – with the enfranchisement not being extended to those without the funds to own property. Further, the education that was required to register as a medical practitioner meant that the profession was out of the reach of most in society. And, of course, being able to register ships, or to register land, required access to substantial capital. This fits in

147 Michel Foucault, *The Punitive Society: Lectures at the Collège de France 1972–1973* (Palgrave Macmillan 2015) 105.

148 HC Deb 3 July 1844, vol 76, col 273, Hawes. Further, the lists of stockholders, kept by the companies, was, in part, 'to prevent fraudulent jobbing in shares': HC Deb 10 July 1844, vol 76, col 559, Gladstone.

149 HC Deb 3 July 1844, vol 76, col 275, Gladstone.

150 For a discussion of the moral basis of political economy, at least as expressed by Smith, see Athol Fitzgibbons, *Adam Smith's System of Liberty, Wealth and Virtue* (Oxford University Press 1995).

151 James McDonnell, 'The Report of the Registration Titles Commission, 1857' (1858) 2 Journal of the Dublin Statistical Society 191–203, 191.

152 HL Deb 12 August 1850, vol 113, col 1017, Beaumont.

153 Another inference of morality in the systems is evident from the use of 'piracy' to describe the infringement of registered designs: Designs Act 1839, s 3.

with the broader assessment that the law of the nineteenth century had a bias towards the capitalist class. For Schumpeter, the nineteenth century was a time when the 'ascent of the business class was most nearly unimpeded, most nearly unchallenged'.[154]

Protection was also a reason for the creation of one of the 'professional' registers. The register of coalwhippers was explicitly to protect their interests as labourers – to limit their exploitation. The practices, the 'evils', of the time were described by Gladstone:

> two-thirds of the men employed were engaged by publicans ... [T]he publicans, in order to increase their business, furnished the men with the implements of their calling. Naturally the men who drank the most would be considered the best customers to the publican. ... The result of this was that great reductions were made in the wages of the men for the drink they consumed in the public-houses, where they were engaged, to the great injury of their families, and to the moral degradation of the workmen themselves.[155]

That said, there was no discussion of the benefits of the register, other than that it was a central repository of names of those who could be employed, 'on reasonable terms' to unload coal from ships.[156] Despite Gladstone stating that, generally, the 'Legislature should not interfere with labour',[157] he supported the Bill. The latter sentiment fits in with one theme of writers such as Malthus who considered that workers were more than just 'manufacturing animals'.[158]

Finally, the importance of 'rent' as a problem grew over the course of the nineteenth century. Ricardo's definition of it – building on that of Malthus – was that 'portion of the value of the whole produce which remains to the owner, after all the outgoings belonging to its cultivation, of whatever kind, have been paid, including the profits of the capital employed, estimated to the usual and ordinary rate of the profits'.[159] Rent, therefore, was seen as excess profit,[160] that which was not justified in terms of expenditure or an appropriate return on investment. It was, then, a moral issue, a question of unfair practices (though still related to market activity). The clearest example of registers acting as a defence to rent-seeking is those that cover industrial property rights. The Patent Law Amendment Act 1852 stipulates that

---

154 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (HarperPerennial 2008) 393.

155 HC Deb 1 August 1843, vol 71, col 78–79.

156 Ibid col 82.

157 Ibid col 78.

158 Winch (n 122 above) 336.

159 Quoted in R Walter, *A Critical History of the Economy* (Routledge 2011) 92–93.

160 Or it could be seen as 'unearned income' (Landreth and Colander (n above 72) 97), with this articulation imputing a greater moral judgement.

the 14 years of protection may start from the date of application for registration;[161] thereby limiting the extent to which an inventor can claim their monopoly.[162] The filing of the specification also meant that they could not overclaim the invention – that is, the patentee could not sue a competitor for the production of a product that was not within the confines of the specification.[163] Further, limiting the registration of trade marks to specific classes of goods meant that the trade mark owner could not (unfairly) overclaim the use of the mark. Overall, then, while the finding may not be surprising, the registration system shows evidence of a morality that informed aspects of its operation.[164]

The desire for the state to protect against fraud[165] or forgeries was an expression of that moral obligation. The desire for the state to protect the coalwhippers, a specific and restricted class of individuals, from exploitation reflected a similar morality.[166] Even the role that registers played in reducing rent seeking may be understood as a degree of protection. The point was not to

161 Patent Law Amendment Act 1852, s 23.

162 Notwithstanding the provisions of Patent Amendment Act 1835 (still in force after 1852, as a result of s 11 of the later Act) that allowed for the prolongation of a patent where a patentee can demonstrate to the Privy Council that the patent term should be extended: s 4.

163 The registration of designs also meant that only a copy of the registered design, or a part thereof, could give rise to an infringement action: Designs Act 1839, s 3.

164 For an understanding of the role of morality in the mid-nineteenth century, see B Hilton, 'Moral disciplines' in Peter Mandler (ed), *Liberty and Authority in Victorian Britain* (Oxford University Press 2006).

165 One pamphlet argued that registration *enabled* a 'great facility [for] the introduction of fraudulent votes upon the register, [while] the most substantial freeholder in the country may be harassed year after year with impunity by groundless objections to his vote': Frederick Slade, 'A Letter to Lord John Russell ... Upon the Defects in the English Reform Act' (Saunders and Benning 1837) 22. Another pamphlet, however, argued that a key purpose of voter registration was the 'prevention of bribery and intimidation': John Chambers, 'An Examination into Certain Errors and Anomalies in the Principles and Detail of the Registration Clauses of the Reform Act' (Saunders and Benning 1832) 25.

166 Though the concern was limited – the legislation lapsed in 1856. As was noted in a pamphlet, the Act was in 'direct opposition to all the usual maxims of certain political economists, which recognise no mean term between leaving all labour to protect itself, so as to be regulated by the law of demand and supply, or the protection of all labour by the direct agency of government': William Deering, 'A Brief Account of the Origin, Establishment and Working of the Office for the Registration and Regulation of Coal Whippers of the Port of London' (np 1851) 6. For Foucault (n 18 above) 64, the new forms of governance required there be a 'free labour market' made up of 'sufficiently competent, qualified' workers. Restrictions relating to coalwhippers were not a free market process, and the workers were not necessarily competent or qualified – so did not fit the governmentalist mode.

remove all risks;[167] nonetheless, the majority of the expressions of morality on the part of the state were focused on the interests of those in the market.[168] Again, the registration of unions was in the interests of those who controlled the market, with registration allowing the registrar to check that the proposed rules were not 'objectionable'.[169] Further, the expressions related to the use of trade marks (protecting firms), the registration of companies (protecting shareholders), land titles (property owners) and the registration of deserters (shipowners and trading companies). Only one, the protection of patients from unqualified doctors, can be seen to have an impact on wider society[170] – even there, the concern may be for maintaining the health of the workers in the interests of their employers.[171]

General public, and church, not constituted by registers

The introduction of the suite of registers did not mean that the shift to governmentality was complete. The registers could only directly guide the conduct of those who actively participated in the systems. In order to show the incompleteness, there is value in considering those who were not. The two populations to be considered here are the general public and the Church. They are, nonetheless, bound through the norms perpetuated by registrants in the 'tight grid of disciplinary coercions that actually guarantee the cohesion of the social body'.[172] The lack of direct guidance reflects the fact that there were no pre-existing legal commands that governed these populations prior to the rise of registration.

---

167 The limited liability of joint-stock companies is a further example – 'immoral corporate behaviour was made possible by the absence of the individual responsibility of directors for their actions in their corporate capacity': Taylor (n 113 above) 30.

168 One pamphlet, similarly, suggested that an issue that arose in unions before they could be registered was that 'larceny and embezzlement were not punishable offences where only the property of Trade Unions was stolen, so that an official of such a society might, with impunity, appropriate their funds to his own purposes': Anon, 'The Trades Union Commission Report' (np 1867) 260.

169 *Eleventh Report* (n 45 above) 24.

170 Given different attitudes to livestock, it may be that the challenges posed by unqualified veterinary surgeons were market-based, rather than moral.

171 Access to treatment was not equal. Practitioners 'could be few and far between in the slumlands where they were really needed': Roy Porter, *The Greatest Benefit to Mankind* (Norton 1999) 359.

172 Foucault (n 15 above) 37.

Most obviously, individuals *qua* individuals did not seek registration.[173] Those who were born and those who died were registered regardless of their desires. With respect to the Representation of the People Act 1832, specifically, a provision within the statute itself noted that it was 'expedient to form a register of all persons entitled to vote'.[174] Higgs has argued that the

> ... key concept in the history of the [General Register Office] is ... citizenship, and the transition from political and social rights based on property-owning to the concept of the citizens as having rights and obligations with regard to the nation state.[175]

However, there was no constitution of all citizens through registration. There was no conduct that was internalised that was consequent to registration (outside the market and the professions); even the capacity to vote was voluntary, as was the initial registration to vote.[176]

More broadly, there was no reference to the 'public interest' in the commercial registers such as under the Patent Law Amendment Act 1852. This fits with the observation that the law of the time only included 'almost patronising views of the public'.[177] That said, in 1881, there was a 'public benefit' aspect to the 'proceedings of a public meeting' defence for registered newspaper proprietors.[178] There were, nonetheless, tangential references to the 'public' as an abstract collection of individuals in discussions around a small number of registers. For example, the register of medical practitioners was established to reduce the harms caused by the 'class of uneducated ignorant quacks who practised on the credulity of the public'[179] Further, registered pharmaceutical chemists:

> would confer a benefit on the public ... by performing in a more safe and efficient manner the duties of pharmaceutical chemists in the preparation of medicines, many of which are powerful poisons, and

---

173 More broadly in law, the working classes were acted upon paternalistically. As an example, one patent was seen to be valuable to society because the invention would improve the 'minds and morals' of the population: *Baxter's Patent* (1849) 5 HPC 904, 905.

174 Representation of the People Act 1832, 37.

175 Winch (n 122 above) 129.

176 Representation of the People Act 1832, s 20.

177 Chris Dent, 'New insights in patent history': an application of evolutionary theory' (2018) 8 Queen Mary Journal of Intellectual Property 171, 179. Mill (n 30 above) 889, in his discussion of the benefits of investment in knowledge creation, focused on its benefits to 'mankind' or 'those members of the community who require external aid'.

178 Newspaper Libel and Registration Act 1881, s 2.

179 HC Deb 2 June 1858, vol 150, col 1406, Cowper.

> ought not to be entrusted in the hands of ignorant and inexperienced persons'.[180]

Even solicitors were seen as being of value to the clients they advised. The emphasis of these is as much on the ignorance of the public (echoing the state's interest in knowledge) as on their health.

Despite some of the registers, there were limits to the nineteenth-century state's interest in knowledge of the population. There was no register for charities[181] (beyond the regulation of friendly societies).[182] The focus of charities, in that century, was on 'pauperism'.[183] This, of course, was also the focus of the Poor Laws, which, themselves, underwent significant reform in 1834.[184] The limits of these forms of welfare meant that there was still room for philanthropy,[185] including a prevalence of 'charity bazaars'.[186] The state intervention was exercised by the Poor Law Commission; while the moral policing was of the recipients of charity,[187] rather than the donors or the charitable institutions. As such, there was little need for a register of charities; an assessment reinforced by the fact that there was no need for the state to 'know' those who were not working.[188] In other words, the poor, other than through the short-lived regulation of coalwhippers, were not directly regulated via registration. This group were not in a

---

180 HC Deb 17 March 1852, vol 119, col 1221, Bell.

181 Though one was called for: Thomas Hawksley, 'The Charities of London, and some Errors of the Their Administration' (John Churchill 1869) 15.

182 Scrope highlighted the roles of the 'poor law, private charity [and] self-supporting and self-managed Friendly Societies' in his discussion of how the working classes can be supported in the 'praiseworthy endeavours' to 'look after themselves financially' (n 42 above) 44.

183 Megan Webber, 'Troubling agency: agency and charity in early nineteenth-century London' (2018) 91 Historical Research 116–136, 120. Procacci discusses pauperism from a Foucauldian perspective in Giovanna Procacci, 'Social economy and the government of poverty' in Gordon and Miller (n 12 above).

184 Under the Poor Law Amendment Act 1834.

185 Including corporate philanthropy: see, for example, Josephine Maltby and Janette Rutterford, 'Investing in charities in the nineteenth century: the financialization of philanthropy' (2016) 21 Accounting History 263–280.

186 See, for example, F K Prochaska, 'Charity bazaars in nineteenth-century England' (1977) 16 Journal of British Studies 62–84.

187 'To prevent dependency and fraud, many charities subjected the poor to intense scrutiny and distributed aid in carefully measured quantities': Webber (n 183 above) 121.

188 There was also an unsuccessful call for the registration of infectious diseases. See, for example, Joseph Rogers, 'Reports of societies: Poor Law Medical Officers' Association' (1870) 2 British Medical Journal 611, 617. This was after the Contagious Diseases Acts of 1864, 1866 and 1869, under which there was the forced examination of prostitutes who worked near naval and military stations.

population that was caught by the registers.[189] They were, however, indirectly regulated through the professions, unions and friendly societies. Similarly, the Church was not constituted by registers. This, though, did not mean that it was outside the processes of governance – as noted above, Miller and Rose considered that the Church was an externalised form just as the market was. This, of course, represented a change from the early modern period when the Crown was more actively the head of state and Church.

The shift in the relationship between the two institutions is most evident in the debates around the Register for Births, Deaths and Marriages. A justification for the register was to enable the inclusion of dissenters in the official records.[190] A follow-on concern of the established Church was that civil registration would result in the 'neglect of baptism'[191] – limiting the knowledge of the religion around its future constituents. The secular, not the religious, practices of governance were of greater importance. Further, 'much evil of the moral kind would also be produced ... [which would] go far to unchristianize the country'.[192] Hale asserted that the register was part of a 'great scheme ... for separating religion from the state, for making the care of public worship ... a mere matter of police'[193] – an assessment that is almost Foucauldian. It also accords with the assessment that registers reflected the development of an English governmentality – the 'double movement ... of state centralisation ... and of dispersion and religious dissidence'.[194] Notably, too, the Register for Births, Deaths and Marriages provided for the registration

189 Procacci has discussed how the poor, in France, were subject to 'processes of exclusion': Giovanna Procacci, 'Governing poverty: sources of the social question in nineteenth-century France' in J Goldstein (ed), *Foucault and the Writing of History* (Blackwell 1994) 212.

190 The centralised register would also provide proof of marriage for those outside the Anglican Church. Prior to the 1836 Act, the registers of 'Nonconformists ... were not admissible in court as evidence ... [and] Dissenters who were married using their own rites were not ... married for legal purposes': Higgs (n 123 above) 116.

191 Hale (n 97 above) 10.

192 Ibid 11. Hale also asserted that the registration of births, as opposed to baptisms, meant that the 'knowledge of the immoral habits of society, when reduced to tabular form, and calculated at the percentage of decrease and increase, has a tendency to familiarize the public mind to evil, than to keep individuals from transgression': ibid 46.

193 William Hale, 'Remarks on the Two Bills now before Parliament entitled A Bill for Registering Births, Deaths and Marriages in England and a Bill for Marriages in England' (np 1836) 7.

194 Foucault (n 12 above) 88.

of Jewish marriages,[195] but not those of any other religions.[196] The Church was marginalised by the registers – save for the registration of certain Christian marriages. This did not mean that it was no longer relevant for inculcating certain forms of conduct within its target population, only that the Church's mode of governance was not linked with the focus on the market evident in many nineteenth-century registers.

CONCLUSION

In sum, the introduction of the registers in a range of legal areas was an historically contingent process and can be seen as an adapted technique of governance.[197] These registers went far beyond the practices of the accounting of population that started, for Foucault, in the eighteenth century. The nineteenth-century registers demonstrate how the law began to be embedded within society, rather than just acting upon it. They formalised the externalisation of governance – notably to the market and professions – and contributed to the inculcation of certain norms of behaviour within those who chose to be bound by them. Even the apparent voluntariness (a suggestion of a 'freedom of behaviour'[198])of many of the registers reflects the manner in which individuals then, and now, are constituted by the different rationalities. That said, the shifts in governance were not total – the broader public and the Church, without direct benefits of participating in registration, had to wait until the twentieth century in order to be more fully embedded within governmentality. Registers, however, were a clear step toward the more limited role for law evident in society now.

195 Births and Deaths Registration Act 1836, s 30.

196 And, of course, there was no recording of marriages of other faiths under the pre-existing parish registers systems.

197 For another Foucauldian analysis of how past techniques of governance were adapted and reapplied over time, see Chris Dent, 'Patents over military equipment: shifting uses for shifting modes of governance' (2021) 30 Griffith Law Review 295.

198 Foucault (n 18 above) 65.

Northern Ireland
Legal Quarterly
Spring Vol. 76 No. 2 (2025) 338–342
Commentaries and Notes DOI: 10.53386/nilq.v76i2.1178

Not What the Bus Promised: Health Governance after Brexit by Tamara K Hervey, Ivanka Antova, Mark L Flear and Matthew Wood

Clayton Ó Néill
Queen's University Belfast
Correspondence email: clayton.oneill@qub.ac.uk.

Not What the Bus Promised: Health Governance after Brexit, Tamara K Hervey, Ivanka Antova, Mark L Flear and Matthew Wood (Hart 2023) 352pp; hardback £85/ebook £37.79/paperback £41.99.

There are few who read this review who have not at some time seen the pictures of the now famous (or infamous) Brexit bus emblazoned with the false, wild and wonderful, hopeful and aspirational (depending upon perspective and/or political persuasion) promises that enthralled, coaxed or appalled its 'viewers'. Hervey et al have written a book that seeks to interrogate the substance of these promises. The title of the book (*Not What the Bus Promised: Health Governance after Brexit*) is clever – it attracts potential readers with an open-handed invitation to analyse those big, big promises. Ultimately, the book consists of a deep dive into the realities (and non-realities) of health governance in the United Kingdom (UK) after Brexit.

Once the reader is enticed into the labyrinthine net of the inter-related stories and cases laid out in this book, there is a treat in store. The 'Foreword' clearly delineates the emphases placed by the authors on a number of key themes. It is pointed out therein by the author of the 'Foreword', Dan Wincott, that making sense of Brexit is 'a mammoth task' (at vii). The book attempts to unpick the legal

terrain underpinning what we come to know are the fallacies behind the promises.

The 'Introduction' sets out the narrative of socio-legal scholarship and, in so doing, provides a very interesting social backdrop to the impact of the Brexit bus and its promises. The authors describe the aims of the book clearly and situate these aims within the context of stories within a story. Such stories are personal and complex and point to the similarities of experience, and of loss, endured during the post-Brexit era, especially in the context of Covid-19. They describe the many conversations had on foot of conducting the project and the reader understands and empathises with these conversations and these stories. The authors explore how the research design is linked to, and evolves from, particular narratives and relate the research to specific ethical dilemmas.

The book fleshes out these methodologies in a second chapter. The authors describe the methodology as involving 'close doctrinal analysis of pre-existing and novel legal texts and interviews with legal and policy actors, especially in London, Belfast and Dublin' (at 7). The outcomes are compared with the hopes and dreams of 'ordinary people' for a 'legitimate post-Brexit future for the NHS, obtained through novel ethnographically-inspired methods' (at 7). The authors describe in detail how they distinguish between ordinary people and elites/experts. They also clearly explain how individuals were selected and how the data was interpreted.

At this point, this reviewer felt that the second chapter describing and analysing the methodological approach was almost too much – it may have served to overcomplicate the reasoning behind the approaches adopted. The detailed descriptions of the interviews and their processes with health policy stakeholders and street conversations may, indeed, have led to the production of meaningful data, but the reader eagerly awaited the 'meat' of the book. This was certainly delivered in subsequent chapters. These compelling chapters outline the effects of European Union (EU) law on health and the National Health Service (NHS) and broaden our understanding of the complexities governing the intersection between the two. The chapters describe cross-border healthcare in Great Britain (GB) and Northern Ireland (NI) and explore the related challenges with keen insight. Immigration law and NHS staffing are analysed, and the complexities therein are teased out with discernment. The authors delve into the transition period after the UK left the EU and its aftermath and provide concerning conclusions and challenges for UK healthcare. Chapter 4 is particularly interesting because it jumps into the topic of the very title of the book – the bus! The book explains that many people did not believe what the bus promised, describing it as

'the bus of lies' or 'a load of old crap' (at 40). This was even felt by people who voted 'leave'. The authors provide a fascinating analysis of this, especially in relation to the way in which interviewees had a 'shifting and contradictory sense of '"knowledge"'. It is argued here that the analysis provided:

> suggests that the claim on the bus works to manipulate the hopes of people who would like to see a better-funded NHS, by offering an implicit promise that the benefits associated would emerge from the process of leaving the EU, but without even explaining how that process would lead to the desired outcomes (41).

The discussion in chapter 5 is very thought-provoking. It focuses on cross-border healthcare before the Withdrawal Agreement and the EU–UK Trade and Cooperation Agreement. It is extremely useful for anyone interested in understanding the nuances of cross-border relationships post-Brexit. Where does Northern Ireland fit into this context? Flear provides an insightful explanation of his experience of someone from outside Northern Ireland, currently living in Northern Ireland, which has now become his home (at 74). He refers to the fears surrounding Brexit as well as a feeling that Brexit could deliver a 'best of both worlds' outcome. According to Flear, 'to cut across many of these views is a feeling that Brexit is something happening that is beyond the control of most people. So: why worry too much?' (at 74) The chapter makes an excellent effort to explain the implications of Brexit on health in Northern Ireland. The book highlights the fact that all of the interviewees 'shared a complex understanding of the island of Ireland as a fragile, but functioning, debordered space' (at 87). Further useful clarification is given by the authors:

> There was no sense that people from Ireland receiving healthcare in Northern Ireland were perceived as somehow 'other', as EU citizens, and therefore should be excluded from access to healthcare. Instead, there was a strong sense of shared healthcare infrastructure, of 'health corridors'; through which people access the healthcare they need on either side of the border depending on convenience and cost. The vast majority of people we talked with expressed concern, or even fear, that this precious and precarious way of life would be lost as the UK's relationship with the EU unfolded. (at 87)

Halfway through the book, the assessment lens broadens to include insights into medicines, medical devices and equipment within specific regulatory frameworks and contexts. The shift to biomedical research is interesting and the authors conclude that lack of agreement as to what constitutes the overall governance environment for biomedical research is worrying. Not surprisingly, the people who were interviewed on the streets did not discuss biomedical research,

but there was a desire for the NHS 'to be, remain, or become the best in the world' (at 143).

The final third of the book relates to interconnecting relationships – trade, NHS, health and the associated health governance that operates within (and beyond?) these relationships. Issues such as accountability and misconduct are touched on, but fleetingly, and perhaps that is a pity because these are 'bread and butter issues' – even life and death ones – that are arguably of more concern to the reader than the more torturous consideration of intangible EU regulations.

The vexed question of accountability for post-Brexit health governance is teased out in chapter 11 by analysing the views of 'ordinary people' and by discussing the possibility of legal accountability of this governance from within the context of pervading electoral law, evidence of misconduct in public office, use of the NHS logo and issues pertaining to freedom of information. The authors draw the interesting conclusion that, notwithstanding difficulties around assigning accountability to Boris Johnson or to subsequent governance in relation to the 'broken promise', 'a significant proportion of people thought that law should be a viable accountability process in this instance' (at 175). The authors provide chilling and conclusive evidence of the deficiency of UK law as it applies to this area.

The concluding chapter offers an interesting and informative summary of the overall findings of the research. The authors outline in some detail what they have learnt about the main effects of leaving the EU, particularly in respect of the impact on the NHS and health, summarised as 'detrimental' but not as 'devastating' (at 178). They make very insightful judgements about 'new' and 'surprising' findings, including those relevant to migration, distrust and perceived loss of the use of potential benefits from leaving the EU. The analysis of the rock of the law as 'holding the ring' in terms of peacekeeping between complex 'players' is extremely interesting and offers an alternative evaluative viewpoint in a changing legal landscape that is progressive and insightful.

The way in which the book summarises how 'truth' comes to be formed – through story telling (and story-making?) – is a high point in the book. It causes us to reach within to see what our own Brexit and Covid-19 stories are, and were, and to interrogate the degree to which they, in turn, are truth-making or communicate meaning that resonates beyond the self. And this is what the book has done – it has communicated meaning beyond the jargons or captions designed to manipulate the viewer/reader. It has sought 'truth' within what is identified as a changing and challenging socio-legal context, and the telling of that truth (or those truths) has been captivating and

instructive. The authors identify what they have learned and continue to learn, and therein lies the challenge for the reader. We are now emboldened to go beyond the promises of the bus (or its equivalence) and to seek the complexities of truth behind the visual prompt. This book certainly helps the reader to interpret the impact of leaving the EU on UK healthcare provision. The stories told by individuals give emotional and social context to the description of the legal landscape and provide the book with 'heart'.

Were there gaps in the book? Yes, but it would be impossible for one book to quantify all the ways in which Brexit had an impact upon society or upon health. Perhaps, the narrative could have focused less on regulatory frameworks at EU level and more on commentary on societal contexts at the time of Brexit and beyond, but that, arguably, was not the job of the book. The authors set out to demystify the claims of Brexit about healthcare, and they certainly did so. They did not provide all the answers (this would be an impossibility), but there is much to be learnt about Brexit and health governance in this book. I hope politicians will read it and be chastened by the knowledge that words are power, and promises, which, if left unfulfilled, can come back to haunt. I hope it will be read by legal 'experts' at both UK and EU level, who may gain greater understanding of how the law works, or fails to work, cross-jurisdictionally in a time of febrile political flux. But mostly, I hope it will be read by the people whose stories of grit, determination, loss and endurance provide the pivotal backdrop to this innovative and interesting book.

Northern Ireland
Legal Quarterly
Vol. 76 No. 2 (2025) 343–358
Commentaries and Notes DOI: 10.53386/nilq.v76i2.1186

Out of time and out of pocket: the Victoria Square apartments debacle and the (empty?) promise of the Defective Premises Act (Northern Ireland) 2024

Louise Rhodes

Queen's University Belfast
Correspondence email: l.rhodes@qub.ac.uk

ABSTRACT

The residents of apartments housed within the Victoria Square residential complex in central Belfast were ousted from their homes in February and April 2019 due to concerns over the safety of the building structure. In March 2024, the residents launched a joint claim for compensation under the Defective Premises (Northern Ireland) Order 1975 which was struck out in the High Court by Mr Justice Huddleston applying the Limitation (Northern Ireland) Order 1989. The judgment became the subject of much media attention in Northern Ireland and ignited a swift call to action by Members of the Legislative Assembly to align the legal regime here to that in England and Wales. In September 2024, a very short statute in the form of the Defective Premises Act (Northern Ireland) 2024 came into force and claimants were permitted to appeal the High Court's ruling to the NI Court of Appeal considering the new legislation. Notwithstanding the revival of the claimants' case, this commentary demonstrates how the 2024 Act falls short in many aspects due to its rushed inception and scant provisions; it is not a silver bullet for these types of claims in Northern Ireland.

Keywords: defective premises; high-rise buildings; leasehold covenants; contractual liability; negligence; pure economic loss; statute of limitations.

INTRODUCTION

The judgment in the case of *Ulster Garden Villages Ltd & Maeve Nora McDonald and others*[1] was delivered on 13 March 2024 by Huddleston J sitting in the King's Bench Division of the Northern Ireland High Court.[2] Unfortunately for the apartment owners involved, their case was dismissed by the sitting judge as lacking sufficient merit to proceed to a full trial. The impact of the ruling has undoubtedly caused much 'personal trauma and worry'[3] to the individuals affected, as they were statute barred under the Limitation (NI) Order 1989 from proceeding to trial in their claim for compensation under the Defective Premises (NI) Order 1975 for defects in the building structure discovered in and around February 2019. Regrettably, the (vacant) apartment owners continue to be liable for incumbent property levies which now include property management charges, in some cases mortgage monies and, up until April 2024, domestic rates[4] and alternative living costs.[5]

Despite the immediate and obvious negative consequences of the ruling for the apartment owners in this case, it has precipitated a watershed moment in the legal consciousness around these types of claims in this jurisdiction in the form of the Defective Premises Act (NI) 2024. The former legislative mandate in Northern Ireland for such claims at the time of the hearing (the changes brought in under

---

1 *Ulster Garden Villages Ltd & Maeve Nora McDonald and Others v Farrans (Construction) Ltd & Others* [2024] NIKB 15. Hereafter referred to as *Ulster Garden Villages Ltd*.

2 At the time of writing, the author has been informed by the Northern Ireland Courts and Tribunals Service that the parties settled an appeal to the Northern Ireland Court of Appeal on 12 December 2024 on the procedural point on whether the judgment of Huddleston J in the High Court can be reconsidered in light of the new Defective Premises Act (NI) 2024, or whether this judgment is in fact a settled matter prohibiting a re-opening of the case under s 2(5) of the 2024 Act. It is also important to note that this approach aligns with the English Court of Appeal's decision in *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772 wherein it was held that the new 30-year limitation period prescribed under s 135 of the Building Safety Act 2022 was to be considered as always having been in force where proceedings began before the 2022 Act took effect, but were still ongoing. Thus, BDW Trading Ltd was allowed to amend its claim form to take advantage of the increased limitation periods promulgated under the new legislation.

3 *Ulster Garden Villages Ltd* (n 1 above) [140].

4 Note that apartment owners are no longer liable for domestic rates on their properties and have been refunded any rates paid by them since April 2019 by the Department of Finance: see Department of Finance, 'Rates resolution reached for Victoria Square apartment owners' (27 March 2024).

5 BBC News NI, 'Victoria Square apartments: "no assurances" on compensation' (*BBC News NI* 11 April 2019).

the 2024 legislation are discussed in greater detail below) can be found in article 3 of the Defective Premises (NI) Order 1975. Thus, claims for compensation for defective premises had to be brought six years after building works were completed in tandem with article 4(d) of the Limitation (NI) Order 1989. In relation to any further remedial works to the residential building carried out after the date of its completion, time accrued from the date those (remedial) works were deemed completed. In addition, article 11 of the 1989 Order prescribes that claims in negligence where facts relevant to the cause of action were not known at date of accrual may be brought within three years from the date of discovery of such facts. The plaintiffs in this instance were within the statutory timeframe under the mantle of article 11 of the 1989 Order, but ultimately lost on this ground for reasons related to damage suffered amounting to 'pure economic loss' (as opposed to personal injury or damage) which is discussed in more detail below.

Following the judgment, the spotlight was inevitably put on the relative futility of the Defective Premises (NI) Order 1975 in conjunction with the Limitation (NI) Order 1989 for historic structural defect compensation claims of this kind. The minimum standard petitioned for by the owners and their representatives at that time was that promulgated in England and Wales under the Building Safety Act 2022.[6] The position there was that apartment owners in the same circumstances as the NI litigants would be allowed to make a legal claim for compensation 30 years from the date in which a defect is, in law, deemed discoverable (ie the date of building completion)[7] or 15 years after the date from when remedial works to said premises took place.[8] Given the acute media attention on the case, it was unsurprising that the Minister for Communities, Gordon Lyons, set into motion the Defective Premises Bill 2024[9] which reached its final reading stage at the end of June 2024 and was passed into law in the form of the Defective Premises Act (NI) 2024 in September 2024. This very succinct piece of legislation (four clauses) mirrors the English provisions contained in sections 134–135 of the Building Safety Act 2022. However, caution is warranted over the first glance favourability of the new Northern Ireland legislation. Inevitably, where statutory provisions are expedited in acute situations such as the case of the Victoria Square apartment owners, significant margins for error potentiate. The 2024 Act as it applies in Northern Ireland will require a more extensive reconfiguration to ensure that effective

6 C Lynch, 'Victoria Square apartment owners have building defects case dismissed by High Court' *Belfast Telegraph* (Belfast 13 March 2024).

7 The Building Safety Act 2022, ss 134–135.

8 Ibid.

9 Defective Premises Bill (NIA Bill 03/22-27).

safeguards are put in place to mitigate the deleterious impact of the litigation-avoidant corporate restructuring and financial modelling discussed below.

THE VICTORIA SQUARE RESIDENTIAL APARTMENT OWNERS' CASE: A LEGAL WATERSHED?

The Victoria Square Complex situated in central Belfast is a mixed purpose, high-rise structure consisting of various retail and commercial premises, as well as residential apartments. It is the residential section of the complex to which the claimants' cause of action related.

The residential wing of the Victoria Square complex elevates over nine floors, housing 91 residential apartments, 54 of which are owned by Ulster Garden Villages Ltd (a registered charity,[10] and the principal claimant in this case). The apartments, described as 'luxury' apartments, were completed during the onset of the 2008 global financial crisis in March of that year.[11] The building development company, Multi-Residential Developments Ltd (Multi), engaged Farrans (Construction) Ltd and Gilbert Ash Ltd (collectively FGA) to carry out the necessary construction work and 'fit-out' of the residential tranche of the Victoria Square complex. Further, Building Design Partnership Ltd provided architectural and structural/civil engineering services in relation to the development; the latter two companies were the key defendants in the case.

Following the completion of the residential building construction in 2008, Multi became the lead tenant of the residential section of the complex in April 2009 under a 250-year term lease with CGI Ltd[12] (the owner of the commercial tranche of the complex and head landlord). Importantly, under the terms of the head lease, Multi covenanted with CGI Ltd to keep 'the premises structure in good and substantial repair' and CGI symbiotically covenanted with Multi to keep the centre and centre structure in 'good and substantial repair'. Following the grant of the head lease to Multi, it sold off the individual apartments by way of sublease (for a term just shy of the 250-year head lease). Following sale of all the apartment units by 2015, Multi then assigned

10 *Ulster Garden Villages Ltd* (n 1 above) [1]–[5]. Note also, Ulster Garden Villages is a charity which 'was established under the Industrial and Provident Societies Act (Northern Ireland) 1946 with the principal objective of providing good quality housing and associated amenities for the disadvantaged and aged'. See Ulster Garden Villages Ltd.

11 Ibid. The certificate of practical completion was issued on 5 March 2008.

12 The collective name given by the court for: CGI Victoria Square Partnership, CGI Victoria Square Ltd and CGI Victoria Square Nominees Ltd; see *Ulster Garden Villages Ltd* (n 1 above) [6].

its interest in the head lease to two property management companies: Victoria Square (Chichester Street) Residential Management Ltd and Victoria Square (William Street South) Residential Management Ltd (collectively VSRM Ltd). Importantly, VSRM Ltd held an interest in the retained parts of the residential development which included the premises structure. The apartment subleases further contained certain repairing covenants, one of which was the repairing obligation in relation to the premises structure which VSRM Ltd was bound by, subject to its right to demand and collect a service charge from the apartment owners.

In February 2019, sudden damage to a reinforced structural concrete column (Column E2) in the blockwork partition between two of the apartments (the premises structure) became apparent and the residents of same were evacuated immediately. Several weeks later, on 10 April 2019, residents in the remaining apartments were quickly advised to leave their homes due to safety concerns of further potential movement in the building due to the damaged structural column.[13] The residents have not been able to return since. The retail and commercial section of the Victoria Square Complex remains largely unaffected. The plaintiffs further alleged that certain remedial works were carried out after the evacuation date by various unidentified parties and that these repair works in fact made the column weaker. It was further submitted that spalling brickwork posed a serious risk of injury to passers-by in the Chichester Street and Montgomery Street elevations of the building.

Considering the cumulative impact of these events and the cessation of repair works to the building, the plaintiffs claimed that the building could not be repaired and so theirs was a total loss scenario.[14] In rebuttal of these allegations, the defendants proceeded by way of a strike-out application under order 18, rule 19 of the Rules of the Court of Judicature (NI) 1980 that the plaintiffs' claim either in whole or in part disclosed no reasonable cause of action.

CAUSE(S) OF ACTION AND STRIKE-OUT

The primary causes of action in this case centred on the building contractors', architects' and civil engineers' statutory liability under the Defective Premises (NI) Order 1975, the general law of negligence and, significantly, the effect of the Limitation (NI) Order 1989 on bringing claims of this nature.

It should be noted in preface to the discussion of these that the plaintiffs unsuccessfully argued that CGI Ltd (the head landlord) was

13 Ibid [7]–[8].
14 Ibid [2].

directly liable to the apartment owners under the repairing covenants contained in the head lease (noted above) as 'successors in title' to Multi. Huddleston J rightly asserted that the plaintiffs were somewhat misguided on the operation of privity of contract and privity of estate in the landlord and tenant relationship; there was no privity of contract or privity of estate between CGI Ltd and the apartment owners as sublessees of Multi (and now VSRM Ltd).[15] Thus, as the learned judge explained, the owners 'have recourse through their ability to seek enforcement of those obligations as assumed by their direct landlord (i.e. the present management companies) on assignment'.[16] Consequently, the action against CGI Ltd was discontinued; VRSM Ltd, however, remains liable under the covenants to repair, as laid out in the apartment sublease agreements.[17]

BREACH OF STATUTORY DUTY UNDER THE DEFECTIVE PREMISES (NI) ORDER 1975 AND THE LIMITATION (NI) ORDER 1989

The mainstay of the plaintiffs' case rested on article 3 of the Defective Premises (NI) Order 1975 which stipulates that where persons connected with 'the provision of a dwelling'[18] and/or in the course of a business engage others to take on work in connection to the provision of a dwelling,[19] *all* entities are obligated to ensure that the work is done in a 'workmanlike manner' so that the dwelling in question 'will be fit for human habitation when completed'.[20] Bearing in mind the defects in the structural column of the residential complex and the fact that the plaintiffs' apartments were deemed unsafe for habitation in 2019, these provisions were clearly breached. Unfortunately for the owners, this cause of action was statute barred under the six-year limitation rule prescribed under article 3(5) of the Defective Premises (NI) Order 1975 and article 4(d) of the Limitation (NI) Order 1989 given that the building works of the residential part of the Victoria Square complex were completed in 2008, 12 years before the plaintiffs writs were issued.[21]

---

15 This part of the plaintiff's claim was ultimately discontinued.

16 *Ulster Garden Villages Ltd* (n 1 above) [135].

17 VRSM Ltd was not a party to the action and so the findings of the case in hand did not apply to it.

18 Defective Premises (NI) Order 1975, art 3(1).

19 Ibid art 3(4).

20 Ibid art 3(1).

21 Plaintiffs' writs were issued between April 2020 and March 2021. See *Ulster Garden Villages Ltd* (n 1 above) [6].

To circumvent the deadening effect of the limitation period, it was argued in the alternative that the discovery of (defective) remedial works undertaken in respect of the weakened structural column 'in or around February 2019'[22] restarted the clock running again to the point where 'time becomes at large until the completion of those works'.[23] Furthermore, the claimants tried to argue that there was an issue around concealment of the latent defect in the structural column which counteracted the statutory limitation period. Unsurprisingly, this approach was rejected by Huddleston J, mainly because the particulars of claim failed to specify the specific dates and individuals who had carried out the remedial work. At best, the latest point in time from which the limitation period could begin if the case was taken at its height, would have been before September 2011, when the plaintiff 'at the latest, took, possession on their acquisition of the premises',[24] as, after that point, they would have had knowledge of such remedial works. Significantly, the claimants failed to address the English High Court decision in *Sportcity 4 Management Ltd & v Countryside Properties (UK) Ltd*[25] which clarified that the performance of further remedial works on defective property does not revive a statute-barred cause of action.[26]

Further, in the factually resonant case of *Canada Square Operations Ltd v Potter*[27] the UK Supreme Court clarified the terms 'deliberately' and 'concealed' for the purposes of section 32(1)(b) of the Limitation Act 1980 as it applies in England and Wales.[28] Thus, for concealment to be actionable it must involve an intention to conceal a relevant fact or facts from the claimant by way of a positive act of concealment or by withholding information.[29] Once again, the plaintiffs' pleadings and affidavit evidence failed to meet this threshold and were struck out accordingly.

---

22 Ibid [51].

23 Ibid [63]. Note that the completion of works appears to be an ongoing process as part of investigations into the sustainability of the residential part of the Victoria Square complex.

24 Ibid [64].

25 *Sportcity 4 Management Ltd & Others v Countryside Properties (UK) Ltd* [2020] EWHC 1591 (TCL).

26 *Ulster Garden Villages Ltd* (n 1 above) [69].

27 *Canada Square Operations Ltd v Potter* [2023] UKSC 41.

28 That is 'any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant'. Note the equivalent in Northern Ireland lies in art 70(1)(b) of the Limitation (NI) Order 1989.

29 *Ulster Garden Villages Ltd* (n 1 above) [75], citing the UK Supreme Court Judgment in *Potter* (n 27 above) [109].

NEGLIGENCE: PURE ECONOMIC LOSS AND 'COMPLEX STRUCTURE THEORY'

The plaintiffs' claim in negligence at first glance seemed to offer a better chance of surmounting the chokehold of the well-rehearsed statutory time-limits. Article 11(3)(b) and (4) of the Limitation (NI) Order 1989 state that a claim in tort may be brought three years from when the plaintiff knew or ought to have known about the issues giving rise to a claim. In the present case, 2019 was cited as the starting point when the structural damage first came to the knowledge of the apartment owners.[30] Therefore, the cause of action was within the statutory time limit.

Even though the loss sustained by the apartment owners in this instance has been financially oppressive and psychologically distressing, in the eyes of the law, it amounts to 'pure economic loss' which is unrecoverable in tort.[31] Pure economic loss in this context relates to the pecuniary losses generated by the defects in the residential building structure, namely the costs of repair and, where this is not possible, the cost incurred as a result of the building being unfit for human habitation and thus valueless.[32] The House of Lords decision in *Murphy v Brentwood*[33] set the bar for negligence claims vis-á-vis defective premises. Thus, in *Murphy*, the property in question had defective foundations rendering it structurally unsafe.[34] In the absence of physical injury linked to this defect or damage to property other than the building itself, it was held that the loss was financial (economic) only and so no duty of care was owed by the respective builders and local council in that case.[35]

In exasperated rebuff to the pure economic loss doctrine, the *obiter dictum* of Lord Bridge in the *Murphy* case around 'complex structure theory' was deployed in an effort to 'take cases of tortious loss outside

30 *Ulster Garden Villages Ltd* (n 1 above) [78].

31 Generally, 'pure economic loss' is defined as 'economic loss unrelated to injury of the person or property of the plaintiff': see P Benson, 'The problem with pure economic loss' (2008–2009) 60 South Carolina Legislative Review 823–879.

32 See, generally, K Horsey and E Rackley, *Tort Law* 7th edn (Oxford University Press 2021) 190–202.

33 *Murphy v Brentwood* [1991] 1 AC 398.

34 Ibid. The structural defect discovered in *Murphy* had also resulted in serious cracks in the wall of the house and a fractured gas pipeline and soil pipe.

35 Note that there is an exception to the pure economic loss doctrine as identified in *Hedley Byrne v Heller* [1964] AC 465. The House of Lords in this case held that where there exists a special relationship in which one party assumes responsibility for advice given, and in which the claimant places their trust and confidence, that damages may be recoverable for pure economic loss. Note that this principle was not relevant in the case of *Ulster Garden Villages* such that the *Hedley Byrne* line of case law is beyond the scope of this commentary.

of the strictures of being "pure economic loss"'.[36] Prior to the decision in *Murphy*, Lord Bridge had mooted the idea in *D & F Estates Ltd v Church Commissioners for England*[37] that:

> [I]t may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to 'other property,' and whether the argument should prevail may depend on the circumstances of the case.[38]

To that end, the plaintiffs contended that the defective E2 Column in the residential portion of the Victoria Square building ought to be conceptualised as a 'structure distinct from another and so capable of inflicting damage to the wider structure'.[39] However, as Huddleston J pointed out, Lord Bridge in *Murphy* appears to thwart his own hypothesis, stating 'I express no opinion as to the validity of this theory'[40] and crucially, his Lordship concluded that:

> [I]t is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property'.[41]

Furthermore, it was emphasised by the present defendants that the analysis of Lord Bridge in *Murphy* was simply *obiter dicta* and unsupported by other members of the appellate committee in that case. Huddleston J confirmed this approach, citing the more recent decision of *Thomas v Taylor Wimpey Developments Ltd*[42] so concluding that 'it is artificial to suggest that the facia/or Column E2 can be treated other than as an integral and fundamental part of the structure of the Residential Development'.[43] Further, on grounds of public policy and in line with the sentiments in *Murphy*, the limits on the liability of builders and affiliated construction businesses in cases such as these are 'best left to the legislature'.[44] Lastly, it was propounded by the plaintiffs

36 *Ulster Garden Villages Ltd* (n 1 above) [84].
37 *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177.
38 Ibid [206] per Lord Bridge of Harwich.
39 *Ulster Garden Villages* (n 1 above) [89].
40 *Murphy* (n 33 above) [476].
41 Ibid [478].
42 *Thomas & Another v Taylor Wimpey Developments Ltd & Others* [2019] EWHC 1134.
43 *Ulster Garden Villages* (n 1 above) [108].
44 Ibid [90]. Huddleston J reciting the words of Lord Bridge in *Murphy* (n 33 above) at [474].

that spalling brickwork in the Chichester Street and Montgomery Street elevations of the building posed a significant risk of injuring a passer-by. Whilst a possibility, there was no evidence to suggest at the time of hearing that this type of injury had in fact occurred, and so this argument was of limited assistance in the interim. In any event this is not an obvious loss the plaintiffs had sustained. In the round, the desired remedy sought by the apartment owners that the building be demolished and rebuilt ultimately gives way to the strictures of the pure economic loss doctrine.[45]

It is interesting to note that the decision in Murphy has not taken root in most Commonwealth jurisdictions.[46] The High Court of Australia in *Brian v Maloney*[47] held that sufficient proximity existed between a builder and subsequent purchasers owing to the building itself being a permanent structure to be used indefinitely.[48] In Canada, the Supreme Court in *Winnipeg Condominium Corporation v Bird Construction*[49] deemed it reasonable to hold builders and/or architects liable where a building was deemed unsafe due to negligence, with liability limited to the cost of works needed to render such building safe.[50]

Undoubtedly in England, there has been a monumental shift in legal consciousness around the liability of the construction industry and affiliated persons/businesses in property design and development following the publication of Dame Judith Hackitt's damning report on the Grenfell Tower Tragedy which occurred on 14 June 2017.[51] The outpouring from this was the Building Safety Act which was passed in April 2022 and came into force in England and Wales on 28 June 2022. The Act has been heralded as making 'ground-breaking reforms to give residents and homeowners more rights, powers, and protections – so homes across the country are safer'.[52] A key measure incited under the 2022 Act is the extension of limitation periods for legal action vis-á-vis

45 *Ulster Garden Villages Ltd* (n 1 above) [106]–[110].

46 Horsey and Rackley (n 32 above) 147–148.

47 *Brian v Maloney* (1994) 128 ALR 163.

48 See Horsey and Rackley (n 32 above) 147. See also the similar approach in *New Zealand in InverCargill City Council v Hamlin* [1996] AC 624 (PC).

49 *Winnipeg Condominium Corporation v Bird Construction* (1995) 121 DLR (4th) 193.

50 Horsey and Rackley (n 32 above) 148, fn 4.

51 In the Grenfell Tower tragedy, a high-rise block of council flats in the Lancaster West Estate of North Kensington in West London went on fire resulting in 72 deaths. The tragedy revealed many shortcomings in the building regulations and health and safety management of high rise buildings; see J Hackitt, Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report, Cm 9607 (May 2018).

52 Department for Levelling up, Housing and Communities, 'Guidance: The Building Safety Act' (25 July 2022).

defective premises, such as in the case of the Victoria Square apartment owners, to which the discussion now turns.

MODELLING THE BUILDING SAFETY ACT 2022 IN NORTHERN IRELAND: ALL SPIRIT AND NO SUBSTANCE?

Following on from the decision in the High Court in Northern Ireland, the Defective Premises Bill 2024 quickly sailed through the legislative process in a short four-month period resulting in the Defective Premises Act (Northern Ireland) 2024 which came into effect as of 21 September 2024. The 2024 Act is a very short piece of legislation comprising only four provisions in comparison to the 288-page document that is the Building Safety Act 2022. Undoubtedly, the Act is a step in the right direction for the Victoria Square category of claimant, but it is far from a silver bullet and falls short of the English position in important respects. At the time of writing, the Victoria Square claimants are now awaiting a retrial in the NI High Court in which they will be able to operationalise the Defective Premises Act (NI) 2024.[53] Irrespective of the court's decision, this commentary demonstrates that under the current Northern Ireland model these types of claimants will face inevitable challenges to securing adequate redress, as the wider construction sector can employ human rights-centric defences and various corporate accounting structures to stymie long tail compensation claims.

RETROSPECTIVITY AND LONGER LIMITATION PERIODS: WHAT OF HUMAN RIGHTS AND BUSINESS ACCOUNTING MODELS?

The changes made by the recent Defective Premises Act (NI) 2024 essentially replicate the statutory limitation amendments brought in under section 135 of the Building Safety Act 2022 in England and Wales.[54] Hitherto, sections 1 and 2 of the 2024 Act amend the Defective Premises (NI) Order 1975 and the Limitation (NI) Order 1989 to increase the statutory limitation period under which actions can be brought against persons involved in the provision of dwellings, and those who carry out any work in relation to such buildings.[55] The

53 See n 2 (above).

54 S 135 amends s 1 of the Defective Premises Act 1972 which is now read in conjunction with s 4B of the Limitation Act 1980 as they both apply in England and Wales.

55 Art 4A of the Defective Premises (NI) Order 1975 as inserted by s 1 of the Defective Premises Act (NI) 2024.

limitation period has now increased dramatically to 30 years for works completed before the 2024 Act came into force (21 September 2024) and 15 years for claims regarding work completed after this date.[56]

What is also distinctive about the Building Safety Act 2022 and the Defective Premises Act (NI) 2024 is that they are born in a post-Human Rights Act 1998 age, contradistinctively to the 1970s defective premises legislation in both jurisdictions. Resultingly, both Acts stipulate that when previously statute-barred actions proceed under each jurisdiction's respective defective premises legislation 'a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights (within the meaning of the Human Rights Act 1998)'.[57] This applies only to those category of cases brought within the 30-year retrospective limitation period.[58] Indeed, the construction and affiliated industries argue that it prejudices their right to a fair trial under article 6 of the European Convention on Human Rights as promulgated under schedule 1 to the Human Rights Act 1998.[59]

Thus, looking at Northern Ireland, where construction projects were completed as far back as 1994 (ie 30 years before the 2024 Act's inception) there are inevitable evidential hurdles arising out of the passage of time, namely, the destruction of paper and electronic records pertaining to development projects; the unavailability of relevant witnesses; and changes in technical standards that were in force in previous time periods.[60] Indeed, during the Defective Premises Bill's passage through the Northern Ireland Assembly, outpourings in the media from the Royal Society of Ulster Architects expressed concern that:

---

56 Art 8A of the Limitation (NI) Order 1989 as inserted by art 2 of the Defective Premises Act (NI) 2024.

57 S 2(4) of the Defective Premises Act (NI) 2024 and s 135(5) of the Building Safety Act 2022.

58 For Northern Ireland see art 3 of the Defective Premises (NI) Order 1975 and article 8A of the Limitation (NI) Order 1989 inserted under s 2 of the Defective Premises Act (NI) 2024. For England and Wales, see s 1 of the Defective Premises Act 1972 and s 4B(1) of the Limitation Act 1980 inserted under the s 135 of the Building Safety Act 2022.

59 Art 6(1) of the European Convention on Human Rights states that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

60 Construction News, 'Building Safety Act's 30-year liability: Compassionate or draconian?' (22 August 2024). See also Royal Society of Ulster Architects, 'RSUA calls for MLAs to reject Defective Premises Bill' (1 July 2024).

> For example, an 85-year-old architect who has done nothing wrong could potentially be held liable for defective building materials in a housing project she designed when she was 55 … this legislation would not hold the supplier of the faulty material liable.[61]

Considering the fair trial implications of unknown or uncertain limitation periods, the European Court of Human Rights in *Oleksandr Volkov v Ukraine*[62] opined that:

> The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.[63]

It is without doubt that the impact of time on evidential quality and credibility will be to the forefront of these types of cases the further back in time they go. Whilst a positive initiative at face value, the real-life benefit to claimants proceeding under the Defective Premises Act (NI) 2024 for cases pre-dating the Act's enforcement may amount to nothing more than tokenism in the short term.

BUSINESS MODELS, INSURANCE PREMIUMS AND BUSINESS LIABILITY ORDERS

The somewhat perfunctory nature of the law-making noted above becomes particularly stark when contrasted with how the Building Safety Act 2022 would position claimants of the Victoria Square type if they had resided in England and Wales. The expediency of the Northern Ireland legislation following the backlash of the outcome of the Victoria Square case and the Act's minimal content mean that the law is ill equipped to offer any satisfactory remedy for this category of claimant. Furthermore, the Construction Industry Council (CIC) in Northern Ireland expressed concerns about the changes proposed by the Defective Premises Bill, stating that the construction sector here 'will be exposed to risks that the English construction industry (which

61 R Morgan, 'Changes to legislation could leave architects "at risk"' (*BBC News NI* 14 June 2024).

62 *Oleksandr Volkov v Ukraine* Application no 21722/11 (ECHR 27 May 2013); See also *Stubbings and Others v United Kingdom* Application nos 22083/93; 22095/93 (ECHR 22 October 1996).

63 *Oleksandr Volkov* (n 62 above) para 137.

is much larger and has arguably broader shoulders to suffer such actions) has never been exposed to'.[64]

Importantly, when the Defective Premises Bill was being debated in the Assembly, the CIC posted on its website in June 2024 those matters regarding which it considered the Assembly was being short-sighted. Two main areas of concern were the business/finance models used by the construction industry and the inevitable surge in insurance premiums because of the legislation. The CIC has emphasised how the construction sector in Northern Ireland is composed of mostly 'micro SMEs[65] or sole practitioners'[66] who 'will simply not have the capital to fund uninsured losses for remedial work over which they had no influence or control, nor the cost of dealing with claims'.[67] What is more, the special purpose vehicle (SPV) is commonly deployed by construction companies to isolate financial risk associated with building projects. Exploration of the complex machinations of the SPV is beyond the scope of this article, however, for context, Merna et al succinctly define this type of company as '[A] legally and economically independent project company financed non-/limited recourse debt for the purpose of financing a single purpose capital asset usually with a limited life.'[68] The attractiveness of the SPV is that it mitigates ordinarily high financial risk associated with a given project by taking it 'off the balance sheet so that the project failure does not damage the owner's financial condition. The project stands on its own. Debt payment comes only from the SPV rather than from any other entity.'[69] Resultantly, as the CIC has pointed out, construction and affiliated companies who have used SPVs will fall outside the grasp of the new legislation,[70] inevitably weakening aggrieved claimants' prospects of success in terms of financial reward or otherwise.

The Building Safety Act 2022, however, has attempted to circumvent this problem in the form of the building liability order (BLO) of

64 Construction Industry Council, Proposed Defective Premises (Northern Ireland) Bill (CIC 17 June 2024).

65 Small and medium-sized enterprises.

66 Construction Industry Council (n 64 above).

67 Ibid.

68 A Merna, Y Chu & F Al-Thani, *Project Finance in Construction: A Structured Guide to Assessment* (Wiley-Blackwell 2010) 13. See also, T Sainati et al, 'Types and functions of special purpose vehicles in infrastructure megaprojects' (2020) 38(5) International Journal of Project Management 243–255, 243: 'SPVs are legal persons (eg corporations, limited liability companies) engineered to serve specific purposes and transactions … which are widely used in different contexts, including finance, tax optimisation and projects. … The SPV is not reported on the balance sheet of the sponsors; making the SPV an "orphan entity".'

69 Merna et al (n 68 above) 18–19.

70 Construction Industry Council (n 64 above).

which there is no concomitant in the rushed Defective Premises Act (NI) 2024. Essentially, under section 130 of the Building Safety Act 2022, the High Court can issue such an order where it considers it 'just and equitable to do so'.[71] Given the newness of the legislation there is little case authority on the practical impact of BLOs on the construction industry. One case is *Willmott Dixon Construction Ltd v Prater*,[72] which indicates the stark way in which companies can react when informed of the prospect of such a claim coming their way. Wilmott made a claim in damages for £47 million in relation to the remediation of fire safety defects in the external wall of a development at Love Lane in London against various defendant companies. Prater and Linder who were amongst these and part of the same corporate group, upon being made aware of an ensuing claim for compensation, underwent an extensive corporate restructuring to the extent that they would not be able to meet any judgment claim made against them. Aecom Ltd, another defendant in the case, sought a BLO against them under section 130 of the 2022 Act and was successful in arguing that this request ought to be dealt with alongside the main proceedings on liability.

The intended practical effect of the BLO is to pierce the corporate veil so that the incurred liability of one company within a corporate group can be extended to an associated company or companies making them jointly and severally liable. Section 131 of the 2022 Act defines an 'associated company along traditional corporate lines; thus a body corporate (A) is associated with another body corporate (B) if (a) one of them controls the other, or (b) a third body corporate controls both of them'.[73] Thus, where an SPV is used to administer a construction project, this arguably makes the company more susceptible to a BLO.[74] However, again, the court must only administer these where it is 'equitable and just to so', and so it is conceivable that, where a company would be put in the vicinity of insolvency as a result, a grant might be denied.[75]

---

71 Building Safety Act 2022, s 130(1).

72 *Willmott Dixon Construction Ltd v Prater and Others* [2024] EWHC 1190 (TCC).

73 Building Safety Act 2022, s 131(1)(a)(b).

74 See D Korcz, 'Building Safety – Building Liability Orders' (*Mills & Reeve* 7 March 2023).

75 Further, in deciding whether to apply for a BLO, applicants can apply for an 'information order' under s 132 of the Building Safety Act 2022 which 'is an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at any time in a specified period been, associated with the body corporate'.

CONCLUSION

The plight of the Victoria Square apartment owners has highlighted the strictures in the legal regime in Northern Ireland when catastrophic defects in residential buildings come to light years after the relevant limitation period has passed and when the loss incurred is purely economic. Notwithstanding that the Defective Premises Act (NI) 2024 is a welcome step in widening the prospects of legal redress for such claimants, much remains to be done to bring the system here in line with the more favourable regime in England and Wales.

Whilst the increase in the retrospective limitation period to 30 years appears attractive on the surface, both pieces of legislation house a gatekeeper to claimant success – the European Convention on Human Rights. Thus, it has been shown that the breadth of the retrospective limitation period of 30 years not only risks infringing defendant companies' right to a fair trial due to the difficulty in meeting certain evidential requirements, but also grinds to a halt any claim where the court upholds such a finding. Northern Ireland further operates under the failure of the Assembly to provide key protective mechanisms in the form of the business liability order. This is conceivably the by-product of an expedited legislative process. What is more, prospective defendants may find it difficult to secure insurance as the 30-year time period poses an unknown risk which professional indemnity insurers will struggle to quantify until the legislation is further tested in the courts. This may render smaller businesses within the wider construction industry unviable. Another problem for claimants of the kind discussed in this commentary is that the defendant with deep pockets may become even more elusive. Finally, this case also brings into the spotlight the role of property management companies which have surged in recent years. In light of the various covenants that may exist on the maintenance and repair of a given development under leasehold, they too will have to reconfigure how they calculate their service charges and insure for potential compensation claims, as under the current system, the wider construction industry may not be the most attractive target from which to seek a replete redress.

Northern Ireland
Legal Quarterly
Vol. 76 No.2 (2025) 359–390
Commentaries and Notes DOI: 10.53386/nilq.v76i2.1236

Putting participants at the heart of the public inquiry process: insights from the Muckamore Abbey Hospital Inquiry on engaging with vulnerable witnesses

Emma Ireton and Christopher Ratcliffe
Nottingham Trent University
Correspondence emails: emma.ireton@ntu.ac.uk and christopher.ratcliffe@ntu.ac.uk.

ABSTRACT

This case study examines Muckamore Abbey Hospital Inquiry's approach to engaging with vulnerable witnesses and participants, including those with severe learning disabilities, developmental disabilities, and mental health needs. It offers detailed insight into the key considerations, adjustments made, and support provided by the Inquiry, and how it seeks to put the needs and interests of vulnerable participants at the heart of its process.

An inquiry chair has a very broad discretion to determine the procedure and conduct of a public inquiry. As a result, a public inquiry is uniquely placed to explore and adopt bespoke and novel approaches to challenges encountered, including addressing the needs of vulnerable participants. Lessons may be learnt to improve future inquiry practice, and comparative lessons may be learnt to inform other accountability processes, such as the criminal and civil justice systems and tribunals. However, currently, there is no central system that records and disseminates details of individual public inquiries' procedure and conduct.

This case study examines the Muckamore Abbey Hospital Inquiry's adjustments and support measures, including: its treatment of all witnesses and participants as being potentially vulnerable; its innovative approach to the use of registered intermediaries and communication support in an inquiry context; and its flexible and responsive approach to individual participants' needs. This research is designed to provide an evidence base to inform future inquiry teams in their procedural decision-making, in the United Kingdom and other jurisdictions that adopt a similar inquiry model, and to inform future research on comparative lessons for other judicial and quasi-judicial processes.

Keywords: public inquiry; Inquiries Act 2005; vulnerable witnesses; registered intermediaries; inquisitorial process; best practice; reduced inequalities; reasonable adjustments; peace, justice and strong institutions.

* First published in NILQ 75.AD1 (2024) 35–66 on 1 November 2024.

INTRODUCTION AND THE IMPORTANCE OF LEARNING LESSONS[1]

Muckamore Abbey Hospital (MAH) in Northern Ireland provides assessment and treatment for adult patients with a variety of severe learning difficulties, mental health issues and behavioural challenges. The Muckamore Abbey Hospital Inquiry (the Inquiry), chaired by Tom Kark KC, commenced on 11 October 2021. It was established under the Inquiries Act 2005:

> to examine the issue of abuse[2] of patients at Muckamore Abbey Hospital (MAH) and to determine why the abuse happened and the range of circumstances that allowed it to happen. The purpose of the Inquiry is to ensure that such abuse does not occur again at MAH or any other institution in Northern Ireland which provides similar services.[3]

One of the Inquiry's stated priorities is to support all vulnerable witnesses to give the best account of their evidence possible, thus enabling their voice to be heard and to inform the findings and recommendations of the Inquiry.[4]

This case study offers detailed insight into the key considerations, adjustments made and support provided by the Inquiry when engaging with its vulnerable participants, particularly those with severe learning disabilities, developmental disabilities and mental health needs. This research is designed to provide an evidence base to inform future inquiry teams in their procedural decision-making in both the United Kingdom and in other jurisdictions that adopt a similar inquiry model. It is also intended to provide an evidence base for future academic research on comparative lessons that may be learnt about engaging with vulnerable witnesses within the criminal and civil justice systems and tribunals, and on the broader application of the work of registered intermediaries (RIs).

When a public inquiry is announced, it is common for statements to be made by the convening minister and inquiry chair about the importance of 'putting participants at the heart of the public inquiry process'. Unfortunately, there is no clarity or consensus about what exactly is meant by this in practice and how this might best be

1 We are extremely grateful to members of the inquiry team of the MAH Inquiry; the statement-taking team from Cleaver Fulton Rankin; Professor Penny Cooper and Oliver Wilkinson for sharing their experience, expertise and insight, to enable this case study to be produced.

2 BBC News, 'Muckamore Abbey: CCTV reveals 1,500 crimes at hospital' (*BBC News* 27 August 2019).

3 MAH Inquiry.

4 Tom Kark KC, 'Chair's statement of approach to witness statements' (*MAHI* 24 November 2021).

achieved.[5] The chair of a public inquiry has a very broad discretion to determine the procedure and conduct of an inquiry in a way that best fits its scope, subject matter, terms of reference and the needs of its participants.[6] Every inquiry is different. It is vital to learn lessons from the experience and expertise of those who are running inquiries now, and those who have run public inquiries in the past, to inform the decision-making of those setting up and running inquiries in the future to promote best practice. However, currently, there is no consistent recording and examination of the procedure and conduct adopted by public inquiries. As a result, once an inquiry has fulfilled its terms of reference and is closed down, valuable institutional knowledge of good practice is often lost, and poor practice may be repeated.[7]

Further, the chair of an inquiry also has control over an inquiry's budget that is far beyond the control granted to those overseeing other accountability mechanisms, such as courts and inquests. It is also vital to learn lessons from the experience and expertise of past and current inquiries to inform the cost management of future inquiries and to support future inquiry chairs in fulfilling their obligation to act with regard to avoiding unnecessary cost (to public funds, witnesses, or others).[8]

The very broad discretion an inquiry chair has to determine the procedure and conduct of an inquiry, and their control over the budget of the inquiry, also means a public inquiry is uniquely placed to adopt bespoke, novel and innovative approaches to challenges encountered, to address the needs of vulnerable participants. As a result, important comparative lessons may also be learnt from public inquiry procedure to inform other accountability mechanisms, such as courts and inquests, on engagement with vulnerable witnesses.

Draft Cabinet Office guidance from 2012 requires inquiry secretaries to produce a lessons-learnt paper at the end of an inquiry about their experience, in order to share best practice and inform central guidance for future inquiries.[9] However, despite 25 minister-convened public inquiries having published their final reports since then, with one

5 Emma Ireton, 'Public inquiries: irreconcilable interests and the importance of managing expectations' (2023) 45(3) Journal of Social Welfare and Family Law 212–233.

6 Inquiries Act 2005, s 17, for statutory inquiries.

7 House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 155.

8 Inquiries Act 2005, s 17(3).

9 Cabinet Office, 'Draft inquiries guidance: guidance for inquiry chairs, secretaries and sponsor departments' (2012) 43.

exception, these papers have not been produced.[10] There is currently one publication that seeks to address this gap in knowledge by collating lessons learnt from those experienced in setting up and running public inquiries, to provide a practical guide to public inquiry practice (co-written by the lead researcher on this case study).[11] This case study is designed to add to that body of knowledge by examining, in detail, the MAH Inquiry's approach to engagement with vulnerable participants in the setting-up and running of the Inquiry.

The Inquiry is a relatively small public inquiry, which focuses on systemic administrative and regulatory failings in a single institution. This has allowed the researchers to explore the Inquiry's decisions and practice, and reflective feedback and communication loops, more intensively, to gain a comprehensive understanding of its approach to engaging with vulnerable participants.

This research adopts a combined 'descriptive' and 'explanatory' case study methodology, focusing on recording the detail of the processes examined, in context, and the considerations behind them.[12] It focuses specifically on Phase 1 of the Inquiry, 'the Patient Experience' phase,[13] during which evidence was given by patients and former patients of MAH and family members and friends (the Patient Experience Witnesses). At the time the research was carried out, the Inquiry had heard oral evidence from 47 Patient Experience Witnesses. We conducted nine semi-structured elite interviews with a sample of those responsible for setting up and running the Inquiry, including one or more of: the Panel members, Counsel to the Inquiry team (CTI), the Secretariat, the solicitors statement-taking team, academic advisors, and RIs to produce composite data. We reviewed inquiry procedural documents and carried out observations at the inquiry premises.

The first part of the case study looks at the general approach to engagement with vulnerable participants adopted by the Inquiry. The second part looks at the range of adaptations and support measures put in place. The final part looks in greater detail at the Inquiry's approach to gathering evidence from vulnerable witnesses during the statement-taking process and its oral hearings.

---

10 House of Lords Select Committee on the Inquiries Act (n 7 above) paras 160–164. The situation, currently, remains unchanged since the report was published, though some small interim papers on interim steps have been lodged by the Independent Inquiry into Child Sexual Abuse (IICSA).

11 Isabelle Mitchell, Peter Watkins Jones, Sarah Jones and Emma Ireton, The Practical Guide to Public Inquiries (Bloomsbury Publishing 2020).

12 Arya Priya, 'Case study methodology of qualitative research: key attributes and navigating the conundrums in its application' (2020) 70 Sociological Bulletin 94–110.

13 Which was in its final stages during the period of research.

THE INQUIRY'S APPROACH TO ENGAGEMENT WITH 'VULNERABLE PARTICIPANTS'

General approach

It has become usual practice for public inquiries to put support in place for witnesses and participants. The nature of the support required depends on the subject matter of the inquiry and the particular needs of the witnesses and participants engaging with it. Vulnerable participants were at the forefront of the MAH Inquiry's considerations when considering its procedure and drafting its protocols. It used the Chair's broad discretion to determine the Inquiry's procedure and conduct to adopt novel approaches to addressing the needs of its vulnerable participants.

Where any public inquiry is convened into a matter of public concern, frequently there are witnesses and participants who are 'vulnerable' in the wider sense of the term, who find giving evidence extremely challenging. The Inquiry adopted a very broad definition of 'vulnerable', beyond that used in the civil and criminal justice systems.[14] It recognised that all patients and family members are potentially vulnerable. MAH patients and former patients with learning disabilities may need extra support to communicate effectively, including support with understanding questions, articulating answers and focusing on the issues that the Inquiry has been convened to address. They are also likely to suffer from enhanced stress when engaging with the Inquiry and, in particular, when giving evidence, which may adversely impact on the evidence given.[15] Many are also dealing with the psychological impact of their experiences of abuse at MAH.

Family members and friends of patients and former patients may also be suffering trauma and distress themselves because of the treatment of their loved ones. It is common for those engaging with a public inquiry to feel they have been failed by, and have lost trust in, those in authority, whom they consider to be responsible for what went wrong. The experience of speaking about their relative's experience, often for the first time, can be extremely stressful. Many family members and friends feel a passionate commitment to speak on behalf of loved ones who are unable, or less able, to speak for themselves and, for many, an inquiry has been the culmination of many years of campaigning

14 See Civil Procedure Rules, PD 1A, paras 3–5, and Youth Justice and Criminal Evidence Act 1999, and, beyond traditional legalistic definitions to incorporate broader social understandings of the concept of vulnerability, see eg Martha Fineman, 'The vulnerable subject: anchoring equality in the human condition (2008) 20 Yale Journal of Law and Feminism 1–23.

15 See Jonathan Doak, Claire McGourlay and Mark Thomas, *Evidence in Context* (Routledge 2015) ch 5 for comparable discussion on vulnerable witnesses engaging with courts.

and waiting to be heard. However, many have never spoken in a public forum before and are faced with speaking in public about incredibly sensitive matters.

A key challenge for a public inquiry is to build trust with vulnerable participants and reassure them that the inquiry is there to hear their account and to make that process as easy for them as possible (whilst maintaining the inquiry's independence). Building and maintaining rapport is essential when gathering evidence and engaging with any witness. This is particularly so where witnesses have learning disabilities because they often also suffer from high social anxiety, low self-esteem, and a lack of assertiveness.[16] Building rapport and trust, and placing adjustments and support in place, are priorities at the core of the Inquiry's approach to engagement with vulnerable participants.

The Chair of the Inquiry was already trained and experienced in engaging with vulnerable witnesses, and special measures had been put in place to help witnesses give their best evidence, in the context of the criminal justice system in England and Wales. He applied and adapted that approach to address the needs of the Inquiry's participants. Inquiry staff were given vulnerable witness training and trauma awareness training, support from RIs, and physical and procedural adjustments were also made. Counsellors were appointed to assist anyone affected by the work of the Inquiry (see below).

The MAH Inquiry is the first public inquiry in Northern Ireland to use RIs in its process. The Inquiry engaged with the Department of Justice to arrange for qualified RIs (professionals with specialist training)[17] to assist witnesses with communication needs to give evidence in court. RIs support witnesses with physical, learning, sensory or other hidden disabilities or mental health needs. In Northern Ireland they are appointed by the Department of Justice and are part of a government-funded RI scheme in the criminal courts, and civil and family courts.[18] (There is also a government-funded scheme in England and Wales, but not in Scotland or the Republic of Ireland.)[19] The cost of engaging the RIs was borne by the Inquiry.

---

16 Rebecca Milne and Ray Bull, 'Interviewing witnesses with learning disabilities for legal purposes' (2001) 29(3) British Journal of Learning Disabilities 93–97.

17 They are required to pass RI accreditation training (master's level). See Northern Ireland Registered Intermediary Scheme.

18 Introduced to criminal courts in 2013 and extended on an interim basis to civil and family proceedings in 2018. See ibid.

19 Since 2005, ibid. Unlike in Northern Ireland, in England and Wales RIs are not available to suspects and defendants in the criminal justice system under the legislation and this gap is filled by 'unregistered intermediaries'. See John Taggart, '"I am not beholden to anyone … I consider myself to be an officer of the court": a comparison of the intermediary role in England and Wales and Northern Ireland' (2021) 25(2) International Journal of Evidence and Proof 141–162.

Vulnerable witness training

The Inquiry's approach to vulnerable witnesses was reflected in, and informed by, the specialist vulnerable witness training it commissioned at the outset.[20] The training covered investigatory questioning of vulnerable witnesses, working with RIs, witness familiarisation, and practical adjustments and support. Two fundamental considerations underpinned the training: the concept that all witnesses are potentially vulnerable[21] and the significance of a public inquiry being an inquisitorial process (in contrast, for example, to the criminal and civil justice systems). The training was based on the Achieving Best Evidence guidance, which is the guidance followed in Northern Ireland, and more widely, for interviewing vulnerable victims and witnesses in the criminal justice system, to enable them to give their best evidence.[22] It is, in turn, based on the 'PEACE model' of interviewing, an internationally accepted best practice method of conducting investigative interviews.[23] Those attending the training were also referred to the *Equal Treatment Bench Book*, the Judicial College guide to equal treatment.[24]

The training was delivered initially to the members of the statement-taking team.[25] The focus was on the importance of thorough preparation, building rapport, allowing free narrative, and on adapting the interviewing approach to reflect the individual communication needs and abilities of the witness. The training was subsequently delivered to members of the Panel, CTI team members, and other members of the inquiry team, so that they are aware of the

20 It was provided by Professor Penny Cooper, an academic and former practising barrister, who pioneered witness intermediary training in Northern Ireland, England and Wales, New South Wales, Chile and the Australian Capital Territory, and is the Cofounder and former Chair of the Advocate's Gateway, and Dr Michelle Mattison who is an RI, Chartered Psychologist and Chartered Scientist with the British Psychological Society.

21 See Penny Cooper, 'Defendant vulnerability in the criminal justice system: progress made, lessons learned, and future endeavours' (speech at the Success for the Vulnerable Accused in the Criminal Justice System Conference, Birmingham 13–14 September 2023, unpublished) and see eg Fineman (n 14 above).

22 Department of Justice, 'Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy' (3 January 2012).

23 A method of investigative interviewing developed in the 1990s in the UK in a collaboration between law enforcement practitioners and psychologists.

24 The current version of which is Judicial College, *Equal Treatment Bench Book* (2024), which 'aims to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals. It helps enable effective communication and suggests steps which should increase participation by all parties'.

25 A team of independent solicitors appointed by the Inquiry for this purpose.

process by which the statements have been taken and so they can adopt a consistent approach when engaging with the vulnerable participants.

The training stressed that witnesses with learning disabilities may be more easily swayed by the phrasing of a question and therefore the importance of using non-leading, open-ended questions in the interviews and oral hearings and prompts such as 'tell me more', rather than closed questions. This serves to promote inquisitorial evidence-gathering and also to assist those witnesses with limited narrative ability to give as full account as possible in their own words. The Chair has not permitted cross-examination of the Patient Experience Witnesses during hearings. Accordingly, the focus for the training delivered to the Panel and counsel was on a style of questioning much more similar to investigative inquisitorial interviewing than the adversarial testing of evidence in cross-examination (see below).[26]

The training also addressed working with RIs; for many, it was the first time they had worked with an intermediary. It explained the role of the RI and how they might work collaboratively to support the Inquiry during the statement-taking and the oral hearings stage, including advising on phrasing of questions and on making practical adjustments for the witnesses (see below). The inquiry team members were directed to the toolkits on the Advocate's Gateway, including toolkits on using communication aids[27] and questioning people with autism and learning disabilities.[28]

It also highlighted practical matters for the Inquiry to consider when determining its procedures and conduct, setting up its premises, and interviewing its witnesses. The training addressed how daunting it can be for a witness who has suffered trauma to attend inquiry premises and be part of the process. It discussed the provision of counselling support and the possibility of using support animals. It addressed decisions on what rooms and accessible facilities would be made available for witnesses at the inquiry premises and how to create the best environment. It stressed the importance of giving the witnesses the opportunity to familiarise themselves with the inquiry set-up before giving evidence and of providing support throughout the process. Further, it emphasised that the needs of individual witnesses may differ significantly.[29]

It is key to note that adjustments and support for vulnerable participants in a public inquiry may be made at three levels – 'universal',

26 In line with the approach of the statement takers.

27 Such as models and timelines.

28 The Advocate's Gateway, Toolkit on Communication Aids (2015).

29 For example, a witness with autism may have a sensory issue around lighting or sound, so a room setting that is suitable for other witnesses may not be right for them.

'targeted' and individualised' adjustments, namely: adjustments that universally benefit vulnerable witnesses; those that are targeted at a specific group in this Inquiry, for example, participants with communication needs; and those adjustments that are targeted at specific needs of an individual. (These have similarities and parallels with the three-tiered support model identified in New Zealand research in the context of responding to neurodiversity in the criminal justice system.)[30]

Approach to engagement with vulnerable participants
• Adopting a broad definition of 'vulnerable' and considering the needs of vulnerable participants from the outset.
• Recognising the importance of building trust and rapport with vulnerable participants.
• Specialist training for inquiry staff on trauma awareness and vulnerable witnesses.
• Use of registered intermediaries.
• Provision of counselling support and staff wellbeing sessions.

ADAPTATIONS AND SUPPORT

Putting adaptations and support measures in place to support vulnerable witnesses to give their best evidence, and to support wider participant engagement with the Inquiry, was a key focus of the Inquiry. This section examines the adaptations and support measures put in place by the Inquiry at the three levels: universal, targeted and individualised. Building trust and rapport, and providing clear communication and support throughout, are stated priorities of the approach taken by the inquiry team, which are aimed at reducing anxiety and stress for all participants.

Reaching out to potential participants

One of the first tasks of a public inquiry is to reach out to potential participants to invite them to engage. The Inquiry used media campaigns through radio, television and social media to inform potential Patient Experience Witnesses about the Inquiry and to invite them to 'engagement events'. However, not all patients and former patients are literate, so the Chair took part in radio interviews and the Inquiry produced radio advertisements to reach out to them. Radios are frequently on in hospitals and thought was given to the time of day

30 Betony Clasby et al, 'Responding to neurodiversity in the courtroom: a brief evaluation of environmental accommodations to increase procedural fairness' (2022) 23(3) Criminal Behaviour and Mental Health 197–211.

when those interviews and advertisements were most likely to be heard by patients, for example at mealtimes and during the early evening.

Engagement events were held across the region within days of the Inquiry commencing, to enable inquiry team members to meet and speak with potential witnesses openly and in person.[31] The inquiry team judged it important to go out to the potential participants, rather than asking them to travel to the Inquiry's premises, to demonstrate the Inquiry's commitment to hearing their evidence and to build trust. At the engagement sessions, the Chair explained when the hearings would take place, what was wanted from witnesses and participants, and why it was important that they come forward. The Inquiry's senior management team all attended and introduced themselves.[32] No evidence was discussed; contact details were taken so evidence could be taken later, formally. There was an open question-and-answer session and an informal session for those who did not wish to ask questions in public. Leaflets with key information were distributed, including in easy-read format.[33] Additional engagement sessions were held online for those who could not attend in person.

Venue location and travel

The chair of an inquiry is responsible for choosing a public inquiry's venue. Location was a key consideration for the inquiry. Premises were chosen in Belfast city centre to assist those using public transport, but also with sufficient car parking nearby,[34] including free parking for Blue Badge holders.[35] Taxis are arranged to the inquiry premises for those who need them; payment is made on account to avoid the need for a patient or former patient to handle money for payment. Passengers are dropped off and met at the door of the Inquiry or, if they are more comfortable being dropped off somewhere else that is familiar to them, members of inquiry staff meet them there and walk them to the inquiry premises. If a witness or participant is particularly frail, has particular mobility issues, or is worried about being seen by the media, staff will go out for them, for example, to collect lunch, so they do not need to leave the premises once they have arrived.

---

31 In addition to engagement sessions that were held in Belfast, there were two in County Antrim where the hospital is located, one in Coleraine to reach potential participants towards the North Coast, one in Londonderry and one in Newry.

32 The Chair chose to create a senior management team to oversee organisational decision-making for the Inquiry. This was made up of the Chair, the Secretary to the Inquiry, Solicitor to the Inquiry and CTI.

33 See MAHI, 'Easy Read'.

34 On the day a witness gives evidence, two parking spaces are made available for them on site.

35 Because of severe mobility issues: see 'Blue Badge scheme'.

Ongoing engagement with witnesses and participants

As part of providing reassurance, building trust and providing support, the Secretary to the Inquiry and members of the administration team spend significant amounts of time in regular ongoing, open and direct communication with witnesses and with core participants. An inquiry may choose to designate core participant status to a person or organisation that is considered to have a particularly close connection with the Inquiry's work.[36] The designation confers benefits, which include greater visibility of the Inquiry's work. It also brings with it responsibilities and the expectation that a core participant will assist and contribute to the work of the Inquiry.[37] Not all witnesses to a public inquiry are 'core participants' (and not all core participants are witnesses).

Core participants are updated regularly about the progress of the Inquiry and are provided with a direct telephone number for the Secretary to the Inquiry and the administration team's direct line. They are encouraged to raise any queries with them (such as when the Inquiry is next sitting and how to locate documents and other information on the website). In addition, all Patient Experience Witnesses are given direct telephone numbers and are encouraged to contact team members if they have any queries about giving their evidence or have any additional support needs. The Chair also makes regular statements about the progress of the Inquiry, which are accessible to everyone through the Inquiry's website.

Easy-read documents and input from participants

'Tell it like it is' (TILII) is a project run by the charity Association for Real Change (ARC),[38] which supports those with learning disabilities to have their voice heard in matters and issues that affect their lives. The Inquiry approached the charity and ARC agreed, with an existing TILII group made up of professionals and patients and former patients of MAH, and chaired by a patient of MAH, to produce easy-read versions of inquiry documents for witnesses and participants with learning disabilities. Where the Inquiry thinks a document is needed in an easy-read format, the document produced by the Inquiry is sent to ARC, which then produces an easy-read version. ARC then sends it to the TILII group for checking and approval, before it is returned to the Inquiry for distribution and publication.

---

36 Inquiry Rules 2006, r 5.

37 See Mitchell et al (n 11 above) 100.

38 The ARC is a national charity that supports those with learning disabilities and other needs and service providers. See website for details.

Easy-read versions of documents, including the terms of reference and the Chair's updates, are published on a tab on the Inquiry's website alongside its other documents (and are also used by the RIs when supporting the witnesses, see below). Coloured lanyards are used to assist witnesses and participants with limited or no literacy to identify the different categories of people present at the Inquiry.

Timings and flexibility

Some vulnerable witnesses and participants have specific individual needs around timings, connected to their disability or health conditions. For example, some find it harder to concentrate or to manage their condition earlier in the day; others find it harder later on in the day. This affects when the Inquiry telephones them or when they are asked to attend the inquiry premises.

The inquiry team discusses individual witnesses' needs with them when preparing the hearing schedule. The fact that full written statements are available to CTI and the Panel prior to the hearings assists the Inquiry in estimating how much time is needed to hear each witness. Time allowances for scheduled hearings are deliberately generous; that serves two purposes. Firstly, it enables sufficient time to be built in for witnesses to take regular breaks, when they are tired or distressed or have other needs such as taking time-specific medication. Secondly, it minimises the chances of overrunning and having to reschedule subsequent hearings. Schedule changes can be particularly stressful for those with learning and developmental disabilities. They are therefore avoided by the Inquiry wherever possible and, accordingly, are very rare.

Some relatives who are witnesses have ongoing caring responsibilities for patients who have been discharged from MAH. Where that prevents them from physically attending the inquiry premises, the Inquiry hears their evidence remotely, using Zoom. One issue (that was drawn to the attention of the Inquiry by witnesses through the use of pre-statement questionnaires) is that, when giving evidence remotely, these witnesses are at home with a vulnerable person, so need to have alternative care arrangements in place while they give evidence, which often has an associated expense. When a Patient Experience Witness gives evidence remotely, a member of the inquiry administration team goes out to the witness to provide technical assistance, so they can focus on giving their evidence, and to administer the oath.

Registered intermediaries

The Chair determined at the outset that the inquiry team would have access to the services of RIs. Their role is to facilitate communication between the Inquiry and vulnerable witnesses, to ensure that witnesses have the opportunity to give evidence that is as complete, accurate and coherent as possible.[39] They are impartial and neutral. Their role is not to provide emotional support,[40] however, their presence may provide additional reassurance for vulnerable witnesses during the process. Significantly, the use of RIs also assists and supports the Inquiry in identifying additional adjustments and measures for witnesses, to address or minimise potential stress and distress from engaging in the process, to avoid retraumatising witnesses.

The support of an RI was available for all Patient Experience Witnesses, including family members. It was recognised that the provision of RI support can be a very sensitive topic and the subject needs to be approached and explored with care and sensitivity. It does not necessarily follow that a person with a learning disability or mental health needs will have communication support needs. All patient and former patient witnesses met with an RI to assess whether such support would be suitable for them and, if so, to undertake an assessment of their specific needs.[41] Some family witnesses showed signs of vulnerability, for example as a result of trauma or literacy issues, and an RI assessment and support was offered but was not always accepted.[42] Where witnesses have used an RI before, for example when giving a police statement about MAH, and have built a relationship with them, the Inquiry will try and engage the same intermediary.

The RI is given basic information, such as how long a patient was in hospital, and what health condition or learning disability they have, or medication they take, that may affect their communication. They then carry out an independent assessment of their needs. The assessment takes place at the start of the statement-taking meeting, by exploring the witness's ability to cope with different types of question, question structures and complexity of questions or words, and how they might respond to types of questions that are likely to be asked in the hearing. It assesses their ability to listen, process information and then respond, ideally in a logical, coherent and accurate manner.

---

39 Penny Cooper, 'Tell Me What's Happening 3: Registered Intermediary Survey' (City University 2011).

40 Which is the role of a 'support person', see below.

41 Kark (n 4 above).

42 Though the statements were still taken by the team trained in engaging with vulnerable witnesses.

The assessment is done in the presence of the statement taker and the RI provides them with a verbal report. If it is determined that support would be suitable, the report includes advice on how to conduct the witness interview to ensure that the individual is able to understand the questions that are being asked, and recommendations on matters such as language used, the length of questions, duration of questioning, and any communication aids needed. (A full written report, including any additional recommendations for the oral hearing, is subsequently delivered to the Inquiry.) RIs then sit in during the interview. Once the draft statement is produced, they meet with the witness and the solicitor again, to ensure that it is a true reflection of what the individual wanted to say. If the RI considers it necessary to do so, they also attend the oral hearings when the witness gives their evidence to the Inquiry (see details in part three below: 'Details of the evidence-gathering process').

The aim is that the RI's assessment, report and conversations with the statement takers in advance of the interview, and with counsel in advance of the hearings, means that the RI will not have to intervene much, if at all, during an interview or oral hearing. (The detail of RI support during statement-taking and in the oral hearings is also addressed in part three below).

Legal advisers

Most members of the two Muckamore-related action groups[43] were designated as core participants. As the groups had already appointed a legal representative for the members (which was a single firm of solicitors), the Chair designated their existing advisers[44] as their 'recognised legal representative' for the inquiry proceedings.[45]

Not all public inquiry witnesses require legal representation. However, legal advice and assistance was provided to other patients, former patients and family members who were affected by the events at MAH but were not affiliated to one of those groups who were 'required and justified' for their engagement with the Inquiry.[46] This joint representation was provided by an independent firm of solicitors appointed by the Inquiry.[47] A public inquiry can be a very unfamiliar and potentially daunting process and, for many, trust with 'those in authority' had been broken prior to the Inquiry. The additional support

43 Action for Muckamore and the Society of Parents and Friends of Muckamore.
44 Phoenix Law.
45 In the usual way, under Inquiry Rules 2006, r 5.
46 Kark (n 4 above).
47 O'Reilly Stewart Solicitors.

from this team, where justified, is regarded as a reassuring factor for many of the witnesses.[48]

Counselling and other support

The Secretary to the Inquiry worked with victims' and survivors' support groups in Northern Ireland to identify what counselling support should be made available for witnesses. It was decided that a counsellor should be on site every day when a Patient Experience Witness is giving evidence (wearing a yellow lanyard so they can be easily identified). They meet the witnesses when they arrive at the inquiry premises, help put them at their ease and inform them where they will be sitting in the hearing and that they can speak to them at any point. The length of time they spend with a witness depends on the witness's individual needs. All witnesses are also given the option to talk with the counsellor immediately after giving evidence.

Those who work with traumatised people and their accounts of traumatic events are themselves exposed to emotional and, in some cases, traumatic impact. This work is, at times, extremely challenging. It is important that staff carrying out such work are alerted to the type of things they may hear and to potential, and normal, reactions to that, and that support is made available.

The Inquiry makes counselling available to any member of the public attending hearings at the Inquiry premises as well as for inquiry staff, should they want it. Wellbeing sessions are provided for members of staff once a quarter and wellbeing books are available for staff in the inquiry office. Team building is a priority for the Inquiry. During the research interviews, interviewees stressed the importance of the strong and mutually supportive team-working environment that exists within the inquiry team and the open-door policy allowing them, at the end of a difficult day, and without revisiting the details of the subject matter, to be able to talk to colleagues, debrief and support each other.

When the research was conducted, it was too early in the Inquiry's proceedings to identify how the Inquiry will approach ongoing support for vulnerable participants after the Patient Experience Phase is concluded, particularly when resources are then deployed to support and engage with other witnesses. It was also too early to determine how the Inquiry will address the important question of how participants will access ongoing support post-inquiry, when inquiry personnel move on to new roles and funding ends.

---

48 Note: whether public funding is granted for legal advice is at the discretion of the chair (including for core participants, for whom there is no automatic entitlement to funding). Under s 17 of the Inquiries Act 2005, the chair must have regard to the need to avoid any unnecessary cost to public funds. Each application for legal funding was considered individually.

Summary of adaptations and support

Adaptations and support measures for vulnerable witnesses and participants

- Publicity, to encourage engagement, designed and adapted to the needs of potential participants.
- Engagement events, held locally for potential participants and online.
- Carefully selected location accessible by various modes of transport.
- Transport provided by the inquiry where needed.
- Provision of direct contact details and regular communications between inquiry staff and witnesses and core participants.
- Regular Chair's statements and updates on inquiry progress.
- Personal support from inquiry staff throughout witnesses' attendance at the inquiry premises.
- The use of registered intermediaries.
- Provision of counselling support for witnesses and participants.
- Wellbeing sessions for staff and recognition of the importance of a supportive team working environment.

Targeted and individualised adaptions and support measures

- Payment for travel made on account, to avoid the need to handle money.
- Witnesses met by inquiry staff at a place of their choice to assist in finding the premises.
- Provision of additional practical support to avoid having to leave the inquiry premises on the hearing day.
- The use of easy-read documents.
- The use of coloured lanyards to assist in identifying inquiry staff, members of the media and counsellors.
- Inquiry timetable and hearing schedules taking into account witnesses' needs around timing and flexibility.
- Remote hearings and support with caring responsibilities.

DETAIL OF THE EVIDENCE-GATHERING PROCESS

Statement taking

Instructions and case manual

Witness statements for patients and family members were taken by independent solicitors appointed by the Inquiry, rather than by legal representatives engaged by the witnesses.[49] (The Chair refused the request of some family members to provide statements to their own legal representatives on the basis that the statement-taking process must be independent of the interests of any specific party.)[50]

This served a number of purposes. Firstly, it meant that the evidence-gathering was inquisitorial rather than adversarial from the outset. Public inquiries are inquisitorial; there are no 'sides' or 'parties' to a public inquiry.[51] Their role is not to make a determination between opposing viewpoints and positions put forward by opposing parties, but to fulfil the Inquiry's terms of reference by independently investigating the evidence and by following lines of inquiry where they lead. Having statements taken by independent solicitors appointed by the Inquiry ensured that the statements that were taken focused on the matters set out in the terms of reference and that all the matters of interest to the Inquiry were addressed, minimising any time and cost incurred in following up on matters not addressed.[52]

Secondly it allowed the Inquiry greater control over the approach to statement-taking. The statements were produced in a consistent format,[53] and the Inquiry avoided incurring unnecessary cost associated with engaging with multiple legal representatives.[54] Thirdly, it enabled the Inquiry to ensure that all statement takers were 'properly equipped to undertake that task and attuned to the unique sensitivities

---

49 Cleaver Fulton Rankin.

50 Chair's Update and Statement in Relation to Statements from Action for Muckamore, Society of Parents and Friends of Muckamore Represented by Phoenix Law, issued on 23 November 2022. Some of those family members gave their statements to members of the Solicitor to the Inquiry team instead.

51 See further discussion on the significance of an inquisitorial rather than adversarial approach in public inquiries in Ireton (n 5 above); and House of Lords Select Committee on the Inquiries Act 2005 (n 7 above) paras 217–215; and JUSTICE, When Things Go Wrong: The Response of the Justice System (JUSTICE 2020) paras 3.16 and 5.1.

52 Kark (n 4 above).

53 Ibid.

54 Inquiries Act 2005, s 17(3): 'the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)'.

to which the issues in this Inquiry give rise'.[55] All members of the statement-taking team undertook the training provided by the Inquiry on investigative interviewing and vulnerable witness training.[56]

Before work commenced, the Inquiry told the statement-taking team what questions and themes it wanted addressed[57] and agreed the statement-taking approach, taking into account the needs of vulnerable witnesses. The Chair, the Solicitor to the Inquiry, and the Secretary to the Inquiry were directly involved in those initial meetings and in subsequent regular update and review meetings. Day-to-day procedural matters and updates were dealt with in meetings between the Solicitor and Secretary to the Inquiry and the statement-taking team.

The statement-taking team produced a 'case manual' setting out the agreed approach and process and included templates for letters for use by all current and future members of the team, to ensure consistency and efficiency. (The team was, at times, scaled up and down to meet the needs of the Inquiry.) The case manual was reviewed and updated over time to reflect changes to process as the Inquiry progressed. Consistency of approach was addressed further by ongoing additional internal training and the holding of weekly statement-taking team meetings.

Arranging the interview

Patent Experience Witnesses are asked to complete a pre-statement questionnaire, which asks for information including: whether they have additional communication needs; wish to be accompanied by another person; are content to be named; have authority to name a patient; have been asked, or have already provided, a statement to the police;[58] and whether there is anything else that they need the Inquiry to know. They are also given an explanation of the statement-taking process and a non-exhaustive list of themes the statement takers would like to cover, depending on the individual witness. The witnesses' details and

55 Ibid.

56 Further, this was an important factor to ensure compliance with the Memorandum of Understanding entered into with the Police Service of Northern Ireland (PSNI) and the Public Prosecution Service (PPS) (n 58 below).

57 As the statement-taking process is inquisitorial, the statement takers are not strictly confined to only those questions and themes. Guided by the answers given by the witness, they are able to follow that evidence where it leads.

58 There is a criminal investigation running alongside the MAHI, and the Inquiry therefore must ensure that it does nothing that would interfere with that. A Memorandum of Understanding has been adopted in consultation with PSNI and the PPS. Witnesses who have already provided a statement to the police are given the option of adopting that statement for the purposes of the Inquiry or providing a different or supplemental statement.

pre-statement questionnaires are passed on to the statement-taking team. Witnesses are then contacted via their stated preferred method of communication – phone, email, or post.

When contacting both patient and family member witnesses, it was found to be necessary for a member of the statement-taking team to first take them back through the questions and answers in the pre-statement form to answer queries, provide further explanation of the inquiry process, address any concerns, and to seek clarification and additional information from the witness. It is a significant stage in the process. Where, for example, the preferred method of communication is by phone, the process of going through the pre-statement questionnaire may take between an hour and an hour-and-a-half. In addition to ensuring that the witness understands the statement-taking process and the Inquiry receives all the information it needs to put adjustments in place, it also allows the witness statement-taking team to start building trust and rapport.

Each Patient Experience Witness decides where they feel most comfortable having the statement-taking meeting. This is often discussed with witnesses when going through their pre-statement questionnaire, including the fact that, although it may seem more convenient to discuss their evidence at home, they may prefer to do so in the lawyers' office to avoid bringing discussion of traumatic events into their home. Conversely, some witnesses may prefer to be interviewed away from the formal environment of the lawyers' offices, in the familiar surroundings and privacy of their home, where support networks are close by. The decision is made prior to any meeting with an RI, but family members, support workers and family liaison officers may provide support in making the decision, which will include consideration of the witness's prior experience of formal processes and any additional vulnerabilities or other issues. More than half of the Patient Experience Witnesses chose to give evidence in the statement-taking solicitors' offices.

The statement-taking process

RI assessment of a witness takes place at the start of the statement-taking meeting. If the RI determines that communication support is suitable for a witness, they attend the statement-taking meeting with them. The Inquiry also offers vulnerable witnesses the opportunity to be accompanied by a 'support person', who is usually a family member, family liaison officer, or close friend.[59] Their role is to provide emotional support. The number of people who will be in the room during statement-taking is a key consideration for the RI. If a witness

59 It is important to ensure that they are someone with no potential conflict of interest.

attends the statement-taking meeting in the office, it might just be the witness and a single statement taker present. However, on a home visit, statement takers are always accompanied, for example by a social worker or a paralegal, depending on the needs of the particular witness. Some witnesses become agitated by having numerous people in the room. Others, for example, are most comfortable with their support person, support worker, police family liaison officer and RI all present.

The Patient Experience Witnesses have had a range of experiences of the criminal justice system and public health system, and many have a range of associated feelings of vulnerability, distrust and reluctance to provide information. As a result, the statement takers spend time at the beginning of the meeting reassuring the witness and ensuring that everything is explained in terms that are easily understood, to avoid misunderstanding. This includes explaining that an inquisitorial approach will be used rather than an adversarial approach (with which they might be more familiar). The statement takers wear casual, rather than business, dress to help make the process as informal and stress-free as possible. Notes of the meeting are taken by hand, rather than being recorded.

The RI's role during the interview is to ensure that the witness understands the questions they are asked, that they are able to respond coherently and accurately, are not getting confused, and have sufficient breaks to allow them to rest and refocus. They may also recommend the use of communication support aids such as: 'pause cards' for a witness to show when they need a break; 'Post-it' notes, for drawing on and arranging, to clarify the order of events; 'thumbs up thumbs down' cards; stress toys to aid concentration; and pictures or physical models to assist in referring to a particular part of the body.

The aim, by making recommendations to the statement taker and discussing and agreeing in advance how the meeting will be approached, is to minimise the need for any intervention from the RI during the meeting, thereby avoiding interrupting the statement taker and confusing the witness. (Occasional intervention may be needed, for example, if more complex question structures or language use inadvertently slip into questioning, the RI needs to check if the witness has understood what was asked, or to indicate that a witness is becoming tired or distressed and needs a break.)

The length of meetings is guided by the needs of individual witnesses. A meeting with a patient or former patient generally does not exceed an hour-and-a-half and it is common for there to be a series of shorter meetings. By comparison, many family members give their evidence in one or possibly two longer meetings. A balance has to be found between having the fewest possible meetings while ensuring that

the evidence taken is full and accurate. The statement is then drafted and sent either directly to the witness or to their legal representative. There is usually then an exchange of correspondence, via the secure document management system, in order to agree the finalised content and to arrange for signature.

Adaptations and support measures for taking statements from vulnerable witnesses
• Appointment of independent statement-takers trained in investigative interviews, vulnerable witnesses and working with RIs.
• The use of a case manual, template letters, weekly review meetings and ongoing training by the statement-taking team to maintain consistency of the approach prescribed by the inquiry.
• Pre-statement questionnaires for witnesses to identify any specific needs.
• Witnesses' choice of venue for statement-taking meeting and who will be present.
• RI assessments and communication support.
• The use of multiple short meetings, rest breaks and communication support aids.

Familiarisation support in advance of the hearing

The Inquiry produced a 'Hearing Day Explainer Video' to assist those attending the inquiry premises, including the public, media and witnesses.[60] It enables vulnerable witnesses and participants to visualise what will happen, from when they arrive at the inquiry premises to when they leave. It also allows them to see many of the people they will meet at the Inquiry. The Chair of the Inquiry and CTI introduce themselves in the video and explain their role and the role of the Inquiry. The video also shows all three Panel members and where they sit; where the core participants, lawyers and witnesses sit; and the view from the witnesses' seats.

Patient Experience Witnesses are encouraged to visit the inquiry premises prior to the day of their hearing, on a 'familiarisation visit'.[61] It often takes place exactly one or two weeks before the hearing, on the same day and at the same time as the hearing, so they can practise their timings and travel arrangements. The inquiry team recommends that they come in the clothes they intend to wear on the day of the hearing to make the experience as close as possible to that of the hearing itself. RIs attend with them if they consider it necessary for the witness. (Often, they are accompanied only by their support person.)

They are met at the door of the inquiry premises, as they would be on the hearing day. The Secretary to the Inquiry takes them through the signing-in process, shows them the witness room and hearing

60 See MAHI, 'Hearing Day Explainer Video'.

61 Most took up that opportunity.

room and gives them the opportunity to sit at the witness table. They are shown where the Panel, the legal representatives, stenographer, members of the public and others will sit. Most witnesses, when asked, want members of the administration team to sit at the tables for the Panel, core participants and legal representatives and to stand to tell them who they represent, to give them an idea of how the full room will feel. If any members of the Panel are in the building during the visit, they sit in their usual seat, to give the witness the chance to meet them in advance and give them an idea of the proximity of the Panel.

The witnesses are introduced to counsel. (Where possible, it will be the member of the CTI team who will be doing their questioning on the day of their hearing). The environment of an inquisitorial public inquiry hearing is very different to that of an adversarial court hearing, which is a process with which the witness may well be more familiar and about which they may have negative preconceptions. To reassure the witness, counsel sits at their usual table and has an open conversation with them, for five or ten minutes, to give them a feel for the inquisitorial approach. The witness's evidence is not discussed, instead counsel will ask them about something they have done the weekend before or a hobby, to get them engaged and speaking and to give them experience of the style of questioning and what they will need to do when giving evidence. This can boost their confidence and also gives counsel an opportunity to gauge, in advance, how nervous the witness is about giving evidence and what further adjustments may be required on the day.

On the day of the hearing

Building trust and providing reassurance and support is a priority for the Inquiry. From their arrival at the inquiry premises to when they leave, the patients and family members have someone from the inquiry team with them, to provide support. Offering cups of tea and biscuits is seen as being a key part of the relationship-building process and helpful in putting the witnesses at their ease. Pictures are hung in the witness room, consultation rooms and corridors, including photographs from the local area, pets and wildlife, to make the rooms appear less formal and to spark conversation. The temperature of the rooms is monitored.

Witnesses, and those accompanying them, are greeted at the door of the Inquiry by one of the security team and guided to the witness room by a member of the admin team,[62] where they are introduced to the Secretary to the Inquiry (who has already been in direct communication, as part of making the arrangements for their attendance). The Secretary to the Inquiry begins by telling the witness

62 They are all aware in advance of who the witness is and any needs and requirements they may have.

that the inquiry team's priority is to help them give their best possible evidence and they are encouraged to let the team know if they need anything from the inquiry team to help them to do so. A general outline of what will happen, where they will sit, and taking the oath or making an affirmation is explained, and any questions the witness has are answered. This is all done slowly, without any rush, to ensure the witness has a clear understanding and is as calm as possible. If they have a legal representative, they will be with them.

The inquiry counsellor also introduces themself and explains where they will be sitting in the hearing room while the witness gives evidence and that the witness has access to them at all times should they wish to speak to them. The Secretary to the Inquiry remains with the witness throughout, including sitting with them during the hearing and until they leave. Another member of the administration team is also always nearby to respond to any needs that arise, to give regular updates on what is happening, and to relay any information, as necessary.

The member of the CTI team who will be questioning the witness meets them about half an hour before the hearing starts, to help to put them at their ease. They explain again that it will be only them asking the questions (with possibly some additional questions from the Panel). Counsel also reminds them of the inquisitorial approach and reassures the witness that they will not be faced with confrontational questioning. Counsel explains the reason for any use of ciphers. The impersonal nature of the use of ciphers contrasts with the reduced formality of the hearings and use of first names. It is explained that it is done to preserve anonymity and, whilst it might sound very impersonal to refer, for example, to their son or daughter as 'P5', CTI and the Panel will do their best to minimise any resulting discomfort.

Counsel does not discuss the witness's evidence with them but does explain which points in the witness's statement they would like to talk to the witness about during the hearing, to prepare them for the areas of questioning. The RI also spends approximately half an hour before the hearing speaking with counsel, talking through the content of the RI's written report and recommendations. Where a witness requests it, the Chair will often come and meet the witness to give further reassurance.

In the hearing room

Whilst witness familiarisation assists those who attend to give oral evidence, walking into the large inquiry hearing room on the day, with recording equipment and 30 or so lawyers and other people present, taking the oath, taking a seat before the Panel and being prepared to face questions, can be very daunting for witnesses. In an attempt to alleviate some of these challenges, large screens are made available for witnesses who are apprehensive about the number of people in the

room, so that the rows of core participants, lawyers and the public can be blocked from view and the witness can just see the Panel. These have been used relatively frequently. Further, two witnesses were apprehensive about the number of other people in the room but did not like the feeling of being enclosed by the screens, so the hearing room was cleared. All the core participants and legal representatives were put into the other hearing room, where they could follow the live stream. The only people physically in the room with the witness were their family liaison officer, the Solicitor to the Inquiry, one member of the CTI team, the three Panel members, the stenographer, IT staff[63] and the witness. One further witness who was apprehensive about the number of people in the room chose to give their evidence from the anonymity room (see below). In this particular instance, their voice could be heard and their face could be seen on screen.

Giving evidence at the hearing

The role of CTI in an inquiry hearing is very different to the role of counsel in adversarial court proceedings. In a court, it is the role of counsel to advise their client, who is a party to the proceedings, on legal issues and to advocate on their behalf. They present their client's case or position to the judge, and test and challenge their opponent's evidence by cross-examination, in order to 'win' the case. A public inquiry is inquisitorial and has no parties. The role of CTI is to review and analyse the evidence in advance of the hearing, question the witnesses on behalf of the inquiry to elicit their best evidence, and assist the chair with legal issues that may arise during the course of the inquiry. The focus of inquisitorial questioning is on clarifying and examining facts; ensuring comprehensive, accurate evidence-gathering and following the evidence where it may lead in order to gather the evidence the inquiry needs. During an inquiry, the role of counsel for witnesses and core participants is to assist the inquiry to fulfil its terms of reference and ensure that their clients' interests are properly represented during the course of the inquiry.[64]

One of the most important advantages of the public inquiry process in terms of engaging with vulnerable witnesses is the flexibility with which counsel may examine witnesses. Counsel is not confined to examination in the form of chief and cross-examination but can adapt their style for each witness, as required. Individual witness may each have very different vulnerabilities. In addition to some witnesses having communication needs, many relatives and friends who give evidence

63 The presence of the IT technicians to one side of the witnesses did not cause any issues (their role having been explained).

64 See Mitchell et al (n 11 above) ch 6.

also find it extremely challenging to talk about the experiences of their loved ones.

A lot of the groundwork for evidence-gathering from the vulnerable witnesses is done during the statement-taking process because it can be much more flexible and can take place over an extended period of time. Witnesses can take breaks, reflect and go back and give further evidence. This provides a thorough starting point for evidence in the oral hearings.

Reading in the statement

One adaptation adopted by the Inquiry is the option to 'read in' a witness's statement and to ask the witness to adopt it, so they do not have to recount everything that they have already told the statement taker. It is intended to make the process easier and less stressful for the witness. It also saves time and associated cost and assists the Inquiry in navigating its obligation to ensure that its process does not interfere with parallel criminal investigations.[65]

The Inquiry adopted this approach for the Patient Experience Witnesses. The length of statements has varied hugely. Most statements are around eight to 10 pages long, but some family members have given statements of up to about 60 to 70 pages. Sometimes the whole statement is read in; other times counsel identifies and reads in only those paragraphs that are directly relevant to the issues being addressed by the Inquiry and reassures the witness that, whilst the other paragraphs are not going to be read into the hearing record, they are available to the Panel, and others, in the form of their written statement. The time taken to read in a statement gives the witnesses time to settle and familiarise themselves with the hearing room. Once a statement is formally read into the record, the witness is directed to specific paragraphs of the statement for clarifying questioning.

Some witnesses are not able to elaborate on the evidence in their statements but still want to attend to give oral evidence, to be involved in the process and have their voice heard (in a potentially much more powerful way than solely in the form of written statement). In such cases, counsel reminds them of what they said in their statement and asks them 'Is there anything else you want to tell the Panel about that?', for example about a particular incident, or more generally about conditions in MAH. Other witnesses choose not to give oral evidence but to simply have their statement read into the record. In those cases, the Inquiry notifies them of the date and time when their evidence

65 For example, it was used to avoid detailed discussion in the hearing about matters that are subject to ongoing criminal proceedings. That information was not read aloud, but counsel explained to the witness that the Panel and others had that information available, through the written statement.

will be read, so that they can listen online if they wish to do so, feel involved, and know that the Panel has heard their evidence.[66]

A flexible approach is taken. On occasions, witnesses who expect to give detailed evidence, and to whom it is personally very important to speak at the hearing and make their story or that of a loved one known, find on the day that the process is more difficult for them than anticipated and that they are unable to do so. In such cases, Counsel adapts their approach, reads in the statement, and asks very few questions whilst giving the witness the opportunity to add additional information if they are able to do so.

Adaptations to reduce the formality of hearings

A number of adaptions have been adopted to reduce the formality of the interaction between CTI and the Patient Experience Witnesses. Rather than using a lectern, CTI sit at a table by the witness, so they are speaking at the same level, in an attempt to help the witnesses to relax. CTI frequently uses witnesses' first names,[67] to make the exchange feel as conversational as possible (which requires care, to ensure a witness's evidence does not slip into a 'casual conversation').[68]

A decision was made by the Chair that only CTI would be allowed to ask a witness question during the oral hearings in the Patient Experience Phase unless exceptional circumstances arose; no application was made to do so. That ensures that witnesses are not exposed to multiple questioners and ensures that all those questioning witnesses have received vulnerable witness training and adopt the approach to questioning that is prescribed by the Inquiry.[69] Core participants can propose questions, in writing, in advance of a hearing.[70] This is followed by a screening and refinement process by which questions are chosen. Some proposed questions are incorporated into one; not every question proposed will be asked. This gives the Inquiry greater control to ensure that all the questions asked assist it in fulfilling its terms of reference.

---

66 In this Inquiry, this was used as a way to ensure that all those who wanted to give evidence were able to do so. In other larger inquiries, such as the IICSA, when it is not possible to call all witnesses who wish to give evidence, this has been used to ensure the key points of all relevant witnesses' evidence is heard and read into the record.

67 Though see page 62 below in the setion regarding anonymity.

68 Wigs and gowns are not used by counsel for any public inquiry.

69 MAHI, 'Transcript of Hearing of 6 June 2022' 26.

70 About nine days in advance. Note: Inquiry Rules 2006, r 10, permits core participants to apply to the chair for permission to ask questions of a witness in limited circumstances. No such application has been made in this Inquiry to date.

The length of questioning varies significantly between witnesses depending on the extent to which a witness is able to elaborate on the evidence in their statement and on the information sought by the Inquiry. Some witnesses take only an hour and others a full day. The purpose of questioning is to seek clarification, elaboration and additional information from the witness, not for them to repeat the information that is already contained in their statement.

The Chair of the Inquiry does not permit cross examination of the Patient Experience Witnesses. That does not mean that the evidence is simply allowed to go unchallenged; it is important for the Inquiry to test the evidence where necessary. CTI may question witnesses to clarify facts, probe and resolve inconsistencies, and seek additional evidence, but may not engage in questioning aimed at discrediting evidence or undermining the credibility of a witnesses, as occurs during cross-examination in adversarial proceedings. It hears the evidence, additional evidence that challenges it, and responses.

By allowing the Inquiry to depart from some of the norms of adversarial advocacy practice, the inquisitorial approach allows questioning to be done in a less confrontational way, which is particularly important in the context of vulnerable witnesses. It enables those witnesses to give evidence in a way they find more comfortable.[71] The style and nature of questioning is closer to inquisitorial investigative interviewing than adversarial interrogation. The common 'tell, don't ask' approach of adversarial advocacy is not used. Particular care is taken as some vulnerable witnesses can be more easily swayed by the phrasing of a question.[72] Counsel focuses on directive rather than non-directive open questions, for example 'How did you feel?' rather than 'Were you angry?' Tag questions are avoided (ie those where a statement is followed by a question such as 'didn't you?').

The role of the RI

Some witnesses are supported by an RI during the oral hearing, where recommended in the RI's assessment. As is the case for the statement-taking meetings, good preparation in advance of the oral hearings minimises the need for any intervention by the RI during the hearing. CTI and the RI talk through the written report and recommendations prior to the hearing and discuss adjustments and modifications to counsel's approach to the questioning. The advice and recommendations are aimed at supporting the witness to ensure that they can give their best possible evidence and also to ensure that the witness does not experience any avoidable stress or trauma as a result of participating in the inquiry process.

71 Kark (n 4 above).

72 See above.

It is often agreed in advance how the RI will attract the attention of counsel if an issue is identified, such as raising a hand. In practice, interventions are rare (and often simply the RI looking across towards counsel is sufficient for counsel to register an issue and to, for example, rephrase or reframe a question). The RI's role during the hearing includes ensuring that the pace of questioning is manageable for the witness; gauging how well the witness is able to listen, understand and respond to the questions; where necessary, requesting that words are clarified; indicating when the witness needs a break; and, on occasions, ensuring that the witness is sufficiently supported and prepared so that the witness does not do anything that might disrupt the hearing.

The RI reminds the witness that they do not need to rush and that they should notify the RI (or CTI or the Panel)[73] if there is anything they are not sure about. They sit at the witness table beside the witness in order to see the witness's facial expressions and to pick up on subtleties of their body language,[74] and also sit in the line of sight of the Panel and counsel.[75] They listen to the questions asked and answers given, while observing the witness throughout.

Anonymising and delay on feed

The Chair determined that all patients and former patients of MAH were to be allocated a cipher, although they can choose to waive that right.[76] Quite often, family members have been happy to use their own name or first name, and their respective dependent patient's first name. However, there are situations in which that is not appropriate and a system of ciphering is used. There is a delay on the live feed video that is shown in the second inquiry hearing room. If a witness accidentally gives their own name, or the name of another with anonymity, counsel

73 In practice, it is usually the former.

74 It is also important that they do, rather than sitting in the main body of the hearing room, to make it clear that their only role is to provide communication support for the witness and to avoid any misplaced perceptions that they are associated, for example, with one of the legal teams or the inquiry team.

75 This also serves to make the support open and transparent and make it clear to the Panel, and others present, that there is no question of the RI prompting or speaking for the witness. The independence of the RI must be clear and protected during the process.

76 That is, to have their identity protected from disclosure and/or publication during the Inquiry. See MAHI Protocol No 4 Protocol On Redaction, Anonymity and Restriction Order 7 December 2021 and Restriction Order Pursuant to Section 19 of the Inquiries Act 2005 Restriction Order No 2 (Patient Anonymity) 7 December 2021 (varied 16 June 2022). Other persons may apply for anonymity by applying for a restriction order. The PSNI and the PPS also applied for restriction orders to protect against any adverse impact on potential and ongoing criminal investigations and prosecutions in relation to evidence given.

asks to pause the feed for a few seconds, to enable it to be rectified for the purposes of the feed and the transcript, before being restarted.[77]

If a witness chooses to give evidence anonymously, there is an 'anonymity room' which is soundproofed, has blinds and voice distortion equipment. The witness can see the inquiry room, but no one in the inquiry room can see the witness. (There is a separate entrance and exit to the inquiry building for those witnesses giving evidence anonymously.) One drawback to the use of the anonymity room that was noted during the semi-structured research interviews is that the Inquiry could not see the reaction and emotions of the witness as they gave evidence, which can be an important consideration as to how the Panel attributes weight to evidence.

Support person

Giving evidence during a hearing can be very stressful for a witness as it is an unfamiliar process and requires them to revisit what may have been extremely stressful experiences. The Inquiry offers vulnerable witnesses the opportunity to be accompanied in the hearing room by a support person, usually a family member or close friend.[78] Their role is to provide emotional support. Witnesses frequently choose to have a support person present; they sit at an adjacent table with the Secretary to the Inquiry or, at a witness's request, at the witness table with them.

The support person is not involved in the process other than to provide reassurance and they must remain neutral. Where the support person is also a witness, each gives their evidence one at a time. In a traditional court environment if, for example, both parents of a patient are giving evidence in court, one of them will have had to sit outside while the first gives their evidence. The Inquiry does not have to adopt such strict evidential procedures, since it is not conducting adversarial testing of evidence.

After giving evidence

A witness may find they are distressed after giving evidence. Whilst for many the process of giving evidence and being heard may be cathartic, and may be part of the healing process, it does not of itself complete that healing process. Once the witness leaves the hearing room, they are given the opportunity to speak to a counsellor before they leave. Some choose to, others decide not to. If the RI has any concerns about

---

77 This is also the case if a witness gives information that could impact adversely on concurrent police investigations and is not in the public domain. (It also provides the chair with the opportunity to grant a restriction order over the information if it is appropriate to do so.)

78 It is important to ensure that they are someone with no potential conflict of interest.

how the witness coped during the hearing, they will tell the counsellor and the Secretary to the Inquiry.

Members of the media may wish to speak to witnesses after giving evidence. There is no live video link to the hearings for the patient experience on the Inquiry's website. It can only be used in the Inquiry's second hearing room (to control how it is used). As a result, members of the media have to come into the inquiry premises to view it. The Inquiry has sought to maintain a positive relationship with the media and has a dedicated media engagement team. There is an agreement with members of the media, who can be identified by their blue lanyards, that they will not approach Patient Experience Witnesses to speak to them. If members of the media are present, the Secretary to the Inquiry informs witnesses of the fact when they arrive at the Inquiry premises and explains that they may wish to speak to the witness after the hearing but that there is no requirement for the witness to do so. The media will only speak to a witness if the Secretary to the Inquiry

Support measures for the hearings

Adaptations and support measures for oral hearings

- 'Hearing Day Explainer Video', to allow witnesses and participants to visualise what will happen at the inquiry.
- Familiarisation visits.
- Practical support from a member of the inquiry team throughout.
- Counsellor support available throughout.
- Pre-meeting with CTI.
- Pictures hung to reduce the formality of the room.
- Temperature of inquiry rooms monitored to maintain them at a comfortable level.
- No wigs, gowns, or lectern and use of first names.
- Anonymity room and separate entrance and exit for those giving evidence anonymously.
- Inquisitorial approach to questioning.
- Flexible approach to style of witness examination.
- Flexible approach to reading in part, or the whole, of a witness statement.
- All questioning by CTI; core participants may propose questions.
- No cross-examination of Patient Experience Witnesses.
- Use of RIs and support persons.

Targeted and individualised measures for oral hearings

- Physical screens available to block the witness's view of core participants, lawyers and the public and *vice versa*.
- The option of clearing the hearing room.

Post-hearing

- Witnesses have the opportunity to speak with the counsellor.
- Agreement with members of the media that they will not approach witnesses.
- Thank-you letters sent after the hearing.

has spoken to the witness, the witness has asked to speak to them, and the member of the media has been advised of the fact by the Secretary to the Inquiry. There is a media room for conducting such interviews, which is away from the witness room and consultation rooms. (The media is not allowed into that section of the building).[79]

After giving evidence at the hearing, the Secretary to the Inquiry sends each witness a thank-you letter. That serves two purposes. Firstly it provides an opportunity for the Inquiry to show it has heard the witness and demonstrate its recognition and appreciation of the importance of them attending to give evidence. Secondly, it explains that the Inquiry might need to hear from them again in the future, to gently make them aware that that might not be the end of their involvement.

CONCLUSION

Pledges to 'put the needs of participants at the heart of the process' are often made by ministers and inquiry chairs following the announcement of a public inquiry, but exactly what is meant by this is unclear. This case study demonstrates the practical adjustments and support measures the MAH Inquiry put in place to put the needs of its vulnerable witnesses and participants at the heart of its process; to support them to give their best, most accurate and complete evidence; to enable their voices to be heard; and for them to inform the findings and recommendations of the Inquiry.

The broad discretion of the Chair under section 17 of the Inquiries Act 2005, to determine the procedure and conduct of the Inquiry, and the Chair's direct control over the Inquiry's budget, enabled the Inquiry to adopt a bespoke and novel approach, to respond to the challenges faced by the Inquiry and its participants. Examining this approach enables lessons to be learnt, to inform future chairs and inquiry teams in their procedural decision-making and also to draw comparative lessons for other judicial and quasi-judicial processes about engaging with vulnerable witnesses and participants.

The Inquiry's adjustments and support measures can be seen to operate at three levels: universal, targeted, and individualised adjustments and measures. The universal adjustments and measures adopt a broad definition of 'vulnerable', recognising that all witnesses and participants to the Inquiry are potentially vulnerable. They recognise the importance of building trust and rapport, of providing clear channels of communication and strong support mechanisms throughout, and are used to reduce the formality of the Inquiry's hearings and to adapt its questioning style.

79 Many witnesses do not wish to speak to members of the media.

The Inquiry's targeted adjustments and measures were put in place to address the specific needs of witnesses and participants with communication needs. Importing aspects of special measures from the justice system, particularly the integrated use of RIs, is innovative in the context of the public inquiry process. The provision of practical support, such as the use of easy-read materials, travel assistance, and being accompanied and supported by a member of the inquiry team throughout attendance at the Inquiry, helped vulnerable witnesses to give their best evidence and have their voice heard. Further, the Inquiry's flexible and responsive approach to its procedure and conduct enabled it to adopt individualised adjustments and measures to respond more specifically to the wide range of individual needs presented, such as individual adjustments to timings and limiting who may be present in the hearing room.

Because all public inquiries address serious matters of public concern, it is very common for witnesses and participants of any public inquiry to be vulnerable in the broader sense. The nature of the vulnerability, and the adjustments and support measures required for any specific inquiry, will vary according to its subject matter and the participants engaging with it. However, when determining the procedures and conduct of a public inquiry at a universal level, the starting point for all public inquiries should be considering the extent to which adjustments and support should be put in place for any vulnerable witnesses and participants, and whether additional targeted and individualised adjustments may also be necessary. All public inquiries should also consider, relatively early on, how they will approach ongoing support for vulnerable participants when the phase or module to which they have contributed comes to an end and resources are redeployed to support and engage with new categories of witnesses, as well as how vulnerable participants will access ongoing support once the inquiry comes to an end.

Costly and inefficient reinvention of the wheel each time a new public inquiry is convened must be avoided.[80] Lessons on procedural best practice must not be lost and poor practice must not, inadvertently, be repeated. There is therefore an ongoing need for greater reflection and learning on public inquiry procedure and for the recording and examination of the procedure and conduct of all public inquiries to inform future inquiries, to deliver ongoing improvement and to draw comparative lessons to inform other accountability mechanisms.

80 See the chair's obligation to act with regard to avoiding unnecessary cost: Inquiries Act 2005, s 17.

Northern Ireland
Legal Quarterly
Vol. 75 No. AD1 (2024) 391–399
Commentaries and Notes DOI: 10.53386/nilq.v76i2.1237

Sentencing: *R v Kenneth Clarke & Jamie McConnell (Reference by the Director of Public Prosecutions)* [2024] NICA 52

John Taggart
Queen's University Belfast
Correspondence email: john.taggart@qub.ac.uk.

ABSTRACT

Sentencing offenders for multiple offences can be a complicated task with various competing demands placed on the sentencing judge. The principle of totality seeks to ensure that the overall criminality of the offending behaviour is reflected in the ultimate sentence. Judges normally achieve this by making some or all of the sentences concurrent or by reducing the length of each individual sentence. In approaching this task, what role does the 'headline' or 'lead' offence have and how does it assist the judge to arrive at a 'just and proportionate' sentence? This case comment examines the reference brought by the Director of Public Prosecutions (DPP) in the case of *R v Clarke & McConnell*. In this decision, the Northern Ireland Court of Appeal decided that the wrong headline offence had been identified in the lower court which, in turn, skewed the starting point for the overall sentence. This comment examines the relevance of such a 'headline' or 'lead offence' and considers its role in the sentencing exercise. With Northern Ireland operating a different sentencing regime to England & Wales, it also considers how such cases are approached by judges in the absence of specific sentencing guidelines.

Keywords: sentencing; totality.

INTRODUCTION

Almost half of cases that come to be sentenced in our criminal courts involve individuals who have committed multiple offences.[1] It is generally accepted that simply adding together individual sentences for multiple offences to reach an aggregate sentence can often be disproportionate. Instead, the totality principle must be considered to ensure a final sentence is not too severe and that judges can 'scale

* First published in NILQ 75.AD1 (2024) 26–34 on 9 September 2024.

1 Mandeep Dhami, 'Sentencing multiple- versus single-offence cases: does more crime mean less punishment?' (2022) 62(1) British Journal of Criminology 55–72, 60–61.

back' the sentence as appropriate.[2] Since 2009, the Sentencing Council in England & Wales has had a statutory duty to prepares guidelines 'about the application of any rule of law as to the totality of sentences'.[3] The guidelines issued since have emphasised that sentencing judges must pass a sentence which reflects the totality of the offending behaviour and also considers the factors personal to the offender as a whole. This is imperative to ensure that the overall sentence is 'just and proportionate'.[4]

As Ashworth and Kelly recognise, multiple offences give rise to both theoretical and practical difficulties in the sentencing process.[5] Perhaps the most obvious difficulty is the tension between the principles of totality and proportionality. The fact that a defendant may receive 'discount for bulk offending' arguably undermines the deterrent effect of the law.[6] As Reitz notes, a persistent offender may ultimately have the same amount of convictions as a multiple offender who is sentenced on one occasion, yet the former is punished more severely.[7] It may be argued that the recidivist is more culpable and thus deserves an increased sentence, but the significant difference between the sum of sentences imposed on one offender over several years compared to the total sentence imposed at one time is often difficult to justify considering the principle of proportionality.[8] There are other issues with the totality principle in practice: what criteria should sentencing judges use to assess if a proposed total sentence is just and proportionate? Ashworth concludes that the calculation of totality seems to be left to 'instinct' and 'feel' – an unsatisfactory position for any sentencing regime.[9] Further, should a different approach be adopted depending on the categories of harm/offence?[10]

---

2 Martin Wasik, 'Concurrent and consecutive sentences revisited' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 287.

3 Coroners and Justice Act 2009, s 120(3)(b).

4 Sentencing Council, 'Totality' (guideline effective from 1 July 2023).

5 Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* 7th edn (Hart Publishing 2021).

6 Wasik (n 2 above) 287.

7 Kevin Reitz, 'The illusion of proportionality: desert and repeat offenders: theoretical and applied perspectives' in Julian Roberts and Andrew von Hirsch, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart 2010).

8 Allan Manson, 'Some thoughts on multiple sentences and the totality principle: can we get it right?' (2013) 55(4) Canadian Journal of Criminology and Criminal Justice 481–494.

9 Andrew Ashworth, *Sentencing and Criminal Justice* 6th edn (Cambridge University Press 2015) 285.

10 Manson (n 8 above) 484.

The effectiveness of the totality approach in facilitating rehabilitation and the weight that sentencing judges should give to these factors is also open to debate.[11]

This article considers the reference brought by the Director of Public Prosecutions (DPP) in the case of *R v Clarke & McConnell*.[12] While the judgment is important for the emphasis placed on deterrence as a sentencing aim, this article focuses on the role of the 'headline' or 'lead' offence in the sentencing of a multiple offence case. It considers the utility of identifying such an offence, which is typically the most serious among all of the charges brought. No formal sentencing guidelines exist in Northern Ireland (unlike England & Wales) so the discretion of the sentencing judge comes into sharp relief in such cases. As such, there is an argument that identification of a headline/lead offence attains even more importance as a guide to ensure the overall sentence is 'just and proportionate'.

BACKGROUND

This was a reference brought by the DPP for Northern Ireland under section 36 of the Criminal Justice Act 1988 (as amended by section 41 of the Justice (Northern Ireland) Act 2002).

Both respondents had pleaded guilty to conspiracy charges, namely: i) conspiracy to steal from several ATMs, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 1 of the Theft Act (Northern Ireland) 1969; ii) conspiracy to commit arson of vehicles intending that such property would be destroyed or damaged, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and article 3(1) and (3) of the Criminal Damage (Northern Ireland) Order 1977; and iii) conspiracy to commit criminal damage to buildings and ATMs, contrary to article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and article 3(1) of the Criminal Damage (Northern Ireland) Order 1977.

The factual background of the case involved a series of incidents whereby ATMs were attacked using digger machines across County Antrim, Northern Ireland. The charges pertaining to the first respondent (Clarke) related to offending which took place over a 14-month period. The second respondent (McConnell) had a much more limited role with offending taking place over a 16-day period. The *modus operandi* involved a digger being stolen in the early hours of the morning close

11 Mirko Bagaric and Theo Alexander, 'Rehabilitating totality in sentencing: from obscurity to principle' (2013) 36(1) University of New South Wales Law Journal 139–167.

12 *R v Clarke & McConnell* [2024] NICA 52.

to the location of an ATM. The digger would be driven to the ATM where it would rip out the ATM and load it onto a waiting vehicle, such as a car with a trailer. The digger would be burnt out at the crime scene to destroy any forensic evidence and the ATM would be moved and opened at another location.

An agreed basis of plea was entered by both respondents in which it was accepted that the prosecution could not identify the respondents as having removed or disposed of the ATM machines, of having handled or disposed of cash taken from the ATM machines or having destroyed property. However, the respondents accepted their guilt on a joint-enterprise basis. The total damage associated with the first respondent (Clarke) was over £1 million, including £550,000 of cash from the ATM machines, arson damage amounting to £153,000 and property damage with consequential loss in the region of £472,000. In relation to the specific incidents in which McConnell was engaged, the loss of cash stolen from the ATMs was £263,000 with the damage caused by arson of £115,000 and the damage to property with consequential loss at £184,000.

In its reference, the DPP contended that both sentences were unduly lenient. The trial judge had sentenced the first respondent (Clarke) to a period of imprisonment of five years and eight months after reduction for a guilty plea. The starting point chosen by the trial judge was eight years. The second respondent (McConnell) was sentenced to a total period of imprisonment of three years and eight months, after reduction for a guilty plea, the starting point chosen by the judge being five years in his case.

Allowing the appeal in part, the Court of Appeal of Northern Ireland (NICA) accepted that in relation to the first respondent (Clarke), the trial judge erred in her choice of a starting point of eight years. Instead, based on Clarke's specific offending, the starting point should have been 10 years. However, the NICA noted that the trial judge had been 'unwittingly drawn into this error as the case was presented to her based on a headline offence attracting a maximum sentence of ten years'.[13] The court described this as 'a mistake' which restricted the sentencing powers of the judge. Instead, greater sentencing flexibility was available to the trial judge given the other offences which attracted a 14-year maximum sentence. The court dismissed the reference in the case of the second respondent (McConnell) whose sentence remained unchanged at three years and eight months.

13 Ibid [33].

COMMENTARY

The decision of the NICA in the *Clarke & McConnell* reference is significant in relation to the judicial approach that should be adopted to sentencing for multiple offences. In this reference, the NICA deprecated the emphasis placed on the chosen 'headline' offence which in the lower court had been presented as the conspiracy to commit theft. While the maximum sentence for this offence is 10 years' imprisonment, the conspiracy to commit arson and criminal damage offences attract a maximum of 14 years' imprisonment. The court felt that this was an error of principle which had 'crept in' based on how the case was presented in the lower court.[14]

In Northern Irish sentencing practice, the 'headline offence' usually refers to the most serious offence among multiple offences, which acts as a base for the overall sentence which should ultimately reflect the total range of offending. In England & Wales, this has been referred to as the 'lead offence' (see *R v ADX*;[15] *R v PS*).[16] As the NICA previously made clear in the case of *R v ZB*,[17] where no 'headline' offence is apparent – that is because all offences are as serious as the others and 'one does not aggravate the other' – the assessment of totality becomes increasingly important.[18] In England & Wales, the approach to sentencing an offender for multiple offences is laid out by the Sentencing Council's 'Totality' guidance.[19] The NICA 'found assistance' in this guidance in the *ZB* case but has more recently in the case of *R v Hutton* stressed that courts should avoid a 'mechanistic approach' to sentencing such cases.[20] Nonetheless, while Northern Ireland does not have formal sentencing guidelines like England & Wales, the broad principles of the Sentencing Council's guidance have been approved, with the imperative being the need to achieve a 'just and proportionate' sentencing outcome.[21] The NICA has cautioned, however, that the sentencing methodology adopted by the England & Wales Court of Appeal should not be 'direct[ly] read across to this jurisdiction' and has laid out some broad guidance in *Hutton*.[22] One feature of this guidance is that courts should 'consider the sentence for each individual offence and consider identifying a headline offence' before consideration of concurrent/consecutive sentences, whether any

14 Ibid [27].
15 *R v ADX* [2024] EWCA Crim 196.
16 *R v PS* [2022] EWCA Crim 202.
17 *R v ZB* [2022] NICA 69.
18 Ibid [70].
19 Sentencing Council (n 4 above).
20 *R v Hutton* [2024] NICA 19, [58].
21 Sentencing Council (n 4 above).
22 *R v Hutton* (n 20 above).

'downward adjustment' might be required and whether any reduction for a guilty plea might be appropriate.

The utility of identifying a 'headline' or 'lead' offence in such cases is worthy of examination. The NICA in the *Clarke & McConnell* reference essentially determined that the totality principle had not been properly interrogated and applied. The court emphasised the 'interplay' between the three different conspiracy offences but noted that there had been undue focus on conspiracy to commit theft in terms of sentence availability.[23] The unfortunate outcome, the court suggested, was that the trial judge was not afforded the flexibility to properly address the 'high harm' caused by the first respondent.[24] Unlike other NICA cases (such as *R v Playfair*,[25] for example) the court here did not explicitly identify an alternative headline offence. While it did not say so directly, the NICA signalled that the wrong headline/lead offence had been presented since, if the trial judge had identified one of the more serious charges as the headline/lead charge, sentencing flexibility would have been maximised. Indeed, the NICA went further and suggested that in cases involving multiple incidents a range of 10 to 14 years is an appropriate starting point before a guilty plea is taken into consideration.[26]

What then is the purpose of identifying the headline/lead offence in these cases? In *R v Plaku & Ors*,[27] a stalking offence was identified as the lead offence in a case involving several other related offences as it was appropriate to 'reflect the overall criminality' of the offender.[28] In the case of *R v PS*,[29] the Court of Appeal was content that the sentencing judge had assessed the case's 'seriousness by reference to the combination of offences committed' and then gone on to 'pass the resulting sentence on the lead offence in that group'.[30] These cases contrast in terms of the utility of identifying a lead offence – in *Plaku* the headline/lead offence was sufficient to reflect the overall criminality while in *PS* the headline/lead offence acted as the centrepiece around which the ultimate sentence was constructed. To be clear, it is not suggested that either of these approaches is correct or incorrect – rather it demonstrates that the headline/lead offence can be a useful tool for the sentencing judge in gauging the totality of the offending. Considering the 'overriding need to maintain judicial discretion' in

23 *R v Clarke & McConnell* (n 12 above) [32].
24 Ibid [31].
25 *R v Playfair* [2024] NICA 21.
26 *R v Clarke & McConnell* (n 12 above) [41].
27 *R v Plaku & Ors* [2021] EWCA Crim 568.
28 Ibid [50].
29 *R v PS* (n 16 above).
30 Ibid [14].

sentencing in Northern Ireland, the headline offence operating in this flexible way is arguably in keeping with general sentencing principles.[31]

Although subtle, there is an assumption in the Sentencing Guidelines in England & Wales that a lead offence will be identified in cases involving multiple offences.[32] While the judicial guidance in Northern Ireland encourages judges to 'consider' identifying a headline offence, this is not mandatory.[33] It is worth briefly noting that the judicial approach to the relationship between the 'headline offence' and the principle of totality has appeared inconsistent at times in Northern Ireland. For example, in the case of *R v Magee*,[34] the Crown Court considered that dealing with manslaughter as the headline offence was important 'to comply with the principle of totality' where an arson charge was also involved.[35] In *ZB*, cited above, the court agreed with both the prosecution and defence that no headline offence needed to be identified in a case involving an offence under section 18 of the Offences Against the Person Act 1861 and a sexual assault of a child under 13, contrary to article 14 of the Sexual Offences Act 2008.[36] Since there was no identifiable headline offence, the NICA emphasised the importance of the totality principle. Granted, these cases involved very different charges but there is nonetheless a lack of clarity around the operation of the headline offence in terms of how it impacts the court's overall approach to totality.

In any event, there are compelling reasons for identifying a headline/lead offence in cases involving multiple offences. This is true even if the multiple offences are deemed equally serious (as in *ZB*) or when one more serious offence clearly subsumes the others in terms of its constituent elements (as in *Magee*). Rory Kelly has proposed a framework that incorporates judicial assessment of harm and culpability into totality assessment and which centres, or at least begins with, identification of a headline/lead offence.[37] This framework requires an assessment of whether the harm of the other offence(s) and the offender's culpability can be dealt with whilst sentencing for the lead offence or whether those offences must be addressed separately. Further, this assessment requires consideration of the sentences available for the headline/lead offence in addition to whether the offence-specific guideline for the headline/lead offence

31 Department of Justice (Northern Ireland), 'Sentencing Policy Review Consultation: Way Forward' (April 2021).
32 Sentencing Council (n 19 above).
33 *R v Hutton* (n 20 above).
34 *R v Magee* [2024] NICC 6.
35 Ibid [18].
36 *R v ZB* (n 17 above) [70].
37 Rory Kelly, 'Totality: principle and practice' (2022) 7 Criminal Law Review 562.

offers sufficient guidance for sentencing the other offence(s). This approach is also instructive in terms of the approach to concurrent/consecutive sentences as the sentencing judge will consider whether or not the other offence(s) can be wholly accounted for whilst sentencing for the lead offence. An additional benefit of this approach is that it communicates to the victims of the other non-headline/lead offences that the crimes against them matter.[38]

The obvious challenge to adopting Kelly's suggested approach is the lack of formal sentencing guidelines in Northern Ireland. Indeed, while the England & Wales sentencing guidelines are frequently cited in Northern Irish decisions, it has been stressed on multiple occasions that they are not binding and are often of limited relevance.[39] Despite the lack of offence-specific sentencing guidelines in Northern Ireland, there is nothing in the case-focused approach to sentencing to prevent judges in multiple offence cases from being required to identify a lead offence and thereafter crafting the appropriate sentence. This practice is already common in many cases, as has been discussed, but perhaps the benefits of such an approach should be better understood. While a headline/lead offence was identified in the *Clarke & McConnell* reference, a more formulaic approach (as proposed by Kelly) might have made it more likely that a different headline/lead offence would have been identified – one which would have increased and not restricted sentencing flexibility.

Finally, a practical question emerges from this discussion: who should identify the lead offence? In the *Clarke & McConnell* reference, the NICA clearly identified the presentation of the case by the lawyers as the issue and remarked that the trial judge had been 'unwittingly drawn into this error'.[40] In other cases, such as *R v Magee*, both counsel agreed on the headline offence and the court concurred. Undoubtedly this is the norm in many cases.[41] While the decision as to headline/lead offence will ultimately rest with the judge, it follows that the choice of charges brought by the prosecution in the first instance will materially impact this. Prosecutors must ensure that charges brought reflect the seriousness and extent of the offending, give the court adequate sentencing powers and allow the case to be presented in a clear and simple way.[42] In *Clarke & McConnell*, the court went as far as suggesting how prosecutors should approach cases where multiple

38 Ibid.
39 *R v Magee* (n 34 above).
40 *R v Clarke & McConnell* (n 12 above) [33].
41 Ibid [18].
42 Crown Prosecution Service (CPS), 'The Code for Crown Prosecutors' (October 2018); Public Prosecution Service (NI), 'Code for Prosecutors' (May 2023).

offences are involved by recommending a 'more natural route' which would maximise flexibility for the sentencing judge.[43] The court noted that the charging of separate offences would assist the sentencing judge and reduce the risk of undue fixation on a headline offence as occurred here. It highlighted the possibility of a burglary or conspiracy to burgle charge (with a maximum of 14 years) which would likely have been identified as the headline/lead offence in the case. Such an approach would be consistent with the prosecution of these types of cases in England & Wales where similar incidents have been charged as burglary.[44]

43 *R v Clarke & McConnell* (n 12 above) [40].

44 For example, see *R v Beddoes* [2015] EWCA Crim 2525.

Articles

Commentaries and Notes