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Is Ireland a bilingual state?

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Abstract

This article is a critique of the recent judgments of the Irish Supreme Court on the subject of bilingual juries in Ireland. By ruling that to allow Irish speakers to be tried by a jury that speaks Irish would be unconstitutional, despite the constitutional status of the Irish language as a national and the first language of the state, it has undermined the bilingualism of the Irish state and betrayed the principal function of the state that the founders had envisaged. The article argues that the issue of bilingual juries in Ireland has left the state on a crossroads, but in a position where it must act. It concludes by offering two alternatives: either to abandon its commitment to bilingualism or to honour it fully.[2]

Introduction

What is a bilingual state? What does the status of a 'national language' mean, and in what contexts can the citizen interact or be denied interaction with the state and its institutions, especially its legal system, through the medium of a national language? Specifically, should the citizen charged with a criminal offence have the right to be tried through the medium of the national language by a tribunal competent in that language? These were some of the questions that confronted the Supreme Court of Ireland in *Ó Maicín v Ireland*.[3]

These were the facts. The appellant, a native of Rosmuc in Connemara, County Galway, was charged with committing an assault and producing an offensive weapon. He was to stand trial at Galway Circuit Criminal Court for these offences. Both alleged assailant and victim were native Irish speakers. The incident occurred and was to be tried in an area where the most recent census figures show that the language enjoys extensive everyday use by significant numbers of the population and is within the competence of the majority of the

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2 A work-in-progress version of this article was presented as a paper at the Regulating Language, Regulating Rights symposium hosted by Cardiff University's Language, Policy and Planning Research Unit on 28 April 2015. The author is grateful to the participants for their comments. He also wishes to thank the NILQ's editor and anonymous reviewers, and Dáithí Mac Cárthaigh BL, for their suggestions.

3 *Ó Maicín v Ireland and Others* [2014] IESC 12 (27 February 2014); [2014] 2 JIC 2703.

population.[4] The appellant wished to present his defence in Irish and to have his case heard by a bilingual jury, that is, a jury who were sufficiently competent in Irish to hear the case without the assistance of a translator or interpreter. He asked that a jury district consisting of bilingual citizens capable of serving on a bilingual jury be created, or some alternative administrative arrangement whereby 12 jurors could be randomly selected from a list of bilingual citizens.

The appellant's argument was that he was constitutionally entitled to be tried by a tribunal which spoke the national and first language of the state. He was not arguing that he should to be tried by an Irish-speaking jury in order to have a fair trial. No doubt, the quality of the process would be better if he were tried by a tribunal that spoke and understood his language without interpretation. But that was not the basis of his submission. Neither was he asking for special provisions to be in place in the cause of compassion, inclusivity, diversity or some other humane consideration. His case was that he was an Irish speaker in a sovereign state whose constitution recognises the Irish language as the national and first official language and, accordingly, he had a right to be tried by a tribunal, that is, a judge and jury who spoke his language.

The Supreme Court of Ireland rejected his application and ruled that a bilingual jury would be unconstitutional. That judgment is one whose significance transcends criminal justice issues, such as trial fairness or due process. Its relevance for criminal process is in many ways secondary. Its true significance is that it challenges a particular sovereign state's commitment to constitutional bilingualism. This article's purpose, in light of the judgment in *Ó Maicín*, is to determine, as a matter of constitutional principle and practice, whether or not the Irish state is a bilingual state.

Justice in the bilingual state: a paradigm

Bilingualism is a linguistic term whose meaning is derived from the Latin for 'two tongues', that is, two languages.[5] Bilingualism as a human phenomenon manifests itself at several levels, from the individual or familial to the communal, regional or national.[6] State bilingualism is a form of societal bilingualism, in that it concerns bilingualism in its collective meaning. But a bilingual state does not necessarily consist of individuals who are all fluent in both languages of the state. Indeed, the global norm is for individual bilingualism to be a trait of the minority in any given society.[7]

This is not an essay in socio-linguistics: it does not explore the cognitive or typological definitions of bilingualism. The question that this paper poses is, what is the bilingual state? This expression, bilingual state, is not a legal or constitutional term of art. However, there are states which are bilingual and whose bilingualism is a keystone in their constitutions. These provide us with paradigms of a bilingual state.[8] Modern Finland, for example, was established as a bilingual state, Finnish and Swedish, by the founding constitution of 1919.[9]

4 The Census 2011 figures for Ireland indicate that 75% of the population of Galway County within the *Gaeltacht* speak Irish, with 50% of Galway City within the *Gaeltacht* able to speak the language. The data can be accessed on the Central Statistics Office website, see <www.cso.ie/en/media/csoie/census/documents/census2011pdr/Pdf,8,Tables.pdf>.

5 See *Oxford English Dictionary* <www.oed.com>.

6 For an overarching guide, see Suzanne Romaine, *Bilingualism* (2nd edn Blackwell 1995).

7 See Mark Sebba, 'Societal Bilingualism' in Ruth Wodak, Barbara Johnstone and Paul Kerswill (eds), *The SAGE Handbook of Sociolinguistics* (Sage 2011) ch 30.

8 Finland, Cyprus and Belarus, for example, are bilingual states.

9 See D C Kirby, *Finland in the Twentieth Century* (C Hurst 1979) 69.

However, the overwhelming majority of the population speak Finnish only. The minority who speak Swedish also mostly speak Finnish and so, on an individual level, are bilingual.[10] But the linguistic demographics are irrelevant to Finland's constitutional status as a bilingual state.[11] The constitution of the state guarantees the right to language and culture, declares Finnish and Swedish to be the national languages of the state, and guarantees the right to use either language in the courts and to receive official documents in either language. Both languages are treated by law on an equal basis.[12]

Giving further effect to these constitutional rights are the provisions of the Language Act 2003, which confirms the equal status of both languages as national languages.[13] Section 14 of the Act deals with the language of criminal proceedings and provides that the national language of the defendant is used as the language of those proceedings. In situations where there are several defendants who speak different languages, or a language other than the national languages, the court determines the language of the proceedings 'with regard to the rights and interests of the parties'.[14] But the first principle which the law upholds is that the language of the defendant shall be the language of the proceedings, which means that, not only has the defendant the right to use his or her national language, but the defendant will also be tried by a tribunal which speaks that language. Finland, of course, is not a common law jurisdiction and the particular issues and dilemmas that arise in the context of jury trials do not apply there. We must therefore look for a better precedent.

Perhaps the archetypal bilingual state in the common law world, and therefore the most appropriate model for comparison, is Canada. Canada's federal bilingualism is entrenched in its constitution and is given further meaning in legislation. In summary, Canada regards English and French as official languages of equal status.[15] The origin of Canadian bilingualism can be found in the British North America Act of 1867 which established the Canadian confederacy and gave dominion status for Canada.[16] Although the Act did not establish Canada as a bilingual state at the outset, it gave the right to use either English or French in debates in the Canadian Parliament and the legislature of Quebec, the right to use either language in certain courts and legal proceedings established by Parliament, and in Quebec, and ensured that legislation published by the Canadian Parliament and the legislature of Quebec would be bilingual. The Act formed the basis of the Canadian Constitution until 1982, when it was redesignated the Constitution Act 1867 and incorporated into Canada's Constitution Act of 1982.[17]

The Canadian Charter of Rights and Freedoms is the key instrument in the country's modern constitution, forming the first part of the Constitution Act of 1982. It confirms the official bilingualism of Canada as a federal state and the bilingualism of the province of New Brunswick. Section 16 of the Charter declares that English and French are official

10 There are also other languages spoken in Finland which enjoy varying levels of state support and protection but which are not national languages. The demographic profile is summarised here <www.ethnologue.com/country/FI/languages>.

11 See Markku Suksi, 'Implementing Linguistic Rights in Finland through Legal Education in Finnish and Swedish' in Xabier Arzoz (ed), *Bilingual Higher Education in the Legal Context* (Martinus Nijhoff Publishers 2012) 101–32.

12 Constitution of Finland, s 17: see <www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

13 423/2003: see s 1.

14 Language Act 2003, s 14.

15 For historical background and social context see John Edwards (ed), *Language in Canada* (CUP 1998).

16 British North America Act 1867, s 133. This section declares the official and constitutional status of English and French.

17 See <http://laws-lois.justice.gc.ca/eng/Const/Index.html>.

languages and have equality of status and equal rights and privileges. Furthermore, s 19 of the Charter states that, 'either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament'. Giving effect to the phrase 'equality of status and equal rights' is the Official Languages Act (Canada) 1988. Section 2 of the Act states that the purpose of the legislation is to:

> (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;
>
> (b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and
>
> (c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

Equality is a keyword in this Act and it is this Act which turns the broad constitutional principles into practical legal rights. The preamble emphasises the guiding values that 'English and French are the official languages of Canada and have equality of status and equal rights' and underlines the commitment of the government of Canada 'to enhancing the vitality and supporting the development of English and French linguistic minority communities, as and to fostering full recognition and use of English and French in Canadian society'.[18] The government of the Canadian state is the guarantor of the development and maintenance of bilingualism. It is not a passive or an indifferent role. Not only is linguistic equality a key constitutional principle, it is clear that it is the business of the state, through its government, to safeguard and support Canada's bilingualism and to work with the provinces to achieve this. The Act's detailed provisions set out how bilingualism is given effect and, among other things, define the role and function of the Commissioner of Official Languages in implementing and promoting language rights.[19] This Act, in addition to confirming the right to use either French or English in the Canadian federal courts[20] and the duty of federal courts to ensure that any person giving evidence in his or her chosen official language is not placed at a disadvantage by doing so,[21] gives parties in the federal court the right to a tribunal which speaks their official language.[22]

In the context of criminal jury trials, the right to a tribunal which speaks one of the official languages is given further manifestation by the Canadian Criminal Code which applies in all the federal criminal courts throughout Canada. The Code gives accused

18 Official Languages Act 1988, Preamble.

19 Ibid ss 49–81.

20 Ibid s 14: 'English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.'

21 Ibid s 15(1).

22 Ibid s 16: '(1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter; (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.'

persons the right to a trial before a judge and jury who speak their official language.[23] The Supreme Court explained the meaning of this provision in its judgment in *R v Beaulac*.[24] It held that language rights are distinctive constitutional rights that are wholly independent of other legal principles or values, such as the right to a fair trial or the right to give evidence and to be understood by a court of law. Bilingualism is an intrinsic value that is enshrined in the constitution and in the law of the state. The right to be tried by a jury who speak the accused's official language derives primarily from the constitution of the state, the meaning of Canadian citizenship and the state's commitment to bilingualism rather than criminal process principles, such as trial fairness or best evidence considerations.

To implement this constitutional right, provinces have created slightly different mechanisms to summon jurors who speak one or both of the official languages. This is because the language demography of Canada is such that, with the exception of Quebec, French is spoken by a minority in all the provinces. Only a minority of the Canadian population are individually bilingual, that is, both English and French speaking.[25] However, although both the numbers and percentages of French speakers are low in certain provinces, all provinces are bound by law and by the constitution to ensure that an accused can be tried by a tribunal that speaks his or her official language.

To give a few examples, in provinces such as Alberta[26] or Saskatchewan,[27] where approximately 2 per cent of the population are French speakers, or about 61,000 and 20,000 respectively, there exist administrative arrangements whereby a list of French speakers is created. In a criminal trial in those provinces where the accused speaks French, jurors are randomly selected from that list. In Ontario, where about 600,000 speak French, the register of jurors is divided into three parts: those who speak only French; those who speak only English; and those who are bilingual.[28] As with most common law jurisdictions, jurors are randomly selected from the appropriate list to ensure independence and impartiality. If the number of those who speak the accused's official language is so small that the summoning of an independent and impartial jury is difficult, the court can transfer the trial to a venue where there is a higher number of people in the population who speak the accused's language.[29]

In Canada, the right to be tried by a jury who speak an official language is absolute because the state treats both official languages on a basis of equality, regardless of linguistic demography, in the administration of justice. Moreover, there are tried and tested mechanisms to ensure that this is done, even in provinces where the numbers who speak the defendant's official language are low. These mechanisms, although necessarily requiring jury selection from what is sometimes a small percentage of the general population, achieve the key objective of empanelling a competent, independent and impartial tribunal. After all, the chances of empanelling a competent, independent and impartial tribunal of 12 people from a population of 60,000 is not statistically significantly less probable than if the population was 600,000. And in the quarter of a century since these processes were devised

23 See the Criminal Code of Canada, s 530: 'On application by an accused whose language is one of the official languages of Canada . . . the accused [shall] be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.'

24 *R v Beaulac* [1999] 1 SCR 768.

25 <http://officiallanguages.gc.ca/en/statistics/canada>

26 See Jury Act (Alberta) 2000.

27 See Jury Act (Saskatchewan) 1998.

28 See Juries Act (Ontario) 1990, ss 7–8.

29 See Criminal Code of Canada, s 531.

and in the years since they have been implemented, the criminal justice system of Canada has, apparently, not come to a grinding halt.

The legal status of the Irish language

The present constitutional and legal status of the Irish language in the Republic of Ireland owes its origins to Irish independence: the fact that Irish is an official language of an independent, sovereign state is fundamental to this discussion. Independence for the 26 counties of the island of Ireland, established by the Irish Free State (Constitution) Act 1922, heralded cultural as much as political emancipation. Article 4 of the constitution of 1922 made Irish the national language and English 'equally recognised as an official language'. This meant that, despite the slightly ambivalent phrasing on the status of English, this was to be a bilingual state. Under British rule, the Irish language had been outlawed as a language of law and justice by virtue of the Administration of Justice (Language) Act (Ireland) 1737, which required the business of the courts to be conducted in English only.[30] This Act of the British Parliament, which had thus made English the sole language of justice in Ireland, represented a position which was to continue until Irish independence. One of the first tasks of the newly established Irish state was to repeal this Act.

The 1737 Act, however, remains in force in Northern Ireland (the creation of the Government of Ireland Act 1920), which, of course, voted itself out of the Irish Free State in 1922 in order to remain in the UK.[31] That the 1737 Act is alive and well on the statute book in Northern Ireland and that its discriminatory effect on Irish speakers does not offend Article 14 of the European Convention on Human Rights 1950 (ECHR) are judicial findings that have been upheld by the Court of Appeal in Northern Ireland in recent times.[32]

Irish is thus spoken by a significant number of the people of Northern Ireland but does not enjoy official status in Northern Ireland and there is no domestic legislation for its promotion or protection.[33] There is no legal right to use the Irish language in court proceedings in Northern Ireland, for example. Before the advent of the constitutional changes of the late 1990s, any prospect for laws recognising Irish language rights in Northern Ireland seemed dead in the political water.[34] However, under the terms of the Belfast Agreement of 1998, the policy ground began to shift when the UK recognised a responsibility for respecting linguistic diversity, including, specifically, Irish and Ulster Scots in Northern Ireland.[35] This was to be followed by the St Andrews Agreement in 2006, when

30 S 1: 'All proceedings in courts of justice, patents, charters, pardons, commissions, &c. shall be in English and in legible character, not in court-hand, and with usual abbreviations in English.'

31 For the language policy of Northern Ireland post-partition, see, generally, Thomas Hennessey, *A History of Northern Ireland 1920–1996* (Macmillan 1997).

32 See *Mac Giolla Cathain v the Northern Ireland Court Service* [2010] NICA 24.

33 For further observations on the social and political significance of the Irish language in Northern Ireland, see Aodán Mac Póilin (ed), *The Irish Language in Northern Ireland* (Ultach Trust 1997).

34 Camille O'Reilly argues that support for the Irish language in Northern Ireland occurs in the context of three discourses or perspectives which she labels as decolonizing, cultural and rights discourses. The three reflect different interpretations of the issue: see Camille O'Reilly, *The Irish Language in Northern Ireland: The Politics of Culture and Identity* (Macmillan 1999).

35 'All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.': Belfast Agreement 24. <www.gov.uk/government/publications/the-belfast-agreement>

the British government undertook to introduce legislation for the Irish language and to work with the Northern Ireland Executive in protecting and developing it.[36]

Contemporaneously with these domestic initiatives, the UK also ratified the European Charter for Regional or Minority Languages (ECRML) in respect of both of the native languages of Northern Ireland as a further step towards implementing its commitment to linguistic diversity.[37] The regional or minority languages protected under the Charter within the UK are Irish, Welsh, Scottish Gaelic, Scots, Manx, Ulster Scots and Cornish. All these languages enjoy the protection of the Charter's general principles, specified in pt II, Article 7 of the Charter. Irish, Welsh, and Scottish Gaelic are also protected under the articles contained in pt III of the Charter, which are more detailed and which list specific measures that are undertaken to protect a minority or regional language.[38] Protection under pt III is a matter for the state party to decide, taking into account the circumstances of the relevant minority or regional language and the extent to which it is used.[39]

Despite these encouraging initiatives, the Belfast and St Andrews Agreements, and indeed the ECRML, have had little impact hitherto on improving the position of the Irish language in Northern Ireland. In the fourth and most recent cycle of monitoring and in periodical reports on the implementation of the ECRML in the UK,[40] in the context of Northern Ireland, the documents make for depressing reading. The Committee of Experts' report, noting that competence for language policy is mainly devolved, remarked that disagreements and discord on the language issue within the power-sharing Executive in Northern Ireland meant that 'it was again not possible to agree within the Executive on the relevant text to be included in the report'.[41] The report, although recognising the Committee of Experts' difficulty in obtaining a clear impression of the position in Northern Ireland, nevertheless concluded 'that legislation is needed for the protection of the Irish language'.[42] This key recommendation was subsequently adopted by the Committee of Ministers which recommended the adoption and implementation of a 'comprehensive Irish language policy, preferably through the adoption of legislation providing statutory rights for the Irish speakers'.[43] In the interests of parity and balance, it also recommended the strengthening of 'work done by the Ulster Scots Agency and [to] take measures to establish the teaching of Ulster Scots'.[44]

36 St Andrews Agreement, 2006, Annex B, 'Human Rights, Equality, Victims and Other Issues'.

37 ECRML, Strasbourg: Council of Europe, 5 November 1992. The ECRML was ratified by the UK on 27 March 2001.

38 ECRML, *Explanatory Report*, paras 38–51. For commentary, see Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing 2005) 72–81.

39 See Woehrling (n 38) 81; also José Manuel Pérez Fernández, 'Article 2. Undertakings and Article 3. Practical Arrangements' in Alba Nogueira López, Eduardo J Ruiz Vieytez and Inigo Urrutia Libanora (eds), *Shaping Language Rights* (Council of Europe Publishing 2012) 121–44.

40 In accordance with ECRML, Article 15.

41 *Report of the Committee of Experts on the Application of the Charter in the United Kingdom Adopted by the Committee of Experts on 21 June 2013 and Presented to the Committee of Ministers of the Council of Europe in Accordance with Article 16 of the Charter*, paras 12–13. See also paras 205–270 for detail. <www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UKECRML4_en.pdf>

42 Ibid para 14.

43 *Recommendation CM/RecChL(2014)3 of the Committee of Ministers on the Application of the European Charter for Regional or Minority Languages by the United Kingdom (Adopted by the Committee of Ministers on 15 January 2014 at the 1188th meeting of the Ministers' Deputies)* para 2. <www.coe.int/t/dg4/education/minlang/Report/Recommendations/UKCMRec4_en.pdf>

44 Ibid para 4.

Recently, the Northern Ireland government's Culture Minister has attempted to implement the Council of Ministers' recommendation by proposing legislation that would give rights to Irish speakers and promote the use of the language.[45] Inspired by language legislation in Wales and Scotland, the consultation document proposed, among other things: granting official status for the Irish language; allowing its use in the Northern Ireland Assembly, the courts of law and by other public bodies; ensuring its place within the education curriculum; establishing the office of an Irish language commissioner; and the recognition of *Gaeltacht* areas.[46] The political narrative was revealing, with a deliberate attempt to de-sectarianise the language by emphasising the fact that 'the Irish language is not the preserve of any particular group or of any section of the community; it is part of our shared cultural heritage and it belongs to everyone'.[47]

It is a vision that is unlikely to be universally shared in Northern Ireland.[48] That should not surprise us.[49] Despite the progressive tone of recent political dialogue and the growth in the nomenclature of human rights and multiculturalism, the harsh truth remains that 'the issue of language is one which both reflects and inflames the ethnic divisions prevalent within Northern Irish society'.[50] Irish speakers in Northern Ireland are predominantly Catholic and, in the eyes of many in the Protestant community, the language continues to symbolise 'the linguistic expression of a cultural tradition and a political enterprise that are both profoundly alien'.[51]

However, the position in the Republic of Ireland is, or at least ought to be, very different.[52] Irish in the Republic of Ireland is not protected by the ECRML because, although it is a minority language de facto, it is an official language of the state.[53] After all, the Irish Constitution of 1922 recognised Irish as the national language of the new state. Then, with the 1937 constitution, the primary status of the Irish language was further entrenched, so that Article 8 of the Constitution of Ireland declared that:

1. The Irish language as the national language is the first official language.
2. The English language is recognised as a second official language.
3. Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.[54]

45 <www.northernireland.gov.uk/index/media-centre/news-departments/news-dcal/news-dcal-100215-the-irish-language.htm>

46 *Proposals for an Irish Language Bill: A Consultation Document* (Department of Culture, Arts and Leisure, February 2015).

47 See *Belfast Telegraph*, 10 February 2015.

48 The politicisation of the Irish language and its ideological significance during the troubles is the subject of a detailed study by Diarmait Mac Giolla Chriost, *The Irish Language, Symbolic Power and Political Violence in Northern Ireland 1972–2008* (University of Wales Press 2012).

49 See Gearóid Ó Tuathaigh, 'Language, Ideology and National Identity' in Joe Cleary and Claire Connolly (eds), *The Cambridge Companion to Modern Irish Culture* (CUP 2005) 42–58, 56: 'Within Northern Ireland the status and significance of the Irish language (and, in a more complex manner, of Ulster Scots) remains an issue of real political significance.'

50 See Colin Coulter, *Contemporary Northern Irish Society* (Pluto Press 1999) 26.

51 Ibid 27.

52 The contrast in the fortunes of Irish in the Republic of Ireland compared with that of Northern Ireland is also discussed by Seán Hutton, 'Notes on the Novel in Irish' in Eamonn Hughes (ed), *Culture and Politics in Northern Ireland 1960–1990* (Open University Press 1991) 119–37.

53 ECRML, Article 1.a.ii.

54 Bunreacht na hÉireann (Constitution of Ireland) 1937, Article 8.

The Irish Constitution's commitment to upholding the status of the Irish language as the nation's first language and thus giving it constitutional precedence over English should, no doubt, be understood in the context of the bloody and bitter struggle for independence which, in the 1930s, was well within living memory.[55] However, it must also be recognised that the restoration of the dignity and standing of the Irish language was at the intellectual heart of the struggle for independence and located deep in the psyche of the Irish nationalism movement.[56]

After all, the *raison d'être* or mission of the Irish state was to provide the Irish people with a homeland where their language, culture and way of life would flourish in direct contrast to their experiences under foreign rule.[57] Language was and is a powerful determinant of nationhood and a marker of the organic, historical nation.[58] The Irish language is therefore, in anthropological terms, proof that the Irish nation is not a political contrivance. As the 1937 constitution's chief architect remarked, the Irish language 'is an essential part of our nationhood'.[59] The independence movement was thus driven by a desire to liberate the Irish nation from the injustices and insults of foreign rule. As the Irish language had been downtrodden by the British, so it would be exalted by the Irish state.[60] Whatever may have been the political or psychological motives behind the enthronement of Irish as first official language, the legal implication was to establish Ireland as a bilingual country.

If the creation of the Irish state promised an upturn in the official fortunes of the Irish language, as a living, daily spoken language, circumstances were less promising. Irish had suffered a rapid decline in the numbers of its speakers in the aftermath of the famine in the middle of the nineteenth century, although the genesis of the decline may be traced back to the seventeenth if not the sixteenth century.[61] The reversal of this decline was something which the Irish state, at least initially, seemed eager to remedy, inheriting the efforts of the Gaelic League a generation earlier.[62] Gaelicisation was thus the state's policy of reviving the national language, with a particular emphasis on, and possibly undue faith in, Irish medium school education as the appropriate organ for achieving this objective.[63] Of course, Gaelicisation was never an exercise in language displacement or an attempt to drive out English and replace it with Irish. It was in fact an attempt to create citizens that could speak

55 See Charles Townshend, *The Republic: The Fight for Irish Independence 1918–1923* (Allen Lane 2013).

56 See Ó Tuathaigh (n 49) 49: 'The leaders of the main political groupings in the new state accepted that the government of an independent Irish state had an obligation to give official recognition and support to the Irish language, the principal marker of the Irish nationality on whose behalf a national state had been demanded.'

57 See Terrence Brown, *Ireland, A Social and Cultural History 1922–1985* (Fontana 1985) 45–78 and 279.

58 See Joshua A Fishman, *Language and Ethnicity in Minority Sociolinguistic Perspective* (Multilingual Matters 1989) 269–320.

59 See Eamon de Valera, 'Language and the Irish Nation', speech broadcast on Radio Eireann, 17 March 1943.

60 See Paul Bew, *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912–1916* (Clarendon Press 1994) 84–5.

61 No doubt that decline was due to a combination of reasons and voluntary abandonment cannot be ruled out as being one of them. See Ó Tuathaigh (n 49) 48: 'The Irish continued to insist that they were a distinct nation, and they demanded a national state. Yet they were abandoning the most distinctive mark of nationhood, the Irish language.'

62 Ibid 48.

63 R F Foster, *Modern Ireland 1600–1972* (Allen Lane 1988) 546: 'The approach was tacitly recognised as unsuccessful by everyone who had anything to do with it, though education ministers and Gaelic League officials resisted any attempts to quantify or examine the actual results of the policy.'

both languages of the state.[64] Other strategies included the designation of Irish-speaking areas as protected *Gaeltacht* areas, a policy which paradoxically may have entrenched the general perception that Irish was a dying language and that the *Gaeltacht* areas were no more than enclaves or reservations for a dying culture.[65]

Promoting the national language as first official language of the state also had some impact, albeit piecemeal, on the administration of justice. The Legal Practitioners (Qualification) Act 1929, for example, required Irish barristers and solicitors to have competent knowledge of the Irish language and, in the same vein, the Courts of Justice Act 1924 required certain members of the judiciary to have command of the language.[66] Section 44 of the 1924 Act made it a requirement, as far it was practicable in the circumstances, to assign circuit judges with knowledge of Irish to courts where Irish was in general use so that justice could be dispensed without the judge relying on an interpreter.[67]

But it was Kennedy CJ, the first Chief Justice of the liberated Ireland, in *Ó Foghludha v McClean* who gave the clearest expression to the meaning of the Irish language's constitutional status, and the state's duty towards it:

> The declaration by the Constitution that the National language of the Saorstát is the Irish language does not mean the Irish language, is or was at that historical moment, universally spoken by the People of the Saorstát, which would be untrue in fact, but it did mean that it is the historic distinctive speech of the Irish people, that it is to rank as such in the nation, and, by implication, that the State is bound to do everything within its sphere of action . . . to establish and maintain it in its status as the National language . . . none of the organs of the State, legislative, executive or judicial may derogate from the pre-eminent status of the Irish language as the national language of the State without offending against the Constitutional position.[68]

Yet, despite this robust constitutional affirmation and the revivalist agenda initiated at the dawn of Irish independence, the twentieth century, as it unfolded, saw continued decline in the Irish language as a daily spoken language.[69] Census figures for 2011 showed that the population of the Irish state was 4,581,269.[70] According to the official figures, about 1.77m could speak Irish, a figure which equated to about 41.1 per cent of the population. This, at first glance, appeared quite encouraging. However, of these only 82,600 (1.8 per cent) spoke Irish daily, 110,642 weekly and 613,236 occasionally outside the school classroom. Detailed regional analysis showed areas where the language had particular strength, such as *Gaeltacht* districts, of which Connemara is one, where 96,628, or 68.5 per cent, could speak Irish.

Why did not the exalted constitutional status of Irish inspire its revival? Whereas the language was granted high status by the constitution, little was done by the state to implement bilingualism in everyday life. There was a complete disconnection between the declared constitutional principle and its practical implementation. Irish language policy thus descended into a series of empty gestures and ritualistic use in the spirit of tokenism. Despite the requirement of competence among lawyers practising in the courts of law, Irish

64 Different societal models of bilingualism are considered by Suzanne Romaine, 'The Bilingual and Multilingual Community' in Tej K Bhatia and William C Ritchie, *The Handbook of Bilingualism* (Blackwell 2006) 385–405.

65 Ó Tuathaigh (n 49) 50.

66 Subject to a few provisos and qualifications. For a useful summary of the constitutional position of the Irish language, see James Casey, *Constitutional Law in Ireland* (Roundhall 2000) 73–7.

67 Courts of Justice Act 1924, s 44.

68 Per Kennedy CJ in *Ó Foghludha v McClean* (1934) IR 469.

69 See Liam Kennedy, *Colonialism, Religion and Nationalism in Ireland* (Institute of Irish Studies 1996) 204–08.

70 See Central Statistics Office (n 4).

was seldom heard and rarely taken seriously.[71] The state's constitutional obligation to provide Irish versions of legislation in accordance with Article 25 went into suspension in the 1980s.[72] This meant that only English versions were being drafted, a state of affairs which the Irish Supreme Court held to be unconstitutional and which was later remedied.[73]

At least one of the principal reasons for the disconnection between principle and practice was due to the fact that 'the constitutional status of Irish was not translated into statutory legal rights for Irish speakers'.[74] After much prevarication, recognition of this fundamental flaw in the constitutional architecture led to remedial legislation for the Irish language. The Official Languages Act (Ireland) 2003 appears to draw much of its inspiration from the Welsh Language Act (UK) 1993, in that its mechanism for promoting the use of the Irish language is to require public bodies to prepare policy schemes to provide services through the medium of Irish.[75] The phrase official languages in the title of the Act is somewhat misleading because the principal concern is Irish – it has little interest in protecting or promoting English, which probably does not need protecting or promoting. Irish language schemes are approved by a designated government minister and are subject to three-yearly reviews. The Act is the first concerted attempt in legislation to create a mechanism for implementing bilingualism in Ireland.

The Official Languages Act also establishes the office of Irish Language Commissioner whose chief function is to monitor and ensure compliance by public bodies with the Official Languages Act and their duties thereunder.[76] However, the role of the Irish Language Commissioner in Ireland seems to have hitherto proved frustrating and thankless. In 2014, the postholder resigned over what he felt were the blatant failures of the Irish government to promote the language and ensure that the public bodies which it funded complied with the provisions of the Act.[77] Indeed, he warned that the Irish state's policy on the Irish language was in jeopardy of becoming 'a sham' unless the state could guarantee an absolute right to deal with its departments through the medium of Irish and, to achieve this, build the capacity to deliver services in Irish by having sufficient numbers of Irish-speaking administrators.[78]

The Official Languages Act contains provisions dealing with Irish in law-making and in the conduct of legal proceedings. Section 7 requires the publication of legislation simultaneously in Irish and English (reinforcing the constitutional provision). Section 8 grants the right to use either Irish or English in court proceedings, and 'that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language'.[79] If the cause of bilingual juries in Ireland seems at first glance to have found its statutory champion, hope is quickly dashed with the following sub-section which provides that disadvantage can be averted through the use of simultaneous or consecutive interpretation of the proceedings.[80]

71 The gulf between the rhetoric and the reality is succinctly described by Niamh Nic Shuibhne in 'First among Equals? Irish Language and the Law' (1999) 93(2) Law Society Gazette (Ireland) 16, 18–19.

72 See John Smith, 'Legislation in Irish – a lot done, more to do' (2004) 9(3) Bar Review 91.

73 See *Ó Beoláin v Fahy and Others* [2001] 2 IR 279.

74 Ó Tuathaigh (n 49) 50.

75 The Act entered into force on 14 July 2003.

76 Official Languages Act 2003, ss 20–30.

77 <www.thejournal.ie/irish-language-commission-formally-steps-down-1330219-Feb2014>

78 *Irish Examiner*, 10 February 2014.

79 Official Languages Act 2003, s 8(2).

80 Ibid s 8(3).

Lest anyone should believe that this represents a special or distinctive arrangement in response to the demands of the bilingual state, the right to translation of proceedings where the accused does not speak the language of the proceedings is a fundamental human right and a basic tenet of a fair trial as protected by Article 6 ECHR.[81] Translating the evidence of witnesses or accused persons for the benefit of a tribunal that does not speak their language, and vice versa, is the best and only solution in most cases where the accused or witness is either a foreign national or is a member of an ethnic minority with poor command of the official language. But it is not the perfect scenario, as it is not merely poetry that is lost in translation. Not only is factual error, or at least a lack of nuanced interpretation, a potential risk, more crucially, the translator becomes the voice of the evidence. The tribunal therefore hears and focuses on the simultaneous translation heard through earphones and misses the subtle tell-tale signs and signals of veracity, or lack of it, that can only be gained by listening to evidence at first-hand.[82]

The right to use Irish in court proceedings is the only right granted to Irish speakers by the Act, and, in this respect, is similar to the Welsh Language Acts of 1967 and 1993 which granted the right to use the Welsh language in court proceedings, but no other legal right.[83] Despite its long-standing status as the official language of a member state, it was only as recently as 1 January 2007, upon the instigation of the Republic of Ireland, that Irish acquired the status of an official and working language of the EU. This, arguably, is further proof of Irish political ambivalence towards the Irish language.

Bilingual juries in Ireland

The jury as an institution was imported to Ireland in the middle ages, and by the seventeenth century had all but supplanted alternative native legal customs and processes.[84] After independence, the common law system was largely preserved and the right to trial by jury, except for minor offences, became a constitutional right in accordance with Article 38.5 of the constitution. Traditionally in Ireland, as in England, the jury was a middle-class, male and unrepresentative institution. The full democratisation of jury service in Ireland occurred more or less in tandem with England and Wales in the post-independence era.[85]

Prior to the Juries Act (Ireland) 1976, the position in Ireland was governed by the Juries Act (Ireland) 1927 which based jury service eligibility rules on a property qualification and, to all meaningful purposes, excluded women. Following the Irish Supreme Court's ruling in *de Burca & Anderson v Attorney General*,[86] which declared the provisions of the 1927 Act to be unconstitutional, s 6 of the Juries Act 1976 was enacted. This created a position

81 Article 6(3)(e) ECHR provides that everyone charged with a criminal offence has the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. However, the Official Languages Act 2003 does guarantee the right to use an official language, regardless of any question of competency, unlike the ECHR which only guarantees the right to an interpreter if that is necessary because of the defendant's lack of linguistic proficiency: see *Fryske Nasjonale Partij and Others v Netherlands* (1987) 9 EHRR CD 261.

82 See *A Review of the Criminal Courts of England and Wales by the Rt Hon Sir Robin Auld, Lord Justice of Appeal* (TSO 2001) ch 5, paras 62–72; also Sir Roderick Evans, 'Bilingual Juries?' (2007) 38 Cambrian Law Review 145–70.

83 Welsh Language Act 1993, s 22.

84 The historical background is summarised in Law Reform Commission Report, *Jury Service* LRC 107–2013, April 2013, 6–7. See also John D Jackson, Katie Quinn and Tom O'Malley, 'The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past' (1999) 62(2) Law and Contemporary Problems 203–32. However, very little has been written about the significance of the Irish language in the history of the jury in Ireland.

85 See Katie Quinn, 'Jury Trial in the Republic of Ireland' (2001) 72(1) International Review of Penal Law197–214.

86 [1976] IR 38.

analogous to that which had been established a few years earlier in England and Wales, by virtue of the Juries Act (UK) of 1974, whereby virtually all adults between 18 and 70 years of age would be eligible for jury service.

The emergence of the belief in jury representativeness also engendered judicial support for the mechanism of random selection from the general population.[87] In *de Burca v the Attorney General*, Henchy J encapsulated this growing judicial enthusiasm for random selection from a representative cross-section of society:

> the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision . . . it is left to the discretion of the legislature to formulate a system for the compilation of jury lists and panels from which will be recruited juries which will be competent, impartial and representative.[88]

That juries should in principle be representative, include women and be drawn from a broad cross-section of society is uncontroversial. But Ireland's bilingual status also calls for juries who can function through both official languages. The judgment in *de Bur*ca would prove decisive in the deliberations in *Ó Maicín*, where, by a majority of four to one, the Supreme Court held that the defendant was not entitled to be tried by a jury who spoke Irish.[89] All the judges were in agreement that the case turned on the question of language rights, the fundamental issue being the nature and parameters of those rights in criminal proceedings.[90] But the Supreme Court, by a majority, concluded that, 'the appellant's constitutional right to conduct official business in Irish had to give way to the constitutional obligation for jury panels to be truly representative'.[91]

In *Ó Maicín*, the prosecution had argued that summoning a bilingual jury, that is, a body of people with sufficient skills to be able to hear and determine evidence in Irish without an interpreter, would be practically difficult if not impossible, and creating a linguistic test would be unconstitutional as it would interfere with the principle that a jury should be randomly selected from the community in general. At the judicial review proceedings, the High Court ruled that jury selection by linguistic ability, albeit restricted to the official languages of the state, would not accord with the provisions of s 11 of the Juries Act 1976[92] and Article 38 of the constitution.[93] The High Court held that the summoning of an Irish-speaking jury would call for unlawful and unconstitutional interference with the principle of random selection from the district population as whole.[94] It also held that the provisions of s 44 of the Courts of Justice Act 1924, which requires judges assigned to Irish-speaking circuits to have sufficient knowledge of Irish to be able to preside without an interpreter, did not extend to the jury.[95]

87 See Flaherty J in *O'Callaghan v the Attorney General* [1993] 2 IR 17, 25.

88 [1976] IR 38, 74.

89 *Ó Maicín v Ireland* (n 3).

90 Ibid, 'Summary' 1.

91 Ibid 2.

92 See Juries Act 1976, s 11: 'Each county registrar, using a procedure of random or other non-discriminatory selection, shall draw up a panel of jurors for each court from the register or registers delivered to him under section 10 (omitting persons whom he knows or believes not to be qualified as jurors).'

93 See the High Court judgment, *Ó'Maicín v Ireland and Others* [2010] IEHC 179.

94 Ibid per Murphy J para 3: 'A jury is selected from the electoral register of that jury district. The selection is made by random sampling. The selection cannot be restricted in any way, for example, by way of political affiliation, religious belief, cultural identity or otherwise . . . the random selection is an integral part of the jury. It would be absurd to say that the basis for jury selection should be otherwise than a random selection of a jury.'

95 Ibid para 2.2.

But the principal authority relied upon was the previous Supreme Court authority of *Mac Cárthaigh*.[96] In that case, the defendant was tried for robbery and wished to conduct his defence through the medium of the Irish language, relying upon the constitutional status of the language. The alleged offence and subsequent trial took place in Dublin. The prosecution argued that Article 38.5 of the constitution meant that to selectively summon an Irish-speaking jury would offend the principles of jury representativeness and random selection. The Supreme Court agreed and held that to make fluency in Irish a requirement for jury service would seriously compromise the representative character of the jury and would therefore be unconstitutional. It held that the need to select jurors randomly from the entire community triumphed over the Irish speaker's purported claim to a right to a tribunal that spoke his language. The Supreme Court referred to a number of authorities which emphasised the importance of the jury being drawn from and being representative of the entire community, including *de Burca & Anderson v Attorney General*.[97]

In *Mac Cárthaigh*, the alleged impracticality of summoning a jury with the ability to understand legal argument and court proceedings in Irish was considered.[98] The capacity within the general population to comprehend evidence and legal direction in the Irish language would also be a matter of debate in *Ó Maicín*, and this is something to which we shall return shortly. But the *Mac Cárthaigh* ruling was criticised for being at odds with the constitutional position of the Irish language as the first official language of the state.[99] It should be noted that the third section of Article 8, which states that 'provision may, however, *be made by law* for the exclusive use of either of the said languages for any one or more official purposes' (emphasis added), was not relied upon. Article 8.3 of the constitution makes clear that the departure from the primary position of Irish being the first official language requires legal provision and there is nothing explicit in the Juries Act (Ireland) 1976 permitting such a departure.

The Law Reform Commission in Ireland in its consultation paper on juries, published in March 2010, also gave *Mac Cárthaigh* some consideration.[100] Among the topics considered was the argument for bilingual juries and the Law Reform Commission stated that it:

> concurs with the approach taken in the *Mac Cárthaigh* case and considers that it would not be desirable to make provision for all-Irish juries. The Commission considers that confidence in the jury system is best preserved through selecting jurors for all cases from a broad cross-section of the community, including cases where a defendant would prefer an Irish speaking jury. The Commission is also conscious that there would be significant administrative difficulties in selecting a panel of jurors competent in the Irish language particularly in cases being tried outside Irish speaking areas. Additionally, the Commission considers that it is important that persons other than the defendant should be able to comprehend the proceedings in court.[101]

The final report that was later published added nothing to this initial finding.[102] In *Ó Maicín*, the binding *stare decisis* significance of the earlier judgment in *Mac Cárthaigh* was considered.

96 *Mac Cárthaigh v Ireland* [1999] 1 IR 200.

97 Ibid 206.

98 Ibid 211.

99 For commentary see Gearoid Carey, 'Criminal Trials and Language Rights' (2003) 13(1) Irish Criminal Law Journal 15 and (2003) 13(3) Irish Criminal Law Journal 5.

100 See Law Reform Commission, Consultation Paper, *Jury Service* LRC CP 61–2010, March 2010.

101 Ibid para 4.99.

102 Law Reform Commission Report (n 84).

It was recognised that the position of the Irish language in Galway is radically different to that of Dublin and that this could provide a basis for valid factual distinction. However, the majority held that the judgment in *Mac Cárthaigh* was to be followed.

The majority acknowledged that the appellant, in principle, enjoyed a constitutional right to conduct official business fully in Irish. However, that principle was not absolute and in some circumstances had to give way to other considerations. It was held that it would neither be possible nor constitutional to create an Irish-speaking jury district on a geographical basis nor to draw up a list of Irish-speaking citizens capable of serving on a jury by some other mechanism.[103] As with the judges in *Mac Cárthaigh*, demographic considerations weighed heavily on judicial reasoning in *Ó Maicín*. It was said that the weak currency of the Irish language meant that it would be very difficult to raise a jury with the requisite linguistic skills to try a case in Irish without the help of an interpreter or translator.[104] The level of competency required for the task simply could not be determined with any degree of accuracy.[105]

With this perceived danger that the pool of eligible jurors could be smaller than the official figures suggest, the challenge of ensuring impartiality and independence when a jury is summoned from a more selective pool of citizens was also noted.[106] Perhaps this, rather briefly mentioned point, reveals more about the anxieties of the non-Irish-speaking population and their perceptions and preconceptions of speakers of the language than any of the other more thoroughly rehearsed arguments. However, these anxieties about the linguistic competence and strength in numbers and, consequently, potential impartiality of the Irish-speaking population did not accord with the expert evidence heard and unchallenged by the court.[107] That expert evidence stated that, in the Connemara *Gaeltacht*, 67 per cent of a population of 13,444 speak Irish on a daily basis and that, in some areas, some 85–90 per cent of the people speak Irish to a standard that enables them to understand legal matters. Accordingly, 12 people chosen at random from an Irish-speaking population of about 10,000 in the district where the alleged offence in *Ó Maicín* was committed would have both the competence and independence to try a defendant in Irish without an interpreter.

Clarke J, unpersuaded by this evidence and its support for creating a bilingual jury district in the Connemara *Gaeltacht*, also introduced a further objection to bilingual juries.

103 Clarke J in *Ó Maicín* (n 3) para 6.12.

104 Ibid para 6.6.

105 Ibid para 6.9: 'there was, in reality, no evidence available as to the level of competence, so far as ability in Irish to the extent necessary to fully understand legal proceedings is concerned, of any particular percentage of persons in *Gaeltacht* areas'.

106 Ibid para 6.10: 'an overly narrow jury area runs the very real risk that a high proportion of persons from it may be excluded from any particular jury because of a connection with the events giving rise to the trial or parties or witnesses likely to be involved. It seems to me to follow that a constitutionally compliant jury panel must be based on a sufficiently large geographical area containing a sufficiently wide population so as to ensure that any panel selected from that area is both reasonably representative and unlikely to suffer significant exclusion on the basis of a connection with the case. There will always be persons who, if selected for a jury panel, would be excluded from any individual case on the basis of such a connection. On average the number of persons so excluded will, taking one case with the next, be much the same. However, if the jury area is drawn over-narrowly, then the percentage of persons so excluded will represent a much greater infringement on the broad representative character of the jury panel as a whole. One hundred people excluded by connection from an overall potential jury panel of (say) 30,000 is neither here nor there. A similar group excluded from a potential jury panel of 500 or even 1,000 would be a different thing altogether. It follows that a constitutionally compliant jury must be drawn from a sufficiently large area and population to avoid the risk of excessive exclusion by connection.'

107 See Hardiman J, ibid paras 125–7.

He claimed a need to strike a balance between the rights of Irish speakers to use their language in their dealings with the state and the rights of others to use English, which is also an official language. In other words, the judge discovered a social tension in Irish language policy which could give rise to a conflict of rights unless kept in check. His view was that promoting Irish language rights might lead to the diminishing of English language rights:[108]

> While the State, and each of its organs, has an obligation to promote and respect the high status of the Irish language there may, nonetheless, be limitations on an entitlement to have Irish used which derive from the limited use of Irish in ordinary everyday life at least so far as many parts of the country is concerned. Other citizens are entitled to use English as an official language if they wish and their rights so to do must also be respected.[109]

This reasoning, described as a false antithesis by Hardiman J, who delivered the sole dissenting judgment which I shall turn to later in this article,[110] appears to present us with a linguistic zero-sum principle. It is reasoning which appears to say that granting the right to a bilingual jury to an Irish-speaking defendant would lead to an injustice, that is, the exclusion of a significant proportion of the population who do not speak Irish from the opportunity to be randomly selected to serve on the jury panel in that particular trial (no matter how infrequently a request for an Irish-speaking jury might arise in reality). That is the only injustice that is discernible, as the citizen who might wish to use English in a criminal trial before a bilingual jury in Ireland could do so without resort to an interpreter or translator as there are very few monolingual Irish speakers remaining in any part of the country. Furthermore, such injustices must be committed on a weekly basis throughout Canada to monolingual English or French speakers who are denied the remote chance to serve on juries in trials where the defendant's official language is French or English. This, however, was something which the majority of the judges in *Ó Maicín* refrained from contemplating.

In accordance with the precedent laid down in *Mac Cárthaigh*, it was further held that, as juries should be representative of the entire community, they should also be randomly selected and no interference with that principle could be supported.[111] Does this assume that the Irish-speaking population is not in other respects representative of the Irish population in general? There is good evidence which suggests that Irish speakers share the same demographic balance as non-Irish speakers in terms of gender and age.[112] Somehow, these facts, which temper concerns about representativeness and which provide perspective and proportionality to the debate, were overlooked or ignored. This only reinforces the view that the judgment of the majority of the judges in *Ó Maicín* was driven more by ideology than evidence.

As for Ireland's purported bilingualism, Clarke J, reflecting upon the state's responsibilities towards the Irish language, concluded that, 'there is a clear constitutional

108 Per Clarke J, ibid para 3.7: 'It follows that those wishing to conduct official business in Irish do have a right, derived from the constitutional status of the Irish language, to have their business conducted in Irish. However, it equally follows that that right is not absolute and must be balanced against all the circumstances of the case (not least the fact that the great majority of the Irish people do not use Irish as their ordinary means of communication) particularly the fact that other citizens are entitled to conduct their business in English as an official language, and also any other competing constitutional interests which may arise.'

109 Clarke J, ibid para 3.3

110 Hardiman J, ibid para 102.

111 Clarke J, ibid para 3.8. See also O'Neil J, para 36.

112 Central Statistics Office (n 4).

obligation on the State to encourage the use of Irish for official business'.[113] Indeed, the obligation to encourage is repeated: 'it does not seem to me that the general obligation of the State can, therefore, be put any higher than an obligation to encourage'.[114] This interpretation of the State's obligation towards the Irish language did not go unchallenged. Even MacMenamin J, who concurred with Clarke J on the unconstitutionality of bilingual juries, and who concluded that the decision in *Mac Cárthaigh* should be followed,[115] nevertheless felt that 'the duty of the State goes further than merely to seek to encourage the status of the first national language'.[116]

But it was Hardiman J who took issue with this point most vehemently and attacked the false antithesis which claimed that granting Irish speakers the same right as English speakers to be tried by a tribunal who spoke their language would somehow undermine the rights of English speakers. He also robustly rejected the claim that the state had no more than 'an obligation to encourage' and condemned it as an attempt to dilute the constitutional position of Irish in breach of the proper function of the Supreme Court to uphold the constitution.[117] Hardiman J held that the appellant had a constitutional right to be tried before a jury who could understand Irish without the assistance of an interpreter. In both tone and content, Hardiman J's judgment is one of the most remarkable dissenting judgments in the history of Irish law: I would suggest that every member of the Oireachtas should read it.

For Hardiman J the crucial fact was that Ireland had been officially a bilingual country since independence and, accordingly, this had implications for the state's treatment of the language in conducting official business, including the business of the courts:

> The effect of Article 8 of the Constitution is to establish Ireland as a bilingual State in terms of the Constitution and the laws. It is a historical truism that official Ireland has always been reluctant to behave as if the State were indeed, in law and in practice as well as in constitutional theory, a bilingual State. But that does not take from the fact that Ireland is, by its Constitution, a bilingual State. The Judges, of course, are bound to uphold the Constitution.[118]

Hardiman J also declared that he did not believe that there was any other country in the world in which a citizen would not be entitled to defend himself or herself before a court in the national and first official language and to be understood directly in that language.[119] The expeditious solution he proposed was that the relevant government minister should exercise a statutory power to order a bilingual jury district and that the Connemara *Gaeltacht* could be declared a jury district from which a bilingual jury could be summoned.

In *Ó Maicín*, a technical point was also identified and which may yet prove highly significant to the future discussion of this issue. The trial judge had refused the defendant's application for a bilingual jury on the basis that he did not have the power to investigate the competency in Irish of potential jurors as there is no statutory provision enabling him to carry out such an enquiry.[120] In the Law of England and Wales, the provisions of s 10 of the Juries Act 1974 enable the courts to disqualify any juror who cannot speak English. All

113 Clarke J in *Ó Maicín* (n 3) para 3.4.

114 Ibid para 3.5.

115 MacMenamin J, ibid paras 20–4.

116 Ibid para 24.

117 Hardiman J, ibid paras 85–6.

118 Ibid para 21.

119 Ibid Appendix 2, 9.

120 See Hardiman J, ibid para 63.

jurors in criminal trials in England and Wales must be linguistically competent, meaning they must understand English. In Ireland, however, the Juries Act 1976 is silent on a potential juror's language skills. Section 6 makes all citizens over 18 and under 70 years of age, and whose names appear on the electoral register, eligible to serve on a jury: however, no language competence is set out.[121]

Is this silence by accident or by design? A more cynical view would be that this was a calculated political sleight of hand, one designed to avoid the language issue altogether and thus allow the courts to circumvent the constitutional status of Irish. That the Irish Law Reform Commission's otherwise comprehensive and detailed report on jury service was virtually silent on the significance of Ireland's bilingualism would tend to reinforce this suspicion.[122] Indeed, even among scholars with an interest in jury composition and jury representativeness in Ireland, the language issue is often ignored.[123] It leads the external observer to the conclusion that language policy in Ireland is politically a thorny if not unmentionable issue.

But the plot thickens. Despite there being no statutory language test for jury service, it came to light during the proceedings that court staff and county registrars responsible for summoning jurors do identify and exclude persons unable to communicate in English. Such persons are often economic migrants and other immigrants from the EU or further afield. However, this ad hoc administrative practice has no statutory basis. O'Neil J valiantly sought to find some legal basis for this administrative practice[124] and suggested that s 9(2) of the Juries Act 1976 might offer that basis. That section gives a county registrar the power to excuse any person from jury service if that person shows that there is good reason why he or she should be so excused. However, regrettably, the learned judge failed to distinguish between eligibility and excusal: to excuse an individual from jury service on a particular occasion due to personal circumstances, such as financial hardship or poor health, is obviously not the same as saying that an individual is ineligible for jury service. Whereas the former may appropriately fall within the province of a bureaucratic decision, the latter cannot as a matter of due process: the magnitude of such a decision requires legal authority more than that which can be provided by administrative action. His response to the corollary that if the provision could be used to justify the exclusion of non-English speakers, so it could also exclude non-Irish speakers if the circumstances of the case so required, was simply that it would be 'a breach of the cross community representation principle enjoined by Article 38'.[125]

Hardiman J, conversely, believed that the practice of court administrators weeding out non-English speakers was without proper legal basis and required urgent legislative attention.[126] That, surely, is the correct legal position. Addressing that specific matter may

121 The other provisions specify groups and categories of persons that are excluded from the process: See Juries Act 1976, ss 8–9.

122 Law Reform Commission Report (n 84) 12–13. It briefly mentions the Supreme Court judgment in *Mac Cárthaigh* and the High Court judgment in *Ó Maicín*, but does not consider the impact of Ireland's bilingualism on the rules on jury service.

123 For example, Niamh Howlin, 'Multiculturalism, Representation and Integration: Citizenship Requirements for Jury Service' (2012) 35 Dublin University Law Journal, 148–72.

124 See O'Neil J in *Ó Maicín* (n 3) 28–33.

125 Ibid para 33.

126 Hardiman J, ibid paras 12–14, 161–75.

yet offer the path to proper democratic scrutiny and open public debate on the state's language policy in the context of criminal jury trials.[127]

Setting a precedent?

It is, I suspect, unnecessary to draw out the obvious distinctions between Canada and Ireland on the issue of bilingual juries. But the judgments in *Ó Maicín* also reflect internally divided opinions on the issue. Their heated and passionate tone, and especially that of the dissenting judge, betray deeply held and discordant views on the proper place of the Irish language in Irish society. The stark contrast with Canada is that there upholding linguistic equality and honouring the principle of bilingualism take precedent over arguments about jury representativeness. In addition, judicial opinion on the proper role of the state in maintaining bilingualism marks a point of divergence between Canada and Ireland. For the majority in the Irish Supreme Court in *Ó Maicín*, a 'duty to encourage' seemed adequate. In Canada, conversely, the law states that the state has duties in 'enhancing the vitality and supporting the development of English and French linguistic minority communities' and 'fostering full recognition and use of English and French in Canadian society'.[128] The latter represents true commitment to bilingualism. The former does not.

If the ruling in *Ó Maicín* means that Ireland has declined to follow the Canadian model and precedent, it is also the case that it may have set a precedent. Across the water from Dublin, the case for bilingual juries has also been exercising minds. Indeed, as long ago as the 1930s, the legal status of the Welsh language was a matter of public debate and gave rise to a national petition calling for rights for Welsh speakers in courts and public administration.[129] The petition, among other things, called for the right to use the Welsh language in legal proceeding and mechanisms to decide whether Welsh or English shall be the language of any particular trial.[130] It also called for Welsh-speaking jurors where evidence is given through the medium of Welsh in the cause of justice and evidential accuracy.[131] The twentieth century would see the enactment of legislation that would promote equality between Welsh and English and guarantee the right to use the Welsh language in legal, including criminal, proceedings.[132] However, that legislative reform did not also create the right to a tribunal which understands the Welsh language.

In Wales, the debate often focused on trial fairness and efficiency in the administration of criminal justice.[133] Advocates of bilingual juries wished Welsh and English to be treated equally in public life and in the courts of Wales. But they also based their case on the alleged advantages to the criminal justice process if jurors understood the evidence without having to rely on an interpreter.[134] In recent times, the comprehensive review of the criminal courts in England and Wales, chaired by Sir Robin Auld, provided a further opportunity to

127 As a postscript to this judgment, the Supreme Court ordered the state to pay the entire costs of the proceedings in the High Court and Supreme Court, as the case raised important constitutional issues. See *Irish Time*s, 29 May 2014 <www.irishtimes.com/news/crime-and-law/courts/state-ordered-to-pay-costs-of-man-s-action-over-bilingual-jury-1.1812967>.

128 Official Languages Act 1988, Preamble.

129 See J Graham Jones, 'The National Petition on the Legal Status of the Welsh Language, 1938–1942' (1996) 18 Welsh History Review 92–123.

130 National Library of Wales, *The Welsh Language Petition* (Welsh Language Petition Committee 1939).

131 Ibid 9.

132 See the Welsh Language Act 1967, s 1, and the Welsh Language Act 1993, s 22.

133 It is a debate that had enjoyed intermittent currency. In 1973, the Lord Chancellor, Lord Hailsham of St Marylebone, announced that Lord Edmund Davies had recommended to him that bilingual juries should not be introduced: see HL Deb 12 June 1973, vol 343, cols 534R–37L.

134 See Roderick Evans J, 'Bilingual Juries?' (2007) 38 Cambrian Law Review 145–70.

examine the subject: he recommended that it should be the subject of consultation and discussion in Wales.[135]

Not only were there arguments in favour of bilingual juries, but also objections to such a development. The objections mirrored those heard in Ireland, those being that the language is spoken by a minority of the population and so to summon bilingual juries would unreasonably limit the pool of eligible jurors, even to the extent that they would not be representative of the entire community.[136] The legal community in Wales considered the merits of bilingual juries in a bilingual country.[137] Officialdom also responded when the Office for Criminal Justice Reform in England and Wales published a consultation paper on the use of bilingual juries (Welsh and English) in some criminal trials in Wales, which outlined the principal arguments for and against bilingual juries.[138]

The government was slow to report its findings on the consultation paper and one member of Parliament strove to stimulate the discussion by presenting a private Bill to revise the law in favour of bilingual juries. Not surprisingly, his efforts were frustrated by the parliamentary machine.[139] Then, in early 2010, the Ministry of Justice finally published its official response to the consultation.[140] Of the 24 responses that were received from organisations and individuals the majority of respondents were in favour of bilingual juries. However, the government's unfavourable response was not unexpected.

The government considered that the overriding question was the case for bilingual juries in principle.[141] The report addressed that question by reflecting on the significance of jury representativeness and random selection's part in the process and found that 'much of the authority of, and widespread public confidence in, the jury system derives from its socially inclusive nature'.[142] The report identified the chief barriers to bilingual juries in Wales as being the interference with random selection and jury representativeness.[143] There was nothing unexpected in this response. Indeed, it simply reiterated the well-rehearsed arguments against bilingual juries. What it failed to do was fully to consider the impact and significance of the bilingual national policy on the issue.

The report also relied upon research commissioned by the Ministry of Justice and carried out at University College London on the jury system in England and Wales, focusing particularly on the representative element within the jury.[144] This was, without doubt, substantial research into various aspects of the subject and its relevance to the jury as an institution. However, the consideration of the linguistic situation in Wales was cursory and sparse. Jurors' linguistic skills in courts in Wales were reviewed over a period of a week and on that basis it was found that only a small minority of potential jurors considered

135 See *Review of the Criminal Courts of England and Wales* (n 82), ch 5, para 72. 'the proposal of a power to order bilingual juries in particular cases is worthy of further consideration—but not by me. It should be developed and examined, with appropriate consultation, in Wales'.

136 Ibid, ch 5, paras 62–72.

137 *The Lord Chancellor's Standing Committee on the Welsh Language: A Report of the Criminal Justice Sub-Committee on the use of the Welsh Language in the Criminal Justice System in Wales* (Lord Chancellor's Office 2002) para 114.

138 Office for Criminal Justice Reform, *The Use of Bilingual (English and Welsh-speaking) Juries in Certain Criminal Trials in Wales* (Office for Criminal Justice Reform 2005).

139 See HC Deb 16 January 2007, vol 455, no 26, 657–58.

140 See Ministry of Justice, *The Use of Bilingual (English and Welsh-speaking) Juries in Certain Criminal Trials in Wales* CP(R) 08/10 (Ministry of Justice 9 March 2010).

141 Ibid 17.

142 Ibid.

143 Ibid 18.

144 See Ministry of Justice, *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (Ministry of Justice June 2007).

themselves to be fluent in Welsh. Indeed, it was claimed that only 6.4 per cent of those who were summoned to serve on a jury were fluent in Welsh, leading to this conclusion: 'such a low level of Welsh fluency among serving jurors indicates that conducting jury trials with a full bilingual jury would be difficult to achieve, certainly on any regular basis'.[145]

Of course, this figure of 6.4 per cent does not correspond with the figures in the 2011 census which state that around 20 per cent of the population can speak the language.[146] The report did not explain how the data was collected (or what questions the prospective jurors were asked), although the authors speculated that respondents in Wales may have flinched at the possibility of having to perform such an onerous public duty as jury service in Welsh.[147] Such speculation, based on the sample of a week's survey, is methodologically inadequate and renders any conclusion unreliable. Even more irresponsible is the government's reliance on this evidence in its response to the call for bilingual juries. Indeed, the government's report engages in socio-linguistic hypothesises that the bilingual skills of the Welsh-speaking population are unlikely to be sufficiently robust to cope without the assistance of the professional interpreter.[148]

But whatever doubts we may have about the soundness of these findings, the government cannot be criticised for taking cognisance of the Irish position on bilingual juries. With the judgment in *Mac Cárthaigh* readily to hand, the authors of the report held up the Irish precedent as a model of good judgment:

> The country where the linguistic position is probably most closely analogous with the position in Wales is the Republic of Ireland. The Government notes that the Irish Supreme Court . . . has decided that there is no right under the Irish constitution to be tried by an Irish-speaking jury. The judgment was based mainly on random selection arguments. This judgment is particularly striking in that Irish has a formal constitutional position as the first language of the Republic of Ireland, and English as second language, rather than Irish and English being regarded broadly as equals as Welsh and English are in Wales.[149]

The government report was deficient in a number of respects. Although there was generous acknowledgment of and support for the Irish example, there was no mention of the alternative Canadian model. Ireland's concept of bilingual justice and the Irish Supreme Court's ruling on the unconstitutionality of granting Irish speakers the right to be tried by a jury that speak their official language gave the British government the perfect excuse to dismiss the claims of Welsh speakers. The reasoning was simple. If a sovereign state which claims that its national language is the first official language refuses the right to be tried by a jury that speak that official language, why should we recognise such a right in Wales? That the Irish courts could have offered the British government such a justification on a plate

145 Ministry of Justice (n 144) 112.

146 <http://gov.wales/statistics-and-research/census-population-welsh-language/?lang=en>

147 Ministry of Justice (n 144) 113: 'it may well be that when asked to declare whether they were fluent when there may have been a possibility of having to perform an official function using the Welsh language (jury service), the respondents were less optimistic (or perhaps more realistic) about their level of proficiency in Welsh'.

148 Ministry of Justice (n 140) 19: 'it is a moot point whether evidence is best understood directly, rather than through a professional simultaneous interpreter, where two languages are in use during a trial. Certainly, one would have to have a very high level of understanding of both languages—in effect, perfect bilingualism—to be able to understand evidence given in both languages.'

149 Ibid 20.

should be the source of discomfort in Ireland. Left unaddressed, this is a subject that has the potential to become another 'sordid' chapter in the history of the Irish language.[150]

Conclusion

In less than a decade, Ireland will be marking the centenary of its independence as a nation. It will be an opportunity for the nation to reflect on its journey thus far and to ponder over its future direction. Ireland has changed and will continue to do so. On 22 May 2015, the Irish people, in a plebiscite, approved changing the state's constitution to extend civil marriage rights to same-sex couples.[151] This would have been unthinkable a generation ago. Yet the Irish people's capacity for generosity and fairness and their willingness to embrace change in the interests of justice should not be underestimated.

The creation of the Irish state as a bilingual state was also an act of justice and a deliberate renunciation of a colonial past when the Irish language was demeaned, routinely mocked and excluded from the courts of justice. Yet, the issue of bilingual juries betrays the Irish state's neurosis about its bilingualism. It is a bilingual state which fails to ensure equality to both its official languages in the administration of justice. Because of this, the Irish speaker in the criminal courts of the Republic of Ireland is in no significantly better position than his or her counterpart in Northern Ireland.

Some may respond to this paper by claiming that it amounts to condemning the Irish state's bilingualism on the basis of a single issue. The reply is that, firstly, to be tried by a court of justice in your official language and by a tribunal which understands your official language is the hallmark or the litmus paper indicator of true state bilingualism. It is a right and privilege that only sovereign people in their sovereign state can expect to enjoy. It is the right which distinguishes the status of Welsh or Irish in the UK from French and English in Canada or Finnish and Swedish in Finland. Secondly, this issue is indicative of a deeper malaise within the Irish state with regard to its national and first official language. It is a malaise that in recent years resulted in an Irish Language Commissioner resigning in despair and thousands of people taking to the streets of Dublin to protest at the treatment of the Irish language by governments in both the republic and the north.[152]

Aggravating Ireland's failure to behave and set an example as a bilingual state is that it has established an unfortunate precedent for another linguistic community which currently lacks the political and democratic means to reject that precedent and adopt the Canadian model. Wales, although proclaiming Welsh as an official language,[153] and with a nascent legislature of its own to legislate for its future, must also function within the straightjacket imposed by being part of the unitary British state, the unified jurisdiction of England and Wales and in a context whereby power over criminal justice is not devolved.

As for Ireland, it has the political and legal means to act. The immediate task is to determine what ought to be the language test for jury service in the Juries Act 1976. Is it seriously suggested that competence in English and only English can be the appropriate qualification in this bilingual state? The palpably unlawful practice of excluding non-English

150 See J J Lee, *Ireland 1912–1985: Politics and Society* (CUP 1989) 135. The author uses the word when discussing the state's failure to revive the Irish language: 'What might have been a noble chapter in the history of the new state became instead a sordid one. None of the instinctive ritualistic excuses could explain this away. The British could not be blamed. Partition could not be blamed . . . the responsibility for the failure of policy lay with the formulators of policy.'

151 *Irish Times* <www.irishtimes.com/news/politics/marriage-referendum>.

152 *Irish Times,* 15 February 2014 <www.irishtimes.com/news/social-affairs/thousands-march-for-language-rights-1.1693607>.

153 See Welsh Language (Wales) Measure 2011, s 1.

speakers by court administrators without any statutory or other lawful basis cannot continue and it is a matter for Ireland's legislature to address with urgency.

This specific issue will unavoidably lead to the wider discussion on Ireland's bilingualism and the state's response to the Irish Supreme Court's interpretation of the constitution in the context of bilingual juries. That debate should lead to one or two outcomes. If the Irish legislature agrees with the Supreme Court's judgment in *Ó Maicín*, it should put in motion processes to amend the Irish Constitution so that a new Article 8 is enacted in these terms:[154]

> **Article 8 (as amended)**
>
> 1. The first official language of the Republic of Ireland is English.
> 2. The Irish language is also recognised as an official language.

Such a formula would reflect the slightly inferior status of Irish and would thus justify a policy of linguistic inequality. Of course, it would be subjected to democratic scrutiny not only in the Oireachtas but also by the people of Ireland in a referendum.[155] Who knows, it might finally lay to rest any pretence the Irish state residually holds about being a bilingual state.

There is, of course, the alternative course. Ireland could renew its commitment to its founders' vision of a bilingual state based on linguistic equality and the place to start would be the subject of bilingual juries. The Supreme Court having twice declared bilingual juries to be unconstitutional, ensuring the constitutionality of bilingual juries would require changing that constitution. That change would need to be initiated by the body politic. The required change might take the following form:

> **Article 38.7 (as amended)**
>
> A person to be tried on any criminal charge shall be tried before a judge, judges or judge and jury who speak the official language of Ireland that is the language of the person to be tried or, if the circumstances warrant, who speak both official languages of Ireland.

Such a formula, in plain language, spells equality. Further supplementary amendments to the Juries Act 1976 to deal with the mechanics of drawing up lists of bilingual citizens from which potential jurors would be summoned should cause little difficulty: there are ample precedents in Canada.

Having been the subject of repeated judicial scrutiny, perhaps it is high time that this matter is subjected to democratic scrutiny. Is it not time for the Irish people to decide the sort of bilingual state theirs should be?

154 For guidance on the process, see, for example, Casey (n 66) 709–19.

155 Bunreacht na hÉireann, Article 46.

NILQ 66(3): 223–41

A referendum on the reform of the House of Lords?

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> A referendum may be defined as the holding of a ballot in which electors are called upon, not to elect, but to pass judgement on a particular question. (Lord Norton of Louth, Professor of Government and Director of the Centre for Legislative Studies, University of Hull)[1]

The question of reform of the House of Lords has remained an unresolved, perennial constitutional issue since the preamble to the 1911 Parliament Act provided that it was an essentially temporary measure, pending the introduction of members on a 'popular' (i.e. elected) basis. The latest attempt at long-term reform in July 2012 involved MPs giving a second reading to the House of Lords Reform Bill which proposed an 80 per cent elected House. The Bill was abandoned by the Coalition government shortly afterwards, however, because of a failure of MPs to agree a programme motion setting out the timetable for its passage through the Commons. A draft version of this Bill had received pre-legislative scrutiny by a Joint Committee which had recommended that a referendum take place on the decision to establish an elected second chamber.[2] Although in its official response, the Coalition government rejected this recommendation,[3] the purpose of this paper is to argue that a national referendum should nevertheless have taken place. Not only was this a lost opportunity in 2012, but also that, when the issue of fundamental Lords reform next appears on the political agenda, a national referendum should be held. In fact, the concept of a referendum on constitutional issues has some weighty provenance as it was proposed

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1 Phillip Norton, *The Constitution in Flux* (Martin Robertson 1982) 213.

2 Joint Committee on the Draft House of Lords Reform Bill, *Report*, vol I, HL Paper 284-I, HC 1313-I (TSO 2012) para 385.

3 *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* Cm 8391 (TSO 2012) 32.

by Professor Dicey over a century ago.[4] As a useful backdrop to the debate, it is rather apposite that in April 2010 the House of Lords Select Committee on the Constitution published a wide-ranging report on referendums[5] in the UK.[6]

A brief history of recent attempts at Lords reform

The Labour government was elected in 1997 with a manifesto commitment to reform the House of Lords and, in 1999 a White Paper[7] was issued in parallel with a Bill to remove the hereditary element from the House. Following a compromise known as the Weatherill amendment, a rump of 92 hereditaries remained under the subsequent House of Lords Act 1999 (pending the introduction of long-term reform). A year later the Royal Commission on House of Lords reform, which had been foreshadowed in the 1999 White Paper, issued its report in which it recommended a hybrid, largely appointed House.[8] A further White Paper followed in 2001[9] which, broadly, gave effect to the findings of the Royal Commission's recommendations and so proposed that one-fifth of the House be elected. Neither the report of the Royal Commission nor the 2001 White Paper proved to be particularly popular. In an effort to achieve some parliamentary consensus, a Joint Committee on House of Lords reform was established in July 2002. Its report set out a number of different options for a reformed composition, ranging from a wholly elected to a fully appointed chamber, with various hybrid positions in between.[10] In 2003 both Houses of Parliament voted on these options and, although the House of Lords approved a fully appointed House, the House of Commons failed to endorse any (although it did reject the option of unicameralism).[11] In the aftermath of this impasse, the government issued a consultation paper[12] in September 2003 in which the lack of consensus on the introduction of an elected element was acknowledged. Instead, the government proposed to implement small-scale interim reforms, such as removing the remaining rump of hereditary peers. No legislation implementing these reforms, however, ever materialised.

In 2005 a non-governmental and cross-party group of MPs issued a document designed to show that broad agreement on Lords reform was possible. In essence, this report envisaged a hybrid House with up to 70 per cent being elected.[13] Two years later the Labour government issued another White Paper[14] prior to a second round of parliamentary votes taking place on the options considered in 2003. These votes proved to be rather inconclusive as, whereas the House of Lords voted overwhelmingly (though hardly

4 Albert Venn Dicey, 'Ought the Referendum to be Introduced into England?' (1890) 57 Contemporary Review 489 and 'The Referendum and its Critics' (1910) 212 Quarterly Review 538.

5 Following David Butler and Austin Ranney (eds), *Referendums around the World* (Macmillan 1994) 1, in this paper the author will follow suit and use the plural of referendum to be referendums.

6 House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom* HL Paper 99 (TSO 2010).

7 *Modernising Parliament: Reforming the House of Lords* Cm 4183 (TSO 1999). On the recent history of reform, see Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (OUP 2013) ch 10.

8 *A House for the Future* Cm 4534 (TSO 2000).

9 *The House of Lords: Completing the Reform* Cm 5291 (TSO 2001).

10 *House of Lords Reform: First Report* HL Paper 17, HC 171 (TSO 2002).

11 On these votes, see Mark Ryan, 'Parliament and the Joint Committee on House of Lords Reform' (2003) 37 Law Teacher 310. In addition, see Iain McLean, Arthur Spirling and Meg Russell, 'None of the Above: The UK House of Commons Votes on Reforming the House of Lords, February 2003' (2003) 74 Political Quarterly 298.

12 *Constitutional Reform: Next Steps for the House of Lords* CP 14/03 (DCA 2003).

13 Kenneth Clarke, Robin Cook, Paul Tyler, Tony Wright and George Young, *Reforming the House of Lords: Breaking the Deadlock* (Constitution Unit 2005) 43.

14 *The House of Lords: Reform* Cm 7027 (TSO 2007).

surprisingly) in favour of a fully appointed House, the House of Commons by contrast approved the contradictory options of both a fully and an 80 per cent elected chamber.[15] Thereafter, informed by this vote in the Commons (but *not* the Lords), the Labour government published a further White Paper in 2008 confining reform to either a wholly or an 80 per cent elected House.[16] Although no major legislation was introduced, the end of the Labour administration's tenure did see it attempt to introduce smaller-scale interim reforms in the vehicle of the 2009–2010 Constitutional Reform and Governance Bill. These elements (e.g. resignation and suspension provisions) were, however, excised in April 2010 during the wash-up prior to the general election.[17]

At the general election of 2010, the issue of Lords reform formed part of all three of the main political parties' manifestoes. Whereas Labour[18] and the Liberal Democrats[19] advocated a fully elected chamber (albeit the former following a national referendum), the Conservatives[20] pledged to work towards a consensus on a mainly elected House. The Coalition government thereafter assumed power in May 2010 with a Coalition Agreement commitment (no doubt driven by the Liberal Democrat element of the administration) to create a committee to produce proposals on the reform of the House of Lords.[21] A cross-party committee headed by the Deputy Prime Minister was immediately established, charged with producing draft reform proposals in the form of a parliamentary motion. One year later in May 2011, the Coalition government published a White Paper (albeit not a motion) which included a Draft House of Lords Reform Bill.[22] In brief, the Draft Bill envisaged a House of 300 members of whom 80 per cent would be elected, although the White Paper made it clear that the Bill could be adapted to create a wholly elected House if required. Members would be elected in thirds by the single transferable vote system of proportional representation and the 20 per cent non-elected element would be appointed by a statutory Appointments Commission.[23]

The publication of the Draft Bill was followed by the establishment of the Joint Committee on the Draft House of Lords Reform Bill (hereafter the Joint Committee) to provide pre-legislative scrutiny of these proposals, and its report was published in late April 2012.[24] Two months later, informed by this scrutiny, the fully fledged Bill (viz the House of Lords Reform Bill) received its first reading in the Commons.[25] This Bill was similar to the draft that had preceded it except that one key difference was that the envisaged House had increased in size to 450 members (i.e. 360 elected and 90 appointed – cl 1(3)). A second

15 For an analysis of these votes, see Mark Ryan, 'A Consensus on the Reform of the House of Lords?' (2009) 60 NILQ 325.

16 *An Elected Second Chamber: Further Reform of the House of Lords* Cm 7438 (TSO 2008).

17 On the passage of this Bill, see Mark Ryan, 'The Constitutional Reform and Governance Act 2010: The Evolution and Development of a Constitutional Act' (2014) 35 Liverpool Law Review 233. It should be noted that one element on Lords reform concerning members of the House being deemed to be resident and domiciled in the UK for the purposes of tax, did survive the wash-up (s 41).

18 *The Labour Party Manifesto 2010: A Future Fair for All* (Labour Party 2010) 9.4.

19 *Liberal Democrat Manifesto 2010: Change that Works for You* (Liberal Democrats 2010) 88.

20 *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (Conservative Party 2010) 67.

21 *The Coalition: Our Programme for Government* (Crown Copyright 2010) 27.

22 *House of Lords Reform Draft Bill* Cm 8077 (TSO 2011).

23 On the Draft Bill in general, see Mark Ryan, 'A Summary of the Developments in the Reform of the House of Lords since 2005' (2012) 21 Nottingham Law Journal 65.

24 Joint Committee on the Draft House of Lords Reform Bill (n 2).

25 HC Deb 27 June 2012, vol 547, col 308.

major difference was the introduction of the semi-open list electoral system (Schedule 3).[26] Although the Joint Committee had recommended a referendum, the Bill did not contain any provision for one. According to the Coalition government there did not 'seem to be a compelling case' to justify the expense that the staging of a referendum would incur.[27]

The House of Lords Reform Bill was considered by the House of Commons in July 2012 in a very lively two-day second reading debate and it is of interest to note that over 20 MPs spoke in favour of holding a referendum.[28] The main principles of the Bill passed muster by the commanding margin of 462 to 124 votes. It was subsequently abandoned by the Coalition government, however, when it became clear that no programme motion (setting out the timetabling of the passage of the Bill) could be agreed by MPs. Although the side-lining of the House of Lords Reform Bill left long-term reform in abeyance, there still remained the possibility of implementing more modest reforms in the interim. In fact, in the preceding years, Lord Steel of Aikwood had on a number of occasions tried unsuccessfully to pilot a Private Member's Bill through Parliament which would have implemented a number of small-scale housekeeping reforms to the composition of the Lords. In 2013 Dan Byles MP incorporated some of these proposals in his Private Member's Bill: the House of Lords Reform Bill. This measure proved to be broadly consensual as it was designed to achieve three modest changes. It proposed to allow peers to resign, but also enable their expulsion for either non-attendance or following a serious criminal conviction. In May 2014 the Bill received the royal assent and, together with two other minor Acts passed the following year,[29] represented the only reform of the House of Lords that would take place during the last Parliament. Any major reform of the House of Lords would accordingly have to wait until after the 2015 general election. At this election, both the Liberal Democrat[30] and the Labour parties'[31] manifestoes pledged to introduce an elected second chamber. Although the newly elected Conservative government's manifesto recognised the case for an elected Lords, it was not regarded as a priority for the incoming Parliament.[32] It is plain, therefore, that no long-term reform will be undertaken during the current Parliament.

26 This was the system proposed for Great Britain; however, under cl 5(5) of the Bill it was envisaged that for historical reasons Northern Ireland would use the single transferable vote.

27 *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 3).

28 For example, on the first day of the second reading the following, among others, supported a referendum on these proposals: HC Deb 9 July 2012, vol 548, Sadiq Khan (col 45); Alan Johnson (col 58); Rory Stewart (col 36); Eleanor Laing (col 58) and Graham Brady (col 63). On the Bill in general, see Mark Ryan, 'The Latest Attempt at Reform of the House of Lords: One Step Forward and Another One Back' (2013) 22 Nottingham Law Journal 1.

29 On the House of Lords Reform Act, see Mark Ryan, 'Bills of Steel: The House of Lords Reform Act 2014' [2015] Public Law 558. The other two measures were the House of Lords (Expulsion and Suspension) Act 2015, which provided for the expulsion and suspension of members, and the Lords Spiritual (Women) Act 2015 which provided for the acceleration of female bishops to sit in the House of Lords.

30 *Manifesto 2015: Strong Economy. Fair Society. Opportunity for Everyone* (Liberal Democrats 2015) 132.

31 *Britain Can Be Better: Labour Party Manifesto 2015* (Labour Party 2015) 64, although it did support a Constitutional Convention to drive forward Westminster reform. It is interesting to note that in March 2014 a Labour Peers' Working Group recommended that any major reform of the second chamber be implemented only if approved by the people in a referendum: *A Programme for Progress: The Future of the House of Lords and its Place in a Wider Constitution* (Labour Peers' Working Group 2014) 32.

32 *The Conservative Party Manifesto 2015* (Conservative Party 2015) 48.

The referendum and the British Constitution

Outside of the UK, constitutional laws are invariably accorded a higher legally entrenched special status to reflect their fundamental character as principles which underpin the basic framework of the state. As a consequence, changes to a codified constitution are subject to a procedure prescribed by the constitutional document. Such procedures could involve a legislative supermajority (Germany), two readings of the measure in successive parliaments (Netherlands) or endorsement of the reform in a referendum (Republic of Ireland). A constitutional referendum can be either mandatory, whereby the constitution stipulates that *any* amendment to the constitution is to be ratified by the people (Republic of Ireland: Article 46), or optional in which a referendum is one way of altering the constitution (France: Article 89). In general terms, therefore, a referendum can be seen 'as a weapon of entrenchment'[33] whereby an obstacle (i.e. the people as the constituent power) can protect the constitution from changes which it considers undesirable. The last three decades have witnessed a surge in the use of referendums on the international plane,[34] with referendums being used increasingly to resolve constitutional questions of a fundamental nature.[35] In fact, Professor Tierney has suggested that 'the task for the constitutional scholar today is to engage with *how* deliberative democracy might be fostered within constitutional referendums [sic]'.[36]

In contrast to elsewhere, the defining characteristic of the British Constitution is the legislative supremacy of Parliament (hereafter parliamentary sovereignty as used by Professor Dicey). This doctrine fills the void left by the historical absence of a codified constitutional document. It has the consequence that our constitutional laws are comparatively flexible and open to change by virtue of the passage of a simple Act of Parliament. Following a general election, parliamentary members enact laws on the basis of a mandate supplied by the people and there is a clear 'division of labour' between the government and the governed.[37] In short, the public are not involved in the post-election legislative process, whether for constitutional or non-constitutional laws. This is because representative government does not give an institutional role to the people.[38] The paradox of parliamentary representation, therefore, is that it *both* includes the people (albeit infrequently through elections), but also 'simultaneously, it serves to exclude them from direct and continuous participation in the decision-making process'.[39]

In Britain the referendum, historically, has been regarded as alien to our traditions[40] and unconstitutional.[41] Direct democracy has been viewed as undermining parliamentary sovereignty and representative democracy[42] because it could result in rejecting a decision made by elected parliamentarians. In a referendum the people replace their parliamentary

33 Vernon Bogdanor, *The People and the Party System* (CUP 1981) 69.

34 Stephen Tierney, 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72(3) Modern Law Review 360.

35 Stephen Tierney, *Constitutional Referendums* (OUP 2012) 1.

36 Ibid 303.

37 See further, Geraint Parry, George Moyser and Neil Day, *Political Participation and Democracy in Britain* (CUP 1992) 5.

38 Bernard Manin, *The Principles of Representative Government* (CUP 1997) 8.

39 David Judge, 'Whatever Happened to Parliamentary Democracy in the United Kingdom?' (2004) 57 Parliamentary Affairs 683.

40 Described as such by Clement Attlee in 1945 and quoted in Philip Goodhart, *Referendum* (Tom Stacey Ltd, 1977) 49.

41 *Report of the Commission on the Conduct of Referendums* (Electoral Reform Society and the Constitution Unit 1996) 6.

42 As recorded in the evidence supplied to the House of Lords Select Committee on the Constitution (n 6) 20.

representatives who, according to the historic Burkean precept,[43] have been entrusted with the responsibility to make decisions in Parliament. Such decisions are made in accordance with an MP's experience, judgment and ability to assess an issue in its broad overall context (rather than in the vacuum of an isolated referendum). It has been noted that representative institutions therefore 'create the conditions for a more deliberative approach to decision-making'.[44] It has also been argued that referendums undermine the principle of accountable government which requires the administration to be constitutionally responsible for policy decisions and held to account thereafter by the people.[45] Professor Tierney has posited that constitutional referendums (unlike ordinary/legislative referendums which 'do not impact upon the location and distribution of sovereign power within the state')[46] raise distinct challenges to the understanding of supremacy in the context of a representative governmental system.

Although the traditional view has been that direct democracy is incongruous with the British Constitution, it must be recalled that Professor Dicey (the person most closely associated with the principle of parliamentary sovereignty) actually approved of selective referendums as they gave expression to the people's will.[47] He recognised the practical reality that the elected assembly of MPs could fail to represent the people/nation with guillotine and closure motions destroying free rational debate and party political discipline undermining the independence of members.[48] Professor Dicey viewed the referendum as an essentially negative device (a 'bridle').[49] It could counterbalance a temporary party political majority which wanted to make constitutional changes without the direct sanction of the public.[50] In particular, he was vigorously opposed to the passage of Home Rule legislation for Ireland which he believed the electorate opposed.[51] It has certainly not gone unnoticed that the Crown in Parliament has absorbed the constituent power in the UK and that Parliament 'has usurped the role of "the people" in the constitutional imagination'.[52] On one view, therefore, the mechanism of the referendum could be regarded as 'a necessary complement to representative democracy, which fails to recognise the advent of party government and the influence of organised interest groups'.[53] In fact, it has been pointed out that the referendum does not represent an attack on representative government, but instead it is incompatible 'with an over rigid party system'.[54]

According to Professor Bogdanor, the effect of a referendum is to divide legislative power between the people and the legislature (thereby checking the executive), with the

43 On Burke's famous address, see Jesse Norman, *Edmund Burke* (William Collins 2014) 77–8.

44 Tierney (n 35) 28.

45 As noted by the *Report of the Commission on the Conduct of Referendums* (n 41) 23.

46 Tierney (n 34) 364.

47 Dicey, 'The Referendum and its Critics' (n 4) 551.

48 Ibid 540–1.

49 Ibid 543.

50 Dicey, 'Ought the Referendum to be Introduced into England?' (n 4) 506.

51 Dicey, 'The Referendum and its Critics' (n 4) 540. On Dicey and Home Rule, see Richard Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan 1980) 105.

52 Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2008) 27–8.

53 Mads Qvortrup, *A Comparative Study of Referendums* (Manchester University Press 2002) 7.

54 Bogdanor (n 33) 81.

people in effect becoming 'a third chamber'[55] (or acting as a 'Third Reading').[56] Professor Norton has also noted that a referendum divides the legislative and executive functions, preventing the government from controlling the former.[57] Direct democracy, therefore, provides an obstacle to change in a state – such as the UK – which lacks a codified constitution.[58] Professor Dicey argued that a referendum would be the veto of the nation[59] and it was democratic precisely because it protected the people's sovereignty.[60] For Professor Bogdanor, the referendum performs an entrenching role in a state lacking a rigid codified constitution.[61] It should be remembered though that a referendum can only take place in the UK with express legislative authority. Indeed, as 'referendums cannot be legally binding'[62] (and so remain advisory), sovereignty is retained, although of course it would be difficult politically for Parliament to ignore an outcome with which it disagreed. The result of a referendum could, therefore, become de facto politically mandatory.

The referendum is, however, hardly an unknown device in the UK. In recent decades our ever-changing constitution has adapted to embrace both UK-wide and regional referendums in order to determine specific constitutional issues. There have been two UK-wide referendums (1975[63] and 2011),[64] together with a number of regional ones, which exhibit a policy of using referendums prior to the implementation of devolution/decentralisation in Scotland (1979 and 1997),[65] Wales (1979, 1997),[66] London (1998),[67] Northern Ireland (1998)[68] and the North East (2004).[69] Northern Ireland also had a border poll in 1973[70] and, very recently in September 2014, Scotland rejected independence in a referendum held under the Scottish Independence Referendum Act 2013. Professor Bogdanor had observed in 1996 that the constitution knew nothing of the British people.[71] Fifteen years later, however, following the constitutional reform programme commenced in 1997 (elements of which had been validated by a referendum), he commented 'that the people have become, at last, a part of the British constitution'.[72]

55 Vernon Bogdanor, 'Western Europe' in Butler and Ranney (n 5) 30.

56 Bogdanor (n 33) 69.

57 Norton (n 1) 218.

58 Bogdanor (n 55) 46.

59 Dicey, 'The Referendum and its Critics' (n 4) 559.

60 Dicey, 'Ought the Referendum to be Introduced into England?' (n 4) 507.

61 Bogdanor (n 33) 71.

62 House of Lords Select Committee on the Constitution (n 6) 46. In this context, also see Rodney Brazier, *Constitutional Reform* (3rd edn OUP 2008) 23.

63 Referendum Act 1975.

64 Parliamentary Voting System and Constituencies Act 2011.

65 The Scotland Act 1978 and Referendums (Scotland and Wales) Act 1997, respectively.

66 The Wales Act 1978 and Referendums (Scotland and Wales) Act 1997, respectively. More recently a referendum took place in Wales in 2011 on extending the legislative powers of the Welsh Assembly, thereby demonstrating the 'rolling process' of devolution. The referendum was held under the aegis of ss 103–4 of the Government of Wales Act 2006 and the National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010 SI 2010/2837.

67 Greater London Authority (Referendum) Act 1998.

68 Northern Ireland Negotiations (Referendum) Order 1998 SI 1998/1126.

69 Regional Assemblies (Preparations) Act 2003.

70 Northern Ireland (Border Poll) Act 1972.

71 Vernon Bogdanor, *Politics and the Constitution* (Dartmouth 1996) 213.

72 Vernon Bogdanor, 'An Era of Constitutional Reform' (2011) Political Quarterly 55.

At a local level, referendums are more established in Britain.[73] For example, provision is made for local referendums/polls under the aegis of the Local Government Act 1972 (Schedule 12, para 18(4) – parish polls), Local Government Act 2003 (s 116 – polls on services etc.) and under the Local Government Act 2000 (as amended[74] – prior to the establishment of elected mayors). Section 72 of the Localism Act 2011 also provides for mandatory local referendums on proposed excessive council tax increases. In terms of the EU, pt 1 of the European Union Act 2011 provides for a UK-wide referendum in the event of a treaty change or decision that proposed to transfer competence or power from the UK to Europe. More recently, at the time of writing, the newly elected Conservative government was piloting the 2015 European Union Referendum Bill through Parliament which stipulated that a referendum must be held before the end of 2017 on whether the UK should remain a member of the EU. In the event that this Bill becomes law, this referendum would be the second referendum in relation to our membership of Europe, some four decades after the UK's very first UK-wide referendum.

Such has been the increasing prominence of domestic referendums in recent years that in 2009 the House of Lords Select Committee on the Constitution (hereafter the Select Committee) was moved to investigate the role of referendums in the UK. It concluded that if referendums were to be used in the UK then 'they are most appropriately used in relation to *fundamental constitutional issues*' (emphasis added).[75] In fact, it has been recorded that on the international plane the majority of referendums have focused on constitutional issues.[76] It has to be said that the concept of a British referendum on constitutional issues already has some weighty provenance. In 1890 Professor Dicey floated one proposal that no legislation which would affect, inter alia, the constitution of either parliamentary chamber should have effect or come into force until sanctioned by the electors.[77]

A seminal constitutional change

The first argument that the Coalition government should have acceded to the Joint Committee's recommendation in 2012 for a referendum was that it was necessary because the envisaged change in composition to a largely elected House would have had a profound effect on our uncodified constitutional arrangements. At the outset, the view of the Select Committee in 2010 on this issue should be recorded. Although the Select Committee conceded that it was not possible to give an exact definition as to what 'a "fundamental constitutional issue"' was, it nevertheless listed the matters which it considered fell within – and so deemed appropriate – for a referendum.[78] These included the abolition of the House of Lords, but did *not* include changing the composition of the second chamber. Even though the Select Committee indicated that its list was not meant to be definitive, its then chair, Baroness Jay of Paddington, in explaining the content of the report to the

73 Matt Qvortrup, 'Democracy by Delegation: The Decision to Hold Referendums in the United Kingdom' (2006) 42 Representation 60. On local authorities and polls, see Mark Sandford, *Local Government: Polls and Referendums* (House of Commons Library 2014).

74 The Local Government and Public Involvement in Health Act 2007 and the Localism Act 2011.

75 House of Lords Select Committee on the Constitution (n 6) 27.

76 *Report of the Commission on the Conduct of Referendums* (n 41) 22. According to Lawrence Le Duc, the most common issues of referendums held in 58 democratic countries between 1975–2000 were the following: constitutional issues; international treaties and agreements; matters of national sovereignty/self-determination; and other issues of public policy (*The Politics of Direct Democracy* (Broadview Press 2003) 34, table 1.1).

77 Dicey, 'Ought the Referendum to be Introduced into England?' (n 4) 499.

78 House of Lords Select Committee on the Constitution (n 6) 27.

House of Lords, drew specific attention to the fact that the Select Committee had *not* included Lords reform 'as a fundamental constitutional issue'.[79]

One could nonetheless take issue with this finding of the Select Committee. In short, it is contended that any proposal to transform the composition of the House of Lords from an appointed chamber to an elected one would be a fundamental constitutional change (and so would warrant a referendum). It would clearly not be a secondary or minor constitutional reform as it would be 'one of the most significant constitutional changes in a century'.[80] As constitutional reform cannot be forged in a vacuum, the reform of the second chamber would have secondary effects reverberating elsewhere. In particular, the advent of an elected second chamber would have a profound impact on the constitutional relationship between the two Houses and the real dynamic of the British Constitution: viz, executive/parliamentary relations. It is posited that a reformed chamber armed with an electoral mandate would be likely to be more robust in its dealings with both the lower House and the government of the day.[81] After all, such a chamber would undoubtedly feel more constitutionally legitimate by virtue of being elected. In fact, a more legitimate House of Lords was the *raison d' être* of the Coalition government's proposals for reform.[82] It is germane that research has revealed that, following the removal in 1999 of most of the hereditary peers (the most constitutionally controversial element of the chamber), the legitimacy of the House of Lords was boosted, which made it more confident in its dealings with the executive.[83]

Although the Parliament Acts of 1911 and 1949 determine the legal relationship between the two Houses and preserve the legal primacy of the Commons, a newly elected chamber would be much more assertive than the House of Lords is at present. It is possible that it would use its legal powers under the Parliament Acts (which are still 'relatively great in comparative terms')[84] to the full. It is only by convention that the current House of Lords exercises self-restraint and, in fact, the Coalition government accepted that an elected House of Lords was likely to be more assertive.[85] A majority of the Joint Committee believed that, despite the shift in the balance of power between the two Houses that would ensue following reform, 'the remaining pillars' (i.e. the Parliament Acts etc.) would be sufficient to ensure the continuation of the Commons' primacy.[86] A minority of the Joint Committee argued in a separate Alternative Report, however, that there was an incompatibility and 'an unbridgeable gap' between an elected upper House and the maintenance of primacy. In short, the government's proposals had put the primacy of the Commons 'into play'.[87]

79 HL Deb 12 October 2010, vol 721, col 409.

80 Lord Dobbs, HL Deb 30 April 2012, vol 736, col 2057.

81 As the Bill proposed a form of proportional representation, it would appear unlikely that one party (including the government) would be able to dominate the second chamber.

82 *House of Lords Reform Draft Bill* (n 22) 29.

83 Meg Russell and Maria Sciara, 'The House of Lords in 2006: Negotiating a Stronger Second Chamber' (Constitution Unit 2007). In this context, also see, Meg Russell and Maria Sciara, 'The Policy Impact of Defeats in the House of Lords' (2008) 10 British Journal of Politics and International Relations 571.

84 Meg Russell, 'Judging the White Paper against International Practice of Bicameralism' in Alexandra Fitzpatrick (ed), *The End of the Peer Show?* (CentreForum 2011) 25.

85 *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 3) 6.

86 Joint Committee on the Draft House of Lords Reform Bill (n 2) 20.

87 Alternative Report, *House of Lords Reform: An Alternative Way Forward* <www.houseoflordsrefrom.com> 39–40.

It should also be remembered that the existing conventions which have ensured collaborative inter-House relations have been predicated on the acceptance that the Commons is the elected House. It is not difficult, however, to imagine newly elected members withdrawing their co-operation in day-to-day parliamentary business and discarding (or at the very least questioning) the present conventions which regulate relations with both the Commons and the government of the day. For example, would – or even should – one of these conventions, such as the Salisbury-Addison convention (which provides that the House of Lords should accord a second reading to a government Bill foreshadowed in its manifesto) apply in the context of both Houses being elected?

The Joint Committee on Conventions in its 2006 report made the point that its conclusions in relation to these conventions would have to be revisited in the event that the composition of the second chamber changed (i.e. acquired an electoral mandate).[88] In May 2011, the Political and Constitutional Reform Select Committee asserted that these conventions would not survive in their present form if the upper House had 'democratic legitimacy'.[89] The Joint Committee on the Draft Bill also recognised that in a reformed House of Lords these conventions would evolve and recommended that work should begin promulgating them (together with any new ones) by way of a 'concordat' to be agreed through parallel resolutions in both chambers.[90] For its part, although the Coalition government conceded that the existing conventions would evolve, it did not agree that work now needed to begin 'to establish new or developed conventions, or dispute resolution procedures'.[91] In the final analysis, the Joint Committee reported that 'By any standard, the Government's proposal to reform the House of Lords is of major constitutional significance'[92] and accordingly recommended that a referendum take place.[93] In fact, the minority Alternative Report argued that changes to the second chamber 'not only should not be done without a referendum but in practice *could* not be done without a referendum' (emphasis added).[94]

The reform of the House of Lords would undoubtedly be a seminal constitutional reform. It has been pointed out that in a representative democracy (in general) the people's representatives should not assume that they have the right to determine the terms on which they hold political office or the powers that they exercise. In other words, these 'are prior questions which properly belong in a written constitution, subject to the approval of the people'.[95] Professor Tierney, furthermore, has theorised that at the 'sovereignty decision-making' level (i.e. issues in which the nature of the state is redefined fundamentally, such as a cardinal change to Parliament's nature), it may be that some (albeit limited) room should be available for the use of referendums. In short, at this level:

> the issues are so fundamental that people should be able to reclaim their direct constitutional authority; and secondly, that these decisions involve the very identity of a sovereign people and again, therefore, that people should be able to play a direct role in such an exercise of constitutional 'self-definition'.[96]

88 Joint Committee on Conventions, *Conventions of the UK Parliament* HL Paper 265-I, HC 1212-I (TSO 2006) 3.

89 Political and Constitutional Reform Committee, *Seminar on the House of Lords: Outcomes* HC 961 (TSO 2011) 5.

90 Joint Committee on the Draft House of Lords Reform Bill (n 2) 26.

91 *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 3) 8.

92 Joint Committee on the Draft House of Lords Reform Bill (n 2) 92.

93 Ibid 96.

94 Alternative Report (n 87) 76.

95 Stuart Weir and David Beetham, *Political Power and Democratic Control in Britain* (Routledge 1999) 111.

96 'Memorandum', House of Lords Select Committee on the Constitution (n 6) 49.

It is contended therefore that the proposal in 2012 (or indeed any such plans in the future) to replace the appointed composition of the House of Lords with elected members fell squarely within Professor Tierney's parameters of a fundamental redefinition of the state. An elected House would have transformed the way in which the constituent power was represented and reflected in the legislature and therefore warranted a referendum. In this context it is fascinating to recall that a clause was moved (albeit unsuccessfully) by the Conservative opposition in May 1911 in respect of the Parliament Bill. This provision stipulated that any Bill which, inter alia, altered the constitution, powers or relations between the two Houses, could not be presented for royal assent until it had been submitted to a poll of the electorate and approved by them.[97]

Finally, as an aside, although the Select Committee identified the abolition of the House of Lords as an issue appropriate for a referendum, it is pertinent to note that, for some, the replacement of the chamber's composition with elected members would in practice amount to the de facto abolition of the House of Lords.[98] It is fair to argue though that this 'abolition' would not have been immediate under the 2012 House of Lords Reform Bill, as it would have involved a 10-year transitional period commencing in May 2015 (cll 1 and 3). It is somewhat coincidental that three months after the Commons had considered the House of Lords Reform Bill, a proposal to abolish Ireland's upper House (the Senate) was rejected by the Irish people in a national referendum. This was an issue, of course, on which the 2010 Select Committee *would* have recommended a referendum on in the UK.

A constitutional precedent?

A second argument for a referendum was that a precedent had been laid down with the events of May 2011. In the UK there is no general Referendum Act which stipulates the circumstances as to when a nationwide referendum should be triggered. Although in strict legal theory the decision to hold a referendum is one for Parliament, the political reality is that this matter is decided by the government of the day. It is certainly the case that both of the UK-wide referendums which have been held to date have been 'controlled'[99] (i.e. determined by the incumbent government). For example, the 1975 referendum was driven by the desire for unity by the then Labour Party/government's internal division over the issue of Europe.[100] In fact, the Select Committee regretted in general 'the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day'.[101] It is pertinent to note that the referendum scheduled to take place before the end of 2017 on the UK's continued membership of the EU had been foreshadowed in the Conservative Party's 2015 general election manifesto.[102]

In the absence of any general Referendum Act, it can nevertheless be argued that a constitutional precedent for a referendum on Lords reform was set by the Parliamentary Voting System and Constituencies Act 2011. Section 1 enabled a UK-wide referendum to take place in May 2011 on whether the existing electoral system to elect MPs should be replaced with the alternative vote (in the event, something which the public rejected

97 Goodhart (n 40) 37. See HC Deb 8 May 1911, vol 25, col 915ff.

98 Lord Grenfell, HL Deb 11 October 2010, vol 721, col 344.

99 Using the terminology cited in Arend Lijphart, *Democracies* (Yale University Press 1984) 203 – Lijphart has argued that 'Most referendums are both controlled and pro-hegemonic' (i.e. they are determined by the government and the result of the referendum is supportive of that administration), cf. Mads Qvortrup, 'Are Referendums Controlled and Pro-hegemonic?' (2000) 48 Political Studies 821.

100 Norton (n 1) 214 and Vernon Bogdanor, *Power and the People* (Victor Gollancz 1997) 125.

101 House of Lords Select Committee on the Constitution (n 6) 20.

102 *Conservative Party Manifesto 2015* (n 32) 30.

decisively).[103] This surely then begged the question that if it could be argued that a *possible* change in the electoral system for the House of Commons from one majoritarian system to another was important enough to justify a referendum, why then was not the decision to *introduce* the principle of elections into the upper House also worthy of a referendum?

It is noteworthy that the Select Committee drew attention to the previous Labour government's inconsistency in advocating a referendum on the alternative vote,[104] but not one on reforming the composition of the Lords.[105] What is curious is that, as noted, the Select Committee *itself* declined to include the reform of the Lords (other than its abolition) as a fundamental constitutional issue meriting a referendum. The then Labour government conceded that, although Lords reform was 'a fundamental constitutional change it is a change that will have been pre-figured in a manifesto commitment, in fact in several manifesto commitments'.[106] More recently, the Coalition government's Deputy Prime Minister also justified not having a referendum on Lords reform on the basis that, unlike in relation to a change in the electoral system, all three parties had agreed to reform the second chamber in their 2010 manifestoes.[107] This explanation was far from convincing. Although the issue of the 2010 manifestoes will be dealt with below, suffice to say at this point that the commitments on Lords reform by the main political parties were *not* identical. Furthermore, the 2012 House of Lords Reform Bill actually contradicted the 2010 Liberal Democrat manifesto commitment for a wholly elected House. It is also often forgotten that no political party actually won the 2010 general election and that in any case, the Labour Party *had* proposed a referendum.

In short, it appeared inconsistent from a constitutional perspective to hold a referendum on changing the electoral system for the House of Commons, but not to hold one to *introduce* the principle of elections into the second chamber. It could be contended that once the principle of having a referendum to settle a constitutional issue is conceded, it is difficult, at least politically, to prevent it from being invoked again in relation to other (and arguably more significant) constitutional issues such as reforming the House of Lords. Indeed, the minority Alternative Report argued that the precedent of the 2011 referendum suggested that it would be unwise for governments 'to try to proceed with major national constitutional change without having first sought the direct mandate of the electorate in a referendum'.[108] Finally, it does seem that there is now a developing view/convention as to when referendums should take place. During the second reading of the House of Lords Reform Bill, Sadiq Khan MP (the then Shadow Secretary of State for Justice) regretted the government's dismissal of a referendum and asserted that there was now a 'growing tradition that major constitutional change should be put to the people in a referendum'.[109] More recently, in July 2014 the Political and Constitutional Reform Committee commented that there were now precedents which may amount to a convention or doctrine as to when referendums should be held and that these included 'when a wholly novel constitutional arrangement is proposed'.[110] It is contended that any proposal to create an elected second chamber would clearly represent such a *novel arrangement* in our constitutional framework.

103 *Referendum on the Voting System for UK Parliamentary Elections* (Electoral Commission 2011) 5.

104 As inserted in the Constitutional Reform and Governance Bill at the committee stage in the House of Commons. However, this referendum element was subsequently removed in the wash-up in April 2010.

105 House of Lords Select Committee on the Constitution (n 6) 26.

106 Ibid Q 220, the Minister of State at the Ministry of Justice, Michael Wills MP.

107 Nick Clegg, HC Deb 27 June 2011, vol 530, col 649.

108 Alternative Report (n 87) 76.

109 HC Deb 9 July 2012, vol 548, col 45.

110 *A New Magna Carta?* HC 463 (TSO 2014) 394.

Avoiding an insular parliamentary perspective on Lords reform

The third argument in favour of a referendum was that it would have avoided an introspective parliamentary approach to this fundamental constitutional issue. Constitutional reform in general in the UK 'has been far too parliamentary-centric and introspective without any real reference to engaging the wider public'.[111] This insular attitude has been a hallmark which, unfortunately, has characterised the debate on Lords reform in recent years (i.e. the 2003 and 2007 parliamentary votes were essentially exclusive parliamentary affairs with no real reference to the wider public). It is a constitutional maxim that the British Constitution – or its reform – is not the preserve of any one political party, but neither is it the exclusive preserve of parliamentarians (and, more specifically, MPs). It has also not gone unnoticed that as both the government of the day and MPs have a vested interest in constitutional changes, any such alterations arguably should require endorsement by the public.[112] In recent years great play has been made of the disconnection between the public and Parliament and how this relationship can be engendered.[113] As an aside, Professor Tierney has suggested that one reason for the increase in the use of referendums on the international plane may be due to increasing public dissatisfaction with representative and conventional politics.[114] In July 2010, the Deputy Prime Minister stated that the Coalition government's 'ambitious programme for political renewal' would involve, inter alia, empowering people by transferring power *away* from Parliament.[115] This was followed up by the government in its official response to the Select Committee which stated that: 'We are firmly committed to giving people a greater say in politics and we believe that referendums can be one means of achieving this.'[116]

As observed by the Select Committee, one advantage levelled in favour of referendums is that they can engage the citizen with the political process[117] and thereby serve the principle of participatory government. Although participation in public affairs is clearly an inherently recognisable good and so 'valued for its own sake',[118] our uncodified constitutional arrangements allow changes to the basic framework of the state to be made without any reference to the people at all. It is certainly the case that the Joint Committee's call for evidence in 2011 was hardly a substitute for ascertaining a comprehensive view of the public on the issue of Lords reform in a single-issue referendum. On a general/international level, it has been noted that there is 'a sense that there is a need to re-engage the demos directly with democracy'.[119] Moreover, constitutional referendums 'can lead to a heightened level of interest by citizens'.[120] Although the turnout of 42 per cent at

111 Written evidence of Mark Ryan, quoted in the Joint Committee on the Draft House of Lords Reform Bill (n 2) 94.

112 Katy Donnelly and Nicole Smith, 'Implementing Constitutional Reform' in Robert Blackburn and Raymond Plant (eds), *Constitutional Reform* (Longman 1999) 216.

113 For example, see the Select Committee on Modernisation of the House of Commons, *Connecting Parliament with the Public* HC 368 (TSO 2004). In addition, one of the principles which underpinned the 2007 Green Paper was to re-invigorate British democracy: *The Governance of Britain* Cm 7170 (Crown Copyright 2007) 40. More recently, in July 2014 the report of the House of Commons Political and Constitutional Reform Committee (n 110) attempted to connect directly with, and engage, the public.

114 Tierney (n 35) 9.

115 HC Deb 5 July 2010, vol 513, col 23.

116 Mark Harper MP, Parliamentary Secretary, Cabinet Office, *Government Response to the Report on Referendums in the United Kingdom: Report* HL Paper 34 (TSO 2010) 4.

117 House of Lords Select Committee on the Constitution (n 6) 14.

118 Barry Holden, *The Nature of Democracy* (Nelson 1974) 70.

119 Tierney (n 35) 44.

120 Ibid 36.

the May 2011 referendum[121] was disappointing, survey data from 2011 nevertheless indicated that referendums in general are popular with the British public.[122] Indeed, the recent referendum on Scottish independence generated considerable interest both north and south of the border, with a turnout registering 85 per cent.[123]

As recorded by the Select Committee, another advantage of referendums is that they can confer legitimacy[124] on any reform approved by the people. It has been commented that in the late 1990s the referendums in Scotland and Northern Ireland conferred more legitimacy on the devolution of power than (arguably) if this had been carried out by politicians simply acting alone.[125] Professor Tierney has remarked that 'the referendum can be seen as "pure democracy". In other words democracy unmediated by representatives; a symbolic reminder that democratic authority finds its legitimacy in the consent of the people.'[126] It has been argued that the case for a referendum is that it maximises legitimacy as it is 'the most authoritative' expression of the popular/public will in contrast to the rather indirect expression provided through the conduit of parliamentary representatives.[127] Professor Loughlin has noted that the constituent power helps us to 'locate the source of modern political authority' and that it 'articulates the power of the multitude: constituent power is the juristic expression of the democratic impetus. The concept expresses the tensions between democracy and law'.[128] Moreover, it is in this context of the so-called 'paradox of constitutionalism',[129] that Professor Lindahl referred to the 'moves to recover the primacy of constituent power over constituted power, and of democracy over the rule of law'.[130] It is contended accordingly that the seminal constitutional changes which would have flowed from the introduction of elected members to the second chamber, would have been so profoundly constitutionally significant that they would have warranted express approval – and legitimisation – by the constituent power. The Joint Committee quite wisely drew attention to the fact that without a referendum, the people would have had no opportunity to approve the changes set out in the 2012 House of Lords Reform Bill before they voted in the first elections to the reformed chamber scheduled for May 2015.[131]

One argument levelled against direct democracy is that it leaves decision-making to those lacking informed opinion.[132] In other words, the public lack the requisite expertise and knowledge to appreciate the constitutional nuances and implications that would ensue from a change in the composition of the upper House. Professor Budge noted that two centuries ago the American political theorist (and later President) James Madison saw representatives as acting as a 'filter' for public/popular opinion.[133] Today such a view would

121 Colin Rallings and Michael Thrasher (eds), B*ritish Electoral Facts 1832–2012* (Biteback Publishing 2012) 243.

122 John Curtice and Ben Seyd, *Will the Coalition's Constitutional Reforms Re-engage a Sceptical Electorate?* British Social Attitudes 29 (NatCen 19 April 2012) table 2: 'How should decisions be made?'.

123 Roderick McInnes, Steven Ayers and Oliver Hawkins, S*cottish Independence Referendum 2014* (House of Commons Library 2014) 13.

124 House of Lords Select Committee on the Constitution (n 6) 13.

125 Qvortrup (n 53) 121.

126 'Memorandum', House of Lords Select Committee on the Constitution (n 6) 48.

127 Butler and Ranney (n 5) 14–15.

128 Martin Loughlin, *The Idea of Public Law* (OUP 2003) 99–100.

129 Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007) 1.

130 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in ibid 9.

131 Joint Committee on the Draft House of Lords Reform Bill (n 2) 93.

132 As noted by Sara Binzer Hobolt, *Europe in Question* (OUP 2009) 6.

133 Ian Budge, *The New Challenge of Direct Democracy* (Blackwell 1996) 73.

do a disservice to the public who would be educated by the comprehensive debate which would accompany any referendum (as publicised by the Electoral Commission). Professor Brazier has stressed that the modern public are better educated than in Edmund Burke's day and that they can be expected to make intelligent decisions provided adequate information is supplied.[134] Indeed, in a 2011 survey, 73 per cent of people stated that they had had sufficient information to make an informed decision in relation to the referendum on the alternative vote.[135] It is self-evident, therefore, that the staging of a referendum would have an educative effect. Professor Tierney has commented that, when an issue of fundamental constitutional importance is at stake, the less compelling might be the argument that people lack the capacity to engage with politics 'in these exceptional moments of great significance'.[136] In any case, if the argument that the public lack sophistication in constitutional/political matters has any currency, then there was clearly no case for a referendum to take place on the alternative vote, or further, to even *propose* that people vote in elections to a reformed second chamber (the *raison d' être* of the 2012 House of Lords Reform Bill). As Professor Budge has observed, 'it is very difficult to stop arguments against direct democracy developing into arguments against democracy itself'.[137]

It could be argued that a referendum on the reform of the House of Lords was superfluous as we already knew what the view of the public was from surveys which have (historically) indicated support for an elected upper House. In his oral evidence to the Select Committee, the then Labour Minister, Michael Wills MP asserted that, if a referendum were to be held, 'without any doubt, I think, we would win the referendum on the case for a wholly or partly-elected House of Lords'.[138] It is argued, however, that the opinion of the public on this issue is clearly not cut and dried and should not be taken for granted. For example, in a survey in 2007 on legitimacy and the House of Lords, 90 per cent of people felt it important (either very or fairly) that there were many experts in the House and a further 83 per cent that there should be 'numerous independent members'.[139] These findings are, of course, hardly consistent with a wholly or largely elected House of Lords which would undoubtedly consist of a raft of professional politicians. As a fascinating aside, in December 2010 on the floor of the House of Lords, the fourth annual debate for young people (those most likely to be directly affected in the future by these reforms) debated the issue of Lords reform and voted for a fully appointed House of Lords.[140]

In short, it was imperative that a referendum should have taken place in order to have ascertained the view of the public on such a fundamental (and controversial) constitutional issue. After all, this was the only way in which the view of the people could have been gauged with precision. In any case, if the perceived prevailing public view *was* that it favoured an elected House of Lords (largely or wholly), what was the danger in testing that opinion in a definitive nationwide referendum? Furthermore, in a survey in late 2011, 63 per cent of people supported a referendum to determine the future of the House of Lords[141] and, in April 2012, 72 per cent were in favour of a referendum on the Coalition

134 Brazier (n 62).

135 *2011 Elections and Referendum on the Voting System to the UK Parliament: Public Opinion Survey* (ICM 2011) 17 and fig 4.3.

136 Tierney (n 34) 383.

137 Budge (n 133) 2.

138 House of Lords Select Committee on the Constitution (n 6) Q 221.

139 Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (OUP 2013) 248, table 9.8.

140 <www.parliament.uk>

141 Ian Cruse, *Public Attitudes towards the House of Lords and House of Lords Reform* (House of Lords Library Note 2012) 21.

government's proposals for an 80 per cent elected House.[142] Although the Coalition government dismissed the opportunity to hold a referendum in the last Parliament, any future proposal for major reform of the House of Lords should be accompanied by a commitment to stage a referendum in order to ascertain the view of the 'constituent power' on this fundamental issue. For one thing, such a referendum would (arguably) give authoritative and definitive clarification on this matter which, as detailed below, is the fourth reason a referendum should have been held by the Coalition government.

Settling the issue

The final argument, therefore, for holding a referendum was that it could have provided some much needed clarity on an issue which has dogged Parliament for decades. There has been no inter-House consensus on this matter as Parliament as a whole has failed (historically) to provide a clear steer as demonstrated by the votes in 2003 and 2007. Quite apart from the fact that the House of Commons in 2003 could not even agree to a reformed composition, in both 2003 and 2007, the House of Lords voted overwhelmingly for an appointed House. Even in terms of the votes in 2007 when the Commons *did* approve the two (albeit contradictory) options of the fully and 80 per cent elected models, it must be remembered that the majority of then Conservative MPs who voted did so against *both*.[143] In any event, concern was expressed as to whether the vote for the fully elected House by MPs in 2007 was marred by tactical voting.[144] In terms of consensus, the director of the Constitution Unit, Professor Hazell has observed that: 'All the parties are internally divided on Lords reform, with strong defenders of an elected or appointed House to be found spread across all parties.'[145] Rather pertinently, Butler and Ranney have argued that referendums have been useful in resolving questions which the representative institutions were unable to resolve.[146]

In December 2010 the then Minister of State at the Ministry of Justice, pointed out that the House of Commons had come to 'a settled and consistent view' of the need to reform the Lords and that these views were then taken to the electorate at the 2010 general election.[147] As noted, the Coalition government dismissed calls for a referendum on the basis that all three political parties' manifestoes had agreed to reform the House of Lords.[148] The following points, however, must be made. First, reform of the House of Lords comprised barely a few lines in each manifesto and the inherent flaw of the mandate doctrine is that the issue of Lords reform was subsumed within a sea of other disparate issues. Over a century ago, Professor Dicey recognised that it was impossible in a general election for electors to provide a satisfactory reply to an incongruous number of different issues[149] and that an election was not a judgment on the merits of a particular legislative proposal.[150] In contrast, a referendum enables legislation to be separated from politics (in

142 Ibid 24. It is also pertinent to remember that in 2011 the author lodged an e-petition on the HM government website calling for a referendum on whether the second chamber should be largely or wholly elected.

143 Ryan (n 15) 341.

144 Ibid 331.

145 Robert Hazell, *The Conservative–Liberal Democrat Agenda for Constitutional and Political Reform* (Constitution Unit 2010) 29.

146 Butler and Ranney (n 5) 263.

147 Lord McNally, HL Deb 1 December 2010, vol 722, col 1474.

148 Repeated by Mark Harper MP, Joint Committee on the Draft House of Lords Reform Bill (n 2) vol II Q 750.

149 Dicey, 'The Referendum and its Critics' (n 4) 547.

150 Dicey, 'Ought the Referendum to be Introduced into England?' (n 4) 494.

other words, it enables the voter to be able to distinguish between 'men' and 'measures').[151] The importance of Lords reform warranted a stand-alone referendum in 2012 in which this issue should have been isolated and considered on its own merits.

Second, it is conceded that at the 2010 general election the manifestoes of the three main parties did coincide to the extent that they were in line with the two options approved by the Commons in 2007 (but not the Lords). It is, nevertheless, a fair question to ask as to how should a Conservative, Liberal Democrat or Labour voter – who wanted a fully appointed House – have voted at the 2010 general election. As Graham Brady MP pointed out during the second reading of the House of Lords Reform Bill, if all the 2010 manifestoes had effectively promised the measure, then the case for a referendum was compelling as the public had been presented with no choice.[152] It is fascinating to record that an analogous situation occurred in relation to Europe at the 1970 general election when all three main parties had supported entry into the European Economic Community and so 'there was no way of telling whether the electorate supported what seemed to many the most important constitutional issue of the century'.[153] In any case, Professor Bogdanor has also posited that, although an election provides a mandate to govern the country, it does not provide one to change the framework of the constitution. Such alteration required something more than a general election.[154] What is also worth remembering is that from a constitutional perspective, the Coalition government's agreement of May 2010 for reform of the Lords was never expressly approved of – and so legitimised – by the public.

Third, in terms of detail, the 2010 manifesto commitments of the two parties in government were actually contradictory. As detailed earlier, whereas the Conservatives proposed to work towards a consensus on a (hybrid) largely elected chamber, the Liberal Democrats advocated a wholly elected House. The distinction between these two views was not a matter of degree, but instead one of kind. This matter was fudged at the outset by the Coalition government's programme 'for a wholly or mainly elected upper chamber',[155] as if the difference between them was simply a matter of political judgment, rather than being entirely different constitutional propositions. For example, a wholly elected House would *ipso facto* have rendered both the bishops and a statutory Appointments Commission superfluous. In any event, in relation to the Conservative Party manifesto, it has been suggested that this was not actually a commitment to reform the Lords, but rather it 'gave a process commitment to seek dialogue to find common ground'.[156]

The mechanics of a referendum

Two final issues remain to be considered: if there had been a referendum on House of Lords reform in the last Parliament, what should the question have been and when should the ballot have been held? In terms of questions, the Select Committee was of the opinion that in a referendum there should be a presumption in favour of questions with two possible responses/options (but it did recognise that 'multi-option questions' might be preferable in some circumstances).[157] In general, this is sensible as it aids clarity and avoids (typically) an ambiguous outcome. One of the difficulties with the issue of Lords reform, however, is that this debate is complex and multi-sided, which would have necessitated

151 Dicey, 'Ought the Referendum to be Introduced into England?' (n 4) 507.

152 HC Deb 9 July 2012, vol 548, col 63.

153 Bogdanor (n 55) 38–39.

154 Ibid 30.

155 *The Coalition: Our Programme for Government* (n 21).

156 Sadiq Khan, HC Deb 9 July 2012, vol 548, col 45.

157 House of Lords Select Committee on the Constitution (n 6) 38.

multiple options being presented to the public (see the suggested prototype below). In any case, any referendum question(s) would have had to have been clear and non-leading, thereby following the guidelines of the Council of Europe.[158] Under any referendum on Lords reform, it would have been the statutory responsibility of the Electoral Commission under s 104 of the Political Parties, Elections and Referendums Act 2000 to have considered and reported on the intelligibility of the question(s). In respect of supermajorities and voter-turnout thresholds, the Select Committee, quite rightly, recommended that there should be a general presumption against such devices.[159]

In terms of timing, the UK has had experience of both pre-legislative (e.g. 1997 Scottish devolution) and post-legislative (e.g. 1979 Scottish devolution) referendums. After the Joint Committee issued its report in April 2012 recommending a referendum, the ideal and optimum position would have been for the Coalition government to have piloted a House of Lords Referendum Bill through Parliament, paving the way for a national poll to have taken place. In other words, it is contended that the referendum should have been a pre-legislative one which should have been held *before* the 2012 House of Lords Reform Bill was even introduced into Parliament (the result of which could possibly have even rendered the Bill redundant). It is suggested that this pre-legislative referendum would have invited the public to select from the following options: a wholly elected House; a hybrid House or an appointed House (the latter, in effect, representing the status quo). To avoid an ambiguous outcome, responses would have been ranked in preferential order (i.e. a '*preferendum*').[160] A second question on the ballot paper would have distinguished between – and have asked the voter to rank in preferential order – three different types of hybrid options (i.e. a minority elected, half elected and largely elected). The responses to this second question would only have been considered in the event that the public had first indicated a preference for a hybrid chamber (i.e. question 1, option 2 above acting as a 'gateway'). An interesting example of a two-part referendum ballot paper (albeit non-preferential) was provided by New Zealand in its 1992 national referendum on its electoral system.[161]

One clear practical and political advantage of holding such a pre-legislative referendum would have been that it would have ameliorated any resistance in the House of Lords to any Bill proposing a largely or wholly elected second chamber. Objections to an elected House were made quite plain in the chamber in June 2011 during a 'Motion to take note debate' on the Draft Bill and White Paper.[162] The political and practical reality in mid-2012, however, was that any referendum would have had to have been post-legislative. This was implicitly recognised by the Joint Committee as it advised that a debate on the principle of staging a referendum be facilitated by the Coalition government before the committee stage of the Bill.[163] It was plain that the Coalition government (no doubt the Liberal Democrat element of it) was anxious to proceed with legislating for reform, secure in the knowledge that recourse to the Parliament Acts could have been resorted to if necessary. Assuming that the 2012 House of Lords Reform Bill had gone on to receive the royal assent, the only practical question that could realistically have been asked in such circumstances was whether or not the public approved of the Act. In other words, the House of Lords Reform Act would have had to have contained a *sunrise* provision which

158 European Commission for Democracy through Law (Venice Commission), *Code of Good Practice on Referendums* (Council of Europe 2009) 3.1.c.

159 House of Lords Select Committee on the Constitution (n 6) 44.

160 Graham Smith, *Beyond the Ballot* (The Power Inquiry 2005) 81.

161 *Report of the Commission on the Conduct of Referendums* (n 41) 50–51.

162 HL Deb 21 June 2011, vol 728, and HL Deb 22 June 2011, vol 728.

163 Joint Committee on the Draft House of Lords Reform Bill (n 2) 95.

would have meant that the legislation would only have been activated if the public had endorsed it in a referendum (known as a '*suspensive* referendum').[164] Although the plans for long-term reform faltered in the last Parliament, it is argued that any future proposal for major Lords reform should be accompanied by a pre-legislative referendum following the two-question prototype detailed above.

Conclusion

In April 2012 the Joint Committee concluded its report by stating that 'in view of the significance of the constitutional change brought forward for an elected House of Lords, the Government should submit the decision to a referendum'.[165] Although the Coalition government rejected this recommendation, a UK-wide referendum would, however, have been justified chiefly on the basis that the creation of a largely elected House of Lords would have represented a fundamental change to our constitutional arrangements. As a result, authority for such reform would have warranted explicit endorsement by the people through a specific mandate. A recent political precedent for a referendum had also been set by the national vote on the electoral system in May 2011. Such a referendum would also have avoided an insular parliamentary approach to Lords reform and thereby have enabled the wider public to impact directly on this crucial constitutional question. In the UK we have had experience of two UK-wide referendums and there was a clear and compelling case for a third one to take place – on completing the reform of the House of Lords. It is fascinating to conclude that we might have been closer to a referendum taking place than is perhaps realised. During the first day of the second reading of the 2012 House of Lords Reform Bill, although the then Deputy Prime Minister dismissed a referendum as unjustified, he did state that he would be prepared to consider one if MPs required assurances after the first tranche of members had been elected 'so that the second and third stages of reform are subject to some type of trigger'.[166] The following morning in an answer to an oral question, however, he reaffirmed his opposition to a referendum.[167] In the event, no provision for a referendum was made and two months later the Bill was abandoned leaving long-term reform of the House of Lords in abeyance and as elusive as ever. Nonetheless, should proposals for fundamental Lords reform surface in the future, the arguments advanced in this paper make a compelling case for a national referendum to take place.

164 European Commission for Democracy through Law (Venice Commission), *Referendums in Europe: An Analysis of the Legal Rules in European States* (Council of Europe 2005) 20.

165 Joint Committee on the Draft House of Lords Reform Bill (n 2) para 385.

166 HC Deb 9 July 2012, vol 548, col 36.

167 HC Deb 10 July 2012, vol 548, col 149.

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A defence of estates and feudal tenure

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Introduction

In a land law consultation paper of 2009, the Northern Ireland Law Commission (NILC) made the following recommendation: 'In the light of the move towards a system of universal registration of title, the commission is inclined to recommend that both feudal tenure and the doctrine of estates should be abolished.'[1] In its report the commission restated this recommendation.[2]

The purpose of this article is to suggest that the doctrine of estates and the concept of feudal tenure both have meaningful contributions to make to our understanding of land law. Also that there are certain aspects of our present law which are difficult not only to conceptualise, but in fact to accommodate outside the framework of a doctrine of estates. Furthermore, that the changes proposed by the Law Commission will, in reality, preserve the essence of both ideas while abolishing much of the assistance that they give in forming an accurate picture of what we mean by landholding or land ownership.

The development of estates and feudal tenure

The consultation paper itself provides a short definition of estates and tenure. Tenure governs the terms on which the landowner holds the land; the doctrine of estates determines for how long that interest is held.[3] A system based on tenure is one where rights in the land are granted by (or 'held of') another. In the common law system as it currently operates in this jurisdiction and England and Wales, the highest interest in land is possessed by the Crown. The corollary of this is that absolute ownership (allodial land) is unknown to the common law of Northern Ireland.

The consultation paper also gives a brief history.[4] It recites the fact that the feudal system was brought to England by the Normans in 1066 and was later exported to Ireland. The fundamental principle was that the Crown had acquired title to all land and that its subjects could only hold land from a superior lord and ultimately from the Crown.

* MA (Oxon).

1 NILC 2 (2009) 35.

2 NILC 8 (2010) para 2.3.

3 NILC 2 (2009) para 2.5. See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn Sweet & Maxwell 2012) para 2–006.

4 NILC 2 (2009) paras 2.1–2.19.

Land was held from the superior lord (as that lord's tenant) on various conditions, the breach of which could lead to the forfeiture of the land. The most that a tenant could hold was an estate in the land and not the land itself. The estate was the length of time that the tenant's interest would last. More than one estate could exist in the same parcel of land at the same time.

It should be acknowledged that the full effect of the medieval system was not experienced in that part of Ireland now found within the borders of Northern Ireland. As is well known, in the medieval period English influence in Ireland waxed and waned and only ever took permanent root around the Pale. The application of English laws was only accomplished in Ulster during the plantation, by which time the medieval system of estates and tenure was already declining in England.[5]

In its medieval heyday the conditions subject to which land was held were properly known as services. Tenants in the feudal hierarchy owed services to their lord and might in turn be owed services by their own tenants. In addition to services, the occurrence of certain events (incidents) gave rise to other rights benefitting the lord. These services and incidents were many and various and reflected the society in which they were developed. A brief survey is offered here in the full knowledge that discussion of these incidents has the tendency to lead to the conclusion that the system in which they operated has no application whatsoever in the present age.

There were four free[6] tenures: frankalmoign, knight's service, socage and serjeanty. The first was an ecclesiastical tenure by which the holder was obliged to perform religious devotions (prayers for the lord, Masses for his immortal soul and so on). The second is the tenure which, to the modern mind, most sharply evokes the medieval world. It was this tenure by which the lord's tenants were obliged to supply armed men. However, the obligation was only ever to provide men for 40 days and this was of little military utility if an overseas expedition was planned. In England the military aspect of the tenure had in fact fallen into abeyance by the early fourteenth century.[7] On the other hand, the tenure gave rise to incidents which continued to be of value to the lord. Socage was the default tenure and involved provision of agricultural services and payment of money. Serjeanty involved the provision of services to the king and was divided into grand and petty.[8]

Medieval incidents included the right of the lord to the fealty of his tenants and, where the tenure was knight's service, to homage. Fealty was an oath; homage a ceremony. The lord was also entitled to the wardship of his deceased tenant's children during their minority

5 L Fox O'Mahony, 'Something Old, Something New, Something Borrowed: Land Law Reform in Northern Ireland' [2011] Conveyancer and Property Lawyer 355, 362.

6 Unsurprisingly, there were also unfree tenures, typically held by that stock figure of the English medieval period, the villein. Originally, unfree tenure was only recognised in the court of the lord of the manor and not by the royal courts of common law. This tenure came to be known as copyhold and by the sixteenth century had been recognised by the common law. Copyholds were converted into freeholds in England by the Law of Property Act 1922. J C W Wylie's treatment of the subject (*Irish Land Law* (4th edn Bloomsbury 2010) 2.30–2.34) concludes that any vestigial significance of copyholds in Ireland would not have survived the land purchase legislation.

7 This also appears to have been the position in Ireland: Wylie (n 6) para 2.18.

8 Such as carrying the king's banner or holding his head when he felt seasick(!): *Crown Estate Commissioners v Roberts* [2008] 2 EGLR 165. Wylie (n 6) para 2.27 says that serjeanty may not have been prevalent in Ireland; although the Marquesses of Ormonde claimed the title of Hereditary Chief Butler (wine server to the sovereign) of Ireland: M Bence-Jones, *Twilight of the Ascendancy* (Constable 1987).

and the right to decide whom they should marry.[9] It should, however, be noted that these incidents were only appurtenant to tenure in knight's service and grand sergeanty and therefore generally only affected those at the top of feudal society. No lord was permitted to arrange a marriage which disparaged his ward.[10] Another incident was the right to relief: the payment that an heir had to make to a lord to succeed to his predecessor's tenancy.[11] A further service, aid, was a payment to the lord on the occurrence of certain set events: knighting of the lord's eldest son, marriage of his daughter and the ransoming of his body.[12] Escheat is dealt with below.

The modern history of feudal tenure begins with the Tenures Abolition Act (Ireland) 1662 which abolished most of the ancient forms of feudal tenure and converted existing tenures into free and common socage, today known as freehold.[13] The only important incidents of tenure which remained were escheat and forfeiture. The Crown's prerogative rights regarding the latter were abolished by the Forfeiture Act 1870. Escheat, however, remains.

Escheat as a vestigial incident of tenure

In medieval times if a tenant in fee died without leaving an heir, his estate fell to the immediate lord by way of escheat.[14] This was escheat *propter defectum sanguinis*. Prior to the Statute of Westminster 1290 (*Quia Emptores*) any number of fee simple estates could exist in the same land by process of subinfeudation. There could thus be any number of lords and tenants for the one parcel of land.[15] Any lord under the Crown was known as a mesne lord. The statute prohibited that practice and as a result the number of tenants in fee decreased over time until only one tenant in fee was left, holding directly of the Crown.[16]

9 See J H Baker, *Introduction to English Legal History* (4th edn OUP 2002) 238–40. The system was open to abuse but was not without rationale in the context of its time. For example, while the lord had a right to the tenant's land during the wardship, he had also an obligation to raise the tenant's heir. Baker says that after the Statute of Marlborough 1267 the lord was in effect trustee for his tenant's heir.

10 Magna Carta 1215, c 6. No ward could be married to someone (i) below him or her in social status, (ii) legally unsuitable such as a bastard or (iii) physically unsuitable such as someone who was deformed or past the age of childbearing: Baker (n 9) 240.

11 The heirs of a knight's fee were to pay 100 shillings by Magna Carta 1215, c 2. In Bracton's time a tenant in socage had to pay a year's rent: F Pollock and F W Maitland, *History of English Law* (2nd edn 1898, reprinted by Liberty Fund) vol I, 326.

12 Magna Carta 1215, c 12.

13 Wylie (n 6) para 2.51. See also *Re Walker's Application for Judicial Review* [1999] NI 84 at 88 (Girvan J) for a discussion of freehold and tenure and estates generally. Something should also be said about the term 'freehold' which started out being a description of tenure and is now used to describe an estate. As the types of free tenure diminished in importance, the term came to describe the duration of the interest rather than the terms on which it was held: W S Holdsworth, *An Historical Introduction to the Land Law* (1st edn OUP 1927) 52.

14 Baker (n 9) 239. The word comes from *eschier* (to fall).

15 This example is given by Pollock and Maitland (n 11) 247: 'Roger of St German holds land at Paxton in Huntingdonshire of Robert of Bedford, who holds of Richard of Ilchester, who holds of Alan of Chartres, who holds of William le Boteler, who holds of Gilbert Neville, who holds of Dervorguil Balliol, who holds of the king of Scotland, who holds of the king of England.'

16 There was, in effect, a collapse of the feudal pyramid as the multiple fee simple estates came to an end by escheat or forfeiture. Typically, only one fee simple would exist today, although it is theoretically possible that more than one fee could have survived from before 1290. There is a recognition of this theoretical possibility and a simultaneous rejection of its practical significance in *Re Lowe's Will Trusts* [1973] 1 WLR 882, 886.

Consequently, escheat came to be of most significance to the Crown.[17] The right of free tenants to dispose of their land by will reduced the importance of escheat yet further.

Today, if a landholder dies leaving no successors, the Crown (as the Law Commission recognises) will succeed to the land as *bona vacantia* by virtue of s 16 of the Administration of Estates Act (Northern Ireland) 1955. The same Act abolished escheat to the Crown (or a mesne lord) for want of heirs.[18] It is difficult to see any great distinction between escheat as it existed prior to 1955 and the present application of *bona vacantia*. If anything escheat provided a more conceptually accurate analysis of the situation where land is without any apparent successor. This is because historically *bona vacantia* was a response to the problem posed by ownerless property. Blackstone cites Bracton:

> *Haec quae nullius in bonus sunt, et olim fuerunt inventoris de iure naturali, iam effiuntur principis de jure gentium.*[19]

Its application therefore might make sense in the case of personal property where abandonment is possible;[20] however, while physical abandonment of land is obviously possible, this of itself does not equate to abandonment of title in law. Land must have an owner at all times, as was recognised by the Privy Council in *Ho Young v Bess* where it was said to be a 'general principle' that:

> . . . the law abhors a vacuum and that title to land must always be in someone, whether the Crown or a subject . . .[21]

Escheat recognised the idea that land should never be without an owner by ensuring that, upon the absence of a successor to a deceased owner, the Crown would be able to insist on its seigniorial right of ownership. *Bona vacantia* achieves the same outcome but leaves room for a misunderstanding to arise that the Crown is picking up something that was previously without ownership.

The submission made at this point in the argument is that the feudal concept of escheat provided a convenient method for dealing with land where there was no apparent successor to the deceased landholder. Since in Northern Ireland *bona vacantia* fulfils the same function as escheat, we can therefore conclude that the principle underlying the medieval doctrine is regarded as having some usefulness. If further support were required we could note that in the Republic of Ireland feudal tenure was abolished by the Land and Conveyancing Law Reform Act 2009 but the rights of the state as 'ultimate intestate successor' have survived.[22]

17 Holdsworth (n 13) 34.

18 S 1(5).

19 I Bl Comm 299. Those things which are no person's and formerly belonged to the finder as by natural right, become now the property of the king by the law of nations.

20 F Pollock and R Wright, *Possession in the Common Law* (OUP 1888) 44. An owner achieves abandonment by 'quitting possession without any specific intention of putting another person in his place'. See also D Sheehan, *Principles of Personal Property Law* (Hart 2011) 24–5.

21 [1995] 1 WLR 350, 355E. The 1955 Act itself recognised this principle at s 3: where the deceased dies intestate or without nominating executors, the property vests immediately in the probate judge.

22 S 73(1) of the Succession Act 1965 which remains unaffected by the 2009 Act (see Schedule 2, pt 5). In Scotland, where feudal tenure has also been abolished (Abolition of Feudal Tenure etc. (Scotland) Act 2000), the whole concept of *bona vacantia* is obscure. This is due, apparently, to the fact that the law of Scotland regards intestate succession as impossible on the ground that no man is without a blood relative: *Stair Memorial Encyclopaedia*, vol 17, para 343. In fact, consideration of ss 11–12 of the 1955 Act suggests that the law of Northern Ireland takes the same view.

The Crown's ancient seigniorial right to escheat in the strict sense is extant in three known instances when a freehold estate determine:[23]

a where a trustee in bankruptcy or liquidator disclaims onerous property in a bankruptcy or winding up;

b where a company is dissolved and the property passes as *bona vacantia* to the Treasury Solicitor *and is then disclaimed* by the Solicitor under s 1013 of the Companies Act 2006;

c where the Crown makes a grant directly from its own lands and a reserved right of re-entry is triggered.

In these cases, as in succession law, the doctrine of escheat serves the useful purpose of providing for the case where land has no other obvious owner. When one looks at the proposals for reform, the Crown's rights are preserved in the three instances cited above although it would succeed to the land not as an escheat but as *bona vacantia*.[24] This merely puts the present scheme on a statutory footing and appears to alter only the name. But, as suggested above, the use of *bona vacantia* as the means of achieving the desired result may introduce the misunderstanding that the Crown is picking up land to which no person has title.

In actual fact, to preserve the Treasury Solicitor's right to disclaim *bona vacantia* land, the Law Commission's draft Bill provides that, even though escheat is abolished, where the Treasury Solicitor disclaims land, the land will vest in the Crown as if it were an escheat.[25] The reader is left to decide whether this constitutes a simplification.

The function served by tenure: the limits of 'ownership'

As stated above, tenure is concerned with the terms upon which land is held. The estate determines for how long. If we turn first to tenure, it is submitted that no matter how one conceptualises land holding there is no escaping the fundamental proposition that land must be held subject to some terms, or, in other words, such competing rights as are recognised by the law.

The consultation paper states:

> If owners in fee simple were to become allodial owners, they would own the land itself. It would be meaningless and contradictory to say that owners would also have an estate in the land or that they would hold it in fee simple.[26]

If the proposed abolition of tenure and estates were enacted, the second sentence would, of course, be true but it is not clear that the proposed system of allodial ownership would add or subtract from the rights and duties currently enjoyed and borne by the tenant in fee simple absolute in possession. They would be neither more nor less owner than they are at present. The label would have changed but what else?

If anything the alteration in nomenclature, which suggests an untrammelled vision of landholding, hinders an accurate understanding. The reality is that all 'ownership' is only a

23 *Megarry and Wade* (n 3) para 2–023. The freehold does not pass to the Crown; the Crown cannot hold land of itself and thus cannot be possessed of freehold.

24 NILC 8 (2010) para 2.9.

25 NILC 8 (2010) 147 (Draft Land Law Reform Bill (Northern Ireland) cl 2(2)).

26 NILC 2 (2009) para 2.41.

collection of rights which are in competition with rival rights.[27] Indeed, it is in the sphere of real property that the 'bundle of rights' theory appears in perhaps its sharpest focus.[28]

The importance of the function served by tenure can be highlighted by examining problems with the notion of 'ownership'.

a. Ownership versus bundles

The primary proponent of the bundle theory was Wesley Hohfeld who noted that rights *in personam* were distinct claims that one person had on another. Rights *in rem* were claims that one person had, or potentially had, against a very large group of people (or, more lyrically, 'against the whole world').[29] Hohfeld distilled the distinction between the two classes down to one of quantity: a right *in rem* was merely a large collection of personal claims.[30]

In *The Idea of Property in Law*, J E Penner argues that rights of ownership (*in rem*) do exist without that reference to a personal relationship which characterises *in personam* rights. Penner's argument is that, aside from those to whom the owner of property has made certain specific grants of rights, the rest of the world's obligations regarding that property (distilled to the duty not to trespass upon it) exist regardless of the particular identity of the owner of the property.

Penner gives the example of a transfer of Blackacre from A to B. If the Hohfeldian analysis is correct, then what has happened is a transfer from A to B of all the various duties which A was owed by the whole world. Penner rejects this analysis and says that the better explanation is that there has been simply a transfer of the right *in rem* from A to B and that the remainder of the world remains unaffected:

> Everyone else maintains exactly the same duty, which is not to interfere with the use and control of Blackacre. It matters not in the least to C, one of the multitude, who owns Blackacre.[31]

Exploring the soundness of Penner's theory, let us consider it against the example he gives of the transfer of Blackacre from A to B. The generality of the proposition that it matters not to C who owns Blackacre would be undermined if it were possible to identify one or more specific Cs in the multitude whose duties in respect of the *res* (Blackacre) differed according to who the 'owner' was. It is submitted that one such person would be a trustee in bankruptcy where Blackacre is acquired by or devolves upon an undischarged bankrupt pursuant to Article 280 of the Insolvency (Northern Ireland) Order 1989. If the owner is the bankrupt, the trustee will have extensive rights over Blackacre including the right to claim the property (we could equally say that he will have no duty to refrain from trespassing). However, if the owner is someone else, the trustee's rights will correspondingly be fewer (or his duties more numerous).

Further arguments against Penner's theory are presented by Shane Glackin in 'Back to Bundles: Deflating Property Rights, Again'.[32] Glackin notes that, for Penner, a right *in*

27 See J F Garner, 'Ownership and the Common Law' (1986) Journal of Planning and Environment Law 404.

28 William Swadling, 'Ignorance and Unjust Enrichment' (2008) 28 Oxford Journal of Legal Studies 627 states at 640 that, 'despite what a layperson might think, English law has no notion of "ownership"'. He notes that this is not a problem in real property where over time a rich variety of competing named rights (e.g. easement) has been developed which obviates the need to fall back on the imprecise term of ownership.

29 *Parish of Honiton v St Mary Axe* (1710) 10 Mod 9; 88 ER 600. In that case a liability to the whole world.

30 J E Penner, *The Idea of Property in Law* (OUP 1997) 23.

31 Ibid 23.

32 S Glackin, 'Back to Bundles: Deflating Property Rights, Again' (2014) Legal Theory 1, 10.

personam is dependent on knowing which particular person is the duty bearer or the right holder, whereas for a right *in rem* this knowledge is not necessary.[33] Glackin is prepared to accept that such knowledge might be necessary in the case of the person claiming a special right e.g. a licence to walk Blackacre; however, he goes on to say:

> This in no way entails that the rights and duties we assume in default of being specifically exempted – such as the duty to avoid trespassing on the property of others – are any less *in personam* than the exceptional ones we are granted specifically.

When we descend from the jurisprudential level it becomes clear that this is so. If C does infringe A's property rights by walking on his land then A must vindicate his right by action and when he does so the action will be brought in A's own name against C seeking damages from C personally or an injunction to restrain trespass which likewise is directed at C personally.[34]

The criticism which Glackin levels at Penner which is most germane to the argument presented herein is, essentially, that Penner's argument is an overly complex way of describing how property law works in practice. Glackin says, that Penner's attempts, 'to shoehorn various aspects of property law into . . . this concept of a "single, coherent right" can only be described as tortuous'. In an analogy with the simplicity of Copernicus's astronomy compared to the layers of unnecessary complexity required to keep the then-prevailing Ptolemaic theory in business, Glackin asks why it is necessary to provide a unified theory of ownership when the bundle analysis more accurately represents how property law actually works:

> William of Ockham's injunction that [entities are not to be multiplied beyond necessity] would serve perfectly as an epigram for the bundle theory and its insistence that the phenomenon of property can be fully explained on the basis of the individual 'sticks' without any appeal to a wider, all-encompassing relation of 'property ownership'.[35]

By examining something of the complexity of landholding we can see just how unreflective of reality the unified concept of ownership is.

B. The complexity of interests in land

Firmly rejecting Penner's thesis, Glackin notes that it is in the doctrine of estates where the bundle analysis can be most clearly seen. That doctrine:

> . . . introduces further, more exotic interests; I may acquire the right of occupation in an apartment from you, perhaps supplemented by various easements and rights of access, though my right to alienate it may be restricted by the terms of the license. You may in turn have only a life interest in that apartment, with a reversion vesting in a relative upon your death. These arrangements are subject to revision over time in response to economic and

33 Glackin (n 32) 10.

34 There are a number of scenarios where some person or group of persons might bring the action instead, e.g. where A dies and his executors are named as plaintiffs. However, this only strengthens the submission that the action is, in all cases, a personal one: our law would not accord standing to a plaintiff stated as 'the owner for the time being of Blackacre'. Whoever acts as plaintiff in the case of C trespassing on A's land will require to know who C is and a great many other personal details about her.

35 Glackin (n 32) 13. At one point Penner (n 30) seems to agree with this view thereby undermining his entire thesis. In *The Idea of Property in Law* at 144, he says that 'an "owner" is one who has property rights'.

> social circumstances and can thus vary substantially from jurisdiction to jurisdiction, with many local peculiarities developing.[36]

The various interests in land held by those other than the freeholder allows one to see the extent of the restrictions which would confront the person who, in the words of the Law Commission, 'would own the land itself': use of land must be in accordance with the criminal law and one could not, for example, use it to grow prohibited substances;[37] one may not use land in such a way as to unreasonably interfere with your neighbours' land;[38] what one can build on the land is subject to restriction,[39] likewise how one builds there;[40] land use is subject to the restrictions imposed by way of freehold covenants;[41] land is liable to compulsory purchase;[42] land is liable to vest in a trustee in bankruptcy in the event of personal insolvency;[43] land is liable to be sold by creditors in order to satisfy outstanding court judgments.[44]

At the practical level (where the Law Commission's reforms are presumably directed) real property disputes rarely, if ever, revolve around the vindication of 'ownership'. In the average case the holder of title to the land seeks to vindicate one or more of the discrete rights which are attendant on that title.[45] Therefore the term 'ownership' 'is at best an imprecise placeholder for what really matters – which individual bears the particular stick or sticks relevant to the legal dispute in question'.[46]

There is nothing to suggest that Penner and those who reject the bundle theory deny that landholding is as complex as has been suggested here.[47] The criticism is that the unified concept of ownership at best disguises and at worst distorts precisely what is involved when discussing rights in land. Accepting that 'ownership' is fully consistent with all the many restrictions placed upon it by our land law is little more than accepting that 'ownership' means whatever we (or a particular theorist) want it to mean; a problem addressed by Lord Atkin in *Liversidge v Anderson*.[48]

However, while Penner's theory of 'ownership' is capable of accommodating the present (and inescapable) complexity of landholding, it is far from certain that the same could be said for the concept of ownership proposed by the Law Commission. We will address this below when we examine the doctrine of estates and particularly the issue of relativity of title.

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36 Glackin (n 32) 3–4.

37 Misuse of Drugs Act 1971, s 8.

38 Which might even restrict what one can have for dinner in one's own home: *Adams v Ursell* [1913] 1 Ch 269.

39 Planning (Northern Ireland) Order 1991, Article 12.

40 Building Regulations (Northern Ireland) 2012.

41 Such as a covenant to preserve a boundary: Property (Northern Ireland) Order 1997, Article 34(4)(a).

42 Any number of provisions such as the Roads (Northern Ireland) Order 1993, Article 110.

43 Insolvency (Northern Ireland) Order 1989, Article 279.

44 Judgments Enforcement (Northern Ireland) Order 1980, Article 52.

45 Holdsworth (n 13) notes at 13 that from its inception the writ of right used to recover a freehold interest, developed at a 'time when the chief concern of the law was to adjudicate upon a dispute between litigants – to a time when it had not begun to analyse the conceptions of ownership and possession'.

46 Glackin (n 32) 5.

47 For example Penner (n 30) says at 74: 'The right to property is like a gate, not a wall. The right to property permits the owner . . . to make a social use of his property . . . by selectively allowing some to enter.' Aside from this recognition of the right to grant diverse interests, Penner also notes and recognises (at 103) that the expropriation by the state of property is possible.

48 [1942] AC 206 at 245: "'When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all."'

c. Philosophical objections to absolute ownership

There are also philosophical reasons for exercising caution in relation to the idea of absolute ownership (which do not involve a denial of the concept of private property). In his treatment of the subject, John Finnis cites Aristotle:

> property ought to be common in a sense . . . possessions should be privately owned, but common in use; and to train the citizens to this is the special task of the legislator.[49]

Finnis recognises that private property is necessary if for no other reason than that recognition of private property rights is essential (presuming self-interest as the principal motive of human conduct) if property is to be well managed and maximally productive. The minimum attributes of private property are that the property should be 'more or less'[50] (i) exclusive to the owner, (ii) immune from divestment and (iii) transmissible. However, Finnis goes on to suggest that the law's protection of these attributes should not be unconditional if ownership is to be 'distributively just'.[51] He recognises that natural resources are essentially 'common stock', albeit apt for distribution as private property, and goes on to note the limits to private property:

> Beyond a certain private point, what was commonly available but was justly made private, for the common good, becomes again, in justice part of the common stock; though appropriated to his management and control, it is now not for his private benefit but is held by him immediately for common benefit . . . [52]

If it appears that the limits to private property involve the imposition of duties on the owners, that is entirely the conclusion Finnis wishes us to draw. Property owners are obliged by justice to put their property to productive use;[53] to make the surplus yield of their property available for re-investment and consumption; to provide gainful employment; to endow charities and to relieve poverty.

Land is specifically and unsurprisingly cited by Finnis as an example of property once in the common stock[54] and it is submitted that in the various rights, noted above, held by those other than the freeholder we encounter a very clear echo of Finnis's thesis. While his thesis is general and the instances cited above are highly specific, it is submitted that in each of the limitations to which land use is subject we do not need to look very far to see duties owed to the common weal. If a substance has been categorised as harmful to society (or certain members thereof), you may not use your land to produce it; neighbours must live peaceably with one another; land must be available if it is necessary for some scheme possessing utility for society at large; land must be available to satisfy lawful debts (including debts due to the public revenue the resources of which are used to fund the schemes just mentioned).

49 J Finnis, *Natural Law and Natural Rights* (OUP 1980) 171.

50 How much 'more' or 'less' is a task for which the present subtle system is eminently suitable.

51 A disposition is distributively just if it is a reasonable resolution of a problem of allocating something that is essentially common but which needs to be appropriated to individuals for the sake of the common good: Finnis (n 49) 166–7.

52 Ibid 173.

53 Here we might find a jurisprudential basis for the doctrine of adverse possession. See the discussion in S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd edn Bloomsbury 2011) 3–17ff.

54 Finnis (n 49) 167.

We should, perhaps, not move on from this philosophical discussion without at least noting the existence of the 'progressive property' school of thought that has developed in the USA. The fundaments of the idea appear in a short *Statement*.[55] Among the principles are the following:

> Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.
>
> Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.

The progressive school would agree (to say the least) with the submission above that land must be available if it is necessary for some scheme possessing utility for society at large. Of course, agreement with this submission is only the starting point of a long discussion about what constitutes utility and what interference is permissible to realise it. The progressive school adopts a radical standpoint on these issues.[56] The only point it is necessary to make here is (the blindingly obvious one) that a denial of the existence of absolute ownership does not oblige one to take an equally radical approach.

The aim so far has been to demonstrate that land use is subject to restrictions imposed by the law. It is the law which 'makes' private property[57] and it is the law which regulates it. All landholding is to that extent at the sufferance of the law and talk of absolute ownership is misleading at best and erroneous at worst.

Next though we must address a potentially controversial proposition: the impossibility of absolute ownership on the part of a private person is inextricably bound up with the idea that only the Crown may fully own land.

A problem with tenure: the position of the Crown

The potential controversy arises because it may be argued that the Crown is ill qualified to act as the ultimate repository of ownership. There is a general and a specific objection.

The general objection is expressed by Professor Wylie who has written that the abolition of feudal tenure in the Republic of Ireland was brought about in part because the notion of all land being held ultimately from the state as an expression of the fealty due to the state was held to be inconsistent with the principles of a modern, democratic state governed by a written constitution.[58] The answer to this objection is that the recognition of the state as

55 (2009) 94 Cornell Law Review 743 <http://cornelllawreview.org/articles/a-statement-of-progressive-property>. I am grateful to an anonymous reviewer for introducing me to progressive property.

56 In one article on the subject, 'The Ambition and Transformative Potential of Progressive Property' (2013) 101 California Law Review 107 <http://scholarship.law.berkeley.edu/californialawreview/vol101/iss1/5>, Ezra Rosser notes at 111 that 'efforts to change property law from the inside – through use of property concepts alone – are unlikely to bear fruit'. The same article also notes that the progressive approach might extend to land redistribution (not that radical to real property lawyers in Ireland). It would be fair to say that 'progressive property' straddles the porous border between the jurisprudential school and political activism.

57 'Our property is nothing but those goods, whose constant possession is establish'd by the laws of society.' David Hume (1978) 'A Treatise of Human Nature [1739]' in L A Selby-Bigge and P H Nidditch (eds) (Clarendon Press) 491. Cf. Bunreacht na hÉireann, Article 43(1).

58 Wylie (n 6) 2.53. It is assumed that Wylie is criticising the imposition of fealty onto landowners rather than lamenting the denial of its benefits to non-landowners.

supreme landowner is meant to embody the limited rights of land holders under the law and the interdependence of citizens on each other. It is submitted that this is, in fact, profoundly expressive of firm democratic ideals (particularly where threats to democracy are seen to originate in the concentration of much capital in the hands of a few).

However, to address the general objection in the particular context of the Republic of Ireland, it should perhaps be noted that Bunreacht na hÉireann is explicit that, 'Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.'[59] The common law principle of *protectio trahit subjectionem* also appears to be recognised in the Irish Republic.[60] So, as in most (all?) states, fealty is demanded anyway, whether one owns land or not.

We can also call on Penner to offer a vindication of the idea that land is held of the Crown. Penner does not believe that holding land directly of the Crown is inconsistent with his theory of ownership provided the former is regarded as synonymous with the latter. In fact, he believes that tenure conveys the important fact that land is not merely property but also the territory of the state. It follows from this that the ability of a landowner to enjoy her land depends on the state's ability to hold its territory from invaders from without or from rebels within. He concludes that:

> Far from obviating 'ownership' in the common law, the theory that all land is held of the Crown defines landownership in an unusually accurate way.[61]

The basis of the specific objection is historical. While law may be responsible for the idea of property, it was the wearers of the crown and their supporters who fashioned the feudal system. The Crown's right as ultimate landholder does not depend on its act in a governmental or judicial capacity; rather the Crown, acting personally, seized the land by force and redistributed it with little regard for distributive justice as that term is understood in the modern age. It scarcely needs to be stated that this issue is particularly acute in Ireland.[62] Someone who was persuaded by Finnis's analysis of private property might accept having one, symbolic, landowner as an elegant means of expressing that analysis. The same person might object, however, that the Crown, particularly in an Irish context, simply could not serve in that capacity.

One begins to answer the specific objection by noting that the Crown's feudal rights would be only symbolic as, in fact, they have been largely for centuries. In describing the early feudal system Baker says:

> Only the king was not a tenant; but no king after William I had the kind of control exercised in the 1070s, and no one thought of the lord king as being in any meaningful sense owner of all the land in England.[63]

In the eighteenth century Blackstone felt able to say:

> . . . . it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenure, 'that the king is the universal lord and original proprietor of all the lands in the kingdom . . .'[64]

59 Article 9.

60 See the interesting circumstances of *The People v Thomas* [1954] IR 319.

61 Penner (n 30) 152. Before this point is dismissed it should be recalled that within living memory the territorial integrity of this jurisdiction was severely compromised by the wartime activities of a foreign sovereign power.

62 The feudal system was, of course, instituted in a similarly violent manner in England and Wales.

63 Baker (n 9) 230.

64 II Bl Comm II 51.

While Northern Ireland remains part of the UK and while, in British constitutional theory, the Crown and executive power are synonymous, the Crown is the most appropriate entity to act as ultimate owner.[65] This is not to ignore that there are sensitive and emotive political elements to this issue. However, this is (thankfully) not a political essay and is thus bound to recognise the current constitutional arrangements.[66]

The absence of a doctrine of tenure in chattels

It might be objected that chattels are likewise held subject to competing rights and no doctrine of tenure applies to them. To this objection are two responses. Firstly, when one considers the various competing rights that can exist in one chattel the application of the term 'absolute ownership' without a recognition of the limits of this terminology can be apt to mislead and is therefore no more applicable to a chattel than to land. A chattel can be subject to legal co-ownership and a wide range of equitable interests (trusts, charges, future interests, life interests and so on);[67] as with land, ownership can be lost in bankruptcy. Secondly, the temporary nature of most chattels constitutes a fundamental distinction between chattels and land and makes a fully developed doctrine of tenure in the former unnecessary.

The function served by estates

As previously mentioned, this gives notice of how long the land shall be held for, or perhaps more accurately (given, for example, the existence of future estates) when the interest in the land will begin and end. 'Proprietary rights in land are . . . projected upon the plane of time.'[68] The Law Commission recommends the clear and outright abolition of the doctrine of estates: 'the concepts of tenure and estates in land are abolished'.[69]

However, the draft Bill goes on to ensure that tenancies may continue to exist at law[70] to provide, 'flexibility and sophistication'.[71] It is not entirely clear that there is any consistency in purporting to abolish the doctrine of estates on the one hand while on the other retaining the most significant legal estate (although scrupulously avoiding the term, 'leasehold estate'; a consequence of course of the proposed abolition of estates). If the Law Commission can countenance the retention of the terminology of 'landlord and tenant' (which, sensibly enough, it does)[72] with its attendant recognition of one person holding land of another with a superior interest, it becomes difficult to see why there is so much antipathy to the terminology of estates. What is clear is that, following the proposed reforms, the question of how long a particular interest in land is to last will be just as

65 This may seem like an inherently conservative argument but it is submitted that it has the attraction of simplicity *assuming* that some emanation of the state should be the ultimate landowner. Other emanations have the right to hold property, it is true, and they could perhaps be substituted for the Crown but the Crown is the natural candidate (if only as 'a convenient cover for ignorance': F W Maitland, *Constitutional History of England* (CUP 1908) 418).

66 As, obviously, does the Law Commission's draft Bill (see especially cl 2).

67 E McKendrick and R Goode, *Goode on Commercial Law* (4th edn Penguin 2010) 44.

68 Pollock and Maitland (n 11) 11. Holdsworth (n 13) says (at 51) that estates arose because at the time of their development there was an inability to conceive of future rights other than as 'actually existing things'.

69 NILC 8 (2010) 152 (Draft Land Law Reform Bill (Northern Ireland) cl 1(1)). Apart from a finite prescribed list, all other rights take effect as equitable interests which are liable to be overreached.

70 Cl 5(1)(a).

71 NILC 2 (2009) para 2.54

72 NILC 8 (2010) 152 (Draft Land Law Reform Bill (Northern Ireland) cl 11).

fundamental as before. The only difference is that the concept of estates, which has proved to be an adept mechanism for conceptualising such an issue, will be no longer available. This loss will be very clearly felt in the consideration of relativity of title.

Relativity of title

Once we have confronted the fact that 'ownership' disguises the true complexity of landholding, we must go a stage further and address the issue that title to land itself (the right to hold the whole bundle) is never more than a right which is better than someone else's. All title is relative and in a system dependent on such a doctrine the idea that there can ever be such thing as absolute ownership of land is unsustainable and the use of the term misleading:

> At common law . . . there is no such concept as an 'absolute' title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by rival claimants.[73]

The system of registered title has to a very great extent reduced the importance of the relativity of title in registered land. In the case of unregistered land, however, any title is liable to be defeated by one which is preferred by the prevailing rules, in other words by one which is 'better'. At first this sounds shocking. Perhaps the thought arises that, in the present day there should be some means of ensuring that land, which is after all the most enduring commodity we know, can be owned securely without the constant fear of that ownership being challenged.

However, for ownership to be regarded as absolute there must be a recognition that some person is the owner (until he voluntarily relinquishes ownership or dies)[74] and that this state of affairs is, like the law of the Medes and the Persians, incapable of being upset.[75] It is submitted as self-evident that this is not a satisfactory state of affairs and that any rights that the 'owner' holds must be capable of challenge. Only when, by the operation of certain procedural laws governing the right to bring an action, a challenge is no longer possible, can the owner be truly secure in his ownership.[76]

The Law Commission's proposals obviously do not seek to confer absolute ownership in the sense of barring any challenge to the owner's right and, to that extent, the doctrine of relativity of title survives. However, the categorisation of someone as 'owner' is apt to disguise the true nature of their status and dilutes the conceptual accuracy provided by the doctrine of estates. The Law Commission believes that it is the present system which is misleading:

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73 *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 24, 25 per Lord Diplock. Title to chattels is also relative. See *Costello v Chief Constable of Derbyshire* [2001] 1 WLR 1437 CA: a thief has good title against the whole world save the person with a better title.

74 Or loses ownership by due process of law e.g. pursuant to compulsory purchase (which has already been mentioned as an indication that absolute ownership of land is a fictitious concept).

75 Daniel 6:8.

76 The most obvious example of one of those procedural laws being, of course, the Limitation (Northern Ireland) Order 1989. The effect of the statutes of limitation on real property law has in reality been to develop substantive law. However, in essence they are simply means for restricting claims after the expiry of a certain period of time.

> The Commission further recommends the introduction of a straightforward concept of ownership to align the law with public perception. Most people, other than lawyers, currently think that a freehold estate is ownership and are not aware that it is only ownership of an estate, rather than of the land itself. The Commission takes the view that this issue is of the utmost importance and firmly provides a modern foundation for property law in Northern Ireland.[77]

It is respectfully submitted that it is the Law Commission's proposals which are misleading. It is not at all clear that either the 'straightforward concept of ownership' or the 'public perception' with which it is supposed to align are capable of accommodating properly such nuanced ideas of relativity of title. It is submitted that the doctrine of estates more accurately and eloquently represents, among other subtleties, the precarious nature of all landholding. It is also submitted, as examined below, that the abolition of estates will bring confusion to the law of adverse possession.

The defeasibility of registered titles

The ability of statute law to mislead landholders into thinking that they hold greater rights than they actually hold is further apparent from the operation of the system of registered landholding under the Land Registration Act (Northern Ireland) 1970 (LRA(NI)). Under this system the register is deemed to be conclusive as to title and 'full ownership' is possible.[78] This is generally held to confer a state-guaranteed title.[79] However, even in registered land the 'full owner' does not have an indefeasible title.

Firstly, the register is not conclusive where fraud has played some part in the registration of the relevant interest.[80] In response to fraud, and to other defects or errors,[81] the register is liable to be rectified. The circumstances are limited and generally speaking the rectification is not permitted to prejudice the interest of a *bona fide* purchaser. These limits on the finality of the register are perhaps not totally incompatible with the register's statutory claim to be conclusive. They simply act to place conditions on the circumstances surrounding registration. Where they are operative, they say, in effect, to the registered owner, 'you ought not to have been on the register in the first place'. However, they do show that holding the title of full owner on the register is not finally determinative of the question of 'ownership'.

Secondly, there are other aspects of the registration scheme which demonstrate that even the registered title of a person validly on the register is not as certain as the term 'full owner' would suggest. Every registered owner holds subject to certain burdens which are permitted to affect the land even in the absence of registration.[82] These burdens appear in Schedule 5 to the LRA(NI) 1970 and largely take the form of easements, covenants, charges

77 NILC 8 (2010) para 2.4. At para 2.5 the report states that the move away from tenure and estates has 'very little or no practical significance'. It is the contention of this essay that the changes do have significance; but, accepting the Law Commission's case, it is not clear why it believes such apparently meaningless change is of 'the utmost importance'. It is also submitted that the Law Commission accords an unnecessarily elevated status to 'public perception'. It is accepted that the doctrine of estates and tenure is complicated and would not be readily understood by much of the general public. The inference from the Law Commission's report is that its recommendations remedy this defect. However, in spite of the clarity admirably present in the Law Commission's draft Bill, it is not immediately apparent that even this will bring much enlightenment to the broad mass of the general public on matters of land law.

78 Land Registration Act (Northern Ireland) 1970, ss 11 and 12.

79 A H Moir and E K Moir, *Moir on Land Registration* (SLS Legal Publications 2011) 1.2.

80 LRA(NI) 1970, s 11(1).

81 Ibid s 69(1) mentions 'misstatement, misdescription, omission or otherwise'.

82 Ibid s 34(4).

and equitable interests. To that extent, while they may constitute a serious obstacle to the registered owner's enjoyment of her land they do not impinge upon her title. However, one Schedule 5 burden subject to which the registered owner holds her land is, 'all rights acquired, or in the course of being acquired, consequent on the Limitation (Northern Ireland) Order 1989'.[83] This preserves the law of adverse possession in relation to registered land. Once a squatter has fulfilled all the criteria stipulated in the 1989 Order (essentially once she has been in adverse possession for the requisite period of time), she has the right to replace the registered owner on the register of titles. But something more than this happens as a consequence of the provisions of s 53 of the LRA(NI) 1970 which states that the 1989 Order 'shall apply to registered land as it applies to unregistered land'. For present purposes the material provision is Article 21(1) of the 1989 Order which provides that, 'no action may be brought by any person . . . to recover any land after the expiration of' the applicable limitation period. Thus, the squatter of registered land, at the end of the limitation period, acquires not just the right to be registered but also, even in the absence of registration, the right to successfully defend any action for the recovery of land brought by the registered owner. Furthermore, any registered transferee of the registered owner (even one for value) who sought to evict the squatter by action would find that this action was absolutely barred by the 1989 Order. One could therefore have a series of registered owners whose registered title was utterly valueless.

Thirdly, every registered transferee who is a volunteer takes the land subject to all unregistered rights which bound his predecessors in title.[84] Consider the following example. At the turn of the twentieth century a leasehold tenant (A) acquires the fee simple from his landlord and is registered as full owner pursuant to the Local Registration of Title (Ireland) Act 1891. Shortly before his death he executes a conveyance to B for valuable consideration. B does not enter into possession and fails to secure registration of his interest even though at all times he has an equitable right to be registered as transferee.[85] This right is capable of passing to B's successors in title[86] and is only defeasible by a registered transferee for value.[87] A and B both die intestate. At the time of his death A is in possession and his registered interest devolves upon his personal representatives by virtue of ss 83 and 84 of the 1891 Act. The land then passes down gratuitously through A's family and in each generation A's successor is registered as owner. The registered title of A's family is at all times susceptible to the rival claim of B's successors relying on B's transmissible right to registration. Thus, even many years from A's death, the registered title of his successors of itself provides no answer to a claim from B's successors seeking their own registration. Instead, A's family are likely to plead the expiry of the limitation period[88] or laches and delay on the part of B's successors.

83 At para 14.

84 LRA(NI) 1970, s 34(5).

85 *Devoy v Hanlon* [1929] IR 246 at 262–3; see also Moir and Moir (n 79) para 11.4. In *McLean v McErlean* [1983] NI 258, (purchasers for value in possession claiming adverse possession against the registered owner), the Court of Appeal went even further and held that such a purchaser held the full beneficial interest in the land and that, accordingly, it would be incorrect for the vendor to treat the purchaser as if the purchaser were not the 'true owner', merely because the vendor was the registered owner.

86 On conventional property law principles. For example, an equitable interest under a valid contract for the purchase of land is devisable: *Morgan v Holford* (1852) 1 Sm & G 101; 65 ER 45.

87 S 36(1) of the 1891 Act (later s 34(5) LRA(NI) 1970).

88 The right of a purchaser to obtain possession of land which he has paid for is lost after 12 years: *McLean v McErlean* (n 86) per Gibson LJ. The situation would be otherwise were it not for that fact that the Limitation (Northern Ireland) Order 1989 permits a constructive trustee to run a title adverse to the beneficiary of the constructive trust: see Article 2(3).

The effect on adverse possession

Another possible source of confusion, which arises from the fact that titles are relative, lies in the position of the squatter in possession pending the expiry of the limitation period. The Law Commission recommended that the doctrine of adverse possession continue in force largely as at the present in both registered and unregistered land.[89] There was, however, no attempt to account for the status of the squatter in possession prior to the expiry of the limitation period. At present, in unregistered freehold land, a squatter in that position has a fee simple absolute in possession.[90] 'There is thus no absurdity in speaking of two or more adverse estates in the land, for their validity is relative.'[91] The Law Commission might respond that this *is* absurd but it is not clear that its proposals adequately deal with this situation.

The squatter's legal fee simple is of practical importance for three reasons. Firstly it means that her rights bind purchasers from the paper title holder against whom the squatter commences possession. The clock is not re-set each time the land is sold. This is the case in both registered and unregistered land.[92]

Secondly, it allows the squatter to pass this title to another squatter. This allows successive squatters to accumulate the necessary period of possession for the purposes of the statutory time limit. This often happens where a testator (T) who is also a squatter on some land devises all his real property to A. T and A can add their time in possession together to bar O. If T has no title it is not clear that T and A could achieve this unless one or other of them had themselves possessed for the full statutory period.[93] Therefore, unless a squatter has some transmissible interest, the ability of successive squatters to bar O may be brought into doubt. The Law Commission has already endorsed the utility of adverse possession[94] but, unless squatters are to hold some form of transmissible title, the efficacy of the doctrine would be undermined.

Thirdly, the squatter's title allows him to maintain an action against a subsequent squatter.[95] If this were not so, a second squatter could, with impunity, dispossess the first simply by going onto the land if the squatter left it vacant for a short time.[96] If the right to

89 NILC 8 (2010) para 12.3ff. The major change is that, on the expiry of the limitation period, the title which has been barred is transferred to the squatter. See draft Bill, cl 110.

90 *Megarry and Wade* (n 3) para 4–008; R*osenberg v Cook* (1881) 8 QBD 162, 165 per Jessel MR. The Law Commission's treatment of the squatter prior to the expiry of the limitation period is ambiguous. In the Supplementary Consultation Paper (NILC 3 (2010) para 2.10), a squatter is described as 'a person who initially has no title to the land in question'. The paper then goes on to state that title can be 'obtained' after adverse possession for the requisite period. It should be conceded that para 2.10 aims to provide only a summary but, to the extent that it suggests that there is no title at all until the limitation period has run, it is submitted that it is in error.

91 *Megarry and Wade* (n 3) para 4–009.

92 Under LRA(NI) 1970, Schedule 5, pt I, para 14, 'Rights acquired, or in the course of being acquired, consequent on the Limitation (Northern Ireland) Order 1989' bind even a purchaser for value of registered land; this reflects the position in unregistered land where the squatter's possessory title is a legal estate which, on the classical rules of conveyancing, binds even a purchaser for value.

93 Time cannot accumulate were T abandons and A takes possession: Limitation (Northern Ireland) Order 1989, Schedule 1, para 8(3). Where one squatter dispossesses a prior squatter and there is no break in possession, the position is perhaps unclear: Jourdan and Radley-Gardner (n 53) 6–53 to 6–56.

94 NILC 8 (2010) para 12.2.

95 *Asher v Whitlock* (1865) LR 1 QB 1.

96 This is the situation given by Cockburn CJ in *Asher* (ibid 5) who asks what would happen if the second squatter 'had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, "You have no more title than I have, my possession is as good as yours"'.

lawfully evict persons in possession were held only by the holder of the paper title, this would tend to render as common any land abandoned in fact by that holder. In certain circumstances it would be difficult for any person to establish title by adverse possession. As squatters often attract little sympathy, some might ask whether this was particularly unjust. The short answer is that the Law Commission recommends the retention of adverse possession. The slightly longer answer is that not every squatter is wholly without some justifiable claim to the land he possesses. Particularly in cases where land is held by an intestate whose successors are also intestate, the possession in fact of a family member is of great assistance in establishing a marketable title if the family land is ultimately to be sold.[97] The full answer would call for a complete justification of the doctrine of adverse possession, which is outside the scope of this essay.

What bearing do the Law Commission's proposals have on the squatter in possession? Clause 3 of the draft Bill designates as 'owner' of unregistered land the person in whom, on or after the commencement of the proposed Act, 'the fee simple in possession . . . is vested'. As the law presently stands, this would include a squatter in possession. Clause 5(2) of the draft Bill provides that a legal interest subsisting before the commencement of the proposed Act will, after the commencement, 'exist, concurrently with or be subject to, any other legal interest in the same land in the same manner as it could have done before [commencement]'. That raises the possibility of there being two owners which would represent a very serious dilution of the concept of 'ownership' recommended by the Law Commission. It might be argued that the abolition, at the commencement of the proposed Act, of the concept of estates (cl 1(1)) would prevent this from happening. Clause 5(2) is, after all, expressly subject to other provisions of the draft Bill. But then either (i) the squatter is in danger of having a better claim to 'ownership' (as she is in possession) than the holder of the paper title (and this is most unlikely to be desired) or (ii) the squatter has no rights (which would destroy any number of possessory titles and interfere to a seemingly unintended extent with the doctrine of adverse possession) or (iii) the squatter's rights take effect as equitable interests.

If (iii), then the position is that the paper title holder is trustee for his squatter.[98] For the squatter her position would be, arguably, weaker than at present. In the draft Bill equitable rights are liable to be overreached on a sale by the 'owner'.[99] The clock is thus liable to being re-set on each sale as it is not at present. This is possibly prevented by cl 47(4) which preserves the equitable rights of an occupier but only where the occupation would have been obvious from a reasonably careful inspection at the time of the conveyance unless the purchaser otherwise knows of the right.[100]

The following comments can be made about the application of cl 47 to a squatter. Firstly, from cl 47 it seems clear that the equitable rights being discussed are those which come within the LRA(NI) 1970, Schedule 5, pt I, para 15.[101] However, the specific provision in Schedule 5 of provision for the squatter's rights at pt I, para 14, makes it reasonably clear that the equitable rights in para 15 do not encompass the squatter's interest.[102] Assuming (strictly for present purposes) that the squatter's rights could take

97 Especially where the successive possession of certain family members may in fact accord with the wishes of their predecessors who neglected to make these wishes known in any legally enforceable manner.

98 Cf. Land Registration Act 1925, s 75(1) (since repealed).

99 Cl 47(1).

100 See *Ulster Bank v Shanks* [1982] NI 143.

101 Cl 47(3)(b)(iii) in fact amends para 15 and applies it to unregistered land.

102 The exclusion of the squatter's interest from those equitable rights is entirely in keeping with the historical position that the squatter's interest is a legal one.

effect as equitable interests under cl 47, there is then the problem created by the provision that a purchaser who fails to discover the adverse possession on a reasonably careful inspection of the property takes free of the squatter's interest. This is highly innovative because at present only (i) action, (ii) dispossession of the squatter or (iii) cessation of possession by the squatter can stop time running. Clause 47 would seem to introduce the doctrine of notice. Notice is to some extent already present in adverse possession because, to be adverse, possession must be sufficiently obvious to allow the paper title holder to become aware of his right to recover the land by action. However, possession need not be continuous.[103] Periodic possession which presently qualifies as possession for adverse possession purposes might not constitute reasonably obvious occupation at the time of the conveyance, for example, in the case of grazing.

If there is a problem, one solution might simply be to give the squatter in unregistered land shorn of the doctrine of estates the same rights she presently has in registered land. However, the authorities in England support the view that in registered land the squatter in the process of accruing the necessary time in possession to apply to be registered has a fee simple estate.[104] It is submitted that the same analysis would apply in Northern Ireland; while the interest which the squatter has in registered land might not be expressly referred to as an estate in the LRA(NI) 1970, Schedule 5, pt I, para 14 assumes a doctrine of estates. If this submission were not accepted, a return to elementary principles shows that the 'rights' (however one chooses to conceptualise them) of the squatter in registered land are clearly as capable of transmission as they are in unregistered land and they also endure against purchasers in the same way as legal interests do. If they are not called legal estates, they certainly look very like them;[105] as would any prospective analogous provisions in estate-free unregistered land.

Accommodation of relativity of title outside the doctrine of estates

The concept is entirely recognised within Penner's theory:

> But in the case of land in particular, which lasts forever and may see various changes in occupation, documented and remembered facts may not only work to support or deny one claim of ownership but may do so in respect of several claims. The common law properly recognises the uncertainty of that history, and thus the reality of this practice, by abjuring the abstraction of absolute title and embracing the abstraction of relative title.[106]

For Penner, the common law's recognition of relative titles is fully compatible with the idea of ownership that he holds. He says simply that one can own something and at the same time have a title that is adverse to one's ownership. That the law will ultimately decide on which title is best only proves that it supports absolute ownership.

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103 *Bligh v Martin* [1968] 1 WLR 804 at 811.

104 See Land Registration Act 2002, Schedule 6, para 9(1). S Jourdan, *Adverse Possession* (1st edn LexisNexis 2003) 21–55, stated that a squatter in registered land has 'an independent, unregistered possessory title created and evidence by his possession'. In the 2nd edn (Jourdan and Radley-Gardner (n 53)), the commentary (at 22–67) on Schedule 6, para 9(1) is that it: 'expressly provides that the squatter's unregistered freehold estate, created and evidenced by his possession of the land is extinguished when he is registered as proprietor of the registered estate'. See the discussion in C Jessel, 'Concurrent Fees Simple and the LRA 2002' (2014) 130 Law Quarterly Review 587 at 600. See also n 92 above.

105 *Megarry and Wade* (n 3) 3–035ff give two fundamental characteristics of legal estates: the right of alienation (*inter vivos* or testamentary) and the right to everything in and over land. While she is in possession, the squatter's rights even in registered land, display these characteristics.

106 Penner (n 30) 149.

Ben McFarlane argues that the term 'relativity of title' is unhelpful. He prefers to concentrate on the essence of that which is represented by relativity.[107] He concludes that 'title' merely means that a party has a valid claim to ownership and goes on to observe that more than one valid claim is permissible for any given item of property or parcel of land. Valid claims to ownership are determined by a tie-breaker: a fundamental rule of property law that a pre-existing property right binds all persons who cannot produce a legally recognised defence to the pre-existing right.[108] McFarlane is prepared to use the term 'ownership' but that would seem to be open to the very objections he raises to the term 'relativity of title': it presents an incomplete picture.[109]

Summarising McFarlane's analysis in the proposition that multiple valid claims to ownership are possible but must be resolved by a tie-breaker, the question is whether McFarlane's analysis can survive outside a doctrine of estates? The answer is that it can exist in any system that recognises more than one valid claim to ownership provided some means of adjudicating between the claims is provided for. It could therefore exist quite happily with Penner's theory whose definition of 'ownership' can accommodate a person other than the owner who has an adverse title and whom the law will assist in all manner of ways (as, for example, we have seen with the squatter).

Subscription to the views of either Penner or McFarlane in no way involves an abandonment of the doctrine of estates. Both their approaches on the matter of relativity of title (and they are virtually identical) really only require that (i) more than one title to land be possible at one time and (ii) there be some means of adjudicating between claims. Any system that contained these elements could accommodate the concept of relativity of title; it would not need to be the present doctrine of estates.

The problem for the Law Commission is that, as has already been argued, its proposals seem to deny that there can be more than one 'owner' and furthermore make insufficient provision for any alternative mechanism to accommodate any title (or anything fulfilling the function currently performed by title) other than the owner's. The Law Commission's scheme therefore fails to provide the minimum elements necessary to accommodate the concept of relativity of title; a concept which this essay has argued is desirable. If this argument is correct, then legislators acting on the Law Commission's recommendations have two options: (i) they can ask the Law Commission to devise some new system which provides for relativity of title; or (ii) they can retain the present doctrine of estates and channel the resources that would have been expended on (i) into some more worthy endeavour.

Conclusion

Estates and tenure are prime targets for the reformer because they are easy to characterise as anachronisms. However, time has denuded them of their idiosyncratic qualities. As they exist today, they serve the important function of allowing us to address the two important questions that will remain even if the Law Commission's proposals are enacted, namely: what do you have and how long do you have it for?

107 Ben McFarlane, *The Structure of Property Law* (Hart 2008) 146.

108 With respect, it is not clear that this analysis is fundamentally different from the statement above that title to land is never more than a right which is better than someone else's.

109 McFarlane (n 107) 342 acknowledges that it is strictly correct to say that ownership in land is not possible. However, he notes that as freehold gives the 'immediate exclusive control of a thing forever', ownership and freehold are largely synonymous. But the burden of this essay has been to show that 'exclusive control' is rarely, if ever, possible in the case of land.

The continued notion of holding land of the Crown – or the state if preferred – speaks eloquently of the fact that landholding is a form of property subject to a vast range of competing interests. The truth at the heart of the doctrine of tenure, that there can be no such thing as absolute ownership, is worthy of preservation if we value a concept of landholding that accurately reflects the practical day-to-day reality. The preceding demonstration of the limits of so-called absolute titles should cause the present proposals, which ignore this state of affairs, to be viewed with caution. Furthermore, there are consequences following from the proposed changes which have perhaps not been anticipated. For all these reasons, the maintenance of a little anachronism might be worthwhile, indeed essential.

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The Chagos Islands cases: the empire strikes back

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Abstract

Good governance requires the accommodation of multiple interests in the cause of decision-making. However, undue regard for particular sectional interests can take its toll upon public faith in government administration. Historically, broad conceptions of the good of the commonwealth were employed to outweigh the interests of groups that resisted colonisation. In the decision-making of the British Empire, the standard approach for justifying the marginalisation of the interests of colonised groups was that they were uncivilised and that particular hardships were the price to be paid for bringing to them the imperial dividend of industrial society. It is widely assumed that with the dismantling of the British Empire, such impulses and their accompanying jurisprudence became a thing of the past. Even as decolonisation proceeded apace after the Second World War, however, the UK maintained control of strategically important islands with a view towards sustaining its global role. In an infamous example from this twilight period of empire, in the 1960s imperial interests were used to justify the expulsion of the Chagos islanders from the British Indian Ocean Territory (BIOT). Into the twenty-first century, this forced elision of the UK's interests with the imperial 'common good' continues to take centre stage in courtroom battles over the islanders' rights, being cited before domestic and international tribunals in order to maintain the Chagossians' exclusion from their homeland. This article considers the new jurisprudence of imperialism which has emerged in a string of decisions which have continued to marginalise the Chagossians' interests.

Keywords: Chagos Islands; enforced removal; imperialism; national security; human rights; WikiLeaks

Introduction: from old to new imperialism

From the 1970s onwards the debate over colonialism has been winding down. Once the major elements of the European empires had been broken up, the UN Committee of 24 on decolonisation,[1] in the 1960s one of the mainstays of the UN's institutional apparatus, became a backwater of international relations. Attention turned to manifestations of neo-imperialism, from disadvantageous trade deals foisted on newly

* Our thanks to T T Arvind (Newcastle), Jo Bridgeman (Sussex), John Child (Sussex), Aoife O'Donoghue (Durham) and Tanya Palmer (Sussex) for their encouragement and comments upon earlier drafts of this article. Any errors remain our own.

1 Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples, established in 1961 to implement UN General Assembly Resolution 1514 (XV) (14 December 1960).

independent countries to bouts of military adventurism under the auspices of the Cold War and, subsequently, neo-conservatism.

The remnants of the British Empire, and with them traditional imperial paradigms, nonetheless continue to influence UK policy-making and jurisprudence. From the earliest days of empire the Privy Council heard appeals from cases arising in the colonies, with the function of ensuring that law as promulgated in the colonies was not 'repugnant to the laws of England'.[2] The courts of England and Wales were also often prepared to stretch their jurisdiction to ensure, in the words of Lord Mansfield, that a colonial subject 'has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell'.[3] By such claims, the London courts held themselves out as a refuge for victims of colonial misrule when colonial courts often administered 'only a very weak dilution of English law'.[4] But just as Richard Cobden fretted in the 1860s that UK politics 'may become corrupted'[5] through the backwash of practices expedient in the colonies, so too could these cases enmesh the domestic courts in the imperial project.

This article critically analyses the Chagos Islands cases as exemplifying the dilemmas the domestic courts face in maintaining legal principles in the face of the demands of an imperial project. When Michel Foucault considered constitutional law, he saw governance arrangements as remainders of past conflicts between factions within society, with the challenge being to find 'the blood which has dried in the legal codes'.[6] The Chagos cases are so significant precisely because they confront the courts not with dried blood but a still-open wound and have required judges to consider imperial jurisprudence not as a relic but as a living area of law. As such, we read these cases as fitting into, rather than striking out afresh from, this imperial record. In common with the Pitcairn Island litigation[7] and cases on act of state doctrine,[8] the Chagos cases have required judges to 'confront'[9] the fissure between long-established imperial doctrines and twenty-first-century public law principles.[10]

The impact of imperial jurisprudence has been marginalised by competing accounts of the split House of Lords decision in *Bancoult (No 2)*,[11] the centrepiece of the Chagos litigation. The Law Lords upheld a 2004 Order in Council issued by the UK government which prevented the Chagossians from returning to their homeland. The majority reasoned that because the Chagos Islands were part of a conquered/ceded colony, they were subject to the prerogative powers of the Crown, which included a power to prevent resettlement. Cautioning against confusing 'history with adjudication',[12] Mark Elliot and Amanda Perreau-Saussine foreground the constitutional principles at play in the case: '*Bancoult* is a

2 For an example of this oversight, see *Ashbury v Ellis* [1893] AC 339, 341 (Lord Hobhouse).

3 *Mostyn v Fabrigas* (1775) 1 Cowp 161, 171.

4 *The Times*, 8 December 1891, 9. See *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529, [65] (Lord Hoffmann).

5 J Morley, *The Life of Richard Cobden* (Chapman & Hall 1879) vol II, 361.

6 M Foucault, *Il faut défendre la société: Cours au Collège de France (1975–1976)* (Seuil/Gallimard 1997) 48.

7 See *Christian v The Queen* [2006] UKPC 47; [2007] 2 WLR 120, [33] (Lord Woolf).

8 See *Al Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] 2 WLR 225.

9 A Perreau-Saussine, 'British Acts of State in English Courts' (2007) 78 British Yearbook of International Law 176, 243.

10 See S Farran, 'Prerogative Rights, Human Rights and Island People: The Pitcairn and Chagos Island Cases' [2007] Public Law 414, 418.

11 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453.

12 M Elliott and A Perreau-Saussine, 'Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common Law Limitations on Prerogative Power' [2009] Public Law 697, 701–02.

pyrrhic victory for those who regard executive power as constrained by the rule of law'.[13] T T Arvind, in turn, regards the majority judgments as being packaged in a formalist manner but driven by inherently pragmatic concerns.[14] He supports this claim by tracing broad trends in contemporary appellate judgments which define and restrict the scope of judicial authority over the state and public bodies.[15] Read alongside cases like *Gillan*[16] and *Austin*,[17] Arvind sees the House of Lords in *Bancoult (No 2)* as being 'disinclined to set absolute boundaries on the power of the executive, or to establish clear rules as to when executive action will require specific parliamentary authorization'.[18] Arvind does acknowledge that there are recent cases, like *HM Treasury v Ahmed*,[19] where the UK's apex court has placed limits upon executive action,[20] but considers that the overall narrative permits 'islands of principled rules . . . . [to] survive in a sea of pragmatic standards'.[21]

Such accounts locate *Bancoult* within modern public law concerns. Whilst these insights are undoubtedly important, we consider that the Chagos litigation must be understood in the context of broader jurisprudence on the management of the empire. The expulsion of the Chagos islanders following the establishment of the BIOT as a defence colony does not of itself, we should note from the outset, differentiate the UK from the contemporary practices of other major colonial powers.[22] Despite their developed conceptions of freedom and justice, a succession of Western legal orders became despotic when exported through waves of imperial expansion between the eighteenth and twentieth centuries.[23] Many small island colonies were treated as having particular defence significance in the aftermath of the Second World War, including the nuclear weapon testing by the USA at Bikini Atoll and by France at Moruroa Atoll. The former instance involved expulsions of the population of affected islands which were broadly comparable to the UK's treatment of the Chagossians.[24]

Using the British Empire as a foil we explain *how* colonial projects came to be justified and maintained through the self-same legal orders employed in the colonising states. We reassess the Chagos litigation in light of the mass of new documentation released to the National Archives in 2012. These documents tell the story of the Chagos Islands from the viewpoint of the islands' administrators, as distinct from the previously published Whitehall records. As such, these records allow us to re-examine both the strategic significance of the islands that underpins the 50-year partnership between the UK and the USA and the

13 Ibid 717.

14 T T Arvind, '"Though it Shocks One Very Much": Formalism and Pragmatism in the Zong and Bancoult' (2012) 32 Oxford Journal of Legal Studies 113, 146.

15 Arvind notes that Lord Hoffmann identified this trend in recent judgments in his extra-judicial writings; L Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) Judicial Review 137, 137.

16 *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12; (2006) 2 AC 307.

17 *Austin v Commissioner of Police for the Metropolis* [2009] UKHL 5; (2009) 1 AC 564.

18 Arvind (n 14) 145.

19 *HM Treasury v Ahmed* [2010] UKSC 2; (2010) 2 AC 534.

20 Arvind (n 14) 145–6.

21 Ibid 146, citing R Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2003) 61–71.

22 For instance, Belgian colonialism in the Congo (via Joseph Conrad) led to Francis Ford Coppola's musings on American Imperialism in his 1979 film, *Apocalypse Now*. See J Conrad, *Heart of Darkness and Other Stories* (Wordsworth Classics 1995). Likewise, German colonialism, and colonial oppression, in south-west Africa has been recently documented by scholars. See G Krüger, 'Coming to Terms with the Past' (2005) 37 GHI Bulletin 45 and C Erichsen and D Olusoga, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (Faber & Faber 2011).

23 P Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 107.

24 See J Niedenthal, *For the Good of Mankind: A History of the People of Bikini and their Islands* (2nd edn Bravo 2013).

approach to the common good in an imperial context which animated UK policy towards the Chagos Islands and the Chagossians.[25] We show that the imperial common good is riven by competing theoretical justifications for empire: one, based in liberal imperialism, emphasises the civilising nature of empire and focuses on the good governance of colonies; the other, based in a utilitarian imperialism, instead focuses on how to best appropriate colonial possessions for the benefit of the imperial power. In this context it is hardly surprising that 'confusion about the relationship between imperial and local good (and imperial and colonial law) continues to pervade judicial and scholarly discussion'.[26] At every turn, the Chagossians' efforts to protect their interests by judicial review have confronted the UK government with this imperial legacy and the competing justifications for that legacy. This legacy cannot ultimately be wished away, and it showcases the continued significance of empire within public law and even under the European Convention on Human Rights (ECHR).[27]

The UK–USA partnership and the BIOT's creation

The ambition amongst many of the 'empire builders' who brought the British Empire towards the zenith of its power had been to 'unite the settler colonies into an integrated and enduring global polity'.[28] Half a century after Queen Victoria's death, however, burgeoning independence movements, the financial burdens of two world wars and international pressure for decolonisation had stifled such ambitions. But even as decolonisation gathered pace in the 1950s, a Cold-War vision of imperial retrenchment held sway over UK policymakers. As Prime Minister Harold Macmillan told Foreign Secretary Selwyn Lloyd in 1959, 'we only need our Gibraltars'.[29] In other words, expensive commitments over whole swathes of territory which could not be maintained could be substituted for control of strategic outposts; unsinkable aircraft carriers enabling the UK to continue to project power in regions far removed from its shores. At this juncture in the Cold War control of strategically important islands came to be regarded as more important than direct control of extensive colonial possessions. This was because their value for global power projection was not offset by the need to manage extensive hinterlands or the self-determination demands of sizeable populations.

Even as this policy was being articulated, however, it was already becoming beyond the UK's means. The UK's pretensions of 'great power' status had been hobbled by the Suez Crisis, which highlighted its inability to act on the global stage without the sanction of the USA. The USA, by contrast, enjoyed both the capacity to militarise islands 'east of Suez' and, in the Cold-War context, was increasingly eager to dominate the Indian Ocean 'by controlling every available piece of territory, or at least by denying their use to the Soviet Union and China'.[30] The USA and UK began the coordinated evaluation of the UK's island

25 Legal action over colonial-era atrocities in Kenya brought to light a store of archival material on colonies, including the BIOT, which had not been released to the UK National Archives (UKNA); see *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), [48]–[54]. In May 2011 the Foreign Secretary informed Parliament that this material was being prepared for public release; W Hague, HC Deb 5 May 2011, vol 527, col 24WS. The files, subsequently transferred in April 2012 (under the code FCO 141), enable a fresh analysis of executive action during the formation of the BIOT and the Chagossians' expulsion.

26 R Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in J Keown and R P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 396, 404.

27 European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953).

28 D Bell, 'From Ancient to Modern in Victorian Imperial Thought' (2006) 49 Historical Journal 735, 738.

29 A Horne, *Macmillan, 1957–1986* (Macmillan 1989) vol II, 691.

30 D Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press 2009) 60.

colonies for potential sites for a strategic hub in the Indian Ocean. Amongst these sites were the Chagos islands, hitherto administered from Mauritius. Located in the centre of the Indian Ocean the Chagos archipelago provided a potential staging post for operations in Africa, the Middle East, the Indian sub-continent and Australasia. Diego Garcia, the largest of the Chagos islands, was central to the UK–USA bilateral agreement concluded in 1966.[31] This agreement provided that the UK would procure the land and the USA would finance, construct and operate the planned defence facilities. The UK's outlay was compensated by a secret $14m mark-down on the Polaris missile technology shared by the USA, which enabled the UK to maintain its nuclear deterrent.[32] The official line was that the USA had made no direct payments to the UK but had 'shared certain costs in setting up BIOT'.[33] The stakes were raised by the Soviet Union's gradual build-up of assets in the Indian Ocean from March 1968, including its placing of mooring buoys for a cluster of auxiliary ships – a 'floating base' – in international waters near the Chagos archipelago.[34]

Before ground could be broken on the new base, however, the UK would have to navigate a series of late-colonial problems (in the midst of the reorganisations which would see the Colonial Office rebranded as the Commonwealth Office in 1966 and merged with the Foreign Office by 1968). The first of these problems was how to repackage the UK's Indian Ocean colonies in the face of the rapid movement of Mauritius and the Seychelles towards independence. Colonies had previously been carved up or parcelled off on the basis of imperial interests, with scant regard for the affected populace.[35] When parliamentary questions were asked about whether the Heligoland population had consented to the island's transfer to Germany as part of a colony-swap deal in the 1890s, the Leader of the House of Commons responded with equanimity that the government did not believe that the islanders would be 'dissatisfied with the change'.[36] Just as the opposition charged that Heligoland and its population were being treated as 'mere objects of barter',[37] the formation of the BIOT was regarded as one element of an 'inter-state' arrangement with the prospective leaders of the soon-to-be independent colonies. In November 1965 the most promising sites were severed from their parent colonies, the Seychelles and Mauritius, to form the BIOT.[38] In return the Seychelles gained a new civil airport, which

31 Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Availability for Defense Purposes of the British Indian Ocean Territory (30 December 1966) Cmnd 3231; 603 UNTS 273.

32 See UKNA, FCO 141/1428, A B Urwick (FCO) to J C Moberley (UK Embassy, Washington DC) (24 June 1970).

33 UKNA, FCO 141/1411, M Stewart (UK Foreign Secretary) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (1 December 1969). Even the opaque claim that the USA 'made some adjustments in other fields which are more favourable to UK than would otherwise have been the case' was deemed to touch too closely upon the Polaris arrangement; UKNA, FCO 141/1411, M Stewart (UK Foreign Secretary) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (26 November 1969).

34 See V B Bandjunis, *Diego Garcia: Creation of the Indian Ocean Base* (iUniverse 2001) 97.

35 See S Allen, *The Chagos Islands and International Law* (Hart 2014) 120.

36 W H Smith, HC Deb 19 June 1890, vol 345, col 1369.

37 F Channing, HC Deb 28 July 1890, vol 347, col 1079.

38 BIOT Order SI 1965/1920, passed under the Colonial Boundaries Act 1895, s 1(1). See S A De Smith, 'Mauritius: Constitutionalism in a Plural Society' (1968) 31 Modern Law Review 601, 609.

would open in 1972, to further its ambitions as a holiday destination.[39] Mauritius received direct payment of £3m in February 1966.[40]

International opinion presented more of a problem. Earlier efforts to repackage colonies had not faced the attention of the UN. The dismemberment of these Indian Ocean colonies to permit the creation of 'foreign bases' had attracted considerable criticism at the UN from its earliest phases,[41] including a UN General Assembly Resolution asserting that, prior to granting Mauritius independence, the UK should 'take no action which would . . . violate its territorial integrity'.[42] Diego Garcia's part in the scheme was presented as hosting an 'austere communications facility' in order to deflect criticisms that the Indian Ocean was being militarised.[43]

Acquiring copra plantations in the Chagos archipelago proved to be the least complicated element of the plan to implement. Almost all of the land was owned by the Chagos Agalega Company. Its plantations were secured by the UK government in a single transaction under the authority of the BIOT Order in Council[44] and leased back to the former owners whilst preparations for establishing defence facilities continued.[45] The USA, however, had been chastened by previous agreements with the UK over military bases. In 1940, the USA had exchanged 50 obsolete destroyers for a slew of bases in the Atlantic and Caribbean, in what had at the time seemed like a favourable deal. Less than a decade later, however, almost all of these facilities were gone. As they gained their independence 'countries like Trinidad and Tobago evicted the United States from bases in their territories'.[46] The US government was determined not to repeat this experience and made the 1966 Agreement conditional upon the requirement that the entire colony be free of population.[47] Excluding the population would serve the threefold purposes of ensuring base security, preventing oversight of the BIOT by the UN Committee on Decolonisation and negating the possibility that an independence movement would once again cost the USA its investment.[48]

UK officials were initially confident of their ability to fulfil this aspect of the agreement. Much of the population was assessed to be made up of migrant Mauritian and Seychellois copra plantation workers, who could be returned to their home islands once

39 Many UK officials believed that the £5.5m Seychelles airport was a white elephant, with one declaring that no 'blue-haired American widow' would regard the Seychelles as an attractive holiday destination. UKNA, FCO 141/1424, Sir Arthur Galsworthy Memorandum (26 October 1967) para 2.

40 As confirmation that they had struck a hard bargain, the UK government could point to the walkout of Parti Mauricien ministers from the Mauritius self-government over the inadequacy of this compensation. See De Smith (n 38) 609.

41 Ibid 611.

42 GA Res 2066 (XX Session) (16 December 1965) (89 votes to 0 (18 abstentions)). See also, for UK notes on later resolutions condemning dismemberment and militarisation, UKNA, FCO 141/1428, B L Barder (UK Mission to the UN), 'Committee of 24: Mauritius, Seychelles, St Helena' (8 August 1967).

43 For early discussion of the base in these terms, see UKNA, CO 1036/1343, Colonial Secretary (Anthony Greenwood) to Governors of Mauritius and the Seychelles (19 July 1965) para 10. For its part, the US military needed to play a long game, securing congressional approval and then steadily expanding commitments. See Vine (n 30) 96–8, 120–2.

44 BIOT Order 1965 SI 1965/1920, s 3.

45 See UKNA, FCO 141/1458, Seychelles Supreme Court Registry, 'Distribution of Sale Price of the Chagos Archipelago' (6 May 1967).

46 Vine (n 30) 59.

47 See UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 1: General Background' (March 1969) para 8.

48 Vine (n 30) 78–9.

the plantations were closed. Amongst these workers, however, lived the islands' permanent residents, the Chagossians.[49] Known to colonial administrators as the Ilois, some of these islanders could 'trace their roots on the islands back for two centuries'.[50] The Chagossians' numbers could well be downplayed, but acknowledging their very existence triggered the long-standing principle that, in administering any part of the British Empire, 'a colonial government cannot in any ordinary cases direct transportation . . . [to] a particular place outside their jurisdiction'.[51] The Colonial Office's institutional memory, however, provided precedents, as recent as 1945, for circumventing this principle in the context of island populations.[52] Such exclusions had not drawn international attention[53] and officials initially maintained that 'if it becomes necessary to transfer the whole population there will be no problem'.[54] London assured the Seychelles administration that 'only Diego Garcia is likely to be taken over at once for defence purposes' and that this meant that the outer islands (especially Peros Banhos) could absorb the displaced population.[55] The blithe assertion of one senior Foreign Office official that '[u]nfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc',[56] to this day casts the department 'in a light which does it no credit'.[57]

The world of the mid-1960s, however, was far removed from the confusion of the immediate post-war period. The UN Charter began to generate considerable official concern. The distinct nature of the Chagos community, separated from Mauritius by 800 miles of ocean, brought into play the 'sacred trust' Article 73 of the Charter imposed on colonial authorities regarding the treatment of indigenous non-self-governing peoples. With the islands already on the UN's radar, the concern grew within the now-reorganised Foreign and Commonwealth Office (FCO) that the expulsion of the Chagossians 'may well attract considerable attention'.[58] Officials prevaricated, hoping that base security was the US government's main concern and that the Americans 'will not raise any objection to the

49 Population returns for the islands show considerable fluctuation in population between 800 and 1100 in the 1960s, in line not only with the hiring of a migrant element within the plantation workforce, but also with the movement of many Chagossians to Mauritius and the Seychelles to visit family or access services (especially medical services unavailable on the islands). See UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 3: The Problem of the People Living in the Chagos Archipelago' (April 1969) paras 10 and 13.

50 G Robertson, 'Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean' (2012) 36 University of Western Australia Law Review 1, 3.

51 W Craies, 'Compulsion of Subjects to Leave the Realm' [1890] 6 Law Quarterly Review 388, 407.

52 The Banabans, for example, were not permitted to return to their phosphate-rich island home following their brutal relocation at the hands of Japanese forces during the Second World War. The island was subsequently mined out. See *Tito v Waddell* [1977] Ch 106 and J McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change' (2014) 49 Journal of Pacific History 301.

53 See K Roberts-Wray, 'Human Rights in the Commonwealth' [1968] International and Comparative Law Quarterly 908, 913–14.

54 UKNA, FCO 141/1422, R Newton, 'Survey Report' (23 September 1964) para 26.

55 UKNA, FCO 141/1406, Colonial Office to G P Lloyd (Colonial Secretary, Seychelles) (18 May 1965) para 4.

56 UKNA, FO 371/190790, D A Greenhill (Foreign Office Deputy Under-Secretary) to P Gore-Booth (Foreign Office Permanent Under-Secretary) (24 August 1966).

57 *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) [A74] (Ouseley J).

58 UKNA, FCO 141/1428, A S Papadopoulos (FCO), 'Briefing Note: BIOT and the Committee of 24' (28 August 1970) para 2.

relocation of people from Diego Garcia in Peros Banhos'.[59] With delays in congressional approval for base funding and a temporary waning in the US interest in Diego Garcia at the height of the Vietnam War, the islands remained populated long after the creation of the BIOT in 1965 and for more than five years after Mauritian independence in March 1968, ultimately enabling the islanders to claim UK citizenship through the BIOT.[60] In this period the US government raised 'no objection' to continued settlement in the outer islands.[61] At this crucial juncture the archival record becomes somewhat muddled. The generally accepted account is that the Nixon administration, on the basis of Article 73 concerns, reasserted the demand that the entire archipelago be cleared before work on the base would commence.[62] Seemingly faced with the risk of the scheme collapsing, the colonial authorities implemented a depopulation plan on the basis that all remaining islanders were migrant labourers and that the Chagossians, even if islanders for many generations, were 'mostly Mauritian in origin'.[63]

But perhaps this account does the UK too much credit. After all, Whitehall officials had advised from the outset that the Chagossians' very existence as a distinct people would have 'to be ducked if possible'.[64] Moreover, the Diego Garcia Agreement itself speaks only of restricting access of non-military personnel to Diego Garcia and its lagoon,[65] and not the remaining islands, something which accords with the large number of yachts which moor annually at the outer islands.[66] In August 1977 UK government legal advisers noted that the reasons behind the 1969 decision to clear the islands 'were financial and administrative although potentially Anglo-US defence needs underlay them'.[67] US 'demands' might well have been a useful canard, enabling the UK government to explain the expulsions to its own reluctant colonial administrators and subsequently to the courts.

The isolation of the islands aided the authorities in the expulsions. After slavery was abolished throughout the colony of Mauritius in 1835, the Chagossians became and

59 UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 1: General Background' (March 1969) para 12. Officials on the ground continued to labour under this misapprehension as late as 1971; see UKNA, FCO 141/1355, B Greatbach (Governor of the Seychelles and BIOT Commissioner), Hand-written Note (29 January 1971).

60 See R Gifford, 'The Chagos Islands: The Land where Human Rights Hardly Happen' [2004] Law, Social Justice and Global Development Journal 1, 7. UK officials acknowledged that the Chagossians had citizenship of the UK and colonies during the evictions; UKNA, FCO 141/1355, P Carter (UK High Commissioner in Mauritius) to E J Emory (FCO) (13 January 1971) para 2.

61 UKNA, FCO 141/1416, G Oplinger (US Embassy, London) to R Johnstone (FCO Defence (Policy) Department) (22 November 1968) para 1.

62 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to A B Urwick (Defence Department, FCO) (2 November 1970) para 6.

63 UKNA, FCO 141/1421, R C Arnold (Acting BIOT Administrator) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (2 April 1969) para 2.

64 *Chagos Islanders v Attorney General* (n 57) [A44] (Ouseley J). See UKNA, FCO 141/1415, Lord Longford (Colonial Secretary) to H Norman-Walker (Governor of the Seychelles and BIOT Commissioner) (25 February 1966) para 3.

65 Exchange of Notes Constituting an Agreement Supplementing the Above-Mentioned Agreement, Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory and Replacing the Supplementary Agreement of 24 October 1972 (with annexed plan) (25 February 1976) 1018 UNTS 372, para 4.

66 Vine (n 30) 15.

67 UKNA, FCO 31/2193, J D P Bickford (FCO Legal Adviser) to G E Gammie (Treasury Solicitors' Department) (4 August 1977) para 6.

remained serfs.[68] When the UK government purchased the copra plantations in 1967 the islanders remained contract labourers with no property interests beyond mere licences. Treating the expulsion of the entire population as an up-scaled property issue, the islanders' lack of formal land holdings allowed the UK government to assert that 'no-one has any right to reside permanently on the islands'.[69] Responding to questions about the islands' population with the assertion that every person on the islands was a contract labourer was, as FCO officials recognised at the time, a textbook exercise in legalism; 'it does not give away the existence of the Ilois but is at the same time strictly factual'.[70] A twentieth-century audience, alien to the near-feudal arrangement of the Chagos copra plantations, simply accepted that some contract labourers could be not separated out from the migrant labour employed on the plantations as 'belongers' on the islands.

Under the cover of this semantic umbrella, from the late 1960s administrators had attempted to gradually reduce the islands' population by preventing individuals and families who left the islands for Mauritius or the Seychelles from returning, rather than enforcing evictions. Many families and individuals were separated or stranded during this protracted running down of the islands, with Olivier Bancoult and his family being amongst those prevented from returning after they travelled to Mauritius because of a medical emergency.[71] The last of the Chagossians were not expelled from Diego Garcia until October 1971, months after construction teams from the US military had started work on the island. Several hundred inhabitants would remain on the outer Chagos islands until May 1973.[72] Some islanders were transferred to the copra plantations on Agalega. The majority were deposited on Mauritius at the end of a six-day voyage, the ultimate logic of the fiction that they were, after all, Mauritian citizens. At the time, however, even liberal UK newspapers did little to dispute these arrangements, with *The Observer* merely expressing the hope that 'some money will be devoted to resettling the thousand or so inhabitants'.[73]

Meanwhile, on Diego Garcia, by the spring of 1973 barracks and a 2500m runway had been completed, to be followed a year later by a pool hall and bowling alley as facilities rapidly expanded.[74] The USA, with its 50-year renewable agreement secured, quickly abandoned the pretence that Naval Support Facility Diego Garcia would be a 'modest' outpost which 'will in no way constitute a base'.[75] The island became 'a naval "prepositioning" port and "bomber forward operating location" subsequently used for all US missions against Iraq and Afghanistan',[76] cementing the USA's strategic position in the

68 In the words of one particularly patronising briefing, the Chagossians were 'simple islanders, not versed in the obscure problems of their national status'; UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 3: The Problem of the People Living in the Chagos Archipelago' (April 1969) para 22.

69 UKNA, FCO 141/1415, J R Todd (BIOT Administrator) to G Thomson (Secretary of State for Commonwealth Affairs) (4 June 1968).

70 UKNA, FCO 141/1428, A S Papadopoulos, 'Briefing Note: BIOT and the Committee of 24' (28 August 1970) para 3.

71 *Chagos Islanders v Attorney General* (n 57) [A130] (Ouseley J).

72 See UKNA, FCO 141/1418, J R Todd (BIOT Administrator) to S G Hinton (FCO) (14 April 1973). For one of the most thorough narrative histories of the expulsion process, see the following judgment, and its accompanying appendix: *Chagos Islanders v Attorney General* (n 57) [29]–[49] (Ouseley J).

73 'Somewhere East of Suez' *The Observer*, 22 November 1970.

74 See UKNA, FCO 141/1360, Diego Garcia Construction Schedule 1971–1974.

75 See UKNA, FCO 141/1355, A Douglas Home, Foreign Office Circular: Diego Garcia (14 January 1971) para 2.

76 P Sands, 'Diego Garcia: British–American Legal Black Hole in the Indian Ocean?' (2009) 21 Journal of Environmental Law 113, 114.

Indian Ocean. In the aftermath of the 9/11 attacks, it would be used as a hub for extraordinary rendition flights.[77] The UK's sovereignty over the BIOT accorded it few privileges on Diego Garcia,[78] but successive governments would continue to manage the fall-out amongst its imperial subjects. Following the end of the relocations, the Chagossians undertook a decade-long struggle to get access to meaningful compensation.[79] The Crown paid out £4m in compensation on the basis that the recipients renounced all claims for return to the Chagos Islands.[80] Moreover, despite officials recognising that the Chagossians were entitled to UK citizenship at the time of the expulsions,[81] the islanders were not informed of their ability to apply for passports and general citizenship claims were not recognised until 2002.[82]

The management of colonies for the imperial good

Colonialism involves an assertion of dominance, both of the metropolis over the colony and the settler over the native. This much was evident to Cicero when he considered republican Rome's control over Marseilles: '[e]ven though our clients the people of Marseilles are ruled with the greatest justice by chosen leading citizens, that condition of the people still involves a form of slavery'.[83] The effect of this power imbalance, simultaneously underpinning and undermining imperial relationships, is often magnified by an empire's need to accommodate budgetary and security concerns.[84] These tensions are prominent in the UK's treatment of the Chagossians. Before we examine the courtroom battles over the Chagossians' treatment, we must therefore account for the conflicting narratives of empire to which those cases would give expression. This conflict centres on a liberal ideal of good order and governance of a colony, civilisation coming through the application of a higher (European) legal order, and a utilitarian principle of governance that ensured a colony's resources could be exploited for the benefit of the empire at large. The irony remains that the Chagossians were expelled as part of a wider policy driven by anti-imperialism and cost-saving.[85] Within five years of the start of construction at Diego Garcia, UK bases in the Maldives, Singapore and Malaysia all closed.[86] The Wilson and Heath governments were all too aware that the USA was ultimately assuming the cost of

77 See *Bancoult (No 2)* (n 11) [35] (Lord Hoffmann).

78 With UK rights over the territory limited to consultation, the first Royal Navy representative at the base found that the extent of UK sovereignty ran to disputing whether the layout of buoyage in the lagoon should be in accordance with UK or US standards. See UKNA, FCO 141/1360, Lt-Cdr J Canter (RN) to J R Todd (BIOT Administrator) (21 March 1972).

79 The full story of the Chagossians' fight for compensation, spearheaded by the Vencatassen claim issued in 1975 and resolved in 1982, is beyond the scope of this article. See Allen (n 35) 11–12.

80 See *Chagos Islanders v Attorney General* (n 57) [490]–[491] (Ouseley J).

81 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to E J Emery (Pacific and Indian Ocean Department, FCO) (13 January 1971) para 2.

82 British Overseas Territory Act 2002, s 6. See *Chagos Islanders v Attorney General* (n 57) [448] (Ouseley J).

83 M T Cicero, *On the Commonwealth and On the Laws* J E G Zetzel (ed) (CUP 1999) 19.

84 In the aftermath of the First World War, as the British Empire was expanding in the Middle East, the then Foreign Secretary Arthur Balfour noted caustically that for all the talk of 'advantage to the natives [and] advantage to our prestige . . . money and men I have never seen referred to, and they seem to me to be the governing considerations'. British Library, India Office Records, Curzon Papers (Mss Eur F112/274), Eastern Committee Minutes 43 (16 December 1918).

85 See J Pickering, 'Politics and "Black Tuesday": Shifting Power in the Cabinet and the Decision to Withdraw from East of Suez, November 1967–January 1968' (2002) 38 20th Century British History 144.

86 See P H Pham, *Ending East of Suez: The British Decision to Withdraw from Malaysia and Singapore, 1964–1968* (OUP 2010).

maintaining the West's strategic interests in the Indian Ocean and could therefore afford to push its own 'demands, desires and whims' with regard to the islanders.[87]

The division between natural and political societies in Thomas Hobbes' *Leviathan*[88] looms large in justifications for the British Empire. Hobbes's state of nature is one in which people are guided by their emotions, preventing effective government by normative structures.[89] Within the state of nature conflict develops between individuals over scant resources. Individuals are free to attack one another for their own safety or a sense of glory,[90] producing conditions of perpetual war 'of every man, against every man'.[91] The state of nature is not completely lawless. Natural laws enable individuals to 'plant, sow, build or possess a convenient seat'.[92] But these natural laws do not provide for effective covenanting, mutual restraint and personal protection.[93] For Hobbes, the state of nature is something that needs to be overcome if an orderly society is to be established. Inhabitants of the state of nature can do so by covenanting amongst themselves to create a Leviathan.[94] Hobbes' Leviathan amounts to a supreme sovereign which has the power to declare war and make peace as it sees fit and to respond to crises in any way it deems necessary. Public safety must be achieved through promulgating laws and establishing institutions which exist for the good of the people.[95] The *salus populi*, or security of the general populous, is thus the primary concern of government in a political society.[96]

Leviathan established a bipolar opposition between two societal orders; the lower order of the state of nature and the higher order of political state.[97] This divide metamorphosed into a point of division between the 'civilised' and 'uncivilised' worlds which would sustain imperial thought into the twentieth century.[98] John Austin identified natural society in the 'savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland'[99] and in the peoples which 'range in the forests or plains of the North American continent'.[100] His contemporary Joseph Chitty endowed the Crown with the qualities and duties of the sovereign Leviathan; 'The Queen has an interest in all her subjects, who rightly

87 Robertson (n 50) 18.

88 T Hobbes, *Leviathan* R Tuck (ed) (CUP 2004) ch 17.

89 N C Lazar, 'Must Exceptionalism Prove the Rule?' (2006) 34 Politics and Society 245, 259.

90 Hobbes (n 88) 87–8.

91 Ibid 87–8.

92 Ibid 86.

93 P Fitzpatrick, *Modernism and the Grounds of Law* (Routledge 2001) 94.

94 Hobbes (n 88) chs 15 and 18. This is the basis for critiques of the theory of social contracts. See S Veitch, 'Doing Justice to Particulars' in E Christodoulidis (ed), *Communitarianism and Citizenship* (Ashgate 1998) 220, 226. See also D Hume, *Essays Moral, Political and Literary* (Liberty Classics 1987) 471, 474.

95 Hobbes (n 88) 240.

96 See R Ullman, 'Redefining Security' (1983) 8 International Security 129, 130.

97 See D Kishik, *The Power of Life: Agamben and the Coming Politics* (Stanford University Press 2012) 24. See also C Shore, 'Inventing the "People's Europe": Critical Approaches to European Community "Cultural Policy"' (1993) 28 Man 779, 782.

98 More subtle distinctions came to overlay Hobbes' dichotomy, whilst reinforcing its basic premise. Henry Maine, for example, distinguished 'primitive law' from the state of nature but maintained that '[t]he rigidity of primitive law . . . has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form'; H Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (John Murray 1861) 77.

99 J Austin, *The Province of Jurisprudence Determined, 2nd edn and Lectures on Jurisprudence* (John Murray 1861) 179. See also, vol II, 258.

100 Ibid vol I, 184.

look to the Crown, today, to the rule of law which is given in the Queen's name, for the security of their homeland within the Queen's dominions.'[101]

Nineteenth-century liberal defences of the British Empire's 'civilising mission' developed from this dichotomy.[102] Until the nineteenth century, liberal thought in the UK was predominantly anti-imperialist. Adam Smith was of the view that trade with a far-flung empire meant higher profits for the few, whilst undermining the UK's overall competitive position in trade with other foreign countries.[103] Both Jeremy Bentham and James Mill regarded the UK's colonies as a major cause of wars with other European powers and a political liability.[104] John Stuart Mill, however, considered that maintaining an empire served the UK's economic and political interests.[105] To soften the centrality of trade and profit motive to the British Empire he also recast the empire as a historically distinctive development.

The younger Mill's view of the nineteenth-century British Empire was necessarily nuanced. The empire was, after all, composed of settler colonies and non-settler dependencies across the Americas, Asia, Africa, Oceania and Europe. Different colonies were governed under different models depending upon their perceived civilisation and the governance arrangements which the imperial authorities had inherited.[106] Mill favoured home rule for colonies that had majority European populations, such as Canada, Australia and New Zealand.[107] For as long as the peoples of Asia and Africa remained unable to govern themselves, however, Mill considered that they would have to remain subject to the benevolent despotism of colonial administrators.[108] The empire's 'civilising mission' was to govern 'uncivilised' peoples and bring improvement to their lives:

> It is already a common, and is rapidly tending to become the universal, condition of the more backward populations, to be either held in direct subjugation by the more advanced, or to be under their complete political ascendancy; there are in this age . . . few more important problems, than how to organise this rule, so as to make it a good instead of an evil to the subject people.[109]

Because they were steeped in the ethos of an advanced political society, the colonial officials dispatched from London to administer conquered or ceded colonies could therefore know and represent the natives better than they could themselves.[110] Their duty to forge

101 J Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Butterworth 1820) 18, 21.

102 See K Mantena, *Alibis for Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010) 22–30.

103 See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* E Cannan (ed) (University of California Press 1976) vol II, 122–3 and 130–2.

104 See J Bentham, 'Emancipate your Colonies' in J Bowring (ed), *The Works of Jeremy Bentham* (Russell & Russell 1962) vol IV and J Mill, 'Colony' in *Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations* (Innes 1828) 32. See also Bell (n 28) 755.

105 E P Sullivan, 'Liberalism and Imperialism: J S Mill's Defense of the British Empire' (1983) 44 Journal of the History of Ideas 599, 605.

106 Ibid 605–06.

107 J S Mill, 'Lord Durham's Return' (1838) 32 *Westminster Review* 254.

108 J S Mill, 'Considerations on Representative Government' in O*n Liberty and Other Essays* J Gray (ed) (OUP 1998) 260. Contemporary international law theorists sustained these imperialistic attitudes; see M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2004) 98–104.

109 Ibid 454. In this regard, Mill followed in the footsteps of his father, who had justified the maintenance of the UK's colonial possessions in India to enable the barbarous natives to achieve a higher stage of civilisation; see J S Mill, *The History of British India* (Baldwin, Cradock & Joy 1817) vol I, 'Preface'.

110 See Bell (n 28) 758.

civilisation and order out of disorder required the importation of the home political society's institutional infrastructure.[111] Administrators confidently usurped existing legal cultures with familiar rules and processes: 'Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.'[112] The New Zealand Constitution Act 1852, for example, gave New Zealand's legislature the power 'to make Laws for the Peace, Order, and good Government of New Zealand, provided that no such Laws be repugnant to the Laws of England'.[113] This formula embedded the 'fundamental principles' of the UK's ancient constitution in the governance arrangements of self-governing colonies,[114] without the need for London's approval for new colonial enactments.[115] Leading liberal imperialists considered the terms of the repugnancy clause to be 'sacramental words'[116] which tied the administration of the whole empire to its underlying 'civilising mission'. Self-governing colonial administrations, however, bridled that this 'vague doctrine' was a recipe for judicial challenges to the validity of their enactments.[117] The Colonial Laws Validity Act 1865 abandoned the traditional formula,[118] declaring that for the provisions of colonial law to be void for repugnancy it would have to run contrary to an imperial statute which extended to the colony.[119] Orders in Council making law for a territory would also have to conform to such overarching statutes.[120]

The London courts were often prepared to set aside even this truncated oversight function in the interests of imperial expediency, developing a broadly utilitarian jurisprudence. In *Nyali Ltd v Attorney General*,[121] for example, the London courts refused to accept a challenge to an exemption for bridge tolls for military traffic in 1950s colonial Kenya. Denning LJ insisted that '[o]nce jurisdiction is exercised by the Crown the courts will not permit it to be challenged'.[122] Despite the banal subject matter of the case, the dispute took place against the backdrop of the Mau Mau rebellion. Without mentioning the rising, the London courts were signalling their disinclination to entertain challenges to abuses of power by the authorities in Kenya.[123] The London courts also developed firewalls within imperial jurisprudence, such as the theory of multiple Crowns, to restrict the ability of colonial subjects to challenge actions taken by colonial authorities as actions of the UK government. In rejecting a legal action against the UK government by the Banabans over their relocation from Ocean Island in 1945, Megarry V-C maintained that 'the government of the United Kingdom was not the government of the Gilbert and Ellice Islands Colony

111 See J Roach, 'James Fitzjames Stephen (1829–94)' (1956) 88(1–2) Journal of the Royal Asiatic Society 1, 6. For an explanation of how the BIOT Courts Ordinance 1983 usurped forgoing private law arrangements on the BIOT, see *Bancoult (No 2)* (HL) (n 11) [154] (Lord Mance).

112 J F Stephen, quoted in E Stokes, *The English Utilitarians and India* (OUP 1959) 302.

113 New Zealand Constitution Act 1852 (15 & 16 Vict c 72), s 53.

114 *Campbell v Hall* (1774) 1 Cowp 204, 209 (Lord Mansfield).

115 W Gladstone HC Deb 21 May 1852, vol 121, col 958.

116 J Morgan, 'Legal and Political Unity of the Empire' [1914] 30 Law Quarterly Review 393, 397.

117 *Liyanage v The Queen* (1967) 1 AC 259 (PC), 284, quoting with approval K C Wheare, *The Statute of Westminster and Dominion Status* (4th edn OUP 1949) 75–7.

118 Colonial Laws Validity Act 1865, s 3 (28 & 29 Vict c 63).

119 Ibid s 2. The ethos of the reform is summed up in the words of one colonial secretary; it was 'more important to a country to be self-governed than well-governed'; L Harcourt, HC Deb 12 February 1914, vol 58, col 370.

120 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2006] EWHC 1038 (Admin); [2006] ACD 81 at [143] (Hooper LJ). See I Hendry and S Dickson, *British Overseas Territories Law* (Hart 2011) 69.

121 *Nyali Ltd v Attorney General* (1956) 1 QB 1 (CA) and [1957] AC 253 (HL).

122 Ibid (CA) 15.

123 For an alternate reading of the decision, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] 3 WLR 768; [2007] EWCA Civ 498, [39] (Sedley LJ).

at any material time'.[124] This approach to dividing the Crown would be further extended to the legislation of the Crown in Council in *Quark Fishing*.[125]

Liberal imperialism can therefore be seen vying with utilitarian conceptions of efficient colonial administration, and the demands of colonial self-governance, to inform the direction of imperial governance. Many leading nineteenth-century liberal imperialists were also avowedly utilitarian in their outlook, an inconsistency only revealed when these doctrines came into conflict. Both approaches can be traced to Hobbes' binary distinction between natural and political societies. Utilitarianism's prioritisation of the common good was enthusiastically incorporated into a model of imperial administration whereby colonies could justifiably be used to serve the ends of the imperial whole (directed by the UK's needs as the 'hub' political society). Parliamentarians appreciated that defence powers to 'raise fleets and armies and build forts' were exercised by the Crown 'for the government of the British empire as one body'.[126] Adam Smith maintained that colonies could justifiably be required to contribute to imperial defence: 'public debt has been contracted in the defence, not of Great Britain alone, but of all the different provinces of the empire'.[127] Thus in the early twentieth century the Earl of Cromer defended the benefits which the UK derived from its subject colonies:

> An Imperial Power naturally expects to derive some benefits for itself from its Imperialism. There can be no doubt as to the quarter to which the Romans looked for their profit. They exacted heavy tributes from their dependencies . . . England has regarded trade with India, and not tribute from India, as the financial asset which counterbalances the burden of governing the country.[128]

Despite these protestations of the centrality of trade to the British Empire, colonial possessions were, and are still, prima facie expected to contribute to the imperial whole. The UK government's denial, in the early 1990s, that it had any 'selfish strategic or economic interest' in Northern Ireland was significant precisely because it set this region apart from this imperial norm.[129] When the imperial order and security were at issue, Victorian imperialists broadly accepted 'that the empire could not everywhere and all the time be governed by recourse only to civilian legal norms'.[130] Amidst uprisings against imperial rule in the latter half of the nineteenth century, liberal imperialism, for all of its rhetorical force, began to lose ground to the rival accounts of empire, including the 'scientific' accounts of racial superiority unleashed by social Darwinism.[131]

In summary, colonial administrators under London's direction considered themselves better placed than the Chagossians to administer the BIOT and maximise its benefit for the 'undivided'[132] *imperium*. The islanders' expulsion could be justified so long as it was cloaked in legal authority in a hat tip to liberal imperialism, as their contribution to the realisation of imperial security. As Foucault recognised, the particular security pressures of the twentieth century reinforced broad conceptions of the common good: '[w]ars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence

124 *Tito v Waddell* (n 52) 255.

125 See *Quark Fishing* (n 4), [19] (Lord Bingham) and [64] (Lord Hoffmann).

126 W Molesworth, HC Deb 6 May 1850, vol 110, cols 1172 and 1176.

127 Smith (n 103) 483.

128 E Baring, *Ancient and Modern Imperialism* (Longmans 1910) 41.

129 See E Mallie and D McKittrick, *Fight for Peace: Secret Story behind the Irish Peace Process* (William Heinemann 1996) 107.

130 R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2005) 486.

131 See Mantena (n 102) 37–55 and Bell (n 28) 756.

132 Ekins (n 26) 404.

of all'.[133] Under the Cold War's impetus, the militarisation of island colonies was pursued on the basis not merely of imperial good, but of the wider interests of the Western military alliance. The particular harm suffered by the Chagossians in their expulsion from their homeland was, in the view of the Wilson and Heath governments, more than offset by the wider benefits to imperial defence. As soon as this conclusion was reached, and the Crown's allotted compensation provided, the only avenue by which the islanders could challenge these dispensations was in a plea to the 'conscience' of the imperial order embodied by the London courts.

The Chagos Islands cases as imperial jurisprudence

In 2000 Oliver Bancoult, a native Chagossian and leader of the Chagos Refugees Group, brought a judicial review claim challenging the legality of the Immigration Ordinance 1971, issued under the authority of the BIOT Order 1965, which prevented any return by the Chagossians to their homeland.[134] The Crown's effort to claim that the Immigration Ordinance was created by the government of BIOT and therefore outside the jurisdiction of the courts of England and Wales was decried by Laws LJ as 'an abject surrender of substance to form'.[135] The Ordinance was issued at the direction of the UK government and as such the court had the ability to review its validity and the validity of decisions made subject to it.[136] The islanders' difficulty, however, remained that the BIOT had been created under the royal prerogative and the impugned actions were exercises of prerogative powers. Any effort to review such decisions seemed to conflict with the general injunctions against the courts' reviewing exercises of the prerogative in the spheres of foreign policy and national security.[137]

In the Divisional Court Bancoult's legal team made explicit the claim that the exiling of the Chagossians was void under chapter 29 of Magna Carta. Magna Carta, which 'followed the flag' to the BIOT,[138] was the centrepiece of the UK's legal inheritance to its colonies touted by liberal imperialists. As a statute of the imperial Parliament, the claimants argued that it could be relied upon as the basis of a challenge to the validity of a colonial law under the terms of the Colonial Laws Validity Act 1865. Chapter 29 states that no freeman shall be exiled except by the law of the land and had long been considered 'fatal to any royal claim to expel obnoxious subjects from the realm without trial and verdict'.[139] Laws LJ considered that this argument, with its capacity to circumvent restrictions on the review of prerogative powers, possessed a 'beguiling simplicity'.[140] Ultimately, however, he recognised that if a lawmaker has the authority to make a law removing the islanders, then actions pursuant to that law cannot be repugnant for breaching the Magna Carta.[141] This conclusion did not mean that he was immune to the allure of the Magna Carta argument. He instead heralded it as the jurisdiction's first

133 M Foucault, *Histoire de la sexualité 1: La Volonté de Savoir* (Gallimard 1976) 180.

134 Immigration Ordinance 1971, s 4.

135 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067; [2000] EWHC 413 (Admin), [28].

136 Ibid [28].

137 *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418 (Lord Roskill).

138 *Bancoult (No 1)* (n 135), [34].

139 W Craies, 'Compulsion of Subjects to Leave the Realm' [1890] 6 Law Quarterly Review 388, 393.

140 *Bancoult (No 1)* (n 135) [31].

141 Ibid [35]. Numerous examples exist of colonial administrators using emergency powers to exclude individuals from a particular colony on security grounds even when they are 'belongers', including the forced removal of Archbishop Makarios from Cyprus in 1956. See A W B Simpson, 'The Exile of Archbishop Makarios III' (1996) 4 European Human Rights Law Review 391.

proclamation of the rule of law, requiring the authorities to establish that the expulsion of the Chagossians was 'done according to law'.[142]

The BIOT Commissioner was appointed under the prerogative to govern the territory severed from Mauritius, holding powers to make law for 'peace, order and good government' on the islands.[143] It was under these powers that the islanders had been exiled and the military base built and it was the supposed extent of these powers which concerned the Divisional Court. Powers to be exercised for the 'peace, order and good government' of a colony have a long history and previous authority had strongly indicated that the phrase was to be read generously.[144] Parliament's statutes provided the only limitations historically recognised upon such powers. Laws LJ, however, ruled that while the power to act for peace, order and good government 'may be a very large tapestry . . . every tapestry has a border'.[145] Not even these broad powers were capable of conferring upon a BIOT Commissioner the powers to exclude the Chagossians from their homeland. The Chagossians, he declared, 'are to be *governed*: not removed'.[146] In ruling the islanders' exclusion to be *ultra vires* he side-stepped the national security argument in play, stating that the reasons of military security said to underpin the Commissioner's policy were 'good reasons certainly', but that they were 'not reasons which may reasonably be said to touch the peace, order and good government of BIOT . . . whether the test is to be found in our domestic public law . . . or in a more, or less, intrusive approach'.[147] As such, the Divisional Court held that 'peace, order and good government' was a formula grounded in the vision of liberal imperialism which could not be reconciled with the exclusion of a people from their homeland for extraneous purposes.

Laws LJ's judgment challenged and restricted the Crown's prerogative power, evoking the spirit of the British Empire as an empire of law in which decisions about colonies and their populations must be made in accordance not simply of bare legal authority, but with extended principles of legality. Adam Tomkins trumpeted the judgment as a 'bold and welcome' example of the courts of England and Wales countering the scandals and excesses of empire in the time-honoured manner:

> [A] case decided on what might be called traditional administrative, rather than newer constitutional, grounds: a relatively straightforward case of legality and vires, rather than one of rights and neo-constitutional review.[148]

Following the Divisional Court's judgment in *Bancoult (No 1)*, the Labour government gave the Chagossians a theoretical right to return to the islands other than Diego Garcia. The then Foreign Secretary Robin Cook accepted the ruling and issued the Immigration Ordinance 2000 which repealed the 1971 ordinance in its entirety.[149] Return, however, depended upon a series of feasibility studies concerning the resettlement of the Chagos Islands by the Chagossians. In 2002, after receiving the findings of the first study, the government announced that resettlement of the outer islands was not feasible. In 2004 two Orders in Council to this effect were issued under the royal prerogative on the basis that life

142 *Bancoult (No 1)* (n 135) [36].

143 BIOT Order 1965 SI 1965/1920, s 11(1).

144 *Riel v R* (1885) 10 App Cas 675 (PC).

145 *Bancoult (No 1)* (n 135) [55].

146 Ibid [57] (emphasis in original).

147 Ibid.

148 A Tomkins, 'Magna Carta, Crown and Colonies' [2001] Public Law 571, 574–5.

149 From his election to Parliament Robin Cook questioned ministers on the militarisation of Diego Garcia; see HC Deb 9 July 1975, vol 895, col 602.

there would be too precarious to be sustained and that a depopulated Diego Garcia remained necessary for defence purposes.[150] As a form of primary legislation, at least for the purposes of the Human Rights Act 1998 (HRA), these Orders in Council could not be overturned on human rights grounds.[151] The Crown's intention was to create a legal block, so that the Divisional Court's decision that the expulsions were invalid would not prevent the Chagossians' continued exclusion from the islands.

Bancoult challenged the legality of these new Orders in Council, claiming that only Parliament could authorise the removal of the Chagos Islanders from BIOT. *Bancoult (No 2)*[152] might have concerned the new arrangements instituted by the Crown in 2004, but the islanders considered this a continuation of the historic injustices they had suffered. The Crown regrouped from its earlier setbacks, with Laws LJ being accused of 'historical amnesia' in his decision that the BIOT Commissioner's powers were limited to securing 'peace, order and good government' for the Chagossians; the UK's Sovereign Base Area in Cyprus indicated that other colonial possessions have been maintained for the purpose of supporting the UK's defence interests.[153] This assault on the Divisional Court's reasoning in *Bancoult (No 1)* exposed the divide between the liberal and utilitarian rationales for empire. The liberal ideal of maintaining good governance could not be resolved with the utilitarian need to exploit a colony and its resources for the good of the empire. Nonetheless, both the Divisional Court and the Court of Appeal accepted that use of the prerogative power of colonial governance did not enjoy generic immunity from judicial review.[154] In a judgment that owed much to Laws LJ's decision in *Bancoult (No 1)*, the Court of Appeal accepted that there was nothing in the character of the Orders in Council which made them non-justiciable on the grounds that their subject matter concerned national security:

> [W]hile a natural or man-made disaster could warrant the temporary, perhaps even indefinite, removal of a population for its own safety and so rank as an act of governance, the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective wellbeing cannot have that character and accordingly cannot be lawfully accomplished by use of the prerogative power of governance.[155]

A measure enacted to protect the security demands of the US military, for Sedley LJ, therefore 'lies beyond the[se] objects, whether expressed in terms of peace, order and good government or in terms of the legitimate purposes of colonial governance'.[156]

By contrast the House of Lords dwelt at length on whether its jurisdiction was effectively ousted by the Colonial Laws Validity Act 1865. Ultimately, only three of the five judges considered that the Orders in Council could even be assessed on their own merits. Lords Rodger and Carswell were of the opinion that the courts had no power to inquire into whether colonial exercises of the prerogative were in fact for the peace, order and good government of the inhabitants of the territory.[157] The remaining judges were willing to review exclusion under the prerogative, with Lord Hoffmann recognising that the firewalls

150 BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004.

151 HRA, s 21(1)(f).

152 *Bancoult (No 2)* (HC) (n 120).

153 Ibid [116].

154 *Bancoult (No 2)* (CA) (n 123) [46] (Sedley LJ).

155 Ibid [67].

156 Ibid [69].

157 *Bancoult (No 2)* (HL) (n 11) [109] (Lord Rodger) and [126] (Lord Carswell).

around colonial administration which he had helped to extend in *Quark Fishing*[158] were misplaced.[159] Having gone to such lengths to open up a space for judicial oversight, however, he placed considerable emphasis upon the policy concerns at play. He noted that it was 'quite impossible to say' that excluding the islanders from the BIOT was unreasonable or an abuse of power.[160] This is because prerogative powers governing a colony can be used in the interests of the Queen's undivided realm. He further rejected the proposition that, in ruling a colony under the prerogative, the authorities had to have regard only, or even predominantly, to its inhabitants' interests:

> Her Majesty in Council is . . . entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled . . . to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians.[161]

Analysed from a familiar public law perspective, the majority's characterisation of 'the colonial governance power as a plenary one' may well seem 'perplexing' in the leeway it gives to the executive.[162] The majority did not carefully disaggregate the separate issue of the power to exile of a people, unlike the dissents and their 'meticulous examination of the legal principles which justify the grant by the common law to one of power over another'.[163]

The majority judgments are not, however, an aberration. They might well be pragmatic in their effect[164] and parts may be under-reasoned,[165] but they remain modern manifestations of imperial jurisprudence. The Crown considered the establishment of a base on Diego Garcia necessary for imperial defence. The ongoing exclusion of the islanders amounted to their contribution to the imperial good. Lord Hoffmann openly acknowledged that the security uncertainties of the Cold War and its aftermath require a collective approach to defence which must be maintained even if it causes specific hardship.[166] In a conflict of interest between the imperial whole and individual colonies, he considered that the government is entitled to 'prefer the interests of the United Kingdom'.[167] The House of Lords decision in *Bancoult (No 2)* cannot therefore be castigated for neglecting legal principle and developing the law in a manner which went 'against the express words of the very authorities they cited in support of their decision'.[168] The utilitarian strands of the imperial legal framework are more than capable of sustaining the majority's position. As Denning LJ declared in *Nyali*, it was impossible to transplant the common law to the colonial context and 'expect it to retain the tough character which it has

158 See *Quark Fishing* (n 4) [64].

159 *Bancoult (No 2)* (HL) (n 11) [48].

160 Ibid [58].

161 Ibid [49].

162 Elliott and Perreau-Saussine (n 12) 720.

163 Arvind (n 14) 138.

164 Arvind, indeed, characterises the pragmatism as 'untrammelled and unmitigated'; ibid 151.

165 Beyond excluding torture, Lord Hoffmann did not elaborate any 'red lines' in terms of the islanders' interests that cannot be crossed in pursuit of the imperial good. See Elliott and Perreau-Saussine (n 12) 720.

166 *Bancoult (No 2)* (HL) (n 11) [57].

167 Ibid [49].

168 Arvind (n 14) 135.

in England'.[169] Despite this 'triumph' of utilitarian imperialism, the tension between the rationale behind empire continued. Judicial review principles might be traduced in the colonial context but the liberal justification of empire remained, in its most bare form, in place. The exclusion of the Chagossians from their territory was sanctioned in law. In return for their homeland they received the majesty of due legal process.

The Chagossians' legal battle continues

Elliott and Perreau-Saussine called *Bancoult (No 2)* 'pyrrhic public law',[170] for the majority's willingness to circumvent the ouster clause contained in the Colonial Laws Validity Act 1865 and review the continued exclusion of the Chagossians, but not to ultimately uphold their claims and strike down the Orders in Council. The positive effect for public law of the court's recognition of its 'jurisdiction to review the limits of the prerogative of colonial governance' is all but undone by the majority's failure to constrain prerogative lawmaking on the basis of 'a fundamental right of abode'.[171] This leaves us to question, however, whether the outcome for the Chagossians would really have been any better had the judicial review succeeded. Even if the courts had denied the lawfulness of their exclusion as a matter of immigration law, Sedley LJ recognised that 'the Crown has rights as landowner which are capable, for the present, of answering any attempt to resettle there'.[172]

Whilst a majority of Law Lords recognised that the BIOT is covered by a governance order informed by substantive principles, none of the accounts presented an order comparable to those of the UK's domestic jurisdictions. Whilst Lords Bingham and Mance would have struck down the Orders in Council, neither considered that the ECHR extended to the Chagos archipelago.[173] As such, their judgments recognised 'no legal obligation to facilitate this entry or presence'.[174] Without the full panoply of internationally recognised rights protections in play, the islanders ultimately enjoyed no legal avenue by which to assail the Crown's freehold, which Lord Mance recognised could, even had his judgment been in the majority, 'prevent any private initiative to settle'.[175] Well might he assert that the 'symbolism' of accepting the islanders' claim would have remained important notwithstanding this outcome,[176] but the benefit might have been more for the court's conception of its role than for the islanders.

With the sympathy of the Law Lords ringing in their ears, the islanders proceeded to Strasbourg in what seemed like a final effort to unlock the human rights grounds which could provide a substantive basis for challenging their exclusion. From the outset, the omens were not good. The ECHR, drafted in the aftermath of the Second World War and ratified by the UK at a time when the British Empire was rapidly disintegrating, was nonetheless crafted in such a way as to facilitate the management of overseas empires by the colonial powers of Europe. Article 56 ECHR requires contracting states to explicitly extend the ECHR's protections to colonised territories, something which the UK did not

169 *Nyali Ltd* (n 121) 16.

170 Elliott and Perreau-Saussine (n 12) 697.

171 Ibid 722.

172 *Bancoult (No 2)* (CA) (n 123) [71] (Sedley LJ).

173 *Bancoult (No 2)* (HL) (n 11) [68] (Lord Bingham) and [142] (Lord Mance).

174 Ibid [160] (Lord Mance).

175 Ibid [160].

176 Ibid [172].

do with regard to the BIOT.[177] Similarly, when the UK ratified the International Covenant on Civil and Political Rights (ICCPR)[178] it 'reserved the right not just to apply the Convention separately to each of the territories of the UK and Colonies, but also to apply such immigration legislation in each of its territories as it thought fit'.[179] The House of Lords had previously ruled that the ECHR's ambit was not extended simply because, in reaching a decision with human rights consequences, 'the contracting state government attached weight primarily or solely to the interests of the contracting state as distinct from the interests of its overseas territory'.[180]

From the 1970s onwards the UK government's legal advisors were confident that the administration of the BIOT was insulated from an ECHR application.[181] And so it was to prove. For all that the European Court abhorred 'the callous and shameful treatment' of the Chagossians,[182] it was forced to accept that the ECHR offered no refuge, as it was 'incontrovertible that at no time was the right of individual petition extended to BIOT'.[183] Moreover, '[a]nachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice'.[184] The court consoled itself with the conclusion that compensation claims over expulsion had been 'raised in the domestic courts and settled, definitively' and that all subsequent cases amounted to an effort by the islanders 'to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention'.[185]

Even under the ECHR, therefore, 'the needs of the inhabitants of a colony are often secondary to that of the colonial power'.[186] This observation is particularly pertinent when considered in light of the April 2010 decision by the UK government to establish a Marine Protected Area (MPA) around the Chagos archipelago, ostensibly to protect the environment and advance scientific research.[187] In negotiations with the US government, revealed during the 2010 WikiLeaks release of US diplomatic cables, Colin Roberts (the then BIOT Commissioner) talked up the ancillary security benefits of establishing the MPA:

> Roberts stated that . . . there would be 'no human footprints' or 'Man Fridays' on the BIOT's uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former

177 The UK had extended the ECHR to Mauritius and so it applied to the Chagos Islands up until the separation of the BIOT from the parent colony in November 1965, but as the European Court would note, this separation occurred before the UK ratified the right of individual petition (applying to the UK only) in January 1966; *Chagos Islanders v UK* (2013) 56 EHRR SE15, [61]. Nor was the BIOT covered when individual petition was extended to some overseas territories in September 1967.

178 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

179 *Chagos Islanders v Attorney General* (n 57) [380] (Ouseley J).

180 *Quark Fishing* (n 4) [42] (Lord Nicholls).

181 UKNA, FCO 31/2193, J D P Bickford (FCO Legal Adviser) to G E Gammie (Treasury Solicitors' Department) (4 August 1977) paras 14–18.

182 *Chagos Islanders v UK* (n 177) [83].

183 Ibid [62]. The court refused to accept that the fact that the key decisions were undertaken in the UK affected this outcome; [65].

184 Ibid [74].

185 Ibid [83].

186 C Monaghan, 'The Chagossians Go to Strasbourg: Convention Rights and the Chagos Islands – *Chagos Islanders v United Kingdom* (Application No 35622/04)' [2013] European Human Rights Law Review 314, 324.

187 BIOT Commissioner, Proclamation No 1 of 2010. For the text of the UK Foreign Secretary's press release, 'instructing' the BIOT Commissioner, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2013] EWHC 1502 (Admin), [73] (Richards LJ).

> residents . . . [because] the UK's 'environmental lobby is far more powerful than the Chagossians' advocates'.[188]

He added "'[w]e do not regret the removal of the population" since removal was necessary for the BIOT to fulfill [sic] its strategic purpose'.[189] The analysis of this proposal by US Embassy officials suggested that the US government was increasingly concerned about the possibility of resettlement.[190] The cable release was an unexpected boon for the Chagossians' legal strategy, allowing them to mount a fresh challenge to UK policy on the basis that the MPA had been established on the basis of an improper motive.[191] The MPA's hasty unveiling, barely a month before a general election, accorded with US government concerns that should the Conservatives take office they might 'go soft' on the Chagossians.[192] In the course of the judicial review hearings, Roberts accepted that he had advanced the MPA on the basis that 'there should be no human footprint in the Chagos Archipelago other than on Diego Garcia' and that he had conveyed the UK government's support for an MPA on the basis that it 'would create a serious obstacle to resettlement'.[193]

The Chagossians claimed that this leaked record revealed that an improper motive, preventing them from ever resettling the islands, explained the foundation of the MPA rather than the environmental concerns which provided the public basis for its creation. The crux of such a challenge is that powers conferred for public purposes 'can validly be used only in the right and proper way',[194] with the difficulty where mixed motivations are in play being for the courts to assess whether the valid purpose (here environmental protection) is dominant.[195]

Neither the Divisional Court nor the Court of Appeal[196] would consider the substance of this claim in any depth, with both devoting the bulk of their attention to whether the leaked cables were even admissible as evidence. Under the Diplomatic Privileges Act 1964 the UK maintains that official correspondence of diplomatic missions such as the US Embassy are 'inviolable'.[197] The Divisional Court accepted that this provision prevented the WikiLeaks cables from being admissible evidence and curtailed any cross-examination of FCO officials on the basis of the cables.[198] Even though the cables were in the public domain, the government maintained that the courts should close their minds to them entirely, as consideration 'would be damaging to international relations and defence'.[199] The Court of Appeal, concerned that this stance opened the courts to ridicule, recognised that the cable should have been admitted:

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188 WikiLeaks, UK–US Official Meeting on BIOT (15 May 2009) para 7 <http://www.guardian.co.uk/world/us-embassy-cables-documents/207149>.

189 ibid para 8.

190 ibid para 15.

191 Claims regarding the inadequacy of the consultation process and EU law provided ancillary grounds for review which will not be considered in this article.

192 WikiLeaks (n 188) para 15.

193 *Bancoult (No 3)* (DC) (n 187) [59] (Richards LJ). Roberts, however, 'adamantly denied making any reference to "Man Fridays".' In this assertion he was supported by the other FCO official present at the meeting, Joanne Yeadon (BIOT Administrator), at [60].

194 *R v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] AC 858, 872 (Lord Bridge).

195 See *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, [144] (Lord Scott).

196 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] EWCA Civ 708.

197 Diplomatic Privileges Act 1964, s 2(1), incorporating the Vienna Convention on Diplomatic Relations (14 April 1961) 500 UNTS 95, Articles 24 and 27.

198 *Bancoult (No 3)* (DC) (n 187) [51] (Richards LJ).

199 *Bancoult (No 3)* (CA) (n 196) [91] (Lord Dyson MR). See Official Secrets Act 1989, s 6.

> [T]he documents were sent from the US mission in London to Washington with the consent of the sending state and were communicated to the world by a third party. Mr Bancoult was not implicated in the removal of the documents from the mission or their publication to the world.[200]

Despite this concession the court refused to accept that the Divisional Court's stance had impeded the presentation of the Chagossians' case. Nor did they move beyond a cursory consideration of their claim of improper motive.[201] The judges' main concern seemed to be to avoid dwelling, if at all possible, on the content of the cables. Rather than treating them as affirming the utilitarian dominance of the security rationale underpinning the BIOT's existence, and that environmental concerns provided a convenient ruse for adding a further layer of difficulty to the Chagossians' return, the Divisional Court described this account as being an 'unconvincing plot for a novel'.[202] Given all the history of official duplicity surrounding the BIOT, such assertions mark a singular failure of judicial imagination. In any event, an improper motive on the part of officials disclosed by the cables could not, both courts found, be imputed to the Foreign Secretary who took the ultimate decision to establish the MPA.[203] The courts took David Milliband's acknowledgment that the MPA would be reconsidered if the Chagossians' application succeeded before the European Court as important evidence of his good faith.[204] Given the insurmountable procedural hurdles faced by this application, this supposed concession should have been dismissed as mere window dressing. No judge attempted to explain how the WikiLeaks cable (broadly accepted as accurate by Colin Roberts' evidence, with the exception of the 'Man Friday' comment) fits within this account.

These two decisions are markedly different in tone from previous *Bancoult* judgments. Both open with an identical formula; that this case 'is a further chapter in the history of litigation arising out of the removal and subsequent exclusion of the native population from the Chagos Archipelago'.[205] This formula at once fails to blame any party for the 'removal and subsequent exclusion' and creates the impression that the islanders have overstayed their welcome in the Royal Courts of Justice. The islanders have gone from being claimants entertained with sympathy to being viewed with suspicion as serial litigants.[206] Both courts studiously avoid expressing any sympathy towards the Chagossians, lest such statements be employed outside the courtroom as part of a strategy to embarrass the UK government into concessions.[207] Both courts even try to rewrite the history of the dispute and litigation in an effort to mitigate any embarrassment. A clear signal that the Divisional Court regarded the Chagossians as having been over-indulged from the outset is the description of the

200 *Bancoult (No 3)* (CA) (n 196) [63].

201 Ibid [88].

202 *Bancoult (No 3)* (DC) (n 187) [76] (Richards LJ).

203 Ibid [74] (Richards LJ) and *Bancoult (No 3)* (CA) (n 196), [91] (Lord Dyson MR).

204 *Bancoult (No 3)* (DC) (n187) [75] (Richards LJ), repeated at *Bancoult (No 3)* (CA) (n 196) [79] (Lord Dyson).

205 *Bancoult (No 3)* (DC) (n 187) [1] (Richards LJ) and *Bancoult (No 3)* (CA) (n 196) [2] (Lord Dyson MR).

206 Although outside the scope of this article, the Permanent Court of Arbitration (PCA) has ruled that the MPA's creation was illegal. Although the majority did not dwell on the WikiLeaks cables, concluding that the UK's motives in establishing the MPA had not been improper, two judges found that the UK's motives were improper and supported an evaluation of the cables; *In the Matter of the Chagos Marine Protection Area Arbitration (Mauritius v UK)* (Award of 18 March 2015) [494], [542]–[543], and the Dissenting and Concurring Opinion of Judges Kateka and Wolfrum [89] <www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899>.

207 See, for example, the discussion of this 'apparently interminable litigation' in the House of Lords in 2011: Earl of Selbourne, HL Deb 10 March 2011, vol 725, col 1785.

Bancoult (No 1) challenge as being 'long out of time'.[208] If only, the court seems to be suggesting, time limits had been observed from the outset, then this whole train of litigation would never have been set in motion. Flying in the face of the repeatedly traversed record of the expulsion, the Court of Appeal's factual history of the dispute blandly asserts that the Chagossians 'left' the islands by the end of May 1973, as if there was an element of choice in the matter.[209] Once the London courts consider imperial justice to have been done, woe to the colonial litigant who dares to ask for more.

Conclusion: the phoenix and the ashes

Considered in isolation, the description of the Chagossians as 'Man Fridays' at the time of their expulsion and its association with the MPA's creation fully 40 years later suggests that the whole saga can be characterised by UK officialdom's persistent callous indifference towards the islanders. When the fresh archival materials are considered as a whole, however, official accounts of the Chagossians' expulsion display widespread despondency and uncertainty over BIOT policy. Many officials, reflecting liberal imperialist views, regretted and even resented the manner in which the Chagossians were 'chucked out of UK territory'.[210] The repeated delays upon the expulsion policy, which was only executed some four years after travel restrictions to the BIOT had been initiated, reflect the protracted efforts by officials on the ground to circumvent demands that the entire archipelago be free of population. Even when Sir Bruce Greatbatch characterised the islanders as 'untrainable', he did so with the aim of slowing the expulsion process.[211] If the Man Fridays epithet illustrates London officials' attitudes of imperial and even racial superiority over the Chagossians, then this internal resistance nonetheless indicates the extent to which many colonial administrators could not reconcile the expulsion policy with the concomitant obligations they felt towards a colonised population. Monetary compensation would ultimately be provided, even if so belatedly as to suggest that it was intended more to assuage the authorities' concern for the precepts of liberal imperialism than to provide meaningful recompense.

The consistent stonewalling of the Chagossians' claims, however, may point to a conclusion that either the Crown considers its obligations fulfilled and/or that the belief in liberal imperialism, so pervasive amongst the last generation of administrators of the 'old' empire, no longer holds much sway over policymakers. Colonies and dependencies continue to be viewed more as resources to be exploited for the good of the undivided (and UK-centred) realm over and above the needs of their individuated populaces. Responsible government, for Richard Ekins a theory 'central to the imperial constitution',[212] becomes a matter of form rather than substance. And yet, despite the defeat of successive waves of the Chagossians' litigation, these legal challenges were not without positive impact. The discovery processes in these cases highlighted the injustices inherent in the BIOT's administration,[213] leading the UK Coalition government to commission a 2014 study which

208 *Bancoult (No 3)* (DC) (n 187) [7] (Richards LJ).

209 *Bancoult (No 3)* (CA) (n 196) [4] (Lord Dyson MR).

210 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to A B Urwick (Defence Department, FCO) (2 November 1970) para 5.

211 UKNA, FCO 141/1417, B Greatbatch (Governor of the Seychelles and BIOT Commissioner) to D A Scott (FCO) (25 March 1971) paras 2 and 8.

212 Ekins (n 26) 401.

213 Documents released through the domestic court cases formed the backbone of historical evidence in the arbitration over the MPA before the PCA; *Mauritius v UK* (n 206) [35].

accepted the feasibility of resettlement centred upon Diego Garcia.[214] With the 50-year window for the renewal of the base arrangements providing an opportunity for maintaining pressure on the state parties, the Chagossians and the US military could well be persuaded to share the territory (especially as Mauritius, if it gained sovereignty over the archipelago, would not oppose the maintenance of the US base).[215] Such a move would not change the significance of the BIOT for defence, but it would potentially bring its administration into alignment with other colonies which continue to serve 'military purposes',[216] including Ascension Island, the Falkland Islands and Gibraltar.

If the resettlement report holds out the potential for a phoenix, then what of the ashes? The litigation challenging the legality of the expulsions cannot, in the final analysis, be reduced to a clash between pragmatic formalism and the fundamental principles of public law. Even if public law principles had ultimately carried the day for the Chagossians, as they had in the Court of Appeal (and may yet in the Supreme Court),[217] the Crown could continue to exercise its private law rights of property ownership over the islands to exclude the islanders. Nor do these decisions mark a clash between imperialism and anti-imperialism within the highest courts of England and Wales. No matter how favourably disposed individual judges might have been towards the Chagossians, no judge was able to sunder the imperial relationship underpinning this case. Even the European Court found its jurisdiction circumscribed by the imperial context in which the ECHR was created. Instead, the choice in these cases was between liberal imperialism and utilitarian conceptions of the imperial common good. The Chagossians expulsion from their homeland was driven by an imperial account of the common good which prioritised the interests of the imperial whole over the needs of a particular group of subjects; '[l]ooming over all considerations were the twin issues of prohibitive cost and the United Kingdom's interests in co-operation with an important ally in maintaining a secure defence installation'.[218] This vision of empire was contested, in the course of both official discussions and court cases, by liberal imperialism, with its emphasis in the Chagossians' context upon imperial stewardship over a precarious island community which would face supposedly insurmountable difficulties in exercising self-governance.

For centuries the UK's domestic courts acted as an important safety valve within the empire, being seen as the last refuge for victims of imperial injustices.[219] In the *Bancoult* litigation, however, the judges tasked with deciding upon this particular late-imperial injustice were trapped in a double bind. Many of them also found that the empire's legal architecture prevented them from addressing the islanders' claims. Faced with this realisation, judges like Lord Rodger and Lord Carswell sympathised with the 'disgraceful' treatment of the islanders,[220] even tacitly apologised for their judgments,[221] but ultimately

214 KPMG, *Draft Report: Feasibility Study for the Resettlement of the British Indian Ocean Territory* (13 November 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301530/BIOT_Resettlement_Study_Final_Inception_Report_07-04-14.pdf.

215 A resettlement of 1500 Chagossians over six years would be estimated to cost £413.9m: ibid 70.

216 *Bancoult (No 2)* (HL) (n 11) [157] (Lord Mance).

217 The Supreme Court reconsidered the House of Lords decision in *Bancoult (No 2)* in June 2015, assessing whether the decision should be set aside on the basis of the Foreign Secretary's failure to disclose documents relating to the 2002 resettlement feasibility study. Judgment was pending as of September 2015 when this article was finalised. See Owen Bowcott, 'Chagos Islanders ask Supreme Court to overturn House of Lords Decision' *The Guardian*, 22 June 2015 <www.theguardian.com/law/2015/jun/22/chagos-islanders-supreme-court-house-lords-decision>.

218 *Bancoult (No 2)* (HL) (n 11) [132] (Lord Carswell).

219 See J Epstein, 'Politics of Colonial Sensation' (2007) 112 American Historical Review 712, 739.

220 *Bancoult (No 2)* (HL) (n 11) [75] (Lord Rodger).

221 Ibid [136] (Lord Carswell).

did not (or as they would have it, could not) accept the islanders' claims. Alongside their judgments, Lord Hoffmann acknowledged that a choice between the liberal and utilitarian faces of imperialism did rest with the court, and decisively affirmed the utilitarian importance of the imperial interests at stake in light of 'the brutal realities of global politics'.[222] His distaste for the islanders' litigation strategy,[223] which he saw as trying to force open a settled dispute, in which 'the deed has been done, the wrong confessed, compensation agreed and paid', was scarcely concealed.[224] At this uncomfortable end of the legal process, the majority in the House of Lords accepted that their decision reflected the imperial commonweal.

Rather than shedding the imperial jurisprudence of old, even the judges who would have found for the islanders, including Lord Bingham, Lord Mance, Laws LJ and Sedley LJ, remained trapped within a liberal–imperialist approach towards the governance of the BIOT. Striking down the 2004 Orders in Council might well have embarrassed the UK government, but it would not, as Lord Hoffmann pointed out, have obliged it to facilitate the return of the islanders,[225] still less to govern the islands in accordance with human rights norms. Such efforts to oblige the Crown to use its powers over the BIOT in adherence to a bare conception of 'good governance' do not deny the imperial domination of the islands. Moreover, jurisprudence in this vein comes with all of the baggage of asserting the UK's superiority as a civilisation. Before the First World War, the Earl of Cromer posited that the British Empire 'must rest on one of two bases – an extensive military occupation or the principle of nationality', lamenting that the UK had been unable to choose between these options.[226] The alternative judicial path in the Chagos judicial reviews would have aggrandised the courts and might even have given some solace to the islanders (or for Lord Mance, would at least not 'add insult to injury'),[227] but imperial governance in the archipelago would have continued on the model of military occupation to the exclusion of the islanders.

By the time of the WikiLeaks case, this dilemma had either become so embarrassing, or the characterisation of the Chagossians as politically motivated litigants so pervasive, that the Divisional Court and Court of Appeal did all that they could to avoid ruling on the content of the cables. Even when judges have declared themselves unable to tackle the underlying imperial injustice in the Chagos cases their value to imperial administration as a nominal check on power has not diminished; ministers have consistently deflected awkward parliamentary questions regarding the islands by asserting that 'the UK courts have considered the issues very carefully'.[228] The approach of the courts has therefore cloaked UK policy in a protective veil of legalism. Perhaps the ultimate lesson of the *Bancoult* litigation is that the UK must face up to an uncomfortable reality. In its relationship towards the BIOT it is not a postcolonial state, but has remained a colonising power in the interests of retaining its capacity (even if outsourced to the USA) for power projection across the Indian Ocean. Official acts which would be considered illegal if ever contemplated within the UK remain, despite appeals to human rights, colour-blind justice, the rule of law and the undivided realm, legally defensible when applied within this colonial sphere.

222 Ibid [6].
223 Ibid [55].
224 Ibid [53].
225 Ibid [55].
226 Baring (n 128) 118.
227 *Bancoult (No 2)* (HL) (n 11) [172].
228 Lord Howells, HL Deb 10 March 2011, vol 725, cols 1794–5.

NILQ 66(3): 289–95

Case notes and comments—*DPP v Hustveit*: suspended sentence for rape in Ireland – an appropriate response?

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Introduction

DPP v Hustveit[1] is the second case since the introduction of s 2 of the Criminal Law (Rape) Act 1981 (section 2 rape) to impose an outright non-custodial sentence for an offence of rape in Ireland.[2] The case concerns the repeated rape and sexual assault of a woman by her partner as she slept, often while she was under the influence of prescribed medication which had a sedative effect. The behaviour of the defendant first came to light during the relationship when he admitted to the assaults following a confrontation with the victim and later during an email exchange where the victim asked him to explain his actions. The emails from the defendant detailed how he had raped the victim up to 10 times and touched her in her sleep up to three times per week throughout their relationship.

The defendant received a suspended sentence of seven years' imprisonment, having pleaded guilty at the Central Criminal Court to one count of rape and one count of sexual assault between 2011 and 2012. In suspending the sentence, McCarthy J described the circumstances as very exceptional.

Context

A brief summary of the relevant sentencing law and practices in the Irish jurisdiction will inform the analysis of the case that follows. Unlike the position in England and Wales under the Sentencing Council,[3] the Irish appeal courts have not adopted the practice of indicating starting points for the sentencing of particular offences, but rather rely upon the discretion of the judiciary. Judicial discretion, as guided by precedent, is a constitutionally protected power under the doctrine of proportionality, whereby the judge must impose a sentence

1 CCDP0049/2013 *DPP v Magnus Meyer Hustveit*. The case is reported in the *Irish Times* and *Irish Independent* newspapers and so any account should be approached with caution as the accuracy of such reports cannot be guaranteed; 'No Jail Term for Man (25) who Raped Girlfriend while She Slept' *Irish Times*, 13 July 2015; 'Woman Raped by Partner as She Slept Criticises Sentence' *Irish Times*, 14 July 2015; D Brennan and D Conlon, 'Face of Man who Raped Girlfriend while She Slept' *Irish Independent*, 13 July 2015.

2 Under s 2(1): 'A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it . . .'.

3 For a recent summary, see, A Ashworth and N Padfield, 'Five Years of the Sentencing Council' [2015] 9 Criminal Law Review 657.

proportionate to the gravity of the offence but is obliged to mitigate or aggravate that sentence if required by virtue of the circumstances of the particular offender at the time of sentencing.[4] There is no one, overarching sentencing priority in Irish jurisprudence; however, leading cases appear to favour a consequentialist approach, i.e. the deterrence of future offending on the part of the offender, and this approach is, to some extent, evident in the more lenient sentencing decisions for the offence of rape.[5]

Though few empirical studies have been conducted,[6] it is widely accepted that the majority of rape offenders in Ireland are given immediate and substantial prison sentences.[7] In the landmark case of *DPP v Tiernan*,[8] the Supreme Court held that a non-custodial sentence for rape is 'wholly exceptional', though it did not elaborate upon the circumstances that might amount to such a designation. *Tiernan* was affirmed more recently in *DPP v Keane*,[9] where it was held that the 'starting point' for any court imposing sentence for the offence of rape is a 'substantial custodial sentence'.[10] Research conducted by Charleton J in *DPP v WD*[11] found that the majority of cases reviewed imposed a sentence in the area of five to seven years. Punishments below that median were considered exceptional, and fell within the 18 months to two years' imprisonment range.[12] Ó Cathaoir's follow-up study does not take into account cases prior to 2007 and so excludes from its analysis the two cases where outright suspended sentences for rape were imposed; the case at hand and the earlier case of *DPP v WC*.[13]

In *WC*, Flood J deemed the defendant's remorse, plus a manifest intention to seek to rehabilitate himself into society, as conditions precedent to a consideration of the possibility of a non-custodial sentence. As O'Malley points out, however, the presence of these factors does not preclude a custodial sentence where the gravity of the offence demands an immediate sentence of imprisonment, albeit of a short duration.[14] *WC* is somewhat exceptional in a different sense, however, in that at the time it was heard prosecution appeals against unduly lenient sentences were not available.[15]

Related cases are instructive in terms of assessing the exceptional quality of cases of serious sexual offence. In *DPP v McCormack*,[16] relevant factors which warranted a

4 *Deaton v Attorney General* [1963] IR 170; *State (Healy) v Donoghue* [1976] IR 325; *People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351; *People (Attorney General) v Poyning* [1972] IR 402; *State (Stanbridge) v McMahon* [1979] IR 214; *DPP v McCormack* [2000] 4 IR 356 confirms this approach in the context of sexual offences.

5 *People (Attorney General) v O'Driscoll* (n 4); *State (Stanbridge) v McMahon* (n 4).

6 Key empirical analyses include the work of Charleton J in *DPP v WD* [2007] IEHC 310, followed up by the Judicial Researchers' Office in K Ó Cathaoir, *Recent Rape Sentencing Analysis: The* WD *Case and Beyond* (Judicial Researchers' Office 2012).

7 Cathaoir (n 6) 3. See also T O'Malley, *Sentencing Law and Practice* (2nd edn Thomson Round Hall 2006) 264.

8 *DPP v Tiernan* [1988] IR 250.

9 *DPP v Keane* [2007] IECCA 119.

10 Ibid.

11 *DPP v WD* (n 6).

12 See also Ó Cathaoir (n 6) 6.

13 *DPP v WC* [1994] 1 ILRM 321.

14 T O'Malley, 'Resisting the Temptation of Elegance: Sentencing Discretion Re-affirmed' (1994) 1 Irish Criminal Law Journal 1, 10.

15 Criminal Justice Act 1993, s 2. For a comprehensive account of the legislation, see T O'Malley, 'Prosecution Appeals against Sentence' (1993) 11 Irish Law Times 121.

16 *DPP v McCormack* (n 4). The accused was sentenced to three years' imprisonment with two years' suspended for aggravated sexual assault and attempted rape. The Court of Criminal Appeal held that in light of the exceptional circumstances a custodial sentence was unnecessary.

suspended sentence were deemed to be the defendant's extreme youth, loss of control, a blameless record, the display of genuine remorse, a full apology to the victim in court, a good response to counselling and a likelihood of rehabilitation. Similarly, in *DPP v NY*,[17] where the Court of Criminal Appeal was precluded from giving a full suspension,[18] it pointed to the accused's remorse, cooperation and previous good character as significant factors. In imposing a suspended sentence in the case of *DPP v D(G)*,[19] the judge took account of factors such as the youth of the offender, his early guilty plea and cooperation with the police, his previous good character, that he was drunk at the time and confused about his sexual orientation, and that the offence was an isolated event.

Given the rarity of rape cases which qualify as 'wholly exceptional' for the purposes of imposing a non-custodial sentence, it is likely that, as O'Malley points out, 'the best that can be said with any certainty is that a combination of strong mitigating factors may justify a non-custodial sentence'.[20] Furthermore, the factors in question are apt to be related to the offender, as opposed to the circumstances of the offence itself,[21] though it is noteworthy that the case of *DPP v Leech*[22] found that this practice is not to be imposed in a manner which overlooks the seriousness of the crime.[23]

With the above in mind, then, what makes the circumstances of *DPP v Hustveit* 'wholly exceptional' so as to break with general principle and impose a suspended sentence for a rape offence?

Commentary

This section considers the factors that appear to have influenced the court in coming to its decision, as well as those factors which, arguably, could have been afforded greater weight.

Circumstances of the offender

According to reports, the offender wrote to the victim and confessed to using her body for his own gratification for up to one year.[24] McCarthy J, prior to suspending the sentence, said that '[i]n truth this case comes here today out of his own mouth'.[25] It is a common presumption that an early guilty plea signifies remorse on the part of the offender and spares the victim the supposed trauma of testifying at trial.[26] And though the practice of mitigating sentence due to an early plea of guilty may be an established sentencing principle;[27] is a reduction an absolute requirement and does it constitute a 'wholly exceptional' circumstance?

17 *DPP v NY* [2002] 4 IR 309.

18 The appellant, on pleading guilty to raping a sleeping woman vaginally and anally, had been sentenced to three years' imprisonment with the last nine months suspended. The Court of Criminal Appeal affirmed the three-year sentence but suspended the balance of it.

19 Unreported, 13 July 2004. The case concerned a 'rape under section 4' offence under the Criminal Law (Rape) (Amendment) Act 1990, a gender-neutral offence which is defined as penetration of the anus or mouth by the penis, or penetration of the vagina by an object controlled by another person.

20 O'Malley (n 7) 265–6.

21 *DPP v NY* (n 17).

22 *DPP v Leech* unreported, *Irish Times*, 4 June 2003.

23 The Court of Criminal Appeal activated a four-year suspended sentence on the basis that the jury had given undue weight to the circumstances of the offender as opposed to the nature of the offence and its effect on the victim.

24 Brennan and Conlon (n 1).

25 Ibid.

26 *DPP v Tiernan* (n 8).

27 Ibid. See also *DPP v WC* (n 13); *DPP v NY* (n 17).

Ó Cathaoir's study found that '[c]ases with not guilty pleas did not necessarily impose strikingly different sentences to cases with similar facts where a guilty plea was entered'.[28] Though *WC* held that it is one of the two conditions precedent, *WD* confirmed that an early plea of guilty does not, of itself, constitute a wholly exceptional circumstance as to warrant a non-custodial sentence in rape cases.[29] In addition, Fennelly J, in *DPP v R McC*,[30] indicated that it would not be an error of principle to refuse to give credit for an early guilty plea in a rape case, in appropriate circumstances. It is arguable that such circumstances are present in the case at hand as, although it may be unusual for an accused to incriminate himself to the victim in writing; the victim was of the opinion that the defendant had less noble motives in confessing and was of the view that he did not think that she would go to the police.[31] Given the evidence against him, surely he had little choice but to plead guilty.

Psychological reports indicated that the offender felt genuine guilt and remorse for what he had done.[32] *DPP v Naughton* found that a truly remorseful offender is less likely to reoffend and may be more willing to take steps to deal with his own behavioural issues.[33] However, a display of this emotion does not automatically result in a non-custodial sentence, given that if an offender is on notice that a convincing show of repentance can reduce his sentence, he may easily feign it.[34] Arguably, in the case of a multiplicity of offences spanning a year, the defendant's remorse must be seen as less genuine than in the case of a one-off offence, as was the case in *D(G)*, for example.

The genuine nature of the defendant's remorse may be questioned further due to the apparent motives behind his actions, which do not appear to have been explored in detail by the court. For example, Groth alludes to the judicial perception that the rapist is simply unable to control his sexual desires, rather than rape being an expression of power and control in a situation where the defendant is sexually possessive and jealous.[35] According to the victim in this case, the defendant was a controlling and jealous partner.[36] Furthermore, the defendant stated by email that an explanation for his actions may be the fact that he thought the victim oppressed his sexuality because she asked him not to masturbate to pornography as she slept.[37]

As is the position in England and Wales,[38] a lack of previous convictions is treated, in general, as a significant mitigating factor, particularly when combined with evidence that the

28 Ó Cathaoir (n 6) 3.

29 *DPP v WD* (n 6).

30 *DPP v R McC* [2005] IECCA 71 (unreported, 12 May 2005).

31 She stated: 'He responded, not because he thought he was giving me evidence, because he didn't think that I would go to the police. He told me quite clinically what he had been doing . . . He showed no remorse, using the sentence – I'm not blaming you, but . . .' 'Today' FM radio broadcast, 14 July 2015 < www.todayfm.com/I-didnt-want-to-believe-I-was-raped>.

32 Brennan and Conlon (n 1).

33 *DPP v Naughton* [1999] 5 JIC 1808.

34 As Tudor remarks, '[r]emorse can also, of course, sometimes (perhaps often) be distorted, deluded, or faked'; S K Tudor, 'Why should Remorse be a Mitigating Factor in Sentencing?' (2008) 2 Criminal Law and Philosophy 241, 243.

35 A N Groth, *Men who Rape: The Psychology of the Offender* (Plenum Press 1979).

36 Brennan and Conlon (n 1).

37 'Today' (n 31).

38 For example, see O'Bryan [2013] 2 Cr App R (S) 16 where good character was said to be 'very considerable mitigation'. For further discussion, see M Redmayne, *Character Evidence in the Criminal Trial* (OUP 2015) 225.

defendant is of good character.[39] There exists some controversy, however, surrounding the practice of allowing mitigation as to the character of the offender in cases of sexual offence.[40] The danger of allowing mitigation for character in this context has been addressed formally in England and Wales by the Sentencing Council Guidelines for the offence of rape: 'previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.'[41] Here, the persistent nature of the sexual abuse scarcely entitles the defendant to make any great claim to good character, exemplary work record or otherwise.

In light of the above discussion, it is in no way certain that, together, factors such as an early guilty plea, a display of remorse, no previous convictions and evidence of good character, would constitute significant grounds for the designation of 'wholly exceptional' and, if they did, whether the defendant would be entitled to a non-custodial sentence.

Gravity of the offence

It is arguable that the court did not pay sufficient heed to the gravity of the offence at hand. From the available studies, pertinent aggravating factors might include multiple offences, engaging in a campaign of rape which is not necessarily mitigated by a later claim of remorse, abusing a position of trust, vulnerability of the victim, and especial harm to the victim.[42]

That the victim and the defendant were in a relationship at the time of the offence brings into play a number of significant factors. This circumstance accords with what is now accepted (academically, at least) as the 'norm' in terms of sexual offences.[43] As Burton points out, however, it is arguable that the 'proposition that "rape is rape" whatever the rapist's relationship to the victim has never fully been accepted by the judiciary',[44] despite judicial rhetoric evident in cases such as *Millberry*.[45] In respect of that case, Rumney's study shows how the judicial understanding of non-stranger rape is 'obscured and distorted by conceptions of harm and seriousness that fail to consider the full range of impacts experienced by rape victims'.[46] Though no empirical studies exist on the matter in the Irish jurisdiction, it is noteworthy, if just anecdotally, that the two cases of outright non-custodial sentences for section 2 rape occurred where the parties involved were in a relationship.

In the case at hand, there may have been the perception that the rape was less harmful given that the defendant was known to the victim and the fact that the victim was aware of what was going on, yet did not leave or report it. These circumstances go to the heart of

39 *DPP v O'Neill* [2012] ECCA 37.

40 For example, *Ryan v The Queen* [2001] HCA 21. For discussion, see T O'Malley, *Sexual Offences* (2nd edn Thomson Round Hall 2013) 591–2.

41 Sentencing Council, *Sexual Offences: Definitive Guidelines* (2013) 11. For further discussion, see A Ashworth, *Sentencing and Criminal Justice* (6th edn CUP 2015) 190.

42 *DPP v WD* (n 6); Ó Cathaoir (n 6).

43 See, Rape Crisis Network Ireland, *National Rape Crisis Statistics 2014*, which show that 93% of perpetrators of sexual violence are known to the person against whom they perpetrate the abuse, 20.

44 M Burton, *Legal Responses to Domestic Violence* (Routledge-Cavendish 2008) 69.

45 *Millberry* [2003] 1 WLR 546; See also *AG Ref No 44 of 2004 (Keith E)* [2005] 1 Cr App R (S) 59.

46 P N S Rumney, 'Progress at a Price: The Construction of Non-Stranger Rape in the Millberry Sentencing Guidelines' (2003) 66(6) Modern Law Review 870, 883. See also P N S Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' (1999) 19 Oxford Journal of Legal Studies 243.

the especial harm that may be caused by relationship rape.[47] For, as Finkelhor and Yllo observe, '[w]hen you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.'[48] In her impact statement, the victim described her life as being destroyed by the abuse. She gave up her job, moved in with her parents, attempted suicide and suffered from post-traumatic stress disorder, eating disorders and anxiety. Following *WC*, a sentencing court is obliged to take into account any effect (whether long-term or otherwise) of the offence on the victim.[49]

Relationship rape is rarely an isolated event.[50] Though there is evidence that the accused raped and sexually assaulted the victim on a regular basis between 2011 and 2012, the conviction relates to just one count of rape. It is questionable, therefore, whether the court has taken into account the systematic nature of the abuse that the victim was subjected to. Such actions are the result of a significant breach of trust, a factor not always given credence in the context of relationship rape.[51]

In his email to the victim, the offender stated: 'I convinced myself it was a victimless crime because you were asleep . . . I didn't want to hurt you.'[52] Far from simply indicating a supposed guilty conscience, the offender's actions and self-justifications in these statements point to a distinct lack of concern as to the dignity and autonomy of his partner, coupled with a callous determination to have sexual intercourse with her, repeatedly, regardless of her wishes. The lack of consciousness on the part of the victim in no way dilutes the potency of the offence of rape.[53] If anything, the violation of the victim as she slept in her own bed points to an innate vulnerability on her part, of which the defendant took advantage. Indeed, the Court of Criminal Appeal in *Keane* acknowledged the right of an individual to feel safe in their bed as they sleep.[54]

In light of the above, one must question whether there remains an unconscious tinge of the 'less serious' about this case, merely because the couple shared a bed. This is not an outlandish suggestion in light of the evidence discussed above, given that the marital rape exemption was abolished in Ireland only as recently as 1990.[55]

Conclusion

In exercising his discretion to impose a non-custodial sentence for the offence of rape, McCarthy J adhered appropriately to the principle of proportionality by taking account of the particular circumstances of the offender in mitigation. The fact that the judge saw fit to impose a seven-year sentence, which is at the high end of the median range according to *WD*, suggests he considered the offence to be of a serious nature. The fact that the judge suspended that sentence in its entirety warrants consideration of whether he gave undue weight to the circumstances of the offender over and above the gravity of the crime.[56]

47 For example, see D Russell, *Rape in Marriage* (Indiana University Press 1990).

48 D Finkelhor and K Yllo, *Licence to Rape: Sexual Abuse of Wives* (The Free Press 1985) 118.

49 Criminal Justice Act 1993, s 5.

50 Finkelhor and Yllo (n 48).

51 Burton (n 44) 70.

52 Brennan and Conlon (n 1).

53 *R v Bree* [2007] EWCA 256.

54 *DPP v Leech* (n 22).

55 Criminal Law (Rape) (Amendment) Act 1990, s 5. The abolition of the exemption in England and Wales came in 1991, following the case of *R v R* [1991] 2 WLR 1065.

56 Unreported, *Irish Times*, 4 June 2003.

Though the offence was not aggravated by 'additional' violent assault, (the offence of rape itself being inherently violent) it may be aggravated by the fact that the victim was raped by a person she trusted, in her own home, as she slept in her own bed (under the influence of medication) and on multiple occasions. That said, it was appropriate that McCarthy J considered the question of a 'wholly exceptional' designation, in light of the defendant's remorse and his intention to seek rehabilitation.[57] However, a 'wholly exceptional' case does not of necessity point to a non-custodial sentence.[58] Indeed, it is arguable that such a case would warrant a short (below median) prison sentence, as opposed to a long suspended sentence, given that a long sentence would indicate a more serious set of circumstances.[59] This approach appears to have been reflected in English jurisprudence prior to the introduction of Sentencing Guidelines.[60] Whether the Court of Appeal will share this view is another question.[61]

57 *DPP v WC* (n 13).

58 *DPP v NY* (n 17); *DPP v Keane* (n 9). For discussion, see O'Malley (n 40) 657.

59 See O'Malley (n 14).

60 For example, see *R v Taylor* [1983] 5 Cr App R (S) 241, where the Court of Appeal substituted a probation order for a three-year prison sentence where both parties had a learning disability and the offender was not considered to be a danger to the public.

61 At the time of writing, it is understood that the Director of Public Prosecutions has lodged review papers with the Court of Appeal on the basis that the sentence is unduly lenient.