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The first year of the UK'S Supreme Court

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On 1 October 2009 a significant institutional change occurred in the United Kingdom when a new Supreme Court took over the jurisdiction of the Appellate Committee of the House of Lords, as well as the devolution jurisdiction of the Judicial Committee of the Privy Council. Now that the new court has a full legal year under its belt, the time is opportune to make an initial assessment of what else may have changed at the top judicial level in Britain, apart from the location of the court and the official title of the judges who work there. This article looks at procedural and substantive legal changes. It focuses on appeals that were decided during the first year, but also makes passing reference to some appeals that had been heard but not yet decided by the end of that year.

The composition of the Court

The composition of the Supreme Court during its first year turned out to be a more interesting topic than might perhaps have been anticipated, since the Constitutional Reform Act 2005[2] predetermined that the 12 Lords of Appeal in Ordinary who were in office on 1 October 2009 should instantly be metamorphosed into 12 Justices of the Supreme Court, retaining their titles as life peers but losing their entitlement (until retirement) to participate in proceedings in the House of Lords. By the end of the year the judicial picture was not quite as predicted.

When Lord Clarke of Stone-cum-Ebony, the Master of the Rolls, was appointed as a Justice of the Supreme Court in the summer of 2009, to replace the retiring Lord Scott of Foscote, a rival candidate had been a prominent member of the Bar, Mr Jonathan Sumption QC. It was generally believed at the time that the latter's candidature had been so strong that he was almost certain to be appointed the next time round.[3] The resignation of Lord Neuberger at the moment of the changeover, to allow him to return to the Court of Appeal

1 The authors (respectively, a retired legal practitioner, the Professor of International and Comparative Law at Queen's University Belfast, and an emeritus Professor of Public Administration at Royal Holloway, University of London) are co-editors of a commemorative volume on the Supreme Court's predecessor: *The Judicial House of Lords 1876–2009* (Oxford: OUP 2009). For a volume explaining the genesis of the new court, see A Le Sueur (ed.), *Building the UK's New Supreme Court: National and comparative perspectives* (Oxford: OUP 2004). See, too, A Le Sueur, *A Report on Six Seminars about the UK Supreme Court* (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324749.

2 S. 24(a).

3 But of course selection has to be on merit: Constitutional Reform Act 2005, s. 27(5).

as Master of the Rolls as Lord Clarke's replacement, created an unexpected early vacancy in the Supreme Court.[4] Unfortunately, the process of selection was administratively delayed for some six months and was subject to some lobbying, not all of it discrete. A widely held view among judges of the Court of Appeal is that the Justices of the Supreme Court should be drawn – not invariably, but usually – from the ranks of existing judges who have appellate court experience, and when he reflected on this Mr Sumption withdrew his candidature.[5] The history of appointments to the post of Lord of Appeal in Ordinary does not readily support such exclusivity; after all, perhaps the most distinguished of the Law Lords in post-Second World War Britain was Lord Reid, who served from 1948 to 1975 and had never previously worked as a judge. Against a background of competing voices, the selection commission set up to make the selection nominated Lord Justice Dyson for the vacancy and it was he who was ultimately appointed, in April 2010. He was a very popular choice, although the fact that he has not been given a peerage (or even a courtesy title, like judges of Scotland's Court of Session) has raised some eyebrows. The brouhaha over Mr Sumption's candidature was an unfortunate backdrop to a process that had been designed to avoid any politicisation of the higher judiciary. By and large, however, the public image of an independent judiciary was maintained, mainly because very little public interest is ever displayed in UK judicial appointments, even when they occur at the highest level.[6]

The retirement age for Justices is also back in the news. Shortly before the government's announcement that it would be abolishing the compulsory retirement age of 65 for all workers,[7] a parliamentary question was asked in the House of Lords by Lord Pannick QC about the retirement age for Supreme Court Justices.[8] At present, if first appointed to the bench after March 1995, Justices have to retire when they reach the age of 70, otherwise they can continue in post until they reach the age of 75. In his reply to the parliamentary question, Lord McNally, for the government, said that the retirement age for Justices was under review, as was whether they should be given a peerage.[9] The position of Lord Collins, whom Lord Woolf described as "probably the outstanding private international lawyer in the judiciary as a whole",[10] was highlighted, since he was appointed as a Justice in 2009 at the age of 68 and, unless the law is changed, will have to retire in 2011 after serving less than two years. Lord Saville meanwhile, no doubt exhausted after his marathon stint chairing the Bloody Sunday Inquiry between 1998 and 2010, decided to retire in September 2010, even though he was qualified to sit for a further six months.[11] From September 2010 to March 2011, when he turns 75, Lord Saville will be a member of "the supplementary panel", which means that he can be called upon to assist the Justices of the Supreme Court

4 A selection commission was appointed, in accordance with s. 26(5) of and Sch. 8 to the Constitutional Reform Act 2005.

5 See the account by Frances Gibb in *The Times*, 4 February 2010: http://business.timesonline.co.uk/tol/business/law/article7013960.ece.

6 Contrast the position in the USA, where in 2010 extensive media coverage was given to the nomination and senatorial interviewing of Elena Kagan, who was eventually sworn in as a Justice of the US Supreme Court on 7 August.

7 See the consultation document issued by the Department for Business, Innovation and Skills, *Phasing out the Default Retirement Age* (London: DBIS 29 July 2010).

8 HL Debs, vol. 720, cols 505–7 (12 July 2010).

9 Ibid. col. 507.

10 Ibid.

11 Lord Saville sat in 10 of the decided cases during 2009–10, but did not deliver any substantive judgments. He also sat in four cases that had been heard but not decided by the end of the year. In two cases during the year he sat as the presiding judge, being the longest serving of the judges sitting in those cases.

with their work.[12] Indeed, according to the Supreme Court's list of sittings for the Michaelmas Term 2010, Lord Saville sat in an appeal heard in November 2010.

During its first year the President of the Supreme Court (Lord Phillips) or the Deputy President (Lord Hope) presided in all but six of the 57 decided cases.[13] Of the 12 cases in which judgment was awaited at the end of the year, they presided in 10. These two most senior judges sat together in eight of the decided cases and in three of the undecided ones. They were also the judges who produced the most judgments during the year – each of them wrote 12. The next most productive Justices were Lords Rodger and Mance, who each wrote eight substantive judgments. Lord Clarke, despite being a new boy on the court, also wrote eight judgments, though one of these was merely the order of the court in a case decided some months earlier.[14] These comments about "productivity" are not for a moment intended to suggest that other judges did not pull their weight during the year: many of them contributed numerous minor judgments and Justices were also active in the Judicial Committee of the Privy Council, which issued 77 decisions during the year, none of which has been taken into account for the purposes of the present analysis.[15] Moreover, during the month of November 2009, Lord Walker of Gestingthorpe was out of the country serving as a nominated judge of the Final Court of Appeal in Hong Kong.[16]

Although Lord Neuberger did not serve as a Justice of the Supreme Court during the year, having become Master of the Rolls on 1 October 2009, he was involved in six cases which were heard by the Appellate Committee of the House of Lords before the summer recess but in which judgments were issued between October and December 2009. He sat as an "acting judge of the Court" in one Supreme Court appeal heard before nine judges in July 2010.[17] Lord Judge, the Lord Chief Justice of England and Wales, was the only other non-Justice to sit in the Supreme Court during its first year. He participated in four criminal cases, authoring the long annex on European Convention caselaw in *R* v *Horncastle*[18] (having chosen not to sit as the presiding judge when that case was in the Court of Appeal),[19] and contributing a substantive judgment in the sentencing case of *R (Noone)* v *Governor of HMP Drake Hall*.[20]

Applications for permission to appeal and to intervene

Permission to appeal (PTA) is being granted by the Supreme Court at roughly the same rate as it was by the Appeal Committee of the House of Lords. In 2009–10, there were

12 As provided for by the Constitutional Reform Act 2005, s. 39.

13 Two were presided over by Lord Rodger, two by Lord Walker and, as mentioned in n. 11 above, two by Lord Saville.

14 *RTS Flexible Systems Ltd* v *Molkerei Alois Müller GmbH* [2010] UKHL 38, which supplements [2010] UKHL 14.

15 Supreme Court Justices spend about 30% of their time on Privy Council business.

16 *The Supreme Court Annual Report and Accounts 2009–2010* (HC 64, 2010), p. 40: www.supremecourt.gov.uk/docs/ar_2009_10.pdf.

17 *Manchester City Council* v *Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441, which concerns the compatibility of the procedure for the termination of a "demoted tenancy" under the Housing Act 1996 with ECHR Articles 6 and 8. Acting judges are provided for in the Constitutional Reform Act 2005, s. 38.

18 [2009] UKSC 14, [2010] 2 WLR 47 (Annex 4 to Lord Phillips' judgment).

19 It has been suggested (at a conference held at the Supreme Court on 30 September 2010 to mark the first anniversary of the Court, the notes of which are on file with the authors, but Chatham House rules apply to the proceedings) that Lord Judge CJ was asked to sit in the Supreme Court for this case because the presence of a Chief Justice might help to convince the European Court of Human Rights of the authoritativeness of the decision.

20 [2010] UKSC 30, [2010] 1 WLR 1743. The other two cases were *Norris* v *Government of the United States of America* [2010] UKHL 9, [2010] 2 WLR 572 and *R* v *Rollins* [2010] UKHL 39, [2010] 1 WLR 1922.

219 applications for permission, of which 131 were refused, 75 were granted (34 per cent) and 13 were struck out, withdrawn or adjourned. In the three calendar years 2003–05, the percentage of granted appeal petitions was, respectively, 33 per cent, 35 per cent and 31 per cent.[21] The website of the Supreme Court summarises the outcomes of the applications but, alas, provides no further details as to what legal issues were raised by them. (It does, however, show details of "current" cases, that is, cases in which appeals have already been heard but no judgments issued, as well as a small number of the cases in which hearings have already been scheduled but not yet heard.) A better way to track the fortunes of applications for PTA is to use the information provided on the website of the Incorporated Council of Law Reporting for England and Wales: this provides a list of the outcomes of the applications, together with neutral citations for the judgments being appealed from; one can then look up the citations to see what those judgments said, thereby obtaining some clues as to the issues likely to have been raised before the Supreme Court in the PTA application.

The process for handling applications for PTA differs from that used in the House of Lords in that all Supreme Court Justices are now made aware of all pending applications, though only the three Justices on the Appeal Panel receive the full set of papers relating to the application. Any of the other nine Justices can, if they wish, comment on an application and it was made clear at a conference held at the Supreme Court in September 2010 that during the court's first year one Justice did succeed in getting an Appeal Panel to reverse its decision not to grant permission to appeal in one case (and was then selected as one of the five Justices to hear the appeal).[22] But from the information made public it is impossible to know when or how frequently this kind of influence is wielded. The invariable practice does seem to be, however, that, if just one of the three members of the Appeal Panel wishes the PTA application to be granted, it will be.

There were seven occasions during the year on which oral hearings were held to consider PTA applications. The Supreme Court's website[23] reveals that permission was granted in one of these; it gives no indication as to the ultimate outcome in the other six applications but the "current cases" section reveals that at least one of them was successful. In the last few years of the Appellate Committee of the House of Lords, oral hearings were just as rare (11 in 2003, six in 2004, and four in 2005).[24]

The Justices of the Supreme Court are as laconic as the Law Lords in the reasons they give for refusing permission: they simply certify that no point of law of general public importance requires consideration "at this time".[25] This raises the possibility that the Justices are not complying with their own Practice Direction 3.3.3, which strongly suggests that Appeal Panels will give "brief reasons for refusing permission to appeal" over and above the ground that the application does not raise a point of law of general public importance at this time. Interestingly, during 2009–10, no PTA was granted in a devolution case, even though 11 such applications were considered.[26] It would have been illuminating to Scottish lawyers if more details had been provided as to why those applications were rejected (beyond merely stating that the appeal did not raise a devolution issue), and it might even have reduced the Justices' future workload (as well as the expenses incurred by

21 B Dickson, "The processing of appeals in the House of Lords" (2007) 123 *LQR* 571, 583.

22 See n.19 above.

23 In the section headed "News".

24 Dickson, "The processing", n. 21 above, p. 582.

25 Cf. ibid. p. 583.

26 These were all Scottish devolution cases. There has not yet been a devolution case emanating from Northern Ireland or Wales.

litigants), since lawyers would have been made aware of what arguments were probably not worth making in PTA applications.

It would appear that the Supreme Court is planning to be every bit as welcoming to interveners as the House of Lords became in its last few years. In the cases decided to date, interventions were allowed in at least 12, with as many as three interveners being permitted in one case[27] and five in another.[28] Unfortunately, the website of the Court does not supply any information about the number or outcome of applications to intervene.[29] Those that were successful were all from organisations with special interests in the subject matter of the dispute. On the other hand, no *amicus curiae* seems to have been requested by the Court during its first year.

The decided cases

During its first legal year the UK's Supreme Court decided 57 cases,[30] three of which did not result in full judgments because they were decisions to refer questions to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union,[31] and a fourth of which was simply the court's order consequential on its earlier judgment in the same case.[32] The total of 57 is roughly on a par with that for the House of Lords in recent years: in 2008–09 the number of decisions was 49; in 2007–08 it was exceptionally high at 82; and in 2006–07 it was 59. As already noted, the Supreme Court Justices also decided 77 cases in the Judicial Committee of the Privy Council during 2009–10, a higher number than in recent years (58 in 2008–09, 57 in 2007–08, and 73 in 2006–07). There has certainly been no fall in the level of productivity of our top judges since they set up camp in the new Supreme Court building in Parliament Square.

Seven of the Supreme Court's 57 decisions were in Scottish cases,[33] one was in a case from Northern Ireland, and one (though processed through the English courts) was solely about Sark, in the Channel Islands.[34] In five of the remaining 48 cases (all but two of which were appeals from the Court of Appeal of England and Wales),[35] the issues were linked to an earlier decision by the Supreme Court in the same legal year[36] and in two further cases

27 *I (A Child)* [2009] UKSC 10, [2010] 1 AC 319.

28 *R (E)* v *Governing Body of JFS* [2009] UKSC 15, [2010] 2 WLR 153.

29 Interventions are governed by the Supreme Court Rules 2009, rr. 15 and 26.

30 This is the number of cases in which sets of judgments were issued; several cases involved more than one appeal.

31 These were *Office of Communications* v *The Information Commissioner* [2010] UKSC 3, *British Airways plc* v *Williams* [2010] UKSC 16, and *O'Brien* v *Ministry of Justice* [2010] UKSC 34.

32 See n. 14 above, and accompanying text.

33 One of the cases in which judgment was awaited at the end of the year was also Scottish: *Cadder* v *HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601. This deals with whether Scotland's rules on the right of access to a solicitor can lead to an unfair criminal trial.

34 *R (Barclay)* v *Lord Chancellor* [2009] UKSC 9, [2010] 1 AC 464. This was an application for judicial review of decisions taken by the Lord Chancellor, the Privy Council, and a committee of the Privy Council (the Committee for the Affairs of Jersey and Guernsey). Lord Neuberger described Lord Collins' judgment in this case as "magisterial": para. 120.

35 The exceptions were two cases on extradition, where the court appealed from was the Divisional Court of England and Wales.

36 *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325 and *Ahmed* v *HM Treasury (No 2)* [2010] UKSC 5, [2010] 2 WLR 378 were linked to *Ahmed* v *HM Treasury* [2010] UKSC 2, [2010] 2 WLR 378; *In re appeals by Governing Body of JFS* [2009] UKSC 1 was linked to *R (E)* v *Governing Body of JFS* [2009] UKSC 15, [2010] 2 WLR 153; *Secretary of State for the Home Department* v *AP (No 2)* [2010] UKSC 26, [2010] 1 WLR 1652 was linked to *Secretary of State for the Home Department* v *AP* [2010] UKSC 24, [2010] 3 WLR 51; and see the pair of cases cited at n. 14 above.

the issues were linked to decisions reached by the House of Lords two years earlier.[37] It would appear that only three appeals were heard as a result of PTA being granted by a lower court,[38] thereby confirming the trend in recent years towards keeping the country's top court in almost complete control of its own docket. In one case involving two appeals, there was a leapfrog appeal direct from the High Court, but it too required the leave of the Appeal Committee of the House of Lords before it could proceed.[39]

As in recent years, most of the cases decided by the top court involved issues of public law. Of the 57 decisions, 30 (53 per cent) involved matters of public law, a further eight (14 per cent) were criminal law cases[40] and 19 (33 per cent) were private law cases. Sixteen cases (29 per cent) concerned European Convention rights[41] and seven (12 per cent) involved issues around asylum or immigration. Only one case related to taxation law.

The form and promptness of judgments

In no fewer than 19 of the year's 57 cases the Supreme Court's decision took the form of a "judgment of the court", a much higher number than in any previous year. This is a practice pioneered by Lord Bingham while he was the Senior Law Lord from 2000 to 2008.[42] It would seem that the Supreme Court is keen to issue a judgment of the court if that is possible, not just where it is desirable.[43] The practice surely betokens a desire on the Justices' part to be more united and more certain in the guidance they give to lawyers in future cases. The wish to appear more authoritative is also reflected in the high number of cases in which more than the standard group of five judges participated. In the 2009–10 decision, nine judges sat in three cases and seven judges sat in 10 cases, meaning that the norm of five judges per case was exceeded in 23 per cent of all cases. Moreover, of the 11 cases that were heard but not decided by the end of the year, two involved nine judges[44] and three involved seven.[45] Of the 190 cases decided during the two previous years combined, there were only two cases with nine judges and none with seven (i.e. only 1 per cent of the cases involved more than five judges).[46] Lord Phillips has revealed that the Justices do have a set of criteria that are applied when suggestions are made that a larger

37 *Norris* v *Government of the USA* [2010] UKSC 9, [2010] 2 WLR 572 was a sequel to the case reported at [2008] UKHL 16, [2008] 1 AC 920; *O'Byrne* v *Aventis Pasteur MSD Ltd* [2010] UKSC 23, [2010] 1 WLR 1412 was a sequel to [2008] UKHL 34, [2008] 4 All ER 881.

38 *R* v *Horncastle* [2009] UKSC 14, [2010] 2 WLR 47; *Martin* v *HM Advocate* [2010] UKSC 10, 2010 SLT 412; *R (Smith)* v *Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2010] 3 WLR 223.

39 *R (Youssef)* v *HM Treasury*, part of *Ahmed* v *HM Treasury*, n. 36 above. See Administration of Justice Act 1969, s. 13(2).

40 This figure includes two judicial review applications that related to criminal law issues: *R (F)* v *Secretary of State for the Home Department* [2010] UKSC 17, [2010] 2 WLR 992 and *R (Noone)* v *Governor of HMP Drake Hall* [2010] UKSC 30, [2010] 1 WLR 1743.

41 In the "current cases" section of the Supreme Court's website an indication is given as to whether the cases raise human rights issues (or devolution issues).

42 B Dickson, "A hard act to follow: the Bingham court 2000–8" in Blom-Cooper et al., *The Judicial House*, n. 1 above, pp. 261–2.

43 Lord Phillips, the President of the Court, has been cited as saying "[T]here is agreement that, where possible, we should reduce the number of individual judgments." See *The Times*, 7 October 2010, p. 66.

44 These were *Manchester City Council* v *Pinnock* (see n. 17 above) and *Granatino* v *Radmacher* [2010] UKSC 42, [2010] 3 WLR 1367(on the weight to be given to prenuptial contracts).

45 These were *Oceanbulk Shipping and Trading SA* v *TMT Asia Ltd* [2010] UKSC 44, [2010] 3 WLR 1424 (on whether evidence of without prejudice negotiations can be used to help construe a settlement); *Cadder* v *HM Advocate*, see n. 33 above (on whether a criminal trial is unfair if evidence is admitted that has been provided by the accused in the absence of a lawyer).

46 The practice of using nine judges began in 2003 and there have now been a total of seven such decisions.

than usual bench is required for an appeal. These include that the appeal raises a point of high constitutional importance, that it is otherwise a high profile case, that it raises doubts over the correctness of an earlier decision of the House of Lords or Supreme Court, and that if there were just five judges there might be a 3:2 split. Reviewing the year's cases, he felt that in one or two of them a larger then normal bench was used when in retrospect it was not actually required.[47]

The Supreme Court has also dropped the House of Lords' practice whereby judges delivered their judgments (which were, strictly speaking, "speeches") in order of their seniority. Now the most substantive judgment is usually given first and other judgments follow (in order of the judges' seniority) only if the judges in question have something to add. Often the first judgment, by Justice A, will simply indicate, for example, that it has the agreement of Justices B and C, leaving only Justices D and E to add further comments (and Justices B and C may also add one or two additional remarks). Of course, we do not know what transpires at conferences between Justices after an appeal hearing has concluded, and there is nothing in the Supreme Court's Rules of Procedure or Practice Directions[48] to indicate an express change of practice, but it would seem that there is a growing assumption that a Justice will not add any comments unless doing so is specifically justified. Lord Walker, for example, is prone to say that he is adding some remarks of his own only because there is a difference of opinion between his colleagues, or because the Supreme Court is overturning the decision of the court below. In *R (E)* v *Governing Body of JFS*, Lord Walker added just three paragraphs, mainly to stress that he agreed with much of what Baroness Hale had said but that he had reached a different conclusion,[49] and, in *R (Smith)* v *Oxfordshire Assistant Deputy Coroner*, Lord Walker inserted another three paragraphs, mostly saying that the Supreme Court should not be issuing lengthy judgments on issues that cannot actually affect the litigants in the case before them.[50]

The overall length of judgments does not seem to have diminished compared to previous years. In three cases, the total number of paragraphs in the judgments exceeded 200,[51] and in a fourth it was 340.[52] The single longest judgment by any particular judge was the 112 paragraphs by Lord Collins in the case about Sark, *R (Barclay)* v *Lord Chancellor*.[53] In two cases there were eight substantive judgments followed by a brief comment from the ninth judge (Lord Walker in both instances).[54] In *R* v *Horncastle*,[55] the Court adopted the extraordinary expedient of adding not one but four annexes to the Court's collective judgment,[56] delivered by Lord Phillips. Two of these annexes were attributed to particular Justices – Annex 1 to Lord Mance and Annex 4 (itself 96 paragraphs) to Lord Judge CJ.

47 See n. 19 above. See too Buxton LJ, "Sitting en banc in the new Supreme Court" (2009) 125 *LQR* 288. The criteria applied are now listed on the Supreme Court's website: www.supremecourt.gov.uk/procedures/panel-numbers-criteria.html.

48 These can all be consulted on the Court's website.

49 See n. 28 above, paras 235–7.

50 See n. 38 above, paras 129–31.

51 *R* v *Horncastle*, n. 38 above; *R (E)* v *Governing Body of JFS*, n. 28 above; *Ahmed* v *HM Treasury*, n. 36 above, p. 378.

52 *R (Smith)* v *Oxfordshire Assistant Deputy Coroner*, n. 38 above.

53 See n. 34 above.

54 *R (E)* v *Governing Body of JFS*, n. 28 above; *R (Smith)* v *Oxfordshire Assistant Deputy Coroner*, n. 38 above.

55 See n. 38 above.

56 Lord Brown, like the other five Justices, fully agreed with the judgment of Lord Phillips, but he could not resist adding 10 paragraphs of his own to reinforce his view that the Supreme Court should, in effect, join with the UK government in inviting the Grand Chamber in Strasbourg to overrule the Chamber's judgment in *Al-Khawaja* v *UK* (2009) 49 EHRR 1.

These annexes set out details about various precedents, which, if inserted into the text of the main judgment, would have considerably disrupted the flow of the argument. The case is remarkable for the deep rift it overtly displays between the thinking of the Supreme Court and that of the European Court of Human Rights on whether the use of hearsay evidence to convict a defendant violates the requirements for a fair trial.

In the 57 cases decided during the year, the average time allowed for each hearing was two days, but only one day was required in 11 cases and in two cases four days were required.[57] Judgments were issued fairly promptly during the year. The average delay between the hearing of an appeal and the issuing of judgments was 73 days, although this narrows to 59 days if the 10 cases are excluded in which a hearing occurred in the House of Lords prior to the long summer recess in 2009 but judgments were issued by the Supreme Court in the autumn. In the three calendar years 2003–05, the average overall delay for judgments in the House of Lords was 62 days.[58] It may be that the increase in the time taken for judgments to be issued is partly a function of the increasing use of benches of more than five judges, since in such cases more time is required for the sharing and considering of draft judgments. Four of the cases that were not affected by the summer recess nevertheless took at least 105 days (i.e. 15 weeks) for judgments to be delivered, the longest delay being 126 days in the foreign divorce case of *Agbaje* v *Agbaje*.[59] However, as the Supreme Court's *Annual Report* points out,[60] the Court can also act very quickly if it needs to: in *In re W (Children) (Family Proceedings: Evidence)* it handed down judgment just one day after the case was heard.[61]

Dissents and attitudes to precedent

The striving for authoritativeness and unity should not be interpreted as diminishing the determination of individual Justices to pronounce their own thoughts about an issue, particularly if they wish to dissent from the reasoning of the majority or from the outcome of the appeal. In 2009–10, there were dissents (to all or part of the case) in 13 of the 57 cases (23 per cent), and in six of these 13 cases more than one Justice dissented. The starkest instances of "close calls" were: the 5:4 split on whether a Jewish school had *directly* discriminated against a prospective pupil (it had);[62] the 3:2 split on whether the Scottish Parliament had power to increase the sentencing powers of sheriffs in road traffic cases (it did);[63] the 4:3 split on whether Wolverhampton City Council had breached the planning

57 These two cases were *R (A)* v *London Borough of Croydon* [2009] UKSC 8, [2009] 1 WLR 2557 (on the duty on local authorities to provide accommodation and related services under the Children Act 1989) and *Ahmed* v *HM Treasury*, n. 36 above (on the validity of legislative orders freezing the assets of people suspected of involvement in terrorism).

58 Dickson, "The processing", n. 21 above, p. 599.

59 [2010] UKSC 13, [2010] 2 WLR 709. In the *RTS Flexible* case (n. 14 above), 140 days elapsed between the issuing of reasons for the decision and the actual court order (about which further argument from counsel was heard).

60 *Annual Report*, n. 16 above, p. 27.

61 [2010] UKSC 12, [2010] 1 WLR 701. The case was about whether a child could give live evidence during care proceedings; the Supreme Court issued its guidance in time for a fact-finding hearing by the lower court judge the following week.

62 *R (E)* v *Governing Body of JFS*, n. 28 above. According to Baroness Hale (relying on the opinion of the Supreme Court's judicial assistants), this case was the highlight of the Court's first year (see ukscblog.com, interview with Lady Hale, 16 September 2010); Lord Phillips too thought it was most interesting (n. 43 above). Seven of the nine Justices thought there had been either direct or indirect discrimination; only two thought there had been neither.

63 *Martin* v *HM Advocate*, n. 38 above. The two Scottish Justices, Lords Hope and Rodgers, were sharply divided on this point.

laws when preferring Tesco's development bid to Sainsbury's (it had);[64] the 6:3 split on whether Convention rights of UK soldiers are protected when they are serving abroad (they are not);[65] and the 4:3 split on whether donations unlawfully received by political parties have to be entirely forfeited to the Electoral Commission (they do not).[66]

For a while, it seemed that the Supreme Court would be issuing all the majority judgments in a case before issuing any dissenting judgments. This is the way it proceeded in the prominent case of *R (E)* v *Governing Body of JFS*[67] and in the Scottish case of *Martin* v *HM Advocate*.[68] But, ever since *R (Sainsbury's Supermarkets Ltd)* v *Wolverhampton City Council*,[69] the Court seems content to insert dissenting judgments before or between majority judgments, and in that case it even relegated the leading majority judgment to the very end, this being the judgment of the most junior Justice sitting in the case, Lord Collins. The difficulty in assessing whether there are any dissenting judgments in a case, and the extent to which they are dissenting, has been somewhat alleviated by the fact that the Supreme Court's press releases invariably summarise the state of play regarding dissents, although in our opinion some of those releases have not been as explanatory as they might have been, certainly for legally informed readers. Some dissenting judgments, moreover, are still extremely long. The record for 2009–10 is the 89 paragraphs of Lord Rodger in *Martin* v *HM Advocate*,[70] which is more than twice the length of the leading majority judgment by Lord Hope. The partly dissenting judgment of Lord Clarke in *Star Energy Weald Basin Ltd* v *Bocardo SA*[71] was lengthier than the main majority judgment delivered by Lord Brown.

The Supreme Court has not gone out of its way to specify a different attitude to the handling of precedents from that preferred by the House of Lords. Indeed, in *Austin* v *Southwark LBC*,[72] Lord Hope said that it was not necessary for the Supreme Court to re-issue the Practice Statement of 1966 as a fresh statement of practice in the Supreme Court's own name:

> because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by s. 40 of the Constitutional Reform Act 2005.[73]

The Supreme Court Practice Direction 3.1.3(a) provides that: "If an application for permission to appeal . . . asks the Supreme Court to depart from one of its own decisions or from one made by the House of Lords . . . this should be stated clearly in the application and full details must be given." This is very similar to what was contained in the Practice Directions applicable to appeals in the House of Lords: "If a party intends to invite the House to depart from one of its own decisions, this intention must be clearly stated in a separate paragraph of their case, to which special attention must be drawn."[74] No change there then.

64 *R (Sainsbury's Supermarkets Ltd)* v *Wolverhampton City Council* [2010] UKSC 20, [2010] 2 WLR 1173.

65 *R (Smith)* v *Oxfordshire Assistant Deputy Coroner*, n. 38 above.

66 *R (Electoral Commission)* v *City of Westminster Magistrates Court* [2010] UKSC 40, [2010] 3 WLR 705.

67 See n. 28 above.

68 See n. 38 above.

69 See n. 64 above.

70 See n. 38 above.

71 [2010] UKSC 35, [2010] 3 WLR 654.

72 [2010] UKSC 28, [2010] 3 WLR 144.

73 Ibid. para. 25. For a recent analysis of the Practice Direction, see L Blom-Cooper, in Blom-Cooper et al., *The Judicial House*, n. 1 above, ch. 9.

74 Practice Directions 15.5 (Civil Appeals) and 16.5 (Criminal Appeals).

The success rate of appeals

The Supreme Court reversed the court appealed from in 26 cases, a success rate of 46 per cent, which is again in line with statistics for appeals to the House of Lords in recent years.[75] For procedural reasons, in seven of the 57 cases decided during the year there either was no lower court decision to reverse or the decision taken by the Supreme Court was simply to refer the case to the European Court of Justice (ECJ) for a preliminary ruling, so the success rate for appeals could on that basis be said to be 52 per cent. On several occasions the Supreme Court found that the Court of Appeal had developed the law or applied existing legal principles in ways that were unacceptable. This occurred, for example, in three family law cases. In *In re B (A Child) (Residence: Biological Parent)*,[76] Lord Kerr, for the Court, reminded the Court of Appeal that where a child's custody or upbringing is in question the welfare of the child must be the paramount consideration and, if this means that a three-year-old child should reside with his maternal grandmother rather than with his father, so be it: sometimes parental rights have to be overridden by the interests of the child. In *In re S-B (Children) (Care Proceedings: Standard of Proof)*,[77] Baroness Hale, for the Court, stressed that in care proceedings the standard of proof is the balance of probabilities, and that no heightened standard of proof is required in cases where the potential carer is facing allegations of serious abuse. And in *Agbaje* v *Agbaje*[78] Lord Collins, again for the Court, ruled that, when deciding whether to grant financial relief after a foreign divorce, an English court does not have to apply a *forum non conveniens* test. In two further family law decisions, the Supreme Court held that the Court of Appeal had interpreted much too narrowly the power of the courts to do what is in the best interests of a child.[79]

In four cases dealing with the Human Rights Act 1998, the Court of Appeal was also held to have erred. Three of these were cases where the Supreme Court's approach led to protection of human rights being enhanced, but the fourth decision had a negative effect. The first of the positive cases was *ZN (Afghanistan)* v *Entry Clearance Officer*,[80] where Lord Clarke, for the Court, held that, when family members seek entry to the United Kingdom to join a sponsor who has been granted asylum but has subsequently obtained British citizenship, they have to satisfy only the rules relating to applications to join a person who has been granted asylum, not the maintenance and accommodation requirements applicable to family members in general. In *Secretary of State for the Home Department* v *AP*,[81] the Supreme Court held that conditions which are proportionate restrictions on European Convention on Human Rights (ECHR) Article 8 rights *can* "tip the balance" and lead to a conclusion that a person's ECHR Article 5 rights have been violated. Most notably of all, in *HJ (Iran)* v *Secretary of State for the Home Department*,[82] the Supreme Court held in no uncertain terms that it would be wrong to deny asylum to homosexuals on the ground that they could live without fear of persecution in their home country so long as they hid their sexuality: such a "reasonable tolerability" test, as set down by the Court of Appeal,[83] was

75 In the three calendar years 2003–05, 48% of appeals were allowed: Dickson, "The processing", n. 21 above, p. 583.

76 [2009] UKSC 5, [2009] 1 WLR 2496.

77 [2009] UKSC 17, [2010] 2 WLR 238.

78 See n. 59 above.

79 *R (A)* v *London Borough of Croydon* [2009] UKSC 8, [2009] 1 WLR 2557 and *I (A Child)*, n. 27 above.

80 [2010] UKSC 21, [2010] 1 WLR 1275.

81 See n. 36 above.

82 [2010] UKSC 31, [2010] 3 WLR 386.

83 [2009] EWCA Civ 172 (Pill and Keene LJJ and Sir Paul Kennedy).

found to be incompatible with the UN Convention Relating to the Status of Refugees of 1951.[84] Lord Rodger delivered a particularly luminous judgment.

The disappointing decision, from a human rights point of view, was *R (Smith)* v *Oxfordshire Assistant Deputy Coroner*[85] where, by 6:3, the Justices held that when British soldiers are on active service abroad they are not "within the jurisdiction of the United Kingdom" for the purposes of ECHR Article 1, and so are not protected by the Convention rights scheduled to the Human Rights Act 1998. The dissenting judges, Baroness Hale, Lord Mance and Lord Kerr, would have upheld the Court of Appeal's stance, as represented by Sir Anthony Clarke MR, Dyson and Keene LJJ, the first two of whom had become Justices of the Supreme Court by the time that Court decided the appeal. If those two Justices had been available to sit in the Supreme Court in place of two of the six who were in the majority, the decision would very probably have gone the other way.

In at least one other case the Supreme Court thought that the Court of Appeal had extended the law unnecessarily. This was in *R (Lewis)* v *Redcar and Cleveland Borough Council (No 2)*,[86] where a unanimous Supreme Court reversed a unanimous and experienced Court of Appeal[87] in ruling that, when deciding whether land, which had been used by local inhabitants for lawful sports and pastimes for 20 years, had been used "as of right" so that the local inhabitants were entitled to have the land registered as a town or village green under the Commons Act 2006, the tripartite test of *nec vi*, *nec clam*, *nec precario* sufficed (i.e. not by force, in secrecy or accidentally), and it was not necessary to impose a further requirement that it would have appeared to a reasonable landowner that the local inhabitants were asserting a right to use the land for lawful sports and pastimes.

Decisions attracting publicity

Several decisions hit the headlines in the media, the most notable being the ruling that the Office of Fair Trading had no power to consider the fairness of charges imposed by banks for unauthorised overdrafts,[88] and the decision that asylum applicants who are gay should not be returned to their home countries (Iran and Cameroon) if, to avoid persecution, they would have to pretend not to be gay.[89] Publicity was also given to the decision that it was not a breach of ECHR Article 8 rights for the police to disclose to a school, on the enhanced criminal record certificate of a midday assistant at the school, the fact that her son had been placed on the child protection register on the ground of neglect.[90] Surprise was expressed at the decision that the Tamil Tigers are not an organisation that is "predominantly terrorist in character",[91] and at the ruling that restrictions imposed on a man who was the subject of a control order were actually a violation of his right to liberty.[92] This last decision was followed by a further controversial ruling that the media could not

84 Oddly, amongst those who thought the Supreme Court had gone too far in this case was Matthew Parris, a prominent supporter of gay rights: "We must harden our hearts and our borders", *The Times*, 10 July 2010.

85 See n. 38 above.

86 [2010] UKSC 11, [2010] 2 WLR 653.

87 The lead judgment there was given by Dyson LJ (now a Justice of the Supreme Court) and was supported by Rix and Laws LJJ.

88 *OFT* v *Abbey National plc* [2009] UKSC 6, [2009] 3 WLR 1215; see http://news.bbc.co.uk/1/hi/8376906.stm.

89 See n. 82 above; *The Times*, 8 July 2010, pp. 12–13. See too n. 84 above.

90 *R (L)* v *Commissioner of Police of the Metropolis* [2009] UKSC 3, [2010] 1 AC 410.

91 *R (JS) (Sri Lanka)* v *Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766; see www.telegraph.co.uk/news/worldnews/asia/srilanka/7465833/Terrorist-members-can-claim-asylum-in-Britain.html.

92 *Secretary of State for the Home Department* v *AP*, n. 36 above. See J Meikle, *The Guardian*, 17 June 2010.

reveal the identity of the controlee because to do so might result in a violation of his ECHR Article 3 and 8 rights.[93]

Criminal lawyers (and politicians) will have been very interested in *R* v *Horncastle*,[94] where the Supreme Court sent a strong message to the European Court of Human Rights that England's law on the admissibility of hearsay evidence in criminal cases is compatible with the ECHR: the Supreme Court was well aware that the Grand Chamber of the European Court of Human Rights was due to consider a case brought against the United Kingdom on the same issue (in fact the Grand Chamber had delayed its decision on whether to hear the case until the outcome of the Supreme Court's deliberations was known).[95]

Constitutional and international lawyers (and again politicians) will have been very struck by *Ahmed* v *HM Treasury*,[96] where the Supreme Court found that Orders in Council freezing the assets of suspected international terrorists were invalid because in making the orders the government had acted beyond the powers conferred on it by the United Nations Act 1946. Superficially, this approach seems to chime with that adopted by the ECJ regarding the status of the United Nations Charter in *Kadi and Al Barakaat International Foundation* v *Council and Commission*,[97] while running counter to that preferred by the European Court of Human Rights in *Behrami* v *France*.[98] But in reality the decision is one based on traditional national law principles relating to legislation that is *ultra vires*. It does not purport to say that the ECHR in some way trumps action taken under the authority of UN Security Council Resolutions.

Lawyers in Scotland will have noted the decisions on the test to be applied when a trial is rendered unfair as a result of the prosecution's failure to disclose information to the defence,[99] and on whether it was within the legislative competence of the Scottish Parliament to pass the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which amended the Road Traffic Act 1988 by increasing the sentencing powers of sheriffs (it was held to be competently made, although the two Scottish Justices were divided on the matter).[100] These cases were the first devolution cases to be dealt with by the Supreme Court under the powers transferred to it from the Privy Council by the Constitutional Reform Act 2005.[101] They neatly illustrate the apparent anomaly that, while Scottish criminal cases cannot end up in the Supreme Court on an "ordinary" point of law (as was also the case as regards the House of Lords), they can do so if the point of law can be framed in a way that makes it a devolution issue. The criminal law of Scotland is thus creeping, through a side-door, into the corpus of UK jurisprudence.

Management of the Court

The public face of any court is presented by the judges of that court and how they handle judicial business. Hence much of the attention that has been given to the new Supreme Court has focused primarily on the substance of its decisions. The social and professional

93 *Secretary of State for the Home Department* v *AP (No 2)*, n. 36 above.

94 See n. 38 above.

95 For the Chamber's decision, see *Al-Khawaja* v *UK* (2009) 49 EHRR 1.

96 See n. 36 above. *The Times*, 28 January 2010, pp. 20–1.

97 Cases C-402 and 415/05P, 2008 ECR I-6351.

98 (2007) 45 EHRR SE10.

99 *Allison* v *HM Advocate* [2010] UKSC 6, 2010 SLT 261; *McInnes* v *HM Advocate* [2010] UKSC 7, 2010 SLT 266. These decisions are discussed by M Scott QC at 2010 SLT 47 and 53.

100 *Martin* v *HM Advocate*, n. 38 above. Lord Hope was one of the majority of three, Lord Rodger was one of the minority of two (along with Lord Kerr, from Northern Ireland).

101 S. 40(4)(b) and Sch. 9, paras 85–119.

backgrounds of the Justices have sometimes come under some media scrutiny (though occasional calls for parliamentary confirmation hearings of top judicial appointments have so far made no headway).[102] But half-concealed behind the judicial face of a court are other important actors. Even in the modern era, where the judges themselves, now liberated from the oversight of Lord Chancellors, do so much to manage both their own professional affairs and the progress of litigation, it has been increasingly recognised that a court cannot function effectively without substantial administrative support. And here we can identify some crucial changes that render the Supreme Court a substantially different institution from its predecessor, the Appellate Committee of the House of Lords. Apart from the transfer to it of the "devolution" jurisdiction formerly exercised by the Judicial Committee of the Privy Council, the Court has the same remit as its predecessor. So, in the first year of its existence, the substantive judicial work of the Court has carried on where the House of Lords left off. But the arrangements and processes by which it is managed are, in many respects, strikingly different.

The most obvious source of difference lies in the fact that, to borrow an apt phrase used by a distinguished former Clerk of the House of Lords Judicial Office, the work of the judicial House of Lords "had to be filtered through the prism of parliamentary procedure".[103] The essay from which this quotation is taken provides a fascinating account of the developing role of the Judicial Office since the late nineteenth century in supporting the appellate function in its rather incongruous parliamentary setting; and parts of the story, particularly some of the earlier parts, have a quaintly Dickensian flavour. The Clerk of the Judicial Office and his staff were parliamentary officials rather than civil servants; the Registrar of the court was the Clerk of the Parliaments; the procedures followed were governed both by the Practice Directions issued from time to time by the Law Lords and by the judicial Standing Orders of the House. Although, since the establishment of the Appellate Committee in 1948, judicial hearings had been detached from the general legislative business of the House of Lords, parliamentary protocols, and the vocabulary associated with them, were faithfully preserved – "petitions" rather than "applications", "speeches" (rather than judgments) handed down in the chamber of the House. In recent years, quite a lot of significant changes had occurred to modernise the way in which judicial business was managed, as well as the accommodation and resources available to the Law Lords, but at the point of transition to the Supreme Court, the final appeal court retained much of the style and ambience of a parliamentary institution. A consequence of that, of course, was that proceedings in the Chamber, when appeals were heard or judgments delivered there, were recorded for television, in contrast with every other court in the land. In that respect the Supreme Court has followed its predecessor, but in practice the eventual broadcasting of any such recordings is very rare.

So, given that part of the rationale for establishing the UK Supreme Court was that the location of the final appeal within Parliament was increasingly seen to be constitutionally anomalous, it is not surprising to find that, while some judicial procedures remain much the same, the status of the Court and the infrastructure that supports it are markedly different.

The Constitutional Reform Act 2005 specifies in some detail the qualifications and methods and terms of appointment of the Justices; it defines the jurisdiction of the Court, its composition for proceedings and its rules of practice and procedure. Sections 45 and 46 empower the President of the Court to make Supreme Court Rules, to be submitted to the

102 See ML Clark, "Introducing a parliamentary confirmation process for new Supreme Court Justices: its pros and cons, and lessons learned from the US experience" (2010) *Public Law* 464.

103 J Vallance White, "The judicial office", in Blom-Cooper et al., *The Judicial House*, n. 1 above, pp. 30–47.

Lord Chancellor and subject to approval by statutory instrument. These rules,[104] together with various Practice Directions,[105] have replaced the Civil, Criminal and Taxation Practice Directions and standing orders of the Appellate Committee of the House of Lords, and regulate how the Court conducts its judicial business.

The 2005 Act also places the administration of the Court – which has the status of a "non-ministerial department"[106] – on a statutory footing. Section 48 provides for a Chief Executive to be appointed by the Lord Chancellor, after consulting the President of the Court. The Chief Executive is subject to any directions given by the President, who may delegate to him or her any non-judicial functions of the Court and the responsibility, set out in s. 49, for the appointment of staff and officers – including the numbers of such personnel and their terms of appointment The first *Annual Report*, covering the first six months of the Supreme Court's existence and published very promptly in July 2010,[107] confirms that Lord Phillips has chosen to delegate these functions. By s. 51, the Chief Executive "must ensure that the Court's resources are used to provide an efficient and effective system to support the Court in carrying on its business". Section 54 requires the Chief Executive to prepare an *Annual Report* at the end of each financial year. This is very much the modern language of public management – efficiency, effectiveness and economy – rather than that of parliamentary proceedings.

In January 2008, the then Lord Chancellor announced the appointment of Ms Jenny Rowe as the first Chief Executive of the Court and its accounting officer. She is a career civil servant, who has held several posts in the former Lord Chancellor's Department and, immediately prior to her appointment as Chief Executive, was Director of Policy and Administration in the Office of the Attorney General. In the period before the Supreme Court opened for business, she divided her working life between the Judicial Office of the House of Lords and the Supreme Court implementation team in the Ministry of Justice, overseeing and managing the transition process.

The *Annual Report* – particularly section 7 ("corporate services") and section 8 ("management commentary") – contains a wealth of interesting material on the management of the new Court and on the challenges that have faced the Chief Executive and her colleagues in the first few months. This can be read in conjunction with the useful organisation chart of the administrative personnel of the court, also available on the Supreme Court's website,[108] which illustrates the bifurcation of functions below the level of the Chief Executive. On the one hand there are various support services of the kind found in most organisations, headed by a Director of Corporate Resources and covering such aspects as communications management, human resources, finance, records management, and health and safety. On the other side of the organisation chart, we find the legal and judicial support functions specific to the needs of a top court; these are headed

104 Supreme Court Rules, 2009, www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf.

105 Listed at www.supremecourt.gov.uk/procedures/practice-directions.html.

106 A device commonly used to emphasise the independence of a government function from political interference. Among many other examples of non-ministerial departments are the Office of Parliamentary Counsel, the Treasury Solicitor's Department, the Charity Commission, the Land Registry, HM Revenue and Customs and the Crown Prosecution Service.

107 *Annual Report*, n. 16 above. Rather curiously, although, by s. 54(2) of the Constitutional Reform Act 2005 the reports must be laid before "each House of Parliament", the first such report was published only as a House of Commons paper. At the time of writing, the management of the Judicial Committee of the Privy Council remains constitutionally separate from that of the Supreme Court, and the *Annual Report* covers only the latter institution – though both courts occupy the same building and there is, in practice, a great deal of overlap between their management.

108 www.supremecourt.gov.uk/docs/hr_organagram.pdf.

by a legally qualified Registrar, and include judicial assistants, listing officers and the secretaries to the President and the Justices. The internal governance structure also includes a Management Board (with two Non-Executive Directors), an Audit Committee (chaired by one of the Non-Executive Directors and including representatives from Scotland and Northern Ireland), and a Health and Safety Committee.

The report indicates that the Court employed 38.4 FTE (full-time equivalent) staff, including seven judicial assistants on fixed-term contracts from September to July. Some staff (11 in total) transferred from the House of Lords, thus metamorphosing from parliamentary officials into civil servants; some came from the Ministry of Justice or from other government departments. Six staff, in addition, came with the Judicial Committee of the Privy Council, which transferred from 9 Downing Street. Although the administration of the Court is not part of the Courts Service, its staff have initially adopted the pay and employment conditions of civil servants employed by the Ministry of Justice. The report notes that, "for some staff (who had been providing direct support to the Law Lords in the House of Lords) this involved a significant change to their terms and conditions and a new way of working".[109]

Having mentioned the status of the staff, we should note one paragraph of the *Annual Report* that is of particular significance in relation to our discussion earlier of the public law functions that have featured so prominently in both the recent history of the Appellate Committee and, now, in the early work of the Supreme Court. It reads as follows:

> The justices regarded achieving tangible independence from both the Legislature and the Executive (in the shape of the Ministry of Justice) as a key constitutional objective. *This was particularly important because the Government is in practice a party in slightly more than half the cases in which an application is made or a hearing takes place before the Court.* The Chief Executive is therefore also an Accounting Officer in her own right, accountable directly to the House of Commons Public Accounts Committee.[110]

Thus the Court's status as a free-standing non-ministerial department, detached not only from its former parliamentary status but also from the executive branch of government, clearly signals the fact that it plays a very special part in the machinery of justice. The fact that its jurisdiction embraces the whole of the United Kingdom (a role inherited, of course, from its predecessor) further underlines its constitutional uniqueness. These were recurrent themes in the discussions leading up to the establishment of the Court, and the need both to maintain its constitutional independence (not least from the Ministry of Justice) and to embrace all the countries of the United Kingdom are clear and robust sub-themes of its first *Annual Report*. Baroness Hale, too, has spoken about how essential it is for the Supreme Court to be seen to be in complete charge of its own affairs, even as regards the type of water sold in its café![111]

The Supreme Court's *Annual Report* was published a few weeks after the general election, against the background of political statements suggesting that the new government was looking for public expenditure cuts of around 40 per cent to alleviate the economic crisis. Under the heading, "Principal risks and uncertainties", the report suggests that "the key risk facing the organization is that the current funding arrangement could be perceived as compromising the independence and effectiveness of the Court". At the press conference to launch the report, the Chief Executive was quoted as saying: "as 62% of our costs are

109 See *Annual Report*, n. 16 above, p. 46.

110 Ibid. p. 43 (emphasis added).

111 See ukscblog.com, n. 62 above (interview with Lady Hale).

genuinely fixed, a 40% cut causes us some problems. We couldn't actually deal with any casework, in fact, with a 40% cut." At the same press conference, Deputy President, Lord Hope, appeared to echo her sentiments: "It's a quite different operation from what we had before [i.e. in the House of Lords]. It's one which cannot be maintained without resources."[112]

The contents, and indeed the very existence, of the *Annual Report*, signals that the Supreme Court has begun its life as a twenty-first-century institution, steeped in the businesslike culture of "new public management" – effectiveness, efficiency and economy. It was unlucky to have been born into a harsh world of economic crisis, where it faces similar challenges to those confronting other public institutions. Despite some worrying suggestions to the contrary,[113] it is hard to imagine that it will be stunted in its infancy by denial of necessary resources. The effective working of the Court depends and will continue to depend on constructive partnership between the Justices and those behind-the-scenes administrators. On the evidence available so far, this partnership seems to have got off to an excellent start.

Conclusion

Those in the legal professions and others concerned in the administration of justice in modern Britain who mourned or were apprehensive about the disbandment of the Appellate Committee of the House of Lords can rest assured that, after the first year of the UK Supreme Court, the high quality of judicial output (even if some of the judgments are as prolix as those of its immediate predecessor) has been fully maintained. The introduction of a modern infrastructure is one very visible and significant by-product of the top court's move from its former parliamentary environment. So far, the Supreme Court has been a success: it is transparently asserting its authority across the nation in a way that fully justifies the decision to substitute it for its predecessor.

112 "Cuts 'would close Supreme Court'", *The Guardian*, 30 July 2010.

113 The Supreme Court appeared on a leaked list prepared for the Cabinet Office of public bodies that may be axed or merged: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_09_10_bbcnewsquangos3.pdf; see, too, www.guardian.co.uk/law/2010/sep/24/uk-supreme-court-quangos.

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Scots law: a system in search of a family?

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Abstract

The concept of legal families is familiar to most comparativists and although miscegenation is an increasingly common feature in a global community, arguably an understanding of family origins may help to anticipate differences of approach, ideology, attitudes to law and diverging normative values. Classification into families, despite various criticisms and disagreements as to which families there are or how they should be distinguished, provides a useful tool for the comparativists and those seeking, reform, unification or harmonisation.

The Scottish legal system, however, is one that tends to elude classification. Even where "mixed" or "hybrid" legal systems are recognised, that of Scotland may be omitted or distinguished from those of, for example, Greece, South Africa, Israel or the Seychelles.

This begs the question, what is a legal system and how is it distinguished? This paper examines the Scottish legal system, taking as its starting point a focus on juristic style as the key distinguishing feature of a legal system and looking at the key elements that eminent comparativists Zweigert and Kötz suggest shape this. These are: the historical background and development; its typical mode of thought; its distinctive institutions; the types of legal sources it acknowledges; and its ideology. Looking particularly at the academic debates that have arisen in Scotland concerning the nature and identity of Scots law, the paper goes on to consider whether the claim to a distinct legal system is anything more than a manifestation of the fact that "each political society in the world has its own law",[1] and that in fact the time has come to abandon the notion of families.

Introduction

At the outset it might be asked why is it important that a legal system belongs to a legal family? Zweigert and Kötz suggest that for the comparativist this classification serves a useful taxonomic purpose, making the mass of legal systems more comprehensible, and facilitating comparison either by selecting systems with the same family for purposes of comparison or ensuring that dissimilar systems are compared by going outside the family.[2] David suggests that the use of families helps us to overcome the diversity of legal systems and enables us to look beyond differences in the detail of rules, which may in any case

1 R David and J Brierley, *Major Legal Systems in the World Today* (London: Stevens 1978), p. 1.

2 K Zweigert and H Kötz, *An Introduction to Comparative Law*, T Weir (trans.) (Oxford: Clarendon Press 1998).

change, to the "juridical phenomenon" behind laws,[3] which have a historical continuity. Classification of legal families emerged as a feature of comparative law in the early twentieth century when it was felt that the adoption of a more scientific enquiry might facilitate the unification of laws and put comparative legal study on a more respectable footing so that its methodology could play a significant role in the movement towards a single European community and greater international legal dialogue. While these particular aspirations may have passed, today there is a focus on harmonisation of laws, especially within European private law, so there may still be justification in seeking to establish some classificatory framework within that differences and similarities can be identified.

Identifying families

For the comparativist seeking to group legal systems into families, a number of questions arise. How many families should there be? How should membership be established? What should be done about those legal systems which seem to belong to two or more families?

One approach would be to have just two families – Western and non-Western systems of law – but this might be oversimplistic in an age of global legal development and discourse. Esmein suggested five families: Romanistic, Germanic, Anglo-Saxon, Slav and Islamic.[4] This, of course, ignored customary and socialist laws. Lévy-Ullman suggested three families: the continental family of laws; the English-speaking family of laws and the Islamic family – again ignoring much of African and the socialist countries.[5] Sauser-Hall used race as the basis of distinction, identifying Indo-European, Semetic and Mongolian families, and those of uncivilised nations.[6] Arminjon, Nolde and Wolff suggested that the key defining characteristic was difference in substance, focusing on derivation, originality and common elements, and found seven legal families: French, German, Scandinavian, English, Russian, Islamic and Hindu.[7] David argued that only two distinguishing criteria were relevant: ideology and legal technique. Ideology was the consequence of religion, philosophy, political, economic and social structure – either in combination or separately – which shaped the conception of justice in any legal family. David's original families were: Western systems, socialist systems, Islamic law, Hindu law and Chinese law.[8] He reduced these subsequently to three: Romanistic-German, common law and socialist law, with the legal systems of Jewish law, Hindu law and the laws of the Far East in "other systems", a residual category of dissimilar laws.[9] In 1969, Malmström suggested, first, a European–American family, which would include Romanistic and German systems, those of Latin America and the Nordic countries and the common law system. His second family encompassed the socialist legal systems; the third the non-communist Asian systems; and

3 David and Brierley, *Major Legal Systems*, n. 1 above, p. 18.

4 A Esmein, "Le droit comparé et l'enseignement du droit", Congrès international de droit comparé, Procès-verbaux des séances et documents I, Paris, 1905. Esmien also suggests that the key distinguishing features should be historical sources, general structure and particular characteristics.

5 H Lévy-Ullman "Observations generals sur les communications relatives au droit privé dans les pays étrangers" in G Tarde (ed.), *Les transformations du droit dans les principaux pays depuis cinquante ans*, (1869–1919) (Paris: Société de législations comparé/F Pichon et Durand-Auzias 1922) based his main distinction on sources of law.

6 G Sauser-Hall, *Fonction et méthode du droit comparé* (Geneva: Kundig 1913). Indo-European included as sub-divisions Hindu, Iranian, Celtic, Greco-Roman, Germanic, Anglo-Saxon and Lithuanian-Slav. Arguably Scots law would fall into none of these neatly.

7 P Arminjon, B Nolde and N Wolff, *Traité de droit comparé* (Paris: Dalloz 1950). While this included socialist systems, it excluded African customary systems and, again, where would Scots law fit in?

8 R David, *Traité élémentaire de droit civil comparé* (Paris: Librairie Générale de Droit 1950).

9 R David, *Les grands systèmes de droit contemporains* (Paris: Dalloz 1982). Scots law would find itself in this residual category.

the fourth the African systems.[10] More recently, de Cruz has indicated a preference for the term "legal traditions" rather than families, using Merryman's definition of a legal tradition as a set of "deeply rooted historically conditioned attitudes about the nature of law, the role of law in society and the political ideology, the organisation and operation of a legal system".[11] There is therefore, some diversity on how to classify legal systems into families.

Zweigert and Kötz highlight several difficulties that may be of particular contemporary relevance. First, whatever the parent legal system, a legal offspring may adopt a new parent(s) or affiliate with another family or families.[12] Secondly, the categorisation may vary depending on whether one is considering private law or public law, or certain areas of law within these two.[13] Thirdly, the time of categorisation may be crucial, especially if there is a programme of considerable legal reform – for example, codification of the law or the consolidation of unwritten customary laws into written form. Zweigert and Kötz also advocate the need to focus on the style of a legal system and its distinctive "stylistic traits" to inform groups and to decide which family a legal system belongs to. The factors they identify as "crucial for the style of a legal system or legal family" are:

- historical background and development of the law;
- predominant and characteristic mode of thought in legal matters;
- especially distinctive institutions;
- the kind of legal sources it acknowledges and the way it handles them;
- and its ideology.[14]

It is to these factors that this paper now turns to consider Scots law and the legal family it might belong to. There are several possible options that might be considered in determining the family membership of Scots law: the Romano-Germanic family of much of continental Europe; the common law family, as found in England and Wales; the mixed jurisdiction family; or a distinctive (family-less) system. These last two possibilities will be considered in due course. The initial focus will be on the common or distinct stylistic traits of Scots law when compared with that of the common law or civil law legal systems.

Historical background and development

In looking at the historical background and development of the law, the aim is to find similarities and differences in the law of Scotland and that of its near neighbour England and Wales, and its more distant possible cousins on the Continent. The historical origins of Scots law are the subject of considerable debate among Scots scholars and it is not the intention of this article to engage with that debate. What follows is a necessarily cursory treatment of the subject area.[15] Possible elements are Roman law, canon law, common or customary law, feudal law, and cases and legislation from the common law of England and Wales. Elements that could be indicative of modern civil law systems are codes of law,

10 A Malmström, "The systems of legal systems, notes on a problem of classification in comparable law" (1969) 13 *Scandinavian Studies in Law* 127. Here Scots law could fall under his broad first family.

11 P De Cruz, *Comparative Law in a Changing World* (London: Cavendish 1999), p. 33, quoting Merryman 1985.

12 Consider for example, countries emerging from socialist law.

13 This is particularly evident in plural legal systems where customary or religious law may govern family life, property, inheritance etc. but a different system of law govern criminal law, the rules of procedure and evidence, or commercial law.

14 Zweigert and Kötz, *An Introduction*, n. 2 above, p. 68.

15 For a readable account of the history of Scots law, see J Cairns, "Historical introduction", in K Reid and R Zimmermann, *A History of Private Law in Scotland*, vol. 1 (Oxford: OUP 2000), pp. 14–184.

restrictions on the powers of judges to "make" the law, reference to institutional writings, an inquisitorial system, the absence of jury trial, and a professional judiciary.

Roman law

It has been suggested that "Scots law is not . . . based entirely on Roman law",[16] even though Roman terminology – together with a predilection for quoting Latin, can be found in the caselaw. Roman law was probably introduced to fill gaps in the local law – consisting of statutes, feudal law and customary laws, but the extent to which this happened may have been exaggerated by contrast with the lack of Roman law influence in England.[17] One view is that "Roman law has never been of itself authoritative in Scotland."[18] Stair stated that Roman law did not have "with us the authority of law; and therefore [is] only received according to [its] equity and expediency".[19] Such Roman law as was received probably infiltrated Scotland as part of the general law of Europe, especially in mercantile law, and through canon or ecclesiastical law – which was also the case in England.

Whether Roman law remains an influence or feature of Scots law is debateable. Writing in the *Scots Law Times* in 2008, Cairns and du Plessis assert that Roman law is still referred to quite often in the cases that come before Scottish courts,[20] however, leading modern textbooks on the Scots legal system tend to be dismissive of its contemporary relevance.[21]

Canon law

Scots law was also open to the reception of canon law from the Continent over a period of several centuries, although the influence of canon law seems to have waned from the Reformation in 1560 onwards.[22] Indeed, one of the factors that contributed to law scholars studying at Orleans, and the Protestant universities of the Netherlands, was the fact that most universities taught canon and Roman law rather than civil law.[23] Also, in Scotland the ecclesiastical courts had considerably more local power than those in England – where the administration of justice was strongly centralised – and canon lawyers were predominant until the fifteenth or sixteenth centuries.[24] Canon law and the procedures of the church courts – where Roman law sometimes formed the basis of pleadings,[25] crossed over into the secular courts, so that even when the former fell into disuse the indirect influence of Roman law via church law remained.[26]

16 OF Robinson, TD Fergus and WM Gordon, *An Introduction to European Legal History* (Abingdon: Professional Books 1985), p. 377.

17 FH Lawson quoting from the first volume of the Stair Society, "The sources and literature of Scots law" where it was said "the reputation which Scotland has perhaps acquired as a stronghold of Roman Law is an insular one, and is based on the contrast between the legal systems north and south of the Tweed": *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan 1953), pp. 179–82.

18 Robinson et al., *An Introduction*, n. 16 above, p. 377.

19 Stair, *Institutes* 1.1.16, quoted in Robinson et al., *An Introduction*, n. 16 above, p. 378.

20 J Cairns and P Du Plessis "Ten years of Roman law in Scottish courts" (2008) *Scots Law Times* 191.

21 R White and I Willock *The Scottish Legal System* 4th edn (Edinburgh: Bloomsbury Professional 2007), p. 21, suggest that the "influence of Roman law on Scots law has been very limited and spasmodic in comparison with that of English law".

22 One of the long-lasting influences of the canon law was the appointment of an executor or administrator of a deceased estate – an institution that was avoided on the Continent, where the estate vests in the heir.

23 TB Smith points out that before the Reformation churchmen took a leading role as judges in Scotland: TB Smith, *Studies Critical and Comparative* (Edinburgh: W Green 1962), p. 35.

24 Robinson et al., *An Introduction*, n. 16 above, p. 379. For example, in 1532, when the College of Justice was founded in Scotland, the Lord President and 50% of the judges were clerics.

25 For example, a claim for *restitutio in integrum* where a voidable contract had been entered into.

26 For example, the legitimation of children by subsequent marriage.

Local (common), customary and feudal law

Any laws introduced into Scotland during the course of the thirteenth to eighteenth centuries were in addition to existing Scots law, which included its own written laws, indigenous customary laws[27] – including feudal property laws influenced by the feudal law of England – and common law developed through the courts.[28] Indeed, until the Middle Ages, those books of law that did exist were of feudal and customary law.[29] Even when other influences were adopted or introduced, Scots law continued to develop its own "common law", moulding and adapting these various "transplants" or "transfusions".[30]

English (common) law

In Scotland it is argued by some that the turning point in the forces that shaped Scots law was the Act of Union,[31] but others indicate that there was considerable influence of English common law in Scots law long before that,[32] and in any case in certain areas such as mercantile law, or feudal land law, there was much that was similar. Certainly, following union, the influence of English law accelerated in two ways. First, as regards legislation, which was made in Westminster, and secondly as regards appeals of civil cases.[33] In respect of the former, rarely were the legislative needs of Scotland considered as being unique or distinct. Legislation was for the most part extended to Scotland, occasionally "kilted" to make it appear more Scottish. As regards the latter, Article XVIII of the Treaty of Union 1707, expressly preserved Scots private law while Article XIX stated quite clearly that no causes in Scotland were to be heard in the English courts or any other court sitting at Westminster Hall. However, there was no reference to the Scots role of the Appellate Committee of the House of Lords or provision as to what was to happen to those appeals from the Inner House of the Court of Session that had previously been heard by the Scots Parliament – now abolished. Following test cases in 1707 and 1709, the appeal jurisdiction of the House of Lords, for Scots civil cases, emerged.[34] Consequently, Scots law cases were frequently decided by non-Scots judges (in fact until 1844 frequently by peers who had no legal training let alone any knowledge of Scots law).

The relationship with continental civil law

Scottish affinity with the Continent rather than the English was prompted by religion and politics. Certainly, the political alliance between Scotland and France – the Aulde Alliance – meant that there were military and diplomatic exchanges in the period 1295–1707, and during the fourteenth and fifteenth centuries Scots lawyers went to France for their legal

27 For example, Udal law in Orkney and the Shetland Islands and Birlaw – derived from Danish or Nordic law – which governed the use of commons.

28 This was collected into judges notebooks (Practicks) one of the earliest being that of Balfour (1579).

29 Robinson et al., *An Introduction*, n. 16 above, p. 378.

30 See W Sellar, "The resilience of the Scottish common law" and other essays in D Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (Berlin: Duncker and Humblot 1997).

31 W Sellar, for example, suggests that by the end of the thirteenth century one could talk of a *lex anglicana* but thereafter divergence occurred: "Scots law: mixed from the very beginning? A tale of two receptions" (2000) 4 *EdinLR* 3 at 7, and A Wijffels, "A British ius commune? A debate on the union of the laws of Scotland and England during the first years of James VI/I's English reign" (2002) 6 *EdinLR* 315.

32 TB Smith, for example, points out that lay justices tended to borrow ideas from England, certainly until reaction against Edward I led to the alliance with France at the end of the thirteenth century: Smith, *Studies Critical*, n. 23 above, p. 32.

33 For a detailed review of the development of Scots law from 1701 to the end of the nineteenth century, see A Gibb, *Law from over the Border: A short account of a strange jurisdiction* (Edinburgh: W Green 1950).

34 *Earl of Roseberrie* v *St John Inglis* (1707) and *Greenshields* v *Magistrates of Edinburgh* (1709).

education – to Paris, Orleans, Avignon and Louvain, bringing back with them not only continental legal ideas but also a more cosmopolitan approach to law, language and culture than perhaps was experienced in England.[35]

How much this ensured a "reception" of French (or civil law) in Scotland is debated. Lawson has suggested that "In Scotland there is some doubt whether any reception in the proper sense of the term ever occurred."[36] Certainly, the works of leading French writers were brought back to Scotland and informed legal argument in the fourteenth and fifteenth centuries, the availability of these treatises supplementing the lack of equivalent Scots writing until Stair.[37] Law students who had studied in France, Italy, Germany or the Netherlands in the fifteenth and sixteenth centuries returned to practise law in the church and secular courts and no doubt brought back with them a number of received civil law ideas – Roman law modified by glossators, commentators, humanists and pandectists,[38] and mixed with the customary laws of France, Germany and the Netherlands. Moreover, the civil law that was received was itself a hybrid law, being the law in force prior to the legal revolution of the Napoleonic (and other) codes.[39] Increasingly, it was the Protestant academic institutions of the Netherlands that attracted student lawyers from Scotland,[40] so that other elements of civil law – notably the Roman–Dutch law of the sixteenth and seventeenth centuries – may have influenced Scots legal thinkers. However, the Napoleonic wars at the end of the eighteenth and early nineteenth centuries put an end to the continental influence, while Napoleonic codification in France and the Netherlands marked a profound change in the legal systems of these countries.[41] There was a change in the political affiliation of Scotland, and the emergence of a more developed Scottish legal system, Scottish legal education and Scottish written sources of law.[42] The shift away from the civil law system of the Continent was compensated by a shift towards the common law, driven by the pace and needs of industrialisation and trade. The severance of ties with the Continent and the increasing influence of English common law on Scots law during the nineteenth century via legislation and caselaw meant that "the purity of Scots law was sullied by the introduction of English legal ideas".[43] It also meant that the old institutional writers lost ground to the more specialised works.[44]

Early historical background may not be of particular help in distinguishing a legal system. These sources suggest a background not vastly dissimilar from many Western legal systems, in which ordinary people tended to be ruled by local laws and customs administered at a local level – often with the intervention of church or ecclesiastical law and ecclesiastical courts in

35 There were no universities in Scotland until the fifteenth century. St Andrews was founded in 1413, Glasgow in 1451 and Aberdeen in 1496. However, the teaching of law was slow to get off the ground and students continued to travel abroad to study law.

36 Lawson, *A Common Lawyer*, n. 17 above, p. 26

37 Although some collections of court decisions, statutes and customary laws ("aulde lawes") had been made as early at the fifteenth century.

38 The "*ius commune*" of Europe.

39 Including the much earlier codification of French customary law (*les coutumes*)

40 For example, Leyden, Utrecht and Groningen.

41 By the eighteenth century, law was more widely available at the universities in Scotland, removing the need to travel abroad.

42 Although it was intended that the early Scottish universities would offer an education in civil and canon law, this does not seem to have occurred until the late sixteenth/early seventeenth century. The civil law tradition, such as it was, was therefore one of practitioners rather than academics.

43 Zweigert and Kötz, *An Introduction*, n. 2 above, p. 210.

44 See, for example, Bell's *Commmentaries* (1800), which dealt with bankruptcy and mercantile law and drew considerably on English authorities.

those matters that the church viewed to be of most significance, for example, family law. Property law was determined by the property-holding structure – closely linked to social structure – while the law of merchants was less constrained by local boundaries to reflect the pragmatic needs of the market place. Those who practised law either learnt their trade through apprenticeships or, if fortunate, by attending the universities.

Later developments can either bring previously distinct systems closer together (as happened with the reception of the French Civil Code in the early nineteenth century in many parts of Europe) or put asunder systems that were formerly less distinct (as has happened with the disintegration of the Soviet socialist republic). In Scotland there were several key moments at which family allegiance may have shifted.[45]

Typical mode of thought

Zweigert and Kötz suggest that "the Germanic and Romanistic families are marked by a tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law and to think up and to think in juristic constructions".[46] How true is this of Scots law? Writing in 1996, Osborne and Armstrong noted "One of the central articles of Scottish faith is that the Scottish legal system is of peculiar excellence and enjoys a mysterious superiority to that found in all other jurisdictions."[47] Quite what they meant is unclear. Peter Birks suggested that the distinct quality of Scots law lay in its commitment to a more systematic approach.[48] Lord MacMillan suggested that the Scots lawyer had a philosophical mind while the English lawyer was concerned with procedure, remedies and precedents rather than searching for principles,[49] while Mackay-Cooper, supporting continental approaches in Scots law, claimed that "the civilian puts his faith in syllogisms, the common lawyer in precedents".[50] Others have been less convinced. For example, Evans-Jones has suggested that the historical experience of Scots law has been that of a weak legal system open to the reception of other systems.[51] Indeed, Lord Rodger of Earlsferry has suggested that the lack of purity in Scots legal thinking has been a strength, giving it the "advantages of the case law approach of common law, coupled with a degree of civilian rigour".[52]

Certainly, while Roman law may not have been a direct source of law in Scotland, the influence of the late Roman jurists such as Justinian, is evident in the structure and arrangement of the early law books of Scots institutional writers – Stair's *Institutions* (1681),

45 For example, the establishment of the Court of Session in 1532; the "Wars of Independence" against Edward 1 – J Gow, *The Introduction of the Theory of Justice to Scots Law* (PhD thesis, University of Aberdeen 1952), p. 192; the Act of Union 1707; the French Revolution 1789; the Scotland Act 1998, as well as more drawn-out influential factors such as the industrial revolution, the growth of the British empire and a single market in Europe.

46 Zweigert and Kötz, *An Introduction*, n. 2 above, p. 70.

47 B Osborne and R Armstrong, *Scotch Obsessions* (Edinburgh: Birlinn 1996), p. 100.

48 P Birks, "More logic and less experience" in Carey Miller and Zimmermann, *The Civilian Tradition*, n. 30 above, p. 167.

49 Quoted in Lawson, *A Common Lawyer*, n. 17 above, p. 141.

50 T. Mackay-Cooper "The common and civil law – a Scot's view" (1949–50) 63 *Harvard Law Review* 467 at 471. In conversation it has been suggested to me that Scots law is inductive, reaching a solution by adhering to established principles, while English law is deductive, with judges having decided on the solution they wish to reach first and then justifying it by means of selected principles. Both may lead to unsatisfactory outcomes and both may require a degree of selection.

51 R Evans-Jones, "Receptions of law, mixed legal systems and the myth of the genius of Scots private law" (1998) 114 *LQR* 228.

52 Lord Rodger of Earlsferry: "Say not the struggle naught availeth: the costs and benefits of mixed legal systems" (2003–04) 78 *Tulane Law Review* 419, at 425. By contrast K Reid has been critical of the "immature ad hoc products of English law", "The idea of mixed legal systems" (2003–04) 78 *Tulane Law Review* 7 at 14.

for example, has been held to be on par with the work of Grotius in the Netherlands.[53] In part this may have been influenced by the attendance of Scots lawyers at the universities of France and the Netherlands where the work of the later institutional writers was central to legal education.[54] However, the last of the great institutional writers died in 1843, and as TB Smith acknowledged:

> Much . . . has changed since the early nineteenth century, in particular through social and economic legislation affecting the United Kingdom as a whole, and there have been other influences tending to assimilate Scottish and English judicial solutions.[55]

While there are some areas of Scots law that reflect juristic constructions (for example, the division of property into corporeal and incorporeal, hereditable and non-hereditable property), and there are similarities to aspects of modern civil law systems (such as the broad-based law of delict in Scots law compared to the English law of many separate torts), a number of the distinctions have become blurred in the course of the twentieth century, for example, the development of the tort/delict of negligence in both jurisdictions, a shift towards insistence on form and formality in conveyancing transactions and pragmatic accommodation of commercial needs.[56]

Moreover, unlike the claim that Zweigert and Kötz make for continental law, which has developed as abstract rules, Scots law, like English law, develops from caselaw, following the rule of precedent, although it has been suggested that Scots law looks to a line of precedents rather than a single one, as authority (perhaps because of the paucity of caselaw). Nevertheless, the emphasis is on the empirical rather than the abstract.[57]

Zweigert and Kötz also identify as distinct the antiformalism of continental systems. While Scots law never suffered from the same rigidity experienced in the common law "forms of action" and therefore had little need of equity's intervention, Scots law is formalistic, and dislikes equity's inclination to look at the intention rather than the form or to take as done that which ought to be done. However, although Scots law never experienced the parallel system of courts that occurred in England prior to the end of the nineteenth century, it would be wrong to suggest that equity is not part of Scots law, indeed it has been suggested that Stair, who offered "a reasoned and systematic approach to the science of law . . . took equity as his overriding principle".[58] Moreover, it was recognised that the Privy Council of Scotland, the principal executive arm of the Crown, exercised the "equitable jurisdiction" of the Crown.[59] Indeed, Walker has stated "although equity has never formed a substantive and separate part of the law of the country, manifestations of it as a basic principle underlying various branches of the law are sufficiently distinguishable".[60]

53 Smith, *Studies Critical*, n. 23 above, p. 33.

54 Smith, for example, points to the influence of the University of Orleans: ibid. p. 28. Civilian influence on education, however, pretty much ceased in the late eighteenth century.

55 Ibid. p. 33.

56 For comment, see D Cabrelli and S Farran "Exploring the interfaces between contract law and property law: a UK comparative approach" (2006) 13(4) *Maastricht Journal of European Comparative Law* 403.

57 Smith, *Studies Critical*, n. 23 above, p. 33.

58 Robinson et al., *An Introduction*, n. 16 above, p. 386.

59 Ibid. p. 399, at least until the union of the parliaments and the 1708 creation of a Privy Council of Great Britain.

60 W Walker, "Equity in Scots law" (1955) *Juridical Review* 103, at 104.

Distinctive institutions

One of the important style traits which Zweigert and Kötz highlight is the distinctiveness of a system that strikes the comparativist as being very different from his or her own system. If one compares Scots law with English law there are certainly some differences in specific areas of law, although often these are in form rather than the "juridical phenomena; behind the rules" – to use David's expression. So, for example, Scots law may struggle with the private trust, but it recognises contracts for the benefit of third parties,[61] the fiduciary role and the possibility of enforcing promises without consideration. It may not accommodate promissory and proprietary estoppel but recognises the idea of raising a personal bar to the assertion of legal claims where to do so would lead to an unjust result. In contract, Scots law does not require consideration and therefore the gratuitous or unilateral promise is enforceable.[62]

Distinctively, Scots law recognises the reserved share on inheritance and restricts freedom of testation, as in civil law systems. Even here, the difference is less than it was because of the wide scope for those not provided for under freedom of testation in English law to challenge the devolution of the estate under the Inheritance (Provisions for Family and Dependents) Act 1975, but, increasingly, family law is being shaped by considerations of equality, the welfare of children and the influence of human rights considerations.[63]

It is true that in the administration of justice Scots law never experienced the dual system of common law and equity courts as was experienced in England and Wales until the Judicature Acts 1873–75, but this may be largely a consequence of historical chance. As Walker has opined, the civil courts in Scotland were "new and weak" in the sixteenth century, and therefore did not pose the challenge that was being experienced in England between the exercise of power by the Crown and that of the Lord Chancellor. On the other hand, development of an autonomous Scots law through the courts and legislature was severely curtailed in 1707, when not only did Scotland lose the ability to legislate for itself, but also civil cases on appeal were going to the House of Lords to be determined by English judges.

Unlike many civil law system, Scots law never had a clear division between public and private law, nor a constitutional court, so that courts of law had to develop a general competence across a broad range of topics. However, the classification of law in Scotland has tended to follow civil law traditions and in the Scotland Act 1998 this division into the law of persons, things and actions is maintained.[64] Whether new legislation made under the powers conferred by the Act will continue to reflect this rather rigid classification remains to be seen.

Types of legal sources

Unlike civil law countries, Scotland never underwent codification.[65] The sources of law were the customs of the people (the common law, applied in the local and later centralised courts), Scottish statutes and customary laws ("aulde lawes"). Until the union of the two

61 That, until the Contracts (Rights of Third Parties) Act 1999, English law struggled with due to the doctrine of privity of contract.

62 In English law, this can be achieved with a promise made "under seal" or in a formal covenant.

63 Both systems are for example, considering reform of succession law.

64 S. 126.

65 This may have been partly because institutional writers, such as Bell, had already "codified" the law, or because the English Parliament was unlikely ever to approve a code. In any case, there seems to have been little agitation for a code in Scotland.

parliaments – as distinct from the union of the crowns in 1603 under James VI of Scotland (James I of England) – Scotland made its own statute law, but from 1707 until 1998 – when the Scotland Act gave Scotland back its own legislative autonomy – the Parliament in Westminster made laws for Scotland, either specifically, or more usually by extending laws for England and Wales to Scotland.[66]

At the outset, therefore, any claim that Scotland has to having a separate legal system is somewhat flawed by the lack of legislative autonomy experienced between 1707 and 1998. Even post-devolution, Westminster continues to make some laws that are applicable to Scotland or adopted by the Scottish Parliament without alteration and the Scottish Law Commission works jointly with the English Law Commission on a number of projects.[67] Even where the Scottish Law Commission engages separately on the reform of Scots law, the Holyrood Parliament seems at times unwilling to take up its proposals.[68]

As in England and Wales, and other common law systems, the decisions of the courts are an important source of law. In Scotland, the decisions of the Court of Session,[69] the early composition of which more closely resembled the English courts than those in France,[70] was an influential source of law from early on. As in England, early judges were either not trained in the law at all or were clerics, although the number of the latter diminished after the Reformation.[71]

As a smaller jurisdiction, Scotland has never had as many cases going through its courts as England and Wales and was not divided into two courts to deal with the pressure of work until 1808, when the Inner and Outer Courts of Sessions were formed (the former having appellate jurisdiction).[72] There were no formal or systematic law reports until the early eighteenth century and those that did exist did not give the reasoning of individual judges until the early nineteenth century.[73] The rule of precedent did not apply until around the same time. Perhaps inevitably, lawyers seeking to find solutions to novel legal questions looked south for precedents. In particular, during the industrial revolution of the late eighteenth and nineteenth centuries, when Scotland experienced industrialisation and urbanisation much faster than many European countries, there was a related increase in caselaw and legislation with Scots lawyers tending to look the jurisprudence of England and Wales for solutions.

Although Scots law reports are now more easily accessible, it is still the case that lawyers tend to draw on the jurisprudence of the common law rather than the civil law. Orücü, for example, has undertaken statistical analysis of the frequency with which Scots courts refer

66 Even prior to 1998, Scotland had its own Law Commission, established in 1965.

67 For example, joint reports have been produced on *Third Parties – Rights against insurers* (2001); *Partnership* (2003); and recent joint projects include insurance contract law, consumer remedies and a review on legislation governing level crossings.

68 A point noted by the chair of the Scottish Law Commission in his foreword to the 2008 *Annual Report* (Scot Law Com. No 214), p. 5, although the 2009 *Annual Report* reflected an improvement.

69 Which existed as a unitary court from 1532–1808 and gave one judgment.

70 Its jurisdiction was initially limited and a number of local and specialist courts existed as well as criminal courts of justiciars and sheriffs. In 1672 a centralised criminal court was established in Edinburgh – the High Court of Justiciary – but the administration of criminal justice was pretty shambolic until reforms in 1747.

71 Lay judges, both ordinary and extraordinary continued to exist until the late eighteenth century.

72 Previously, appeal was to the Scottish Parliament but this was disbanded after the Treaty of Union, although it had been challenged prior to that in 1674. After union it was unclear where appeal lay until 1708 when the first Scottish Court of Session case was appealed to the House of Lords. This tradition continued until 2009 for civil appeals although there was no requirement that a Scots judge sit on such appeals until 1876.

73 In this respect, the law reports were much more like those in France.

to other legal systems,[74] noting that these references are predominantly to English decisions, although these are not always or invariably approved or followed.[75] However, Orücü also found that where Scots courts do consider other legal systems these tend to be predominantly common law ones rather than civilian or mixed jurisdictions. Indeed, Walker has suggested that the influence of English law is insidious and creeps in by way of case citation, whereby the jurists use cases in which judges in the Court of Sessions have referred to English law.[76]

Like English law, therefore, the primary sources of law in Scots law are the statutes of Parliament and caselaw. However, the treatises of institutional writers are also referred to as authorities, or sources of law – although today it might be argued that reference to the *Stair Memorial Encyclopaedia* (SME) is little different from reference to *Halsbury's Laws of England*, the SME being subject to regular updates with contributions from a range of academic writers. Nevertheless, the role of academic scholars in the development of the law in Scotland from the 1600s to the1800s probably exceeded that of England and Wales. Indeed, it has been argued that Scots law recognised the value of legal scholarship long before the courts of England and Wales did so,[77] and that this "strong tradition of overview literature" distinguished Scots law from English law,[78] not only in the way that institutional writers rationally classified and exposed Scots law as a national law,[79] but also in the way that Scots writers maintained the traditions of the Roman law jurists in the way the law was set out and organised.[80] However, the contents of the treatises of institutional writers was itself usually a mixture of indigenous law, Roman law, canon law and feudal law.[81] In the course of the seventeenth, eighteenth and nineteenth centuries there were a number of jurists writing whose works were influential in shaping Scots law.[82] For example, the role of institutional writers, such as Stair, was significant in determining the sources and authorities

74 C McDiarmid undertook a similar study "Scots law: the turning of the tide" (1999) 3 *Juridical Review* 156. In 1949, D Walker found that over half the precedents cited in the first half of the twentieth century in Scots courts derived from English caselaw; "A note on precedent" (1949) *Juridical Review* 283, at 288 cited in McDiarmid, at 161.

75 Although, as Orücü points out, courts both sides of the border may assume that English and Scots law are the same unless evidence is brought to demonstrate otherwise. E Orücü, "Comparative law as a tool of construction in Scottish courts" (2000) *Juridical Review* 27.

76 D Walker, "The province of jurists determined" (1991) *Juridical Review* 20, at 40.

77 The earliest recorded writer seems to have been an anonymous one writing around 1300, but Walker is critical of his efforts because he appears to have drawn heavily on Glanvill's *De Legibus et Consuetudinibus Angliae* (1180) at 26. Compare, however, H MacQueen, "Mixture of muddle?" (1997) *ZEuP* 369 at 371, who points to the "pot-pourii" of legal sources found in this medieval Scots law text *Regiam Majestatem*. Later writers who focused on Scots law emerged in the fifteenth and sixteenth centuries, e.g. Balfour and Sinclair. Lord Roger of Earlsferry has stated "Institutional writers produced comprehensive accounts of Scots private law long before anything similar had been achieved in England.": "Only connect" (2007) 3 *Juridical Review* 163 at 171.

78 Birks, "More logic", n 48 above, p. 171. Birks decries later major works, such as the SME, because it is based on alphabetical ordering and therefore similar to *Halsbury's Laws of England*.

79 That was a feature of institutional writers throughout Europe at the time, as nation states sought to develop their own national legal systems. In England, Blackstone followed the same tradition.

80 Although there have also been suggestions that some institutional writers drew heavily on English law, especially to fill gaps in their statements of the law. See Lawson, *A Common Lawyer*, n. 17 above, p. 50, note 20.

81 Craig, for example, one of the earliest Scots institutional writers, wrote solely about feudal law.

82 For example, Craig, Stair, Hope, Mackenzie, Bankton, Erskine and Bell. Some of these recognised the influence of English law – such as Bell and Bankton – while others placed greater focus on Roman and civil law – such as Stair and Mackenzie – with Justinian's Institutes being an influential model for their own "Institutes".

of Scots law, giving pre-eminence to the decisions of the Scottish Court of Sessions, and native rather than Roman or civil law.[83]

The pre-eminence given to the institutional writers during the late seventeenth and early eighteenth centuries may have been both practical and political.[84] Moreover, while English courts tended to adopt the view that no author could be cited until they were dead,[85] in Scotland it appears that this convention was not strictly adhered to and there is evidence of living jurists being cited in court.[86] Indeed, it has been suggested that the views of the institutional writers have traditionally been treated with as much weight as decisions of the Inner House of the Court of Session. Certainly, even in the course of the twentieth century, it would appear that Scottish courts were willing to cite the work of academic jurists more frequently than English courts.[87] The role of academic jurists appears to have fallen into a decline in the early part of the twentieth century, and the production and use of law texts fell considerably in the period 1918–60.[88] In recent decades, the situation seems to have improved due to a conscious effort to encourage and invest in legal academic writing[89] and, while no great institutional writers have emerged, at the start of the twenty-first century, Walker was able to maintain that the work of jurists in "analysing, systematising, putting into rational order, explaining, criticising the law on particular topics" remains an important influence on Scots law.[90]

Nevertheless, although Scots law may claim civilian traditions, today its administration is largely similar to that found in England and Wales. Except at the lowest level, criminal and civil cases are heard in separate courts, there is no separate branch of administrative courts and no constitutional court. Judges are drawn primarily from practitioners and, unlike on the Continent, are not educated to be judges from their student days, and, since the nineteenth century, their judgments are attributable to them and not anonymous. The civil legal process is adversarial and criminal trials are before a jury. The legal profession is divided into those who have the right to appear before the highest courts – advocates – and those who instruct them and may appear before the lower courts – solicitors. The training of both branches of the profession is largely privately controlled by separate professional bodies: the Faculty of Advocates, which began to emerge in the late sixteenth century; and

83 Stair was essentially a practitioner writing for practitioners. His *Institutions of the Laws of Scotland* was published in 1681. In part, the importance attributed to institutional writers may be down to the scarcity of reported decisions in the eighteenth and nineteenth centuries. On the institutional writers, see D Walker, *The Scottish Jurists* (Edinburgh: W Green 1985).

84 Bankton's *Institutes*, for example, published after the Act of Union (1751–53) emphasised the integrity of Scots law as an independent national system – Robinson et al., *An Introduction*, n. 16 above, p. 388.

85 This convention appears to have originated from a judgment of Lord Eldon in 1814.

86 For example, Hume, Bell, Gloag, Clive and Walker.

87 See J Blackie and N Whitty, "Scots law and the new ius commune" in H MacQueen (ed.), *Scots Law into the 21st Century* (Edinburgh: W Green/Sweet & Maxwell 1996), p. 81.

88 Reid, quotes D M Walker's comment that since 1918 "only half a dozen works of any consequence" had been produced. K Reid, "The third branch of the profession" in H MacQueen, *Scots Law*, n. 87 above, p. 43. He points out that in the period 1961–65 only 14 books on Scots law were published, compared to 43 in the period 1991–95, p. 45, Table 3.

89 By the establishment of the Scottish Universities Law Institute in 1960. It might be argued that this nationalistic approach to legal writing has been a double-edged sword, both promoting and restricting the publication of legal works in Scotland.

90 DMA Walker, *Legal History of Scotland: The twentieth century*, vol. 7 (London and Edinburgh: LexisNexis 2004), p. 1149. Others have been more critical of the "canonisation" of the institutional writers – see K Reid in Reid and Zimmermann, *A History,* n. 15 above, pp. 11–12.

more recently (1949), the Law Society of Scotland.[91] Although the notary was and continues to be a more common figure in Scotland than in England and Wales, the *conseil juridique* is unknown. From early on, the Faculty of Advocates wielded considerable power in controlling admission to the profession, including examining potential entrants in Roman law.[92] Much legal training was also undertaken by members of the Faculty of Advocates, as the Scottish universities did not offer a legal education until the 1700s.[93] Today, most legal training takes place away from the profession, in universities offering full-time and part-time law degrees and making provision in the legal diploma for the training of Scots lawyers. However, the Faculty of Advocates retains its monopoly on the training and admission of advocates to the Bar.

Ideology

Zweigert and Kötz suggest that in Western or European systems ideology is less likely to be a distinguishing characteristic compared to socialist systems, or those based on religious law, or where law is seen as being of secondary importance to other regulatory frameworks such as social cohesion, family honour, and what today might be referred to as alternative dispute resolution in traditional societies.[94]

In the case of Scotland it might be argued that the ideology behind the claim to a distinct Scottish legal system and law has been fostered by particular historical and political events, and, in a small jurisdiction, by the advocacy of notable individuals, such as TB Smith, Lord Hooper and more recently perhaps KGC Reid.[95]

Today, events beyond Scotland are providing a platform for the assertion of Scottish difference. Notably initiatives in Europe to arrive at a modern *ius commune* in many areas of private law have provided the opportunity for advocates to assert that Scots law and Scots lawyers are ideally placed to understand how best to negotiate between civil and common law systems.[96] Ironically, while the "purists" of Scots law may find the claim to miscegenation difficult to swallow, those who have asserted that Scots law was always a weak legal system, subject to many influences,[97] may now find themselves in a position where that perceived weakness can now be claimed as a strength, enabling Scots law-makers to be open to harmonisation ideas and demonstrate an ability to "pick-and-mix" from different legal systems.

There is, of course, a risk that harmonisation or unification – the triumph of pragmatism over idealism – will undermine small jurisdictions. This impetus, plus perhaps the danger of being ignored altogether by projects that fail to recall that the United Kingdom does not have just one legal system, has led to recent more vocal claims that there is a "third legal family", the mixed legal systems of laws.

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91 Clerical pleaders appeared before some of the medieval church courts, and procurators in the lower courts from the sixteenth century onwards. The profession of writers to the signet emerged in the sixteenth century, forming their own professional association. Procurators, notaries and writers to the signet gradually merged under the umbrella of "solicitors".

92 Competence in Scots law as an entry requirement was not compulsory until 1750.

93 Even then, chairs in Scots law lagged behind and the LLB did not become a full-time degree until the 1960s.

94 For example, for a long time, recourse to the law in Japan was seen as being highly undesirable.

95 Not always supported by their peers. For example, Whitty says of TB Smith "his crusade was a lonely campaign": N Whitty "The civilian tradition and debates on Scots law" (1996) *TSAR* 446, 556.

96 See, for example, H MacQueen, "Scots law and the road to the new ius commune' (2000) 4(4) *EJCL* December, www.ejcl.org/ejc/44/art44-1.html.

97 See, for example, R Evans-Jones, "Receptions of law, mixed legal systems and the myth of the genius of Scots private law" (1998) 114 *LQR* 228.

The emergence of mixed legal systems

Zweigert and Kötz indicate that there are some "hybrid" systems that do not fit easily into families. Among these they include: the American state of Louisiana; the Canadian province of Quebec, South Africa, Israel, the Philippines, Puerto Rico, the People's Republic of China and Scotland.[98] These, they suggest may claim one parent family for some aspects of their legal system and another for others.

Despite being notably absent in the classifications of early comparativists, it might be argued that the emergence of a new family, that of mixed legal systems, has given Scots law a home. The common denominator among such systems is a legal system "in which a basically civilian system has been under pressure from the Anglo-American Common law and has in part been overlaid by that rival system of jurisprudence".[99] However, the defining characteristics of mixed legal systems are not always agreed on.[100] To some extent almost all legal systems are mixed, as a result of reception, imposition, adaptation and borrowing.[101] Any *ius commune* that emerges in the twenty-first century will be as mixed as that experienced prior to the Reformation. A more restrictive categorisation of mixed legal systems includes South Africa, Scotland, Louisiana and Quebec, which are singled out as being "classically" mixed systems, combining elements of Romano-Germanic and Anglo-American families of laws.[102]

From the Scottish perspective, links with legal systems of Louisiana, South Africa and the Netherlands had been recognised and maintained quite early on. TB Smith, for example, brought over jurists from Quebec, Louisiana, the Netherlands and South Africa to teach at Edinburgh in the 1950s, and gave a complete collection of South African Law Reports to the library of the Faculty of Advocates. Although Smith's example of nurturing links with other "mixed jurisdictions" has not always been so energetically fostered,[103] in recent years greater efforts have been made to develop a sense of solidarity among the members of this family.[104] In part, this has been helped by increasing interest in the Europeanisation of laws

98 De Cruz's list of hybrid or mixed jurisdictions is different. He includes: the Seychelles, South Africa, Louisiana, the Philippines, Greece, Quebec and Puerto Rico. Scotland is not included, nor is Israel.

99 TB Smith addressing the Louisiana State Law Institute in 1965: A Yiannopoulus (ed), *Civil Law in the Modern World* (Baton Rouge: Louisiana State University Press 1965), p. 5, although even Smith recognised this as an oversimplistic definition. See, more recently, I Castellucci, "How mixed must a mixed system be?" (2008) 12(1) *EJCL* 13.

100 See V Palmer, *Mixed Jurisdictions Worldwide: The third legal family* (Cambridge: CUP 2001), and E Orücü, "What is a mixed legal system: exclusion or expansion?" (2008) 12(1) *EJCL* May, www.ejcl.org.

101 J du Plessis, "The promises and pitfalls of mixed legal systems: the South African and Scottish experiences" (1983) 3 *Stellenbosch Law Review* 339.

102 Palmer, *Mixed Jurisdictions*, n. 100 above, p. 8. Palmer suggests that the test for admission into this select class is specificity of the admixture; appropriate (unspecified) quantification attributable to each system; distinguishable structural divisions in which the civil law applies to the private sphere and the common (Anglo-American) law to the public sphere. For comment on the difficulties of applying theses tests, see J Smits "Mixed jurisdictions: lessons for European harmonisation?" (2008) 12(1) *EJCL* 7, and more generally, E Orücü, E Attwooll and S Coyle (eds), *Studies in Legal Systems: Mixed and mixing* (The Hague: Kluwer Law International 1996).

103 N Whitty, for example, highlights the failure of Scots law to pay greater attention to South African law, "The civilian tradition and debates of Scots law" (1996) 3 *TSAR* 442 at 455, a view shared by P du Plessis "Innkeeper's liability for loss suffered by guests" (2007) 11 *EdinLR* 89. This does not diminish, however, the importance of the work of D Carey Miller, K Reid and E Reid or Whitty himself, nor the contribution of R Zimmerman, S Visser and J du Plessis, all of whom have drawn on South African/Scots comparisons.

104 See, for example, publications in the 1990s by Orücü et al., *Studies in Legal Systems*, n. 102 above; R Jagtenberg, E Orücü and AJ de Roo, *Introduction to Comparative Law* (Arnhem: Gouda Quint BV 1995); and Palmer, *Mixed Jurisdictions*, n. 100 above.

and a realisation that those systems that straddle the civil law and the common law may be well placed to take a lead in such initiatives. In 2002 the First Worldwide Congress on Mixed Jurisdictions was held in Louisiana,[105] and the first decade of the twenty-first century has seen a number of publications edited or co-edited by academics from Scottish universities.[106] A World Society of Mixed Jurisdiction Jurists has been formed to study and promote mixed legal systems.

To what extent the emergence of a "third legal family" goes beyond academic engagement is debateable. In particular, it is unclear whether, if at all, these initiatives will impact on the teaching and practice of law in Scotland. While Roman law remains a compulsory subject of study for those wishing to qualify as advocates, it is not for those hoping to become solicitors and, in any case, the study of Roman law tends to be pre-Justinian. There is no requirement for law students to study modern civil law systems, or to take languages in order to access legal material from other civilian systems.[107] Similarly, there is no requirement for law students to engage in comparative legal studies and, while the Scottish Law Commission is mandated by statute to do so where appropriate, there is no requirement to look to other mixed systems. The question arises therefore whether the emergence of a mixed legal family as a third legal family is anything more than an academic exercise, prompted in part by the threat of extinction.[108]

There are, moreover, considerable differences between the members of this mixed family. Louisiana and Quebec, for example, have codified systems; South Africa has a written constitution, a constitutional court and a federal system of provincial courts.[109] It also has a clearly plural legal system, with English law historically evident in clearly demarcated areas of law, such as evidence and procedure, while Roman–Dutch law permeates the law of persons and things.[110] Moreover, due to historical and political division, different provinces adopted different law and legal approaches.[111] Furthermore, in most mixed systems, considerations of overarching national importance – whether of Canada, the United States, South Africa or the United Kingdom – tend to predominate in a number of areas and cannot accommodate localised distinctions. Consequently, the mixed system on closer examination only relates to parts of that system, calling into question

105 The second was held in Edinburgh in 2007. For papers, see (2008)12(1) *EJCL* www.ejcl.org/121/issue121.html.

106 For example, V Palmer and E Reid (eds), *Mixed Jurisdictions Compared* (Edinburgh: Edinburgh University Press 2009), which looks at the Scotland/Louisiana comparison, and R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective* (Oxford: OUP 2005), which compares Scotland and South Africa.

107 Nor to have Latin, despite its use in the courts. Compare, for example, the requirement in South Africa where it used to be compulsory to have Latin, English and Afrikaans and remains a requirement to have at least two recognised South African languages – which now include indigenous languages.

108 See, for example, comments by K Reid, "The idea of mixed legal systems" (2003–04) 78 *Tulane Law Review* 14, who describes the situation of Scotland and Louisiana as "two small islands of the civil law surrounded by an ocean of common law", and possibly in danger of rising sea-levels.

109 These and other differences were noted by Zweigert and Kötz, n. 2 above, p. 204.

110 South African law was also shaped, similarly to Scots law, by political considerations, the Afrikaans universities and academics resisting the incursions of English law, a conflict that spilled over into the courts and was reflected in the political structure of the country until the overthrow of the National Party government.

111 For example, there were considerable difference between the laws in force in the English-speaking province of Natal (where, for example, there was a code of Bantu law) compared to those of the Cape (where the Dutch settlers first established themselves and introduced Roman–Dutch law), and later the Transvaal and Orange Free State (which were largely Afrikaans dominated).

whether in fact there is a distinct legal system, or only certain distinct laws and institutions in particular parts of the system.[112]

However, the emergence of the concept of mixed legal systems as a family suggests that there is more to it than functionality, and begs the question whether legal systems need families to support a sense of legal community and solidarity, especially, as is often the case in hybrid systems, when certain elements are "at risk".[113] Indeed, the impetus behind cross-comparative studies among mixed jurisdictions may well have been prompted by the "perils of isolation and steady assimilation by the Common Law".[114]

Conclusion

If one considers the example of Scotland, there are clearly challenges to defining what is meant by a legal system or legal tradition, and whether looking to the law alone (its sources, institutions, procedures, court systems, legal officers and legal education) is enough. Perhaps it is important to be mindful of de Cruz's warning that "political, economic, social and moral factors all exert considerable influence on the profile of a legal system".[115] In the case of Scotland, while the economic, social and moral factors may not appear to be significantly distinctive, compared, for example, to England and Wales or even a number of continental countries, politics may be the key to the Scottish legal tradition and the claim to Scottish difference. This does not necessarily mean that a legal system is no more than a manifestation of nationalism and legal parochialism,[116] but it may mean that legal systems are more a product of cultural, political and historical orientation, rather than laws and lawyers, although the latter may themselves have a political agenda and wield considerable influence.[117] Certainly, in the case of Scotland, it is these elements that may account for claims of a distinct Scots legal system, rather than any clearly distinctive stylistic traits.

Looking forward, it might be asked: what is the vision of Scots law? One advantage that might be derived from claiming membership to the mixed legal system of laws is that law-makers can select from or draw inspiration from several component sources.[118] However, consideration of the work of the Scottish Law Commission post-devolution suggests that this advantage is underutilised.[119] The Scottish Parliament makes laws for Scotland under the devolved powers conferred by the Scotland Act 1998, but it also adopts Westminster

112 This raises the question of conceptual confusion between "mixed legal systems" and "plural legal systems", which goes beyond the scope of this paper but is certainly worthy of analysis. See further M Delmas-Marty, *Towards a Truly Common Law: Europe as a laboratory for legal pluralism* (Cambridge: CUP 2002).

113 For example, because of language of linked resources (French in Quebec and Louisiana); the infiltration of lawyers/judges trained in the predominant system; the replacement of common law by unifying statutes or law reform that obliterates differences.

114 Palmer and Reid, *Mixed Jurisdictions*, n. 106 above, p. vii.

115 De Cruz, *Comparative Law*, n. 11 above, p. 35.

116 Although, as Reid acknowledges "nationalism has played its part": Reid and Zimmermann, *A History*, n. 15 above, p. 6.

117 The Faculty of Advocates in Scotland is an example, but see also some of the leading Afrikaans judges and academic writers in South Africa and their influence on the Roman–Dutch aspects of South African law.

118 As stated by T Mackay-Cooper "A seat on the fence may not be a very secure seat, but it offers the conspicuous advantage of a view on both sides of the fence": "The common and civil law – a Scot's view" (1949–50) 63 *Harvard Law Review* 468.

119 In the 2008 *Annual Report* for the Scottish Law Commission, for example, comparative reference is made to the New Zealand Personal Properties Securities Act 1999 in the context of considering assignation of and security over incorporeal moveable property, and the German system of priority notices in the German land register in the context of considering reform of land registration. The 2009 *Annual Report* makes no reference to comparative models.

laws, and while some of its legislation appears to have a particular Scottish stamp to it,[120] much of it does not.

Scots law continues to be taught as a distinct legal system in Scottish universities and, while most of these offer courses in Roman law, few offer courses in civil law. Increasingly Scottish academic legal education is characterised by modules focusing on European and international law, and many academics are themselves not Scots and do not come from a Scottish legal background.[121] While the legal profession continues to be regulated separately in Scotland from that of England and Wales, qualified solicitors from the latter can convert and practise in Scotland, and vice versa, and the "winds of change" are blowing through the monopoly that the profession has had on the provision of legal services. It is true that judges for Scottish courts are drawn largely from Scottish legal practitioners, but Scottish judges also sat on the Appellate Committee of the House of Lords and now sit in the Supreme Court of the United Kingdom – where they are considerably outnumbered by English judges. Despite the Scottish legal training of lawyers and judges, English court decisions continue to be referred to more often than those from other civil or mixed legal systems, which are hardly referred to at all. Indeed, pragmatically it has been pointed out that:

> Few practitioners or judges in Scotland actually have any intellectual commitment to maintaining or cherishing Roman or civil law elements. They would say that they have enough difficulty in reaching a satisfactory answer to any given legal problem without worrying unduly as to whether they have got the Roman–English law mix right.[122]

This does not necessarily undermine the strength of Scots law as a legal system. It does, however, make it increasingly difficult to pinpoint its familial affiliation. Perhaps the case of the Scottish legal system suggests that it is time to abandon families, at least in their traditional form,[123] and move to a more functional approach to resolve contemporary legal challenges without being "hung up" over the ancestry of the proposed solutions.

120 A colleague assures me that environmental law does so, which is interesting as it does not easily fit civilian categorisation of law, being partly public and partly private; partly about property, and persons and remedies.

121 Although an increasing number of younger academics come from continental Europe and might be prevailed upon to provide a greater comparative dimension to legal education.

122 JW Cairns and P du Plessis, "Ten years of Roman law in Scottish courts' (2008) 29 *SLT* 191.

123 This is a view supported by Orücü, "What is a mixed legal system", n. 100 above, although she retains the concept of family in her "family trees".

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History, human rights and multilingual citizenship: conceptualising the European Charter for Regional or Minority Languages

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Introduction

The paradox at the heart of the movement towards greater European political and economic union is the recognition of the need to acknowledge, protect and even celebrate the plurality and diversity of language, culture and national identity within the superstructure. Among the initiatives that have sought to bring about the preservation of European linguistic plurality the most notable has been the creation of the Council of Europe's European Charter for Regional and Minority Languages (ECRML).[1]

The ECRML is by far the most comprehensive and detailed international treaty concerned with the promotion of linguistic plurality in Europe. It is the ECRML, more than any other international treaty, that offers a blueprint for the development of a multilingual society based on equal citizenship,[2] a political reality whereby linguistic minorities are integrated without sacrificing or abandoning their linguistic identity.[3] The ECRML operates within a framework of an expanding body of international jurisprudence with an interest in minority language protection. Because there are now a number of international and domestic instruments that offer protection to speakers of minority languages in various ways, establishing the ECRML's place within the jurisprudential firmament is important.

The aims of this paper are to locate the ECRML and its objectives within the broader international context and to scrutinise its contribution to minority language protection by focusing on two key aspects. Firstly, it analyses the implications of its particular focus on the indigenous or historical minority languages of Europe and it considers the potential nexus between this historiography and national minority claims for political self-determination. Secondly, it evaluates the compatibility of historically based, particularised rights with universal human rights principles, with particular reference to the European Convention on Human Rights (ECHR).

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1 ECRML, Strasbourg, 5 November 1992.

2 See, generally, W Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Clarendon 1995).

3 For reflections on the citizenship of linguistic minorities, see C Taylor, "The politics of recognition" in C Taylor et al. (eds), *Multiculturalism: Examining the politics of recognition* (Princeton: Princeton UP 1994), pp. 25–73.

The focus on protecting the historical or indigenous languages has been the source of some disquiet and criticism. Many language rights theorists have questioned whether the differentiation between historical and new linguistic groups has undermined the integrity and validity of the case for recognising linguistic rights as fundamental human rights.[4] Indeed, for some, the ECRML's emphasis on the historical languages has the potential to diminish the value of linguistic rights and perceive it as being at odds with liberal, universal, rights-based principles.[5]

This paper confronts these concerns and examines to what extent the ECRML's historically based approach supports or undermines the cause of linguistic minorities and whether it can be reconciled with the universal emphasis in the ECHR. It thus critiques the treaty's distinctive historiography and evaluates its implications. In doing so, it further highlights the conceptual tension that exists between upholding universal human rights and recognising the rights of particular groups to special measures that are often pre-conditional to the realisation of their human rights.

The ECRML in context

Since the end of the Second World War, there has been a proliferation of international treaties and legal instruments with a stake in minority interests, including regional and minority languages and the individuals who speak those languages. On the global stage, the United Nations has, unsurprisingly, taken a leading role in setting standards. The often quoted exemplar, the International Covenant on Civil and Political Rights (ICCPR), Article 27, declares that linguistic minorities should not be denied their culture and the right to use their own language.[6] The United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities also supports the rights of minority cultures, although it does not amount to a binding legal instrument.[7] This paper does not provide a detailed guided tour of the international jurisprudence in this field.[8] In summary, the common theme is the maintenance of principles of anti-discrimination and non-interference so that linguistic minorities can enjoy linguistic freedom in the private sphere. Non-interference is, of course, not the same as active promotion of multilingualism on the part of the state.

In the context of the European Union, a degree of support for minority language interests can also be discerned.[9] A multicultural entity composed of other multicultural entities, the EU has had an important role in providing a vision for a multicultural and

4 See R Dunbar, "Implications of the European Charter for Regional or Minority Languages for British linguistic minorities" (2000) 25 *ELRev Human Rights Survey* 46, at 50; T Cheesman "Old and new lesser-used languages of Europe: common cause?" in CC O'Reilly (ed.), *Language, Ethnicity and the State*, vol. 1(Basingstoke: Palgrave 2001), pp. 147–66.

5 See, further, P Keller, "Re-thinking ethnic and cultural rights in Europe", (1998) 18(1) *Oxford Journal of Legal Studies* 29–59; R Bauboeck, "Cultural minority rights for immigrants" (1996) 30(1) *International Migration Review* 203–50.

6 See ICCPR, Article 27. For an interpretation of the scope of ICCPR, Article 27, see *Ominayak* v *Canada*, UN 167/1984, Document A/42/40.

7 The United Nations' contribution to international human rights law is often hailed as being one of its "great accomplishments": see H Herman, "Human rights" in CC Joyner (ed.), *The United Nations and International Law* (Cambridge: CUP 1998), pp. 130–54, at p. 153.

8 For a more detailed guide to the range of applicable international instruments, see F de Varennes, "Linguistic identity and language rights" in M Weller (ed.), *Universal Minority Rights: A commentary on the jurisprudence of international courts and treaty bodies* (Oxford: OUP 2007), pp. 253–323, at p. 255–8.

9 For commentary on the position of linguistic rights in European Law, see I Urrutia and I Lasagabaster, "Language rights and community law" (2008) 12(4) *European Integration Online Papers*, http://eiop.or.at/eiop/texte/2008-004a.htm.

multilingual society. Perhaps, as a cultural expression of the principle of subsidiarity, the rationale of the EU's policy is one of normalised linguistic diversity on the basis of "unbiased coexistence".[10] The European Commission appointed a commissioner with responsibility for education, training, culture and multilingualism in November 2004. His brief was to promote "the peaceful co-existence of people from many different language communities", and to facilitate the protection of cultural identity and linguistic diversity.[11]

European Law has for some time, albeit perhaps tentatively, supported a policy of cultural diversity. Article 151 EC promoted cultural diversity within Europe, although there was no specific mention of linguistic diversity in this provision. However, European law gradually began to engage with the notion of linguistic rights within the concept of European citizenship, particularly following the case of *Re Criminal Proceedings against Horst Otto Bickel and Ulrich Franz*.[12] That case upheld the principle that Article 6 EC precludes national rules that confer on its own citizens the right to require that criminal proceedings be conducted in a particular language, without conferring the same right on nationals of other member states who may be subject to criminal proceedings in that region.

More recent developments potentially herald greater support for linguistic diversity within EU law. The European Charter of Fundamental Rights enshrines the core values of the European Union in a consolidating instrument.[13] The European Union's Reform Treaty (the Lisbon Treaty)[14] provides a legal base for the Charter of Fundamental Rights (provided that member states ratify both).[15] Article 21 of the Charter of Fundamental Rights advances the principle of linguistic rights within the European Union and creates means of redress and appeal in cases of discrimination on the grounds of language or where an individual is a member of a national minority. Such appeals will go to the European Court of Justice in Luxembourg. Article 21.1 states that:

> any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 22 of the Charter of Fundamental Rights states that: "The Union shall respect cultural, religious and linguistic diversity." In addition, Article 3.3 of the Lisbon Treaty declares that the European Union: "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Linguistic groups are thus provided with some grounds for redress if they are discriminated against in any European Union legislation. The Charter of Fundamental Rights is intended to complement other international instruments, such as the ECHR, which protect individuals who belong to minorities. A Fundamental Rights Agency (FRA) will be able to monitor and make reports on discrimination, as well as promoting general awareness of minority language issues. The Lisbon Treaty, by giving a binding effect to the Charter of Fundamental Rights, broadens the influence of the European Union in the field of individual rights. It also unequivocally engages the jurisdiction of the European Court of Justice in cases of discrimination.

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10 N Nic Shuibhne, *EC Law and Minority Language Policy: Culture, citizenship and fundamental rights* (London: Kluwer Law International 2002), p. 55.

11 See http://europa.eu/debateeurope/pdf/figel_062006_en.pdf.

12 Case C-274/96 ECJ [1999] 1 CMLR 348.

13 The Charter of Fundamental Rights: http://europa.eu.int/comm/justice_home/unit/charte/en/charter-equality.html.

14 http://europa.eu/lisbon_treaty/index_en.htm.

15 The United Kingdom and Poland have opted out of the Charter of Fundamental Rights.

Of course, it remains to be seen to what extent these recent developments will advance the cause of linguistic rights in a positive and practical way in the medium to long term. The emphasis is largely on preventing discrimination rather than on conferring any rights to speakers of minority languages, and in that sense replicates UN activity in this field. The Council of Europe, however, has been the source of more pro-active standards on minority language promotion. The Council of Europe's Framework Convention for the Protection of National Minorities deals with language rights within the broader context of minority rights.[16] For example, Article 10(1) of the Framework Convention recognises the right to use a minority language in public and private life. Article 14(1) of the Framework Convention deals with education, but it is couched in very general and limited terms. Article 14(1) requires "the parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language", and Article 14(2) requires parties, subject to caveats, to provide adequate opportunities for being taught in the minority language. The difficulty with the Framework Convention, as with many of the other international instruments is that, although it promotes worthy sentiments towards minority languages and cultures, it is weak on detail and specifies few practical measures in the interests of linguistic minorities.[17] It is in the detail and emphasis that the ECRML stands out from the crowd.[18]

The ECRML is significant because it is wholly concerned with linguistic minority rights, and requires states to implement certain defined measures in the interests of minority languages. Part III of the ECRML lists the obligations that states should undertake to promote regional or minority languages. Articles 8 to 14 specify obligations for states in the fields of education, law, public administration, media, culture and economic and social life. Of the total range of obligations set out in Part III, states are required to apply a minimum of 35, about half of the total number of obligations found within the ECRML. The ECRML adopts an *á la carte* system of adoption in that states have a considerable freedom to choose those obligations to which they wish to subscribe in the interests of particular languages.[19] It is thereby flexible in its capacity to take into account the diversity that exists between minority languages within European states.[20] It also encourages gradual, progressive compliance with the ECRML as opposed to immediate, excessive and over-ambitious subscription to its obligations.[21] The often repeated criticism of the ECRML is that it gives states too much discretion to apply it according to their own political priorities. However, this flexibility can also be a virtue in the context of the complex and diverse linguistic landscape that exists within Europe as a whole.[22]

16 See M Weller (ed.), *The Rights of Minorities: A commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: OUP 2005); see also, S Wheatley "The Council of Europe's Framework Convention on National Minorities" (1996) 5 *Web JCLI*.

17 For a study of the mechanisms to implement and monitor minority rights, see RM Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: TMC Asser 2005).

18 For an overview, see R Dunbar, "The Council of Europe's European Charter for Regional or Minority Languages" in K Henrard and R Dunbar (eds), *Synergies in Minority Protection* (Cambridge: CUP 2008), pp. 155–85.

19 This is subject to a few qualifications and a certain quota, namely that they must apply at least three paragraphs from each of Articles 8 and 12 and one paragraph from each of Articles 9, 10, 11 and 13. See ECRML, Part I, Article 2, para. 2.

20 See R Dunbar, "Definitely interpreting the European Charter for Regional or Minority Languages: the legal challenges" in R Dunbar and G Parry (eds), *The European Charter for Regional or Minority Languages: Legal challenges and opportunities* (Strasbourg: Council of Europe Publishing 2008), pp. 37–61, p. 40.

21 J-M Woehrling, *The European Charter for Regional or Minority Languages: A critical commentary* (Strasbourg: Council of Europe Publishing 2005), pp. 137–9.

22 See Dunbar, "Implications", n. 4 above, p. 69.

Although there is no enforcement mechanism, there is a monitoring system, and states must report on their implementation of the ECRML within one year of ratification followed by reporting at three-yearly intervals thereafter. The reports are scrutinised by an independent panel of experts appointed by the Council of Europe, who in turn report their findings to the Council of Ministers.[23] The monitoring process, despite its limitations, provides a mechanism for ensuring a level of public accountability for the implementation of the ECRML by states that are party to it.[24]

The ECRML's detail and pro-active emphasis marks it out from the other international instruments. Take, for example, the use of a minority language in a court trial. Article 6 of ECHR simply guarantees basic comprehension on the basis of linguistic necessity. It guarantees the right to use a minority language as part of the basic tenets of a fair trial.[25] Article 6 ECHR provides that a person on trial must be understood and has a right to understand the proceedings. But the right under Article 6 to an interpreter where the defendant does not understand the language of the court is not the same as a right to use the language of choice, or the right to a tribunal that speaks the defendant's language.[26] This principle of necessity has been maintained in other situations where individuals have unsuccessfully sought the support of the ECHR when seeking to use the language of their choice.[27] We shall be returning to assess the ECHR's significance later in this article.

Article 10(3) of the Framework Convention for the Protection of National Minorities requires party states to guarantee the right of an individual to be informed in a language that he or she understands, the reasons for his or her arrest and the nature of the accusation, and to be able to defend himself or herself in that language (if necessary, with the assistance of an interpreter). The wording of Article 10(3) is so similar to that of Article 6 of the ECHR, that it is doubtful that it creates any further right at all, as it appears to promote linguistic comprehension rather than linguistic choice, which is no more than the basic human right protected by Article 6 of the ECHR. Again, as with the ECHR, it is the principle of linguistic necessity that the Framework Convention upholds.

The ECRML, however, goes much further. Article 9 ECRML takes the position from one of linguistic necessity to one of linguistic equality. It requires states, in appropriate circumstances, to allow speakers of the minority language to use it in court and tribunal hearings.[28] The right to use the minority language in court proceedings applies to defendants, witnesses and all parties. Other provisions require criminal courts, at the request of one of the parties, to conduct proceedings in the minority or regional language[29] and guarantee the accused the right to use his or her minority language.[30] There are similar

23 ECRML, Part III, Article 15.

24 See also, T Skutnabb-Kangas, "Linguistic diversity, human rights and the free market", in M Kontra, R Phillipson, T Skutnabb-Kangas and T Varady (eds), *Language: A right and a resource* (Budapest: CEU Press 1999), pp. 187–222, at pp. 204–06.

25 See ECHR, Article 6.

26 This has been made clear in a number of judgments, see, for example, *A* v *France* (1984) 6 EHRR CD 371.

27 In *Fryske Nasjonale Partij and Others* v *Netherlands* (1987) 9 EHRR CD 261, speakers of Frisian complained about the refusal of authorities in the Netherlands to allow them to use the Frisian language when submitting relevant parliamentary election registration documents. The commission again held that there had been no breach of Convention rights, and there was no right to use the language of one's choice within the articles of the Convention.

28 ECRML, Part III, Article 9.

29 Ibid. Article 9, para. 1(a)(i).

30 Ibid. para. 1(a)(ii).

provisions in the context of civil proceedings[31] and also in the administrative courts.[32] The ECRML provides that the use of the minority language is facilitated, if necessary, by means of interpreters and translation.[33] The key difference is that the provisions of Article 9 are not dependant on the individual not being able to understand the dominant language, but introduces the principle of linguistic choice. It thus brings the position nearer to that of linguistic equality.

The ECRML, in light of its emphasis and detail, is unlike the other international instruments with their limited focus on preventing discrimination. However, it is also limited in its capacity to make a direct impact, because it is not part of European law, it does not grant individual legal rights nor does it create legal obligations and it has no judicial enforcement mechanism in the event of non-compliance. Nevertheless, it does have a valuable role in declaring international standards that can provide a reference point or benchmark for promoting multilingualism and linguistic diversity as a social value.[34] The ECRML provides a set of values, international norms, that guide European states in their policies towards minority languages. It provides a shopping list in the form of practical measures that can facilitate minority language protection and promotion. Also, it is possible that, by signing up to the ECRML's obligations, states will then create laws that thereby create legal rights for speakers of those languages.[35] This is because states that adopt certain measures, in order for that adoption to be effective, may need to legislate at a domestic level. But it is not the ECRML that is the sovereign or authority for the laws created internally by states, even where those laws were inspired by its provisions. While recognising that minority languages may not enjoy the same status as the official languages, its objective is to promote the concept of a multilingual society based on principles of respect and harmonious coexistence.[36]

The ECRML and the use of history

The ECRML is also distinctive in that promotes not simply minority languages, but the indigenous or historical languages of European peoples. It "covers only historical languages, that is to say languages which have been spoken over a long period in the state in question".[37] As is clearly stated in Article 1, the languages that are protected are those spoken by a minority, are traditionally used by part of the population of a state, and are not official languages, languages of migrants, dialects or artificially created languages.[38]

The ECRML is concerned with "the historical regional or minority languages of Europe", because, it maintains that they contribute "to the maintenance and development of Europe's cultural wealth and traditions".[39] The languages of new, migrant peoples, however, do not come under its remit.[40] Its interest in multilingualism, therefore, does not

31 ECRML, Part III, Article 9, para. 1(b).

32 Ibid. para. 1(c).

33 Ibid. Part I, Article 1, para. (b).

34 Woehrling, *The European Charter*, n. 21 above, pp. 19–23.

35 Ibid. p 31.

36 Ibid. pp. 33 and 36–7.

37 ECRML, Explanatory Report, para. 31.

38 ECRML, Part I, Article 1: "The term regional or minority languages means languages that are, i. traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population, and, ii. different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants."

39 ECRML, Preamble.

40 ECRML, Explanatory Report, paras 10 and 15.

include new linguistic minorities, such as those minorities of Asian or African origin that are now well-established in most European states. Repeatedly, the emphasis is on the "common heritage", and on the "traditional regional and minority languages".[41] This distinction between old minorities and new minorities is replicated within the domestic legislation of many of the ratifying states, which have granted certain civic rights to indigenous minority linguistic groups but not to the more recently formed minority linguistic groups.[42]

The ECRML appears to justify its position on the grounds of heritage conservation. In essence, this justification maintains that Europe is a great linguistic safari park, and so the rare, indigenous species must be protected. The newcomers do not face linguistic extinction. On the contrary, many of these languages originate in parts of the world where over-population is the norm. Selective protection is thus justified on environmental grounds, that is, the protection of the human, cultural environment. Yet, this purported justification is not entirely convincing when it is realised that some of the languages protected by the ECRML are not in danger of extinction. Swedish is protected in Finland although it has a homeland where it is the dominant language. The status of German in Denmark is another example. Upon closer examination, the heritage conservation justification fails to encapsulate completely the ECRML's rationale.

A potential alternative to the conservationist theory might be a form of social contract theory. Such a theory might explain the ECRML's rationale on the basis that certain immigrant groups are deemed to have consented (normally by implication) to certain terms and conditions upon being accepted into a new society. It would draw on a notion of voluntary cultural adjustment, in that the new immigrant groups are deemed to have arrived on the understanding that they were required to integrate into the existing, dominant culture, and not supplant or undermine it. The older languages, on the hand, are spoken by peoples of Europe who did not "arrive" in an established society, but who were already present, and were never given the option of accepting the terms and conditions or otherwise return to another place of origin.[43]

Both the conservationist and social contract models have their attraction, especially the conservationist motive with its contemporary resonances. But upon careful reflection we see that both are derived from the same root in that both defend the special treatment of certain linguistic groups through the invocation of history. The heritage conservation basis must draw upon history to justify and explain its selection of languages that are to be regarded part of the linguistic heritage. The social contract model, and its use of the tacit consent argument, can only work if by means of historical enquiry we find that it is feasible to argue that certain linguistic immigrant peoples *did* find themselves in a politically ordered society, and that, by implication, they *were* expected to conform within that society's already established political regime. Conversely, using the same reasoning, the historical narrative maintains that the older linguistic communities were required to assimilate either contrary to their desires or without having been consulted about the matter.

Surprisingly, there has been little open debate on the historiography that underlines the ECRML's rationale. Historical rights often figure in discussions on the case for protection,

41 ECRML, Explanatory Report, para. 26.

42 The United Kingdom has recognised its obligations under the Charter for Welsh, Irish Gaelic, Scottish Gaelic, Scots, Ulster Scots and Cornish. For an overview, see R Dunbar, "Is there a duty to legislate for linguistic minorities?" (2006) 33(1) *JLS* 181–98.

43 For further reflections on social contract theory, see W Kymlicka, "Language policies, national identities, and liberal–democratic norms" in C Williams (ed.), *Language and Governance* (Cardiff: University of Wales Press 2007), pp. 505–15, at p. 506.

but in a very casual, taken-for-granted way. The ECRML's use of history can be said to occur in two ways. First of all, history is used as a means of authenticating or validating linguistic status and entitlement to protection. The languages that enjoy protection do so in the light of their origins, their antiquity or their experience as victims of the past. The past is therefore the means of proving status as an indigenous language, or, of the language's status as the victim of past injustices, be they wars, arbitrary boundary changes, or forcible population displacement. Cornish is a language that enjoys some protection under the ECRML in the UK. It has very few speakers, probably no native speakers, and little real, visible presence even in its traditional heartland of west Cornwall. Yet, its right to protection under the ECRML is verified by reference to its history as an indigenous British (in its original meaning) language that survived the Anglo-Saxon displacement of Celtic culture in England during the sub-Roman era.[44]

As well as determining status, history also becomes a means of legitimising present and future claims for protection and promotion. Indeed, the promotion of the relevant language becomes a form of historical reparation. Accordingly, making up for past wrongs or injustices becomes the imperative, rather than the promotion of linguistic plurality as a universal and neutral value. It has interesting parallels with other political movements which promote a "coming to terms with the past" approach in order to offer apology and, possibly, reparation and repatriation.[45] With this approach, history becomes the validating source of a language's right to protection under the ECRML.

There can be no doubt that many of the languages protected by the ECRML were the victims of historical assimilation movements or state border change, often a result of war or some other imposed political settlement. They consequently found themselves as minorities in larger political units, often multi-national states, processes that climaxed with the emergence in the nineteenth century of the modern nation-state. They were rarely asked to agree or consent to being absorbed within the newly created political supra-entity. As one observer comments, "national minorities and indigenous peoples did not come to the state (as with immigrants); rather the state came to them through some process (voluntary or involuntary) of territorial expansion".[46]

This emphasis on the historical or indigenous languages, therefore, has its political resonances. Promoters of the ECRML face a fundamental, self-evident truth, which is that many of the languages protected by it are, put simply, the languages of nations that were at a point in history incorporated into larger states. The linguistic agenda at a local level can therefore be an aspect of a broader nationalist movement rather than a product of some non-political or liberal cultural diversity agenda.[47] In Wales, for example, the language issue has traditionally been driven by groups or individuals who have also promoted a nationalist, political drive for self-determination.[48] This close nexus between the language revitalisation and political autonomy agendas has, occasionally, been detrimental to both the linguistic and political causes, *mutatis mutandis*. The political argument for greater self-determination has sometimes been treated with suspicion by the English-only speaking majority due to fears of hidden linguistic agendas that might eventually lead to their marginalisation as a linguistic

44 See, generally, C Thomas, *Celtic Britain* (London: Thames & Hudson 1986).

45 J Black, *Using History* (London: Hodder Arnold 2005), pp. 92–3.

46 See Kymlicka, "Language policies", n. 43 above, at p. 506.

47 Ibid. pp. 509–15.

48 The important cultural dimension in the story of national rebirth in Wales has been acknowledged in many of several major historical studies. See, for example, KO Morgan, *Rebirth of a Nation, A history of modern Wales* (Oxford: OUP 1981); alternatively see DG Evans, *A History of Wales 1906–2000* (Cardiff: University of Wales Press 2000).

group. Conversely, the language revitalisation agenda has sometimes encountered opposition based on a fear that it might lead to, or at least provide sustenance for, claims for political separation.[49] Detrimental or not, it is doubtful that the language agenda would have ever surfaced let alone enjoyed a degree of political success were it not for the efforts of nationalist campaigners.[50]

Of course, the link between language and nationhood is not always clear or straightforward. Not every linguistic community is harbouring serious ambition for self-governance *as a linguistic group*. In Scotland, for example, there is no political drive for independence on the part of either Gaelic speakers or Scots speakers in an effort to somehow undo the unity of Scotland brought about in the eleventh century. Gaelic speakers and Scots speakers do not regard themselves as nations by virtue of language. The claim of these linguistic communities is for recognition and protection within a larger, multilingual political entity, be that Scotland or the United Kingdom.[51] But there can be no doubt that by looking at Europe as a whole we see that there is a tangible political nexus between language, culture and national identity.[52]

The Canadian political theorist, Will Kymlicka, also acknowledges this potentially potent connection between the emphasis on historical injustice and the cause of nationhood. He argues that the demands of small nations for greater national and political autonomy, of which cultural and linguistic autonomy are important aspects, have become acceptable in western Europe, and seen as being compatible with liberal–democratic values and notions of justice.[53] If so, the discrimination between historical and immigrant linguistic groups may be defensible because, in the case of the former, their claims are firmly wedded to a broader national autonomy agenda rather than purely in terms of cultural diversity claims. Conversely, however, such nationalist claims are not as sympathetically considered by central and eastern European states, which see secessionist movements as being a threat to state security and a menace to international stability.[54]

Certainly, within Europe as a whole, the notion of "historical injustice" is interpreted and used in complex and diverse ways when it comes to national minorities.[55] Whereas in western Europe, there is, generally speaking, a greater consensus on the historical minorities that are victims and deserve protection, in central and eastern Europe the picture is far from straightforward. This is due to the legacy of conquest and colonisation, and of changing positions of power among the peoples concerned. Although in western Europe we find a historical continuity of position between the dominant and minority languages, in eastern Europe the positions have changed repeatedly over time, so that languages that once represented the dominant authority have become minority languages, and suppressed languages have now achieved dominance.

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49 This nexus between political separatism and cultural rights has also been noted by external observers; see CGA Bryant, *The Nations of Britain* (Oxford: OUP 2006), at pp. 117–56.

50 See D Phillips, *Trwy Ddulliau Chwyldro . . . ? Hanes Cymdeithas yr Iaith Gymraeg, 1962–1992* (Llandysul: Gomer 1998).

51 For some legal–historical perspectives, see H MacQueen, "Laws and languages: some historical notes from Scotland" (2002) 6(2) *Electronic Journal of Comparative Law* http://law.kub.nl/ejcl/62/art62-2.html.

52 For further reflections, see K Henrard, "The interrelationship between individual human rights, minority rights and the right to self-determination and its importance for the adequate protection of linguistic minorities" (2001) 1 (1) *Global Review of Ethnopolitics* 41–61.

53 Kymlicka, "Language policies", n. 43 above, pp. 509–15.

54 See W Kymlicka, "Justice and security in the accommodation of minority nationalism" in S May, T Modood and J Squires (eds), *Ethnicity, Nationalism and Minority Rights* (Cambridge: CUP 2004), pp. 144–75.

55 Ibid. pp. 154–6.

The potential consequence of this is that, in historical terms, the languages of former colonial powers might not be regarded as "deserving" protection, because they represent the authors of a past injustice as opposed to being victims of it. These historically based conflicts and their enduring and, sadly, damaging influence on contemporary debates can be seen in the troubled relationship between Turkey and Greece. Neither state has ratified either the Framework Convention or the ECRML, failures that reflect both states' problematic attitude towards their respective Turkish and Greek minorities.[56] The burden of history weighs heavily on the political discourse in this particular conflict as it can in other instances where the legacy of the past is yet to be fully resolved.[57]

The question is whether the historiography, which is deeply imbedded in the ECRML's rationale, besides running counter to multilingualism as a universal value, is counterproductive and, indeed, fuelling the historical flames. Is this particular concern for indigenous minority languages and the apparent emphasis on facilitating historical justice, therefore, politically problematic? Of further significance is the fact that the ECRML does not provide a definitive list of those languages that it protects.[58] Definition, interpretation and application are matters left to the state governments. Although this might appear to give it the advantage of flexibility and adaptability, allowing ratifying states to specify which languages within their respective territories are to be protected might also be a source of controversy.

This is because it potentially leaves minority language policy at the mercy of political expediency.[59] Political imperatives can often shape and influence state use of history in justifying cultural policy,[60] because "issues of national identity are centrally involved".[61] Public history often involves a selective use of historical narrative to support a very contemporary agenda and to legitimise present priorities.[62] Deciding on what is heritage, and what is not, involves subjective, if not politically biased decisions.[63] The political dimensions that underpin the popular historical narrative can often overwhelm the quest for

56 The failure to honour the rights of minorities has been the subject of repeated criticism by the Council of Europe. See http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4493: also www.aina.org/news/20100127195356.htm.

57 For a further example of a complex relationship between the past and the present in shaping national policy, see B Bowring and M Antonovych, "Ukraine's long and winding road to the European Charter for Regional or Minority Languages" in Dunbar and Parry, *The European Charter*, n. 20 above, pp. 157–82.

58 See Woehrling, *The European Charter*, n. 21 above, pp. 53–7.

59 The potentially destructive role of history as a nutrient of state propaganda was witnessed in the Serbian response to Kosovo's unilateral declaration of independence. The Serbian account maintained that Kosovo is rightfully Serbian, and according to the popular tradition, taken wrongfully in 1389 by the Ottomans and later colonised by Albanian usurpers. Time and time again, Serbian resistance to Kosovo's right to independence turned to this historical narrative that purportedly supported Serbian claims to sovereignty. See, further, Black, *Using History*, n. 45 above, p. 9; also M Ferro, *The Use and Abuse of History* (London: Routledge 2003), pp. 1–20.

60 See, among others, J Arnold, K Davies and S Ditchfield (eds), *History and Heritage: Consuming the past in contemporary culture* (Shaftesbury: Donhead 1998).

61 Black, *Using History*, n. 45 above, p. 2.

62 See GG Iggers, *Historiography in the Twentieth Century* (Middletown: Wesleyan UP 2005), at pp. 149–60.

63 See, further, A Green and K Troup, *The Houses of History: A critical reader in twentieth-century history and theory* (Manchester: Manchester UP 1999), at pp. 230–7.

objective truth.[64] Indeed, the very word "heritage" has developed connotations with anti-history, with state and popular myth-making.[65]

By adopting a historical or heritage-based approach to its promotion of multilingualism, is the ECRML courting political controversy and providing support for nationalist agendas within European states? The ECRML endeavours to distance itself from the political mire by promoting the concept of multilingualism within the unitary state. In particular, Article 5 provides a rule for interpreting the ECRML that prevents any conflict with the charter of the United Nations. In particular, it prevents the ECRML being used to undermine principles of international law governing national sovereignty or territorial integrity. It states that:

> nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.[66]

Article 5 claims that the ECRML is not an instrument to undermine the authority of European states by promoting political autonomy for national/linguistic groups or justifying intervention on behalf of those groups by other states or the wider international community. The explanatory report embellishes on the provisions of the article by stating that "the protection and promotion of regional or minority languages which is the objective of the charter must take place within the framework of national sovereignty and territorial integrity".[67] The Preamble also outlines the overriding purpose and rationale of the treaty in upholding the values of "inter-culturalism and multilingualism" and proclaims that:

> the protection and promotion of regional or minority languages in the different countries and regions of Europe represent an important contribution to the building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity.[68]

Woehrling also comments that Article 5 affirms the ECRML's commitment to international law and that "the charter cannot legally have the effect of calling into question the aims of the Charter of the United Nations".[69]

It is a well-established principle of international law that states should enjoy respect for their sovereignty and territorial integrity. This was the foundation for world peace as declared in the Charter of the United Nations. After all, the overriding objective in setting up the United Nations was to maintain international peace and security and "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".[70] The creation of the United Nations was a key component of the post-Second World War reconstruction agenda and at the very heart of the new world order. Its cardinal purpose was to prevent war and aggression and to guarantee the security of all state members. As has been said, "Most of the fundamental norms, rules and

64 For historiographical critiques of notions of "truth" in history, see W Thompson, *Postmodernism and History* (Basingstoke: Palgrave 2004); H White, *The Content of the Form: Narrative discourse and historical representation* (Baltimore: Johns Hopkins UP 1987); EM Wood and JB Foster (eds), *In Defense of History: Marxism and the postmodern agenda* (New York: Monthly Review Press 1997); J Warren, *The Past and its Presenters: An introduction to issues in historiography* (London: Hodder & Stoughton 1998), pp. 163–71.

65 See Ferro, *Use and Abuse*, n. 59 above, p. 359.

66 ECRML, Part 1, Article 5.

67 ECRML, Explanatory Report, para. 55.

68 ECRML, Preamble.

69 Ibid.

70 UN Charter, Article 1(1).

practices of international relations rest on the premise of state sovereignty . . . non-intervention is the duty correlative to the right of sovereignty. Other states are obliged not to interfere with the internal actions of a sovereign state."[71]

Interference with the domestic jurisdiction of states can thus amount to a breach of Article 2(7) of the Charter of the United Nations, and the threat or use of force against the territorial integrity of states can likewise contravene Article 2(4) of the Charter of the United Nations. Article 2(4) states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[72]

These are the provisions of the United Nations Charter to which Article 5 ECRML refers and upholds. The explanatory report gives further guidance on what exactly Article 5 is seeking to achieve when it states:

> the fact that, by ratifying the charter, a state has entered into undertakings with respect to a regional or minority language may not be used by another state having a special interest in that language or by the users of the language as a pretext for taking any action prejudicial to the sovereignty and territorial integrity of that state.[73]

Perhaps it is this particular passage in the explanatory report that is most instructive in explaining the inclusion and content of Article 5 in the ECRML. It ensures that the ECRML cannot be interpreted in such a way that it gives the authority to a state to interfere in the interests of a linguistic group in another state. For example, in theory, it prevents Sweden from drawing upon the ECRML as a basis for interjecting on behalf of Swedish speakers in Finland, or Germany to intervene on behalf of German speakers in Denmark.

The need to declare this injunction, and thus compatibility with the United Nations Charter, may have historical resonances, and may be a response to the inter-war experience of minority protection within international affairs. In the inter-war period (1918–39), the purported claims of linguistic and national minorities had been manipulated and used, most notably by Germany, to justify military intervention in neighbouring states.[74] The ECRML's rejection of this form of political manipulation of its objectives is to declare its compatibility with the principle of national sovereignty and state integrity and to make it clear that it does not challenge the territorial boundaries of states and does not "identify distinctive territorial entities which would present a challenge to state integrity".[75]

Perhaps the need for the inclusion of Article 5 also reflects the fact that the ECRML came into existence when the fragmentation of established political order in the Balkans was reaching its climax with the disintegration of Yugoslavia.[76] This may have created wariness in some quarters of a treaty that promoted the rights of linguistic minorities and that might, indirectly and by extension, also promote the cause of national minorities seeking political autonomy. The provisions of Article 5 were thus necessary as part of the

71 See J Donnelly, "State sovereignty and international intervention: the case of human rights" in GM Lyons and M Mastanduno (eds), *Beyond Westphalia? State sovereignty and international intervention* (Baltimore: Johns Hopkins UP 1995), pp. 115–46, at p. 118.

72 UN Charter, Article 2(4).

73 See ECRML, Explanatory Report, para. 55.

74 See de Varennes, "Linguistic identity", n. 8 above, pp. 254–5.

75 Woehrling, *The European Charter*, n. 21 above, p. 86.

76 Much has been written on this subject. See, for example, B Magas, *The Destruction of Yugoslavia: Tracking the break-up 1980–1992* (London: Verso 1993); M Glenny, *The Fall of Yugoslavia: The third Balkan war* (London: Penguin 1992).

diplomatic trade-off to provide reassurance that the drafters of the ECRML had no such agenda. Consequently, "the purpose of Article 5 is primarily to forestall misinterpretation of the charter as a means of creating a right for linguistic groups to satisfaction of separatist claims".[77]

However, the position at international law on the subject of state sovereignty and territorial integrity is complex and not always easy to determine. Sovereignty as a concept is controversial, relative and malleable and can mean different things in different contexts.[78] International law recognises that the principle of non-intervention is not absolutely sacrosanct and can be overridden under certain circumstances. After all, another important principle within international law is that which recognises the right of peoples to self-determination.[79] Indeed, the United Nations Charter provides that one of the primary purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[80] Although it has been said that "self determination cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign states", it is also acknowledged that "it may be of some use in resolving cases of disputed frontier lines on the basis of the wishes of the inhabitants".[81] Perhaps the right of nations within established states to unilateral secession has been held to be justified only in extreme cases.[82] But reconciling the rights of national minorities to collective self-determination and the principles of state sovereignty and territorial integrity is by no means straightforward in international law.[83]

Adding to the complexity is the fact that, in recent times, there has been steady erosion of the sovereignty and territorial integrity principles due to an escalation in situations where the use of force against sovereign states has either been justified or has not been condemned by the UN.[84] The use of force against terrorism in the name of collective security and international stability has provided disputed legitimacy for military interventions in Iraq and Afghanistan. The emergence of the humanitarian intervention justification for the use of force, particularly following NATO action in Kosovo in 1999, has made the advancement of human rights a potential basis for breaching the state sovereignty principle. This has set a precedent that potentially justifies intervention for the protection of minorities within states, particularly where such interference is necessary to preserve wider stability and where there is some risk of escalation in international conflict in the event of non-action.[85]

These recent conflicts have thereby added to the wariness among states that well-established international law principles have been undermined and that the territorial

77 Woehrling, *The European Charter*, n. 21 above, p. 86.

78 For a detailed consideration of the significance of the concept of sovereignty within international law, see D Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (Oxford: OUP 2005).

79 For further discussion, see K Knop, *Diversity and Self-Determinations in International Law* (Cambridge: CUP 2005).

80 UN Charter, Article 1(2).

81 M Shaw, *International Law* (Cambridge: CUP 2003), p. 445.

82 *Reference Re Secession of Quebec* (1998) 161 DLR (4th) 385, 438.

83 For a detailed conceptual analysis see TH Malloy, N*ational Minority Rights in Europe* (Oxford: OUP 2005). See also S Wheatley, *Democracy, Minorities and International Law* (Cambridge: CUP, 2005).

84 For reflections on the United Nations' position on the use of force, see JF Murphy, "Force and arms" in Joyner (ed.), n. 7 above, pp. 97–130.

85 See SD Krasner, "Sovereignty and intervention" in Lyons and Mastanduno, *Beyond Westphalia?*, n. 71 above, pp. 228–49.

integrity principle may be less robust than in the past.[86] A lack of clarity and certainty in international law on the right to secession[87] might have also fuelled anxiety that minority language campaigners could use linguistic claims as a pretext for the claims of national self-determination. If language rights are presented as an extension of human rights principles, then the unease and concern that either internal instability or external interference might be consequences of the recognition of such rights at some future point is understandable.

Yet, it is easy to exaggerate these concerns and anxieties. As one commentator has remarked, "sovereignty remains the central norm in the politics of international human rights. The international community, except in rare circumstances, does not have the right to exercise the power to intervene on behalf of human rights, nor has it been willing to do so."[88]

But the need for Article 5 betrays the political sensitivity surrounding the advent of the ECRML. Of course, there is no provision within the ECRML that undermines states or promotes political secession for minorities. The authors of the ECRML clearly wished to respect state authority and to reassure that the ECRML has not in any way taken over states' powers to legislate for languages within their territories. It does not in any way derogate or diminish the right of states to do so. Indeed, for its provisions to be implemented and for them to acquire legal force, states must create domestic legislation for that purpose. We are thus reassured that ratification of the ECRML does not raise difficult constitutional questions about transfer of powers.

Article 5 is a device to depoliticise the treaty so that it cannot be interpreted in such a way that it is deemed to grant political power on any group. Linguistic minorities are not empowered to challenge state authority.[89] Yet, somewhat paradoxically, the need to respect and observe the rights of minority language speakers arguably has an inherent political quality. Indeed, as was pointed out by one commentator, the European Union has "gone as far as to make respect for minority rights one of the 'political criteria' for admissions of new States to the Union".[90] In some contexts, the political and the linguistic are inextricably linked as part of a comprehensive civil rights package.[91] The ECRML's objective is the recognition and promotion of linguistic diversity within European states as a normalised component of European society and of membership of the European political community.[92] The underlying rationale is to promote recognition of equality in diversity.[93] Linguistic minorities are afforded the status, obligations and privileges of full citizenship without sacrificing their linguistic identity. Of course, this vision of multilingual citizenship is intended to benefit the linguistic minority. However, it may also benefit the dominant group and, in particular, may serve the interests of preserving political hegemony and unity.

86 See, generally, C Gray, *International Law and the Use of Force* (Oxford: OUP 2004); also Y Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 2005).

87 See A Buchanan, "The morality of secession" in W Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford: OUP 2006), pp. 350–74.

88 See Donnelly, "State sovereignty", n. 71 above, pp. 115–46, at p. 115.

89 Woehrling, *The European Charter*, n. 21 above, p. 86

90 See F de Varennes, "The linguistic rights of minorities in Europe" in S Trifunovska (ed.), *Minority Rights in Europe: European minorities and languages* (The Hague: TMC Asser 2001), pp. 3–30, at p. 3.

91 See J Muller, "The European Charter for Regional or Minority Languages and the current legislative and policy contexts in the north of Ireland" in Dunbar and Parry, *The European Charter*, n. 20 above, pp. 219–37.

92 Kymlicka, *Multicultural Citizenship*, n. 2 above, pp. 174–6.

93 The approach is summed up by one commentator as follows: "With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctiveness from everyone else." See Taylor, "The politics", n. 3 above, at p. 38.

As Kymlicka remarks, having recognised language as one of the key components of national identity:

> if there is a viable way to promote a sense of solidarity and common purpose in a multinational state, it will involve accommodating, rather than subordinating national identities. People from different national groups will only share an allegiance to the larger polity if they see it as the context within which their national identity is nurtured, rather than subordinated.[94]

Instead of promoting political fragmentation along linguistic/national lines, an agenda for linguistic equality supports the concept of a multilingual and multinational unitary state. Accordingly, the grievance felt by the minority linguistic group, which might develop into an ambition for political autonomy and possible secession, is diffused if the concept of citizenship recognises and protects the linguistic identity of that group.

This vision of linguistic plurality that the ECRML offers is a means of recognising linguistic diversity within a homogenous society. It also encourages an approach whereby it is appreciated "that citizenship is not just a legal status, defined by a set of rights and responsibilities, but also an identity, an expression of one's membership in a political community".[95] Therefore, citizenship that values and celebrates the maintenance of linguistic identity is also one that can facilitate the full membership of the political community of linguistic minorities. This concept of multilingual citizenship is also compatible with the principles of state sovereignty and territorial integrity. This, as is made clear in Article 5, is the agenda that the ECRML supports.

Human rights and the ECRML

The ECRML formally declares its relationship with the ECHR in Article 4, which contains an explicit declaration of non-derogation from the ECHR: "Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights."[96] According to the Explanatory Report, this paragraph "seeks to exclude the possibility that any of the provisions of the charter might be so interpreted as to detract from the protection accorded thereby to the human rights of individuals".[97] This declaration of compatibility is echoed elsewhere in the treaty. The ECRML also declares itself and its mission to be in communion with international human rights jurisprudence in its preamble:

> The right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms.[98]

Why is there a need to declare this principle of compatibility, and is there a genuine potential for the ECRML to be interpreted in a way that contravenes the provisions of the ECHR? Of course, the ECHR governs the relationship between the individual and the state. It is a product of its period in history, a necessary innovation from a time when Europe and the world were recovering from the destruction and human suffering caused by those fascist regimes that had subsumed individual freedom and dignity in the name of

94 Kymlicka *Multicultural Citizenship*, n. 2 above, p. 189.

95 Ibid. pp. 191–2.

96 ECRML, Part 1, Article 4, para. 1.

97 ECRML, Explanatory Report, para. 54.

98 ECRML, Preamble.

extreme collectivist ideologies. The ECHR was thus conceived as part of the international community's rejection of state totalitarianism and was created in order to lay down a series of minimum, fundamental and basic human rights intended to protect all human beings from future oppression. The history of its genesis is the key to understanding why the ECHR has an individualistic emphasis and why it is concerned with fundamental, individual human rights.

What impact does the ECHR have on minority language rights? Although the ECHR does not support linguistic freedom in the sense of facilitating language choice, it counters and prevents discrimination or degrading treatment towards individuals who belong to particular linguistic groups.[99] It is thus an important contributor to the maintenance of the rights of linguistic minorities, even if those rights are mostly confined to the private sphere and are essentially a prohibition on discrimination. As one commentator observes:

> State measures which have the effect of preventing the use of a minority language in private activities can be in breach of a number of well-established rights in international law [because] in the private sphere what are involved are in fact the application of basic individual human rights which impact in the arena of language.[100]

The ECHR is mainly a preventative instrument concerned with the maintenance of fundamental freedoms and rights, with laying down a bottom line below which states must not fall. The ECRML, on the other hand, is a totally different sort of instrument. It encourages and promotes positive initiatives and measures for the benefit of minority languages.[101] Its promotion of minority languages is also couched in abstract rather than individualistic or human terms. Whereas the ECHR protects individual speakers of minority languages from human rights infringements, it does not provide active promotion of multilingualism as a social objective. In other words: "The right to free speech does not tell us what an appropriate language policy is."[102]

Even if it is accepted that there is a difference in emphasis, scope and objective between the two instruments, can the ECRML's distinction between the historical and the new minorities be reconciled with the universal emphasis in ECHR? Of course, there is the perspective that is sceptical of the very idea of universal human rights as proclaiming self-evident, objective and metaphysical truths about human values.[103] The rights sceptics see it as a creation of a Western, neo-liberal, individualist mindset. Others doubt how ethereal human rights can permeate to the ground level and influence policy in real situations. In the linguistic context, some argue that the maintenance of language rights is more of a bottom-up rather than a top-down process, one which depends more on the socio-political situation of the particular linguistic community than on general, universal and international policy initiatives.[104] There can be no doubting the tensions that exist between declaring universal

99 See SM Poulter, "The rights of ethnic, religious and linguistic minorities" (1997) 3 *EHRLR* 254.

100 Indeed, "Government attempts to regulate the language used in the private sphere . . . may run foul of the right to private and family life, freedom of expression, non-discrimination or the rights of persons belonging to a linguistic minority to use their language with other members of their group.": see de Varennes, "The Linguistic Rights", n. 90 above, at p. 9.

101 Kymlicka, *Multicultural Citizenship*, n. 2 above, p. 6.

102 Ibid. pp. 2–5.

103 For a critique of the idea of human rights, see M-B Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: CUP 2006).

104 See X Arzoz, "Language rights as legal norms" 15(4) *European Public Law* (2009), pp. 541–74.

rights and their implementation and monitoring in a particular domestic context.[105] Yet, despite the scepticism, there is no denying the international consensus that supports human rights principles and the instruments that uphold them as important contributors in the task of protecting individuals against state oppression.

Despite the emphasis on historical languages, the ECRML does not restrict or invade the rights of individuals who speak dominant or official languages. Neither does it undermine the rights of those who speak other minority languages that are not protected by it. Its Explanatory Report specifically leaves the door open to further measures to deal with the linguistic interests of migrants:

> The charter does not deal with the situation of new, often non-European languages which may have appeared in the signatory states as a result of recent migration flows often arising from economic motives. In the case of populations speaking such languages, specific problems of integration arise . . . these problems deserved to be addressed separately, if appropriate in a specific legal instrument.[106]

In recent years, the European Commission has recognised that the promotion of linguistic diversity and the development of a European language policy must include the official languages of the European Union, the indigenous minority languages, and also the languages of more recent migrant linguistic communities.[107] Certainly, the ECRML is not an obstruction to the development of a comprehensive language policy that addresses the needs of new linguistic minorities.

The ECRML's particular emphasis on the promotion of indigenous minority languages does not infringe the universal principles of the ECHR, but builds on those principles so that minority language speakers enjoy a greater equality with speakers of official languages.[108] Instead of representing a divergence from the values of the ECHR, the ECRML is a logical development on the ECHR and enhances its core principles.[109] The difference is that the ECRML marks a shift from an anti-discriminatory, minimalist emphasis to an affirmative and pro-active approach towards linguistic minorities. Indeed, it is arguably a part of a well-established liberal political tradition that has sought to bring about the emancipation of minorities and those marginal groups who were historically excluded from mainstream society.

Although differential treatment always appears counter-intuitive to notions of universal equality, affirmative action or positive discrimination in the form of "group differentiated rights" for minority or neglected groups has also been recognised as being compatible with universal rights.[110] This is because bringing about real social equality also requires special measures in favour of the minority or disadvantaged group. Provided that the group-differentiated right does not infringe other basic, individual, human rights and that it is

105 Some of these tensions are explored by Lord Hoffmann, "The universality of human rights" (2009) 125 *LQR* 416–32.

106 ECRML, Explanatory Report, para. 15.

107 See http://europa.eu/debateeurope/pdf/figel_062006_en.pdf.

108 Woehrling, *The European Charter*, n. 21 above, pp. 83–4.

109 See F de Varennes, "Language rights as an integral part of human rights – a legal perspective" in M Koenig and P de Guchteneire (eds), *Democracy and Human Rights in Multicultural Societies* (Aldershot: Ashgate 2007), pp. 115–25.

110 Kymlicka, *Multicultural Citizenship*, n. 2 above, pp 108–16.

proportional to meet the deficit, then such affirmative action in favour of the minority language group can be justified.[111]

Indeed, such affirmative action is consistent with basic liberal and more universal principles of individual freedom, namely, in this case, the freedom to belong to a cultural group and the right to cultural (and linguistic) self-expression. Group-differentiated rights are thus necessary in order to provide a climate whereby the minority culture can function in the way the dominant culture takes for granted.[112] Furthermore, it is also accepted that for human rights principles to impact on real, localised situations, a degree of adaptation to meet specific circumstances is also necessary. The local or specific implementation of universal rights principles requires practical measures, which ground or embed such universal rights in the particular context in which they are meant to impact and thereby promote a just society.[113] The ECRML can thus be appreciated as a dedicated measure to implement the human rights of indigenous linguistic minorities.

If so, the purported tension between universal human rights and more particular linguistic rights may be regarded as a conceptual fallacy. One observer claims that "the 'linguistic rights' of minorities actually refer to the application of universal human rights and freedoms in specific situations . . . as part of an evolving, comprehensive framework based on respect for human worth and dignity".[114] Indeed, such a view sees the relatively recent acknowledgment of the case for linguistic rights as being an inevitable consequence of the maturing of human rights jurisprudence. To quote:

> It is therefore an often repeated error to assume that the protection of the rights of minorities is somehow inconsistent with or different from "individual" human rights. On the contrary, by being founded on the recognition of the intrinsic value of the human person's dignity and worth, human rights have gone beyond mere tolerance of human differences: respect of the individual includes valuing human diversity.[115]

The validity of this argument of compatibility between the particular emphasis of the ECRML and the universal emphasis of the ECHR could also be reinforced by the fact that the ECRML is not alone in its historical orientation and its focus on the rights of specific minority groups. Support for the notion of particular rights based on historical claims as distinct from universal rights can also be found in the United Nations Declaration on the Rights of Indigenous Peoples, which, after much negotiation, was adopted by the General Assembly of the United Nations on 13 September 2007.[116] An important contributor to international human rights standards, it recognises the individual and collective rights of indigenous peoples *as* indigenous peoples.[117]

For example, it recognises the right to unrestricted self-determination,[118] an inalienable collective right to the ownership, use and control of lands, territories and other natural

111 See J Castellino, "Affirmative action for the protection of linguistic rights: an analysis of international human rights; legal standards in the context of the protection of the Irish language" (2003) 25(1) *Dublin University Law Journal* 1–43.

112 Kymlicka, *Multicultural Citizenship*, n. 2 above, p 126.

113 For observations in the context of Northern Ireland, see C Harvey and D Russell, "A new beginning for human rights protection in Northern Ireland" (2009) 6 *EHRLR* 748–67.

114 See de Varennes, "The linguistic rights", n. 90 above, p. 4.

115 Ibid. p. 29.

116 United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295.

117 Ibid. para. 22.

118 Ibid. Article 3.

resources,[119] rights to political, social, cultural[120] and educational institutions[121] and to protection of cultural and intellectual property.[122] Article 13 explicitly refers to linguistic rights, and states that "indigenous peoples have the rights to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures". Article 14 refers to the rights to "education in their own languages" and Article 16 to "media in their own languages". Such rights are also incorporated within the cultural rights to which the declaration repeatedly refers and which it protects.[123]

Like the ECRML, the declaration draws on notions of historical injustice in support of its rationale:

> indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.[124]

Similar to the ECRML's emphasis on recognising the diversity of circumstances facing minority languages, it recognises that every indigenous community faces its own particular challenges and that "the situation of indigenous peoples varies from region to region and from country to country, and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration".[125]

Although it is not legally binding on states, and so does not impose legal obligations on governments, its adoption was not without some dissent among some of the UN members who expressed reservation at the notion of recognising the collective human rights of certain groups.[126] This was seen to run counter to the universal emphasis in other international human rights instruments and to compromise the universal basis upon which the very idea of human rights is based. Without doubt, the declaration brings to the fore the complicated relationship between international law, human rights and claims for reparation based on historical injustice. Yet, that relationship is a real one because "Striving for truth and justice, which includes reparation, is part of a system based on the rule of law and on the equal dignity of all human beings."[127]

Both the declaration and the ECRML are specific in emphasis and engaged with historically based rights or measures for specific minority groups or languages. Both also highlight the fact that, with group or minority rights, the engagement of history is often unavoidable because group identity and claims for justice can be so firmly grounded in historical perception.[128] However, recognising the special rights of groups is part of an evolving international human rights framework, which acknowledges the diversity of human existence and which seeks to facilitate justice for all human beings by taking into account their particular identity. Human rights can thus incorporate the right of individuals to express cultural and linguistic identity as individuals and collectively within their community. Even if such special rights may be conceptually problematic if treated as

119 UN Declaration, n. 116 above, Articles 26–30.

120 Ibid. Article 5.

121 Ibid. Article 14.

122 Ibid. Article 31.

123 Ibid. Articles 8, 11 and 15.

124 Ibid. para. 6.

125 Ibid. para. 23.

126 http://www.un.org/News/Press/docs/2007/ga10612.doc.htm.

127 See F Francioni, "Reparation for indigenous peoples: is international law ready to ensure redress for historical injustices?" in F Lenzerini (ed.), *Reparation for Indigenous Peoples* (Oxford: OUP 2008), pp. 27–45, at p. 45.

128 See M Bentley, *Modern Historiography: An introduction* (London: Routledge 1999), pp. 156–8.

universal human rights, it is recognised that such "special" or differentiated rights are necessary to implement the human rights of groups in practice. It is further recognition that, simply, "differentiated groups may require additional rights to enable them to overcome specific obstacles which prevent them from being able to exercise their human rights as effectively as others".[129]

Conclusion

Its policy towards its linguistic minorities forms a key element of Europe's policy on common citizenship, because the recognition of linguistic diversity is an essential prerequisite of a coherent and harmonious European society. Minority language policy plays a key role in determining the way in which minority linguistic groups participate in society. The European Commission acknowledges that a multilingual Europe demands "the peaceful co-existence of people from many different language communities", and that the protection of cultural identity and linguistic diversity is the key to greater European unity.[130]

Is reconciling the ECRML's particular emphasis on historical languages with universal human rights a case of trying to square the circle? Perhaps there is too much focus on resolving conceptual dilemmas and on finding theoretical hooks on which to hang worthy social values and objectives. It distracts from the need for these international instruments and their implementation mechanisms to impact on actual situations and to have practical benefit. The ECRML is a detailed and specific instrument that seeks to emancipate particular linguistic minorities who were historically marginalised. That it is tailor-made to facilitate the rights of historical languages does not mean that it demeans or undermines the validity of the rights of other marginalised groups. Neither does it act as an instrument to promote political secession.

Indeed, the ECRML is a particularly European recognition of the need to respect the right to a cultural and linguistic identity and to express that identity freely within a politically homogenous society. Although its particular historiography might seem unattractive for the more universally orientated palate, in its task of setting standards and promulgating international norms for the protection of regional or minority languages, the ECRML encourages constructive measures that promote linguistic diversity in a way that is compatible with international law principles of sovereignty and territorial integrity. It is, in essence, Europe's solution to the challenge of managing its own particular cultural and linguistic patrimony. Indeed, it is the only international instrument that provides a comprehensive road-map towards the ideal of the multilingual unitary state.

129 See S Greer, "Being 'realistic' about human rights" (2009) 60(2) *NILQ* 147–61, at p. 150.

130 See http://europa.eu/debateeurope/pdf/figel_062006_en.pdf.

NILQ 61(4): 349–62

How unfair is cross-community consent? Voting power in the Northern Ireland Assembly

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Rick Wilford astutely describes the system of government in Northern Ireland as "parliamentary life, but not quite as we know it".[1] Naturally, the "we" here refers to those of us who are most familiar with the Westminster model of parliamentary democracy. Undeniably, many of the features of the Westminster model are either absent or barely recognisable in Northern Ireland.[2] Perhaps most fundamentally, the "constitution" of Northern Ireland does not concentrate public power in the hands of transient electoral victors. Instead, the scheme seeks to include all major political factions within a broad power-sharing coalition. Thus, in contrast to Westminster-style majority rule, most commentators agree that the system of government in Northern Ireland is an example of "consociational" democracy.[3]

One of the central elements of Northern Ireland's consociational framework is the idea of "cross-community support". That principle has (at least) two dimensions. On the one hand, the representational legitimacy of public authorities, ranging from the Police Service of Northern Ireland, the Parades Commission, the Commission for Victims and Survivors, to the Northern Ireland Human Rights Commission, is frequently understood (or contested) in terms of cross-community support.[4] On the other hand, the idea of cross-community support finds concrete expression in the decision-making procedures of the Northern Ireland Assembly where, with respect to certain "key" decisions, cross-community "consent" is a formal procedural requirement.[5]

* I am indebted to Moshé Machover, John McGarry, and Rick Wilford for helpful comments on earlier drafts of this article.

1 R Wilford, "Northern Ireland: the politics of constraint" (2010) 63 *Parliamentary Affairs* 134, at 137.

2 Ibid. pp. 137–40.

3 See D Horowitz, "The Northern Ireland Agreement: clear, consociational and risky" in J McGarry (ed.), *Northern Ireland and the Divided World* (Oxford: OUP 2001); see also R Taylor "Introduction" in R Taylor (ed.), *Consociational Theory* (Oxon: Routledge 2009); and B O'Leary "The nature of the Agreement" (1999) 4 *Fordham Journal of International Law* 22. For a dissenting interpretation, see P Dixon, "Why the Good Friday Agreement in Northern Ireland is not consociational" (2005) 76 *Political Quarterly* 357.

4 See G Anthony "Judicial review in Northern Ireland: a guide to the 'real' devolution issues" (2009) 14 *Judicial Review*.

5 Agreement reached in multiparty talks (The Agreement), Strand One, para. 5(d).

The apparent "group-think" of the cross-community consent procedures would seem to challenge the individualistic suppositions of liberal constitutionalism.[6] The procedures require that, upon taking their seats, members of the Assembly (MLAs) register a "community designation" as "unionist", "nationalist", or "other".[7] When the cross-community consent procedures are activated, designated unionists and nationalists enjoy a potential veto power that designated others do not. Not surprisingly, the cross-community consent procedures have been the subject of vociferous criticism, not only from the academic community,[8] but also from the Alliance Party, which, as designated others, argues that the procedures unfairly discriminate against it.[9] In effect, so the argument goes, the procedures make it "more rewarding to be a member of one of the two named national communities".[10]

As we shall see, there is some basis to this line of criticism. Thus far, however, the debate about the cross-community consent procedures has transpired at a very general level. I hope to advance the conversation here by showing precisely how the procedures impact voting power within the Assembly. This should help to correct vague notions about the unfairness of the procedures. As we shall see, the critics overstate their case: in practice, "others" are not *necessarily* any more (or less) disadvantaged than designated unionists and nationalists. Moreover, I argue that cross-community consent is a valuable mechanism for managing the constitutional politics of Northern Ireland in an appropriately non-majoritarian way.

The unfairness of the cross-community consent procedures

The basic aim behind the cross-community procedures is to prevent a simple majority of the Assembly from passing decisions without a critical amount of support from both national blocs. Hence, certain key decisions, such as standing orders and budget allocations, require either at least a majority of designated unionists and nationalists, as well as a majority in the Assembly, or, in the alternative, a weighted majority of at least 60 per cent of members present and voting, including at least 40 per cent each of designated unionists and nationalists present and voting.[11] Moreover, any Assembly decision may be subjected to the cross-community consent rules where a "Petition of Concern" is brought by at least 30 MLAs.[12]

Arguably, the cross-community decision procedures protect each community from being politically dominated by the other. But even if one grants that unionists and nationalists ought to enjoy some kind of counter-majoritarian protection against each other, the cross-community procedures paradoxically appear to purchase that protection at the expense of those who do not identify with either community. As Rick Wilford argues:

6 See I O'Flynn, "The problem of recognising individual and national identities: a liberal critique of the Belfast Agreement" (2003) 6 *Critical Review of International Social and Political Philosophy* 129. On the general tension between liberal constitutionalism and group-rights, see J Habermas, "Struggles for recognition in the democratic constitutional state" in A Gutmann (ed.), *Multiculturalism: Examining the politics of recognition* (Princeton: Princeton UP 1994).

7 Northern Ireland Act 1998, s. 4(5).

8 See, for example, Wilford, "Northern Ireland", n. 1 above; D Horowitz, "Explaining the Northern Ireland Agreement: the sources of an unlikely constitutional consensus" (2002) 32 *British Journal of Political Science* 193; and O'Flynn, "The problem", n. 6 above.

9 Alliance Party of Northern Ireland, Submission to the NI Assembly Voting System and MLA Designations – Review 1/11/2001.

10 O'Flynn, "The problem", n. 6 above, p. 144.

11 See Northern Ireland Act 1998, ss. 4(2A), 4(3), 4(5), 17, 28A(4(a)), 30, 39, 41 and 63(3).

12 Ibid. s. 42.

> In effect, there are two orders of Assembly members: in relation to key decisions there are those whose votes always "count" and those whose votes never do so. Not only is this patently undemocratic, in the particular case of the Alliance Party it is also richly ironic. Since its inception, it has been bi-confessional and committed to the promotion of positive cross-community relations and yet it is a casualty of this anomalous and wholly unnecessary procedure which could easily be surrendered in favour of weighted majority voting on key issues.[13]

Intuitively, this does seem unfair. But we need to be careful about drawing hasty or general conclusions here. Critics tend to overstate the differential impact of the procedures on designated others. Wilford, for one, certainly gives the wrong impression when he says that the votes of others *never* count. In fact, the votes of others *always* count – they count towards the majority (or supermajority) threshold. Similarly, Ian O'Flynn argues that "in practice the parallel consent rule implies that once a majority is secured within the assembly, the 'others' no longer count; at such a point, all that matters is whether or not there is a majority within both communities".[14] Again, this is a very misleading way of characterising the cross-community consent procedures. It is true that once a majority is secured in a cross-community vote, the votes of others no longer count. But it is equally true that under a simple-majority decision the votes of others do not count once a majority is otherwise secured.

Perhaps what critics like Wilford and O'Flynn really mean to say is that the votes of designated unionists and nationalists are more decisive than the votes of designated others. This much is suggested by the Alliance Party in its 2001 submissions to the Review of the Northern Ireland Assembly.[15] As the Alliance Party points out, the cross-community consent procedures effectively count the votes of designated unionists and designated nationalists *twice* – first with respect to the overall threshold in the Assembly, and again with respect to the community designation thresholds.[16] So, in so far as the votes of others may be necessary to meet the majority or supermajority thresholds, their votes are not, strictly speaking, irrelevant. However, on a cross-community vote, the votes of designated unionists and nationalists are *more likely* than the votes of others to have a determinative effect on the outcome. This line of argument, at least, suggests a more precise way of formulating the problem.

The disadvantage suffered by designated others, understood in terms of the relative decisiveness of their votes, can actually be quantified by calculating and comparing the voting power of each party in the Assembly on a simple-majority decision against their respective voting power under the cross-community consent procedures. As we shall see, such an analysis substantiates, in mathematical terms, the moral intuition that the cross-community rules are unfair to others. But the same analysis also reveals that the rules do not unfairly disadvantage others vis-à-vis unionists and nationalists per se. Rather, the cross-community rules tend to enhance the voting power of the two largest community designation parties at the expense of *all* other parties, including the smaller community designation parties. In other words, the rules tend to be unfair to smaller parties, regardless of community designation. Moreover, designated others are not necessarily the most disadvantaged by the cross-community consent procedures – on occasion the rules can be *even more* unfair to smaller community designation parties.

13 Wilford, "Northern Ireland", n. 1 above, p. 139.

14 O'Flynn, "The problem", n. 6 above, p. 144.

15 Alliance Party, Submission, n. 9 above.

16 Ibid. para. 2.2.4.

Measuring voting power

It is perhaps too optimistic to hope that real-world democratic politics will ever be perfectly *fair*. From the outset, power relations tend to inhibit the realisation of free and equal discursive engagement.[17] But we can at least scrutinise the fairness of the procedures that regulate politics. Here, we are specifically concerned with how the *procedures* in the Assembly affect the voting power of its MLAs. This question is distinct from the *actual* voting power of MLAs. To be sure, the Assembly's procedures inevitably have an effect on actual voting power, but they do not exhaustively determine it. The *actual* voting power of MLAs is a much more complex question. It depends on any number of empirical factors, including, inter alia, the diplomatic skill of individual MLAs, the compatibility and intensity of their respective preferences, the particular issues that happen to dominate the agenda at a given time, and changing party alliances and rivalries.[18] Because the argument that concerns us here relates to the fairness of the procedures themselves, we need only focus on that element of actual voting power that derives solely from those procedures. In other words, we are interested in *a priori* voting power – "the power that a member derives exclusively from the decision rule itself".[19]

As Felsenthal and Machover explain, *a priori* voting power can be conceptualised in two distinct ways. The first of these is what they call "I-power": "a voter's potential influence over the outcome of divisions of the decision-making body – whether proposed bills are adopted or blocked."[20] I-power is to be distinguished from what they call "P-power": "a voter's expected relative share in a fixed prize available to the winning coalition under a decision rule".[21] I-power understands voting in terms of the passage or defeat of bills. Voting behaviour is therefore motivated by "policy-seeking". Conversely, P-power understands the outcome of a vote in terms of the distribution of some set of goods ("transferable utility") to be divided by the victors among themselves. P-power can be measured by the Shapley–Shubik index, a type of voting power analysis derived from cooperative game theory.[22] The Shapley–Shubik index equates voting power with a voter's expected pay-off in a cooperative game where a fixed amount of transferable utility is to be shared among victors of a winning coalition according to "a prior binding agreement, arrived at through bargaining, and concluded in advance of the decision".[23] This game-theoretic model of voting power may have some distinctive applications, but it is not generally applicable to legislative decision-making.[24] In such cases, voting is primarily about determining a common course of action on behalf of a decision-making body.[25] Collective decisions of this kind may or may not have consequences that are intelligible in terms of transferable utility.[26] Since we are concerned here with how the rules affect the ability of voters to influence the outcome of decisions in the Assembly (and not with the pay-offs they might expect as a result), we will ignore P-power and concentrate solely on I-power. In

17 See, generally, J Habermas, *The Theory of Communicative Action* (London: Heinemann 1984).

18 See D Felsenthal and M Machover, "*A priori* voting power: what is it all about?" (2004) 2 *Political Studies Review* 13.

19 Ibid. p. 14.

20 Ibid.

21 Ibid.

22 LS Shapley and M Shubik, "A method for evaluating the distribution of power in a committee system" (1954) 48 *American Political Science Review* 787.

23 Felsenthal and Machover, "A priori voting power", n. 18 above, p. 8.

24 See ibid. p. 10.

25 Ibid.

26 Ibid. p. 12.

what follows, all references to "*a priori* voting power" (or even just "voting power") will therefore refer exclusively to I-power and not P-power.

Penrose and Banzhaf

The *a priori* voting power of a voter in a decision-making body can be understood in terms of the probability that the voter's vote will be decisive in a binary decision (a "yes" or "no" decision on a bill or motion). So understood, *a priori* voting power is measured by the Penrose index (ψ). The Penrose index assumes that all possible divisions of "yes" and "no" votes are equally probable. In other words, it is assumed that any voter is just as likely to vote "yes" as to vote "no", regardless of how the other voters vote. An assembly of n members therefore yields 2^n possible divisions of "yes" and "no" votes. Voter "a" is decisive in those divisions where a's vote could convert an otherwise winning coalition into a losing one or an otherwise losing collation into a winning one. In such cases, a has a "swing vote". The proportion of all possible divisions in which a has a swing vote yields ψ_a:

ψ_a = a's swing votes/2^n possible divisions

Accordingly, ψ_a represents a's voting power understood as the "*a priori* probability that, in a division on a bill, the votes will be so disposed that if a's vote were to be reversed then the fate of the bill would also be reversed".[27]

The Penrose index expresses a probabilistic measurement of voting power in absolute terms. But for some purposes it may be useful to measure how much voting power voters have *relative* to one another. Relative *a priori* voting power is measured by the Banzahf index (β).[28] β_a is simply *a*'s proportion of all possible swing votes. Alternatively, if ψ is known for all voters, β_a can be easily derived from ψ_a as follows:

$$\beta_a = \psi_a / (\psi_a + \psi_b + \psi_c + \psi_d)$$

It should be noted that, because the Banzahf index measures the relative share of total voting power, the total β indices of all voters will always equal 1. It should also be noted that, while there is a relation between absolute and relative voting power, a gain or loss in ψ does not necessarily entail a corresponding gain or loss in β.

Voting power simulations

The following voting power analysis makes use of "simulations". These simulations are intended to illustrate the differential impact of the cross-community consent procedures. They are not intended to accurately depict reality. Thus, the simulations make a few counterfactual assumptions in the interests of simplicity. First of all, the Northern Ireland Assembly has 108 members. This means that there are 2^{108} possible divisions. Calculating the *a priori* voting power of each individual MLA in these terms is not only exceedingly complicated; it is also of little value since it takes no account of MLAs being organised along party lines. So, for the sake of simplicity (and a little realism), the following calculations concern the voting power of parties (not individual MLAs), on the assumption that parties vote as blocs. This is not an altogether unrealistic assumption.[29] In any case, it helps to simplify matters considerably. The simulations also treat all designated others as if they formed a single party (the Others Coalition, or OC) and it is assumed that the Others Coalition also votes as a bloc. This is less realistic. While the three parties designated as

27 See D Felsenthal and M Machover, *The Measurement of Voting Power* (Cheltenham: Edward Elgar 1998), p. 40.

28 See J Banzhaf, "Weighted voting doesn't work: a mathematical analysis" (1965) 19 *Rutgers Law Review* 317.

29 On intra-party cohesion and division, see J Tonge and J Evans, "Party members and the Good Friday Agreement in Northern Ireland" (2002) 17 *Irish Political Studies* 59.

other currently holding seats in the Assembly – the Alliance Party, the Green Party and the Independent Health Coalition – have worked together for some purposes under the umbrella of the United Community Group (UCG), they are distinct political parties, each with its own policy preferences. Nevertheless, since we are concerned here with the voting power of designated others *qua* others, it helps to imagine the others as forming a cohesive coalition. This allows us to conceptualise their collective voting power vis-à-vis the collective voting power of designated unionist and nationalist parties. A final simplification here is the exclusion of the independent unionists from the simulations. This undoubtedly distorts the results, since even a single seat can be a decisive vote on occasion. But the addition of n parties increases the possible divisions by 2^n without necessarily helping to illuminate the fairness of the decision rules in question. In the interests of simplicity then, all simulations imagine that their are no independent unionist (or nationalist) seats. The different decision procedures – simple majority, parallel consent, and weighted majority – are respectively abbreviated as SM, PC and WM. The associated overall, unionist, and nationalist quotas for each procedure are shown within "curly" brackets in the simulation tables reproduced below.

Simulations A and B are very simple: in both simulations the Assembly is composed of only three (imaginary) parties, the Unionist Party (UP), the Nationalist Party (NP) and the OC. This yields 2^3 possible divisions (i.e. eight). In Simulation A (Table 1.1), the UP and the NP each have 26 seats and the OC holds the remaining 56 seats. In Simulation B (Table 1.2), the same three parties are in play, but this time each holds 36 seats in the Assembly.

The simulations help to illustrate a few mathematical rules that derive purely from the operation of the cross-community decision procedures. In order to describe these rules, it is useful to divide the Assembly into "sets". So, let P be the set of all parties in the assembly; $P = \{p_1, p_2 \ldots, p_n\}$. Similarly, let U be the set of all unionist parties, let N be the set of all nationalist parties, and let O be the set of all designated others. Finally, let C be the set of all designated nationalists and unionists, such that $C = U + N$.

Table 1.1: Simulation A

UP (26)	NP (26)	OC (56)	Total votes (Us, Ns)	Swing voters SM {55}	Swing voters PC {55; 14; 14}	Swing voters WM {65; 11; 11}
Y	*Y*	*Y*	*108 (26, 26)*	*OC*	*UP, NP, OC*	*UP, NP, OC*
Y	*Y*	*N*	*52 (26, 26)*	*OC*	*OC*	*OC*
Y	*N*	*Y*	*82 (26, 0)*	*OC*	*NP*	*NP*
Y	*N*	*N*	*26 (26, 0)*	*OC*	-	-
N	*Y*	*Y*	*82 (0, 26)*	*OC*	*UP*	*UP*
N	*Y*	*N*	*26 (0, 26)*	*OC*	-	-
N	*N*	*Y*	*56 (0, 0)*	*OC*	-	-
N	*N*	*N*	*0 (0, 0)*	*OC*	-	-

Now, as Simulation A shows, under an SM decision rule it is possible for a party to be a "dictator" ($\psi_p = 1$). Thus, because OC has a majority of seats in Simulation A, there is a 100 per cent probability that the votes of the OC will be decisive ($\psi_o = 1$). This illustrates the general proposition that if *p* holds a majority of seats in the Assembly, then *p* is a dictator. This proposition can be expressed as follows, where "s_p" refers to the number of seats held by any party *p*, and "s*P*" refers to the total number of seats held by all parties (*P*):

For any SM decision rule, $s_p > sP \times 0.5 \rightarrow \psi p = 1$

Under both of the cross-community decision rules, however, no party can *ever* enjoy more than a 50 per cent probability that its vote will be decisive ($\psi_p \leq 0.5$) because no party can ever form a winning coalition without the contribution of *at least one* other party (nationalists cannot win without unionists; unionists cannot win without nationalists; and others cannot win without some nationalists and some unionists). Thus, unlike the SM decision rule, the cross-community decision rules preclude the possibility of a dictator. This can be seen in Simulation A, where a winning coalition under the cross-community procedures necessarily includes all three parties, and in Simulation B, where a winning coalition necessarily includes at least two parties.

However, although the cross-community procedures require that a winning coalition necessarily includes at least some unionists and some nationalists, there is no such requirement with respect to others. Indeed, where the votes of others are not needed to meet the majority threshold, the cross-community rules have the effect of reducing their voting power to 0. This can be seen in Simulation B. There, the votes of the unionist and nationalist parties are both necessary *and* sufficient to carry their respective community quotas *and* both parties together have more than enough votes to carry the overall majority quota (and even the overall WM quota). In other words, the votes of both community designation parties are necessary and sufficient for *any* possible winning coalition. Conversely, the OC is neither necessary nor sufficient for *any* winning coalition. The OC's Penrose index is therefore 0.

Table 1.2: Simulation B

UP (36)	NP (36)	OC (36)	Total votes (Us, Ns)	Swing voters SM {55}	Swing voters PC {55; 19; 19}	Swing voters WM {65; 15;15}
Y	*Y*	*Y*	*108 (36, 36)*	-	*UP, NP*	*UP, NP*
Y	*Y*	*N*	*72 (36, 36)*	*UP, NP*	*UP, NP*	*UP, NP*
Y	*N*	*Y*	*72 (36, 0)*	*UP, OC*	*NP*	*NP*
Y	*N*	*N*	*36 (36, 0)*	*NP, OC*	*NP*	*NP*
N	*Y*	*Y*	*72 (0, 36)*	*NP, OC*	*UP*	*UP*
N	*Y*	*N*	*36 (0, 36)*	*UP, OC*	*UP*	*UP*
N	*N*	*Y*	*36 (0, 0)*	*UP, NP*	-	-
N	*N*	*N*	*0 (0, 0)*	-	-	-

The unfairness apparent in the above simulations can be quantified in terms of the differential impact of the cross-community procedures on the *possible* voting power of others. Although the procedures limit the possible voting power of all parties, the possible voting power of others is limited to a greater extent. In effect, the procedures yield two different voting power "ceilings" – one for unionists and nationalists ($\psi_c \leq 0.5$), and another for others ($\psi_o \leq 2.5$). The difference between these two ceilings captures, in an abstract way, the inherent unfairness of the cross-community procedures.

In practice, however, the effects of the cross-community decision procedures are significantly more complicated. Simulation C helps to illustrate this point. Simulation C contemplates an Assembly not unlike the one elected in 2007: the Democratic Unionist Party (DUP) has 36 seats, Sinn Féin (SF) has 28 seats, the Ulster Unionist Party (UUP) has 18 seats, the Social Democratic and Labour Party (SDLP) has 16 seats, and the hypothetical OC has 10 seats. An Assembly composed of five parties (each presumed to vote as blocs) yields 2^5 (i.e. 32) possible divisions (see Appendix A on page 362 below). The impact of the PC rule is apparent (see Table 2).

The DUP has more than enough votes to carry the unionist quota of 28 and SF has more than enough votes to carry the nationalist quota of 23. Moreover, both parties together have more than enough votes to carry the SM quota of 55. Thus, out of 32 possible divisions, the DUP and SF have 16 swing votes each (SF's vote is decisive whenever the DUP votes "yes" and the DUP's vote is decisive whenever SF votes yes). Hence, the Penrose index for both the DUP and SF is 0.5, meaning that each enjoys a 50 per cent probability that their vote will be a decisive one. Conversely, the other three parties are *never* decisive (the Penrose indices for all three other parties is 0). Because the DUP and SF are the only two parties to have any swing votes, their Banzhaf scores are 0.5 each, indicating that each party enjoys 50 per cent of the relative voting power under the PC rule. In short, the rule makes the DUP and SF "co-dictators" – the votes of both parties are necessary *and* sufficient for the formation of any possible winning coalition. Conversely, the votes of the UUP, the SDLP and the OC are all "dummy" votes – they have no decisive impact one way or the other.

Table 2: Voting power for Simulation C

Decision procedure	*DUP (36)*	*SF (28)*	*UUP (18)*	*SDLP (16)*	*OC (10)*
SM {55}					
swings	18	14	10	6	6
Penrose (ψ)	0.563	0.438	0.313	0.188	0.188
Banzhaf (β)	0.33	0.26	0.19	0.11	0.11
PC {55;28;23}					
swings	16	16	0	0	0
Penrose (ψ)	0.5	0.5	0	0	0
Banzhaf (β)	0.5	0.5	0	0	0
WM {65;22;18}					
swings	14	14	2	2	2
Penrose (ψ)	0.438	0.438	0.063	0.063	0.063
Banzhaf (β)	0.41	0.41	0.06	0.06	0.06

The results are similar under the WM rule. Once again the votes of both the DUP and SF are both necessary and sufficient to carry their respective unionist and nationalist quotas. However, the two parties together do not have sufficient combined weight to meet the 60 per cent WM threshold. For that they need to enlist the help of one (and only one) other party. This gives the other parties some impact that they would not have under the PC rule discussed above – out of 32 possible divisions, each of the other parties has two swing votes each (a "yes" swing and a "no" swing) and their Penrose indices accordingly are 0.063 (as opposed to 0).

A comparison of the resultant voting power for each party against its voting power under the SM rule shows that the cross-community procedures are not necessarily more unfair to others.[30] On the contrary, in Simulation C, the cross-community procedures are *equally* unfair to the SDLP and the OC. Moreover, the procedures are even more unfair to the UUP – it suffers the greatest total loss in both absolute and relative voting power. The clear winner in the cross-community procedures is SF. Under the PC rule, SF is 14 per cent stronger in absolute terms and 92 per cent stronger in relative terms (almost twice as strong). Similarly, the weighted majority rule is fair to SF in absolute terms, but favourable in terms of relative voting power. The results for the DUP are more ambiguous – under both the PC and WM rules the DUP is weaker in terms of absolute voting power. But the unfairness to the DUP in terms of absolute voting power is arguably counterbalanced by its substantial gains in relative voting power – the DUP becomes 51.5 per cent stronger under the PC rule and 24 per cent stronger under the WM rule.

Idiosyncrasies aside, the general point to take away here is that the cross-community rules tend to be unfair to *all* smaller parties – nationalists, unionists and others alike. This is not an accidental artefact of the particular distribution of party strengths in Simulation C: it is a general feature of the cross-community consent procedures whenever there is a larger unionist party and a larger nationalist party such that the larger unionist party's voting weight is sufficient to meet the unionist quota *and* the larger nationalist party's voting weight is sufficient to meet the nationalist quota. In all such cases, the cross-community decision rules will be unfair to all other parties, regardless of community designation.[31]

The foregoing analysis identifies two aspects of the unfairness inherent in the cross-community rules. On the one hand, the rules are specifically unfair to others in so far as they impose upon them a lower ceiling of possible voting power. On the other hand, the rules tend to be unfair to any smaller party, regardless of community designation. The question to be addressed in what follows is whether or not this unfairness is mitigated by other considerations.

Constitutional politics and super-legitimacy

While the preceding discussion helps to clarify the unfairness inherent in the cross-community decision rules, it also risks obscuring something important about those rules: whether or not the cross-community decision procedures apply, the Assembly cannot pass a motion or Bill without at least a majority of MLAs in favour of the same. Thus, the legitimacy of *any* successful motion or Bill within the Assembly is always, at least partially,

30 This assumes, of course, that a simple majority decision procedure represents an abstract or formal benchmark standard of fairness. On that assumption, a party is treated "fairly" by a deviation from the SM rule where its voting power remains the same. A party is treated "unfairly" if it suffers a loss in voting power. A party is treated "favourably" if it gains in voting power.

31 Indeed, if the combined voting weight of the larger unionist party and the largest nationalist party is also greater than or equal to the overall quota for the decision procedure in question, then the Penrose and Banzhaf indices for all other parties will be exactly 0.

derived from the consent of the majority. The difference the cross-community procedures make is that certain decisions require a degree of "super-legitimacy" beyond that which is conferred by an SM. So, whatever differential impact on voting power the cross-community decision procedures may have, the procedures also have the more general effect of making it more difficult to execute certain types of collective action.

It is not uncommon for some matters to be singled out and subjected to especially onerous decision procedures. The quintessential example in constitutional law is, of course, constitutional amendment. Typically, constitutions cannot be changed except by way of some special amendment formula. Amendment formulae may variably require such special measures as the approval of a super-majority in the legislature, the approval of consecutive legislatures, or ratification by popular referenda.[32] In federal systems, constitutional amendment may also require the consent of some or all of the constituent territories.[33] In any case, formal amendment processes tend to have the general effect of making constitutional change more difficult to realise than ordinary legislation.[34]

The justification for onerous amendment formulae is often explained in terms of constitutional "pre-commitment".[35] The idea is that the "people" collectively bind themselves to certain fundamental principles or rules so as to guard against the temptation to depart from those fundamentals when subsequent events strain their collective commitments.[36] To be sure, the possibility of constitutional amendment allows that the people may later resolve to alter their fundamental laws. In some cases, as Bruce Ackerman argues, sustained and popular "mobilized deliberation" may even succeed in effecting constitutional change without recourse to formal amendment procedures.[37] But such instances of "higher lawmaking", whether by formal amendment or popular mobilisation, occur "rarely, and under special constitutional conditions".[38] In contrast to the everyday politics of ordinary lawmaking, higher lawmaking is an extraordinary and onerous process, the peculiar product of "constitutional politics" at exceptional "constitutional moments".[39]

In a plurinational context, however, processes of constitutional change have an added significance. As Sujit Choudhry explains, in multinational polities, "constitutional politics" has two dimensions:

> On the one hand, there is the sort of constitutional politics that presupposes the existence of a national political community. But in parallel – and simultaneously – multinational polities also engage in constitutive constitutional politics, which concern existential questions that go to the very identity, even existence, of the political community as a multinational political entity.[40]

32 See D Lutz, "Toward a theory of constitutional amendment" (1994) 88 *American Political Science Review* 355.

33 E.g. Canada's Constitution Act 1982, s. 38(1).

34 Lutz, "Toward a theory", n. 32 above, pp. 360–2.

35 See, generally, J Elster, *Ulysses Unbound* (Cambridge: CUP 2000), ch. 2.

36 On the tension between democracy and constitutional pre-commitment, see S Holmes "Precommitment and the paradox of democracy" in J Elster and R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: CUP 1998); see also M Laughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent power and constitutional form* (Oxford: OUP 2007).

37 See B Ackerman, *We the People: Foundations* (London: Belknap Press 1993), pp. 7 and 285–8.

38 B Ackerman, "Constitutional politics/constitutional law" (1989) 99 *Yale Law Journal* 461.

39 B Ackerman, "Revolution on a human scale" (1999) 108 *Yale Law Journal* 2279.

40 S Choudhry, "Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory" (2007) 5 *International Journal of Constitutional Law* 606, pp. 635.

In such cases, processes of constitutional change are not neutral as between competing substantive preferences.[41] The processes themselves invariably reflect a particular conception of the polity, one in which the power to effect constitutional change resides in a single national *demos* or one in which constituent power is shared between multiple *demoi*.[42] It is typical then for sub-state national groups to challenge monistic conceptions of the polity and insist that the processes of constitutional change occur "on the basis of parity between or among national societies within the state, particularly where rights or prerogatives of the sub-state society are affected by the constitutional changes in question".[43] The image then is not of a single people deciding on a common set of principles once and for all, but that of a plurality of "peoples" who continue to negotiate norms of mutual recognition in perpetuity.[44]

Constitutional politics in Northern Ireland raises similar constitutive issues concerning the identity of the polity and constitutional change, but the challenges it poses are significantly more complex. To begin with, the *temporal* border between regular politics and constitutional politics in Northern Ireland is especially indeterminate – constitutionalism in Northern Ireland is still very much "transitional" in nature.[45] Thus, although the Belfast Agreement provides a framework for managing the constitutive constitutional politics of Northern Ireland in a peaceful way, it does not purport to finally resolve it.[46] Instead, constitutional change in Northern Ireland has been (and still is) an ongoing process in which incremental changes, such as the St Andrews Agreement or the recent Hillsborough Agreement, have played a critical role.[47] Secondly, and perhaps more importantly, there is no clear *substantive* border between regular politics and constitutional politics in Northern Ireland. Alongside the high politics of Northern Ireland's ultimate constitutional destiny, there are a range of lesser issues that, although not constitutional in the strict sense, nevertheless have an indirect constitutional significance in so far as they concern the constitutional identity of the polity or the viability of its power-sharing style of government. Thus, decisions concerning the public display of political symbols, the composition of public authorities, the regulation of contentious parades, and the election of the First and Deputy First Ministers all have a quasi-constitutional importance in Northern Ireland that comparable decisions would not have in a more normal society. In short, because there is no bright line between regular politics and constitutive constitutional politics in Northern Ireland, the system of government is under a far-reaching and seemingly indefinite burden to legitimate itself.

The cross-community decision procedures provide a way of managing the ongoing constitutional politics of Northern Ireland by requiring a degree of super-legitimacy for decisions of special constitutional significance. Indeed, the constitutional significance of

41 S Choudhry, "Ackerman's higher lawmaking in comparative constitutional perspective: constitutional moments as constitutional failures?" (2008) 6 *International Journal of Constitutional Law* 193, pp. 197.

42 S Tierney, "We the peoples: constitution power and constitutionalism in plurinational states" in Laughlin and Walker, *The Paradox*, n. 36 above.

43 S Tierney, *Constitutional Law and National Pluralism* (Oxford: OUP 2004), p. 132.

44 J Tully, "Recognition and dialogue: the emergence of a new field" (2004) 7(3) *Critical Review of International and Social Philosophy* 84–106.

45 On the distinctive characteristics of "transitional constitutionalism", see R Teitel, *Transitional Justice* (Oxford: OUP 2000), ch. 6.

46 J Morison and M Lynch, "Litigating the Agreement: towards a new judicial constitutionalism for the UK from Northern Ireland?", in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition, and Human Rights* (Oxford: OUP 2007), p. 115.

47 See R Wilford, "Northern Ireland: St Andrews – the Long Good Friday Agreement" in J Bradburh (ed.), *Devolution, Regionalism, and Regional Development* (Oxon: Routledge 2008).

many of the decisions to which the procedures apply is fairly obvious. Decisions relating to the legislative competencies of the Assembly, the powers and number of ministerial offices, amendments to standing orders, and amendments to the ministerial code have palpable constitutional consequences – they directly concern the substantive or formal properties of Northern Ireland's devolved system of government. Other decisions have a less direct constitutional significance. Budgetary decisions of the Assembly fall into this class.[48] The quasi-constitutional significance of such decisions derives from their connection to the maintenance of a power-sharing system of government. The model of power-sharing envisioned by the Agreement entails that the Executive will be inclusive of all major political factions within the Assembly. It is further presumed (although not strictly required) that the Executive will be led by a unionist–nationalist diarchy. In other words, it is part of the very logic of the system of government that the Executive should enjoy cross-community support. Thus, although budgetary decisions are not strictly speaking constitutional – they do not affect the formal or substantive properties of the system of government – a programme of government that did not enjoy cross-community support would undermine the purposes of the constitutional settlement. The requirement that budgetary decisions be passed on the basis of cross-community consent therefore provides an extra guarantee that the system of government will not degenerate into unilateral majoritarianism. Similarly, the requirement that a decision to exclude a minister or political party from the Assembly be made on the basis of cross-community consent ought to be understood in precisely the same way – as a safeguard against the erosion of inclusive power-sharing.[49]

But, because the border between normal politics and constitutional politics in Northern Ireland is porous, it is very difficult to identify matters of constitutional significance in advance. This is why the Petition of Concern is important. Precisely because the Northern Ireland Act does not specify any kind of restriction as to the subject-matter of the decisions that may be the subject of a Petition of Concern, the procedure has proven to be a useful device for identifying and managing matters of constitutional significance as they have arisen. In some cases, the matters subjected to cross-community vote by Petition of Concern have a fairly straightforward constitutional significance. Such cases have included motions relating to the continuance of the institutions set up under the aegis of the Agreement (the North/South Ministerial Council, the Civic Forum, the Northern Ireland Human Rights Commission).[50] In other cases, the Petition of Concern has been used to block motions relating to contentious issues that, although not of direct constitutional significance, are nevertheless matters of constitutive constitutional politics. These have included the display of Easter lilies within the Assembly, the flying of the Union flag from Northern Ireland government buildings, the eligibility of footballers born in Northern Ireland to play for the Irish Republic, the use of the Irish language in the Assembly, and funding for Irish-medium schools.[51] Admittedly, the Petition of Concern procedure is open to abuse – MLAs can strategically activate the cross-community consent rules simply to block ordinary legislation or motions that they are opposed to, even where there is no

48 Northern Ireland Act 1998, s. 63.

49 Northern Ireland Act 1998, s. 30.

50 See Northern Ireland Assembly Official Report (Hansard) 9 February 2009 "North/South Ministerial Council"; ibid. 3 February 2009 "Civic Forum"; ibid. 1 October 2001 "Northern Ireland Human Rights Commission".

51 Northern Ireland Assembly Official Report (Hansard) 10 April 2001 "Display of lilies in Parliament buildings"; ibid. 6 June 2000 "Motion on Union flag" (Petition of Concern); ibid. 11 December 2007 "FIFA eligibility proposal"; ibid. 9 October 2007 "Irish language"; ibid. 19 November 2007 "Irish-Medium Club Bank".

particular reason why the matter in question ought not to be decided by an SM vote. But such cases have been the exception, not the norm.[52]

Conclusion: reform?

It should be clear by now that the existing cross-community voting procedures entail a kind of trade-off: super-legitimacy is obtained at the cost of some unfairness. This trade-off is not, strictly speaking, a necessary one. As many critics (and even some supporters) of the cross-community consent procedures have argued, the existing procedures could be replaced by a "difference-blind" WM quota.[53] In theory, WM quotas of 60 per cent or 65 per cent could guarantee a kind of de facto cross-community support but *without recourse to community designation*. Thus, the unfairness to others within the Assembly would be remedied.

Nevertheless, I want to sound a brief cautionary note about the proposed reforms. Voting power is very sensitive to the particular distribution of seats within the Assembly and the adoption of different decision quotas can sometimes have counter-intuitive results. A quota of 60 per cent may indeed entail that a winning coalition will include at least some unionists and some nationalists. However, given the current make-up of the Assembly, this is not a particularly "safe" guarantee of de facto cross-community consent. The 65 per cent WM rule is "safer" in this respect, but it also poses a real risk of making the largest party a quasi-dictator. In Simulation C, for example, without the DUP, the other four parties together have 72 votes, just one vote more than the 65 per cent threshold of 71 votes. Thus, an increase in the DUP's strength by only two seats would make their votes necessary (but not sufficient) to any possible winning coalition. In other words, the DUP would have a veto.

The community designation and voting rules are currently scheduled for review by the Assembly and Executive Review Committee, at which time the merits of alternative procedures are likely to be debated.[54] The adoption of a 60 per cent or 65 per cent weighted majority quota for key decisions would go some of the way towards alleviating the grievances of the others. Moreover, as the foregoing analysis shows, smaller unionist and nationalist parties also have an interest in reforms of this nature. Nonetheless, the existing procedures have proven to be a valuable way of managing especially divisive issues of constitutional importance. This value should be carefully considered before endorsing reforms that may have unpredictable consequences for the rather delicate balance of power in Northern Ireland.

52 Arguably, the use of the Petition of Concern to block a motion in the Assembly relating to the Department of Energy and Climate Change's advertising campaign "Act on CO_2 emissions" and to block a motion denouncing MLAs for holding dual electoral mandates would qualify as "abuses" of the procedure. See Northern Ireland Assembly Official Report (Hansard) 9 February 2009 "North/South Ministerial Council"; ibid. 3 February 2009 "Civic Forum"; ibid. 1 October 2001 "Northern Ireland Human Rights Commission".

53 See for example, Wilford, "Northern Ireland", n. 1 above; see also J McGarry and B O'Leary, "Power shared after the deaths of thousands", in Taylor, *Consociational Theory*, n. 3 above; see also Alliance Party, Submission, n. 9 above.

54 See Assembly and Executive Review, "Forward work programme", www.niassembly.gov.uk/assem_exec/2007mandate/assem_exec_fwp.htm.

Appendix: Simulation C

DUP (36)	SF (28)	UUP (18)	SDLP (16)	OC (10)	Total votes (Us, Ns)	SM {55}	PC {55; 28; 23}	WM {65; 22; 18}
Y	Y	Y	Y	Y	108 (54, 44)	—	DUP, SF	DUP, SF
Y	Y	Y	Y	N	98 (54, 44}	—	DUP, SF	DUP, SF
Y	Y	Y	N	Y	92 (54, 28)	—	DUP, SF	DUP, SF
Y	Y	Y	N	N	82 (54, 28)	DUP, SF	DUP, SF	DUP, SF, UUP
Y	Y	N	Y	Y	90 (36, 44)	DUP	DUP, SF	DUP, SF
Y	Y	N	N	Y	74 (36, 28)	DUP, SF	DUP, SF	DUP, SF, OC
Y	Y	N	Y	N	80 (36, 44)	DUP, SF	DUP, SF	DUP, SF, SDLP
Y	Y	N	N	N	64 (36, 28)	DUP, SF	DUP, SF	UUP, SDLP, OC
Y	N	Y	Y	Y	80 (54, 16)	DUP	SF	SF
Y	N	Y	Y	N	70 (54, 16)	DUP, UUP, SDLP	SF	SF
Y	N	Y	N	Y	64 (54, 0)	DUP, UUP, OC	SF	SF
Y	N	Y	N	N	54 (54, 0)	SF, SDLP, OC	SF	SF
Y	N	N	Y	Y	62 (36,16)	DUP, SDLP, OC	SF	SF
Y	N	N	N	Y	46 (36, 0)	SF, UUP, SDLP	SF	SF
Y	N	N	Y	N	52 (36, 16)	SF, UUP, OC	SF	SF
Y	N	N	N	N	36 (36, 0)	SF	SF	—
N	Y	Y	Y	Y	72 (18, 44)	SF, UUP	DUP	DUP
N	Y	Y	Y	N	62 (18, 44)	SF, SDLP, UUP	DUP	DUP
N	Y	Y	N	Y	56 (18, 28)	SF, OC, UUP	DUP	DUP
N	Y	Y	N	N	46 (18, 28)	DUP, OC, SDLP	DUP	DUP
N	Y	N	Y	Y	54 (0, 44)	DUP, UUP	DUP	DUP
N	Y	N	N	Y	38 (0, 28)	DUP, UUP	DUP	DUP
N	Y	N	Y	N	44 (0, 44)	DUP, UUP	DUP	DUP
N	Y	N	N	N	28 (0, 28)	DUP	DUP	—
N	N	Y	Y	Y	44 (18, 16)	DUP. SF	—	—
N	N	Y	Y	N	34 (18, 16)	DUP, SF	—	—
N	N	Y	N	Y	28 (18, 0)	DUP, SF	—	—
N	N	Y	N	N	18 (18, 0)	—	—	—
N	N	N	Y	Y	26 (0, 16)	DUP	—	—
N	N	N	N	Y	10 (0, 0)	—	—	—
N	N	N	Y	N	16 (0, 16)	—	—	—
N	N	N	N	N	0 (0, 0)	—	—	—

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Asylum seekers and the right to access health care

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Abstract

In recent years, the issue of access to health care by asylum seekers has raised serious questions for government, the courts and the medical profession. Who has the right to medical treatment in the United Kingdom is a political, humanitarian and human rights matter. For the government – often facing public hostility towards asylum seekers and migrants, fearful of health tourism or "pull factors" to the UK, and confronting burgeoning financial constraints – access to treatment is often regarded as a concession rather than a right. For the courts, any decision to grant treatment to non-nationals, particularly those with no right to remain, is seen as having political implications far beyond the needs of the individual. The medical profession, by contrast, prefers in the main to focus on the patient, without regard for immigration status, and is uncomfortable with a dual role. Where the balance should lie is currently being assessed by government as it considers responses to a consultation paper on Review of Access to the NHS by Foreign Nationals. *At this timely point, this article offers a multidisciplinary approach to the question of access to health care by asylum seekers, by examining not only the legal position but also government policy, its impact on the individual, and, significantly, the ethical and philosophical arguments pro or contra treatment. It is contended that only through this comprehensive analysis can an appropriate legislative approach be adopted at a time when this critical social right is gaining ascendance.*

Introduction

Asylum seekers, from the mid-1980s onwards, have been subjected to unparalleled executive, judicial and media scrutiny. Their motivations for seeking asylum have been examined with intense suspicion. Their ease of travel to the United Kingdom has been intentionally hindered and rights to work, to support and to remain during the asylum process have been slowly eroded, if not wholly removed.[2] Those granted a right to remain are often considered to have exploited loopholes in overly liberal human rights laws with

1 Email: Dallal.Stevens@warwick.ac.uk; tel 02476 523289.

2 See for a discussion of the asylum situation in the 1980s and 1990s: C Harvey, *Seeking Asylum in the UK – Problems and prospects* (London: Butterworths 2000); P Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (London: Cavendish 2000); D Stevens, *UK Asylum Law and Policy* (London: Sweet & Maxwell 2004). See also, for practitioners' perspective, M Symes and P Jorro, *Asylum Law and Practice* (London: Bloomsbury Professional 2010); I Macdonald and R Toal, *Macdonald's Immigration Law and Practice* (London: Butterworths LexisNexis 2010).

the aid of politically correct lawyers.[3] Their rights, some claim, have been unfairly elevated above those of the host population, of British nationals.[4] In sum, many now believe that we owe the asylum seeker very little and the so-called "failed asylum seeker" nothing at all.[5]

The focus has recently shifted to access to health care by asylum seekers. Granting free health care to any foreign national is politically sensitive and forces one to confront controversial issues: treatment of the non-national, who has contributed little or nothing towards the NHS, can seem unnecessary and unjustified, particularly in the face of a besieged NHS facing financial stringency; access to health is often perceived as a "pull factor" encouraging non-nationals to come to the UK; as evidenced by pre-election polls in the UK in 2010, the host population is increasingly concerned about migration and its impact on key services. At the same time, there are some who regard access to health care as a right of all those on UK soil, whether national or non-national, and a mark of a civilised, human-rights-oriented society.

The decision to treat or not to treat a human being is clearly of political concern but it also raises complex legal, medical, ethical and philosophical questions. Some of these issues have been outlined in the former government's long-awaited consultation paper on the *Review of Access to the NHS by Foreign Nationals*, published in February 2010, and with responses currently under consideration.[6] Others are discussed in part by the courts, by academics, or by NGOs. Many factors, however, remain unexplored, and the current academic literature often lacks a cross-disciplinary approach. It is thus timely to seek to place the important debate on access to health care of asylum seekers within a broad context, thereby ensuring a more comprehensive analysis than hitherto. The article evaluates the current role of law, policy and ethics, in particular the inter-relationship between the three, and draws conclusions on where the balance ought to lie. Opening with the legislation and caselaw on asylum applicants seeking health treatment in the UK, the article goes on to discuss the implications of government policy for the health of non-nationals, as well as the wider community. It then proceeds to address some philosophical arguments for and against treatment and concludes by positing that legislation, divorced from wider reflections on ethics and human rights, is misguided for the twenty-first century where the social rights of the individual are increasingly in the ascendance.

Access to health care by foreign nationals: legal principles

The legislation

For many decades, access to health services by foreign nationals, including asylum seekers, was relatively non-contentious. The duty on the Secretary of State was to promote a comprehensive health service aimed at improving physical and mental health and

3 See, for example, J Rozenberg, "Is David Blunkett the biggest threat to our legal system?", *The Daily Telegraph*, 13 November 2001.

4 See the storm caused in 2007 by Labour MP for Barking, Margaret Hodge, who suggested "We prioritise the needs of an individual migrant family over the entitlement others feel they have.": M Hodge, "A message to my fellow immigrants", *The Observer*, 20 May 2007; F Elliot, "British families need housing priority over migrants, says Hodge", *The Times*, 21 May 2007; A O'Hagan, "Shame on you, Margaret Hodge", *The Telegraph*, 22 May 2007.

5 The term "refused asylum seeker" is used throughout in preference to the politically charged "failed asylum seeker".

6 Consultation closed 30 June 2010; available at: www.dh.gov.uk/publications.

preventing, diagnosing and treating illness;[7] the underlying presumption of consecutive health service statutes was that services would be free for all.[8] Non-citizens were thus treated on a par with citizens and were provided with free health care where necessary. The separation between social and other rights was not at issue. Nor, ostensibly, were the resource implications of treating all those who arrive on these shores. This changed in the 1970s, but even when a power to charge "non-residents" was included in the National Health Service Act 1977, no immediate action was taken to bring it into effect (s. 121). By the 1980s, however, a shift in attitude was evident. Asylum applications were rising rapidly and the migration issue was once more singled out as a major concern for government.[9] Regulations were ultimately introduced in 1989 to give effect to s. 121 and to charge "overseas visitors" for secondary health care (hospital treatment).[10] Primary (general practitioner (GP)) care services remained universally free. Refugees, asylum seekers and any overseas visitor who had resided in the UK for 12 months prior to needing treatment were exempted.[11] So too were certain forms of treatment.[12] However, these measures were soon deemed insufficient by government and, in 2004, the radical step was taken to withdraw access to secondary health care from a broader group of overseas visitors.[13]

Both the 1989 and 2004 Regulations permit a health trust to charge overseas visitors in the UK for health care. The move from charging non-residents, as specified in the NHS Act 1977, to charging overseas visitors, described as those who are "not ordinarily resident in the United Kingdom", is a subtle linguistic adjustment. "Ordinary residence" has a long history, especially in the field of taxation, but is not an easy concept to define.[14] There is no explanation in the NHS Act 1977 (or later legislation). Much needed clarification was provided by the House of Lords case of *R* v *Barnet London Borough Council, ex parte Shah*, which concerned entitlement to local authority further education grants of foreign-born students. The term "ordinarily resident" was held to mean that residence was voluntary, lawful, and for a settled purpose or purposes, and this now constitutes the standard interpretation.[15] Overseas visitors are considered not to be ordinarily resident.[16]

The onerous legal duty of establishing whether a person is ordinarily resident or exempt from charges falls upon the individual NHS trust. In order to aid NHS trusts, the Department of Health (DoH) issued guidance to clarify, inter alia, the position of refugees

7 See, for example, National Health Service Act 1977, s. 1; see also National Health Service Act 2006.

8 Starting with the National Health Service Act 1946.

9 See n. 2 above for a detailed analysis.

10 National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306 (the 1989 Regulations).

11 Regs 4(1)(b) and (c). On the entitlement of refugees to certain rights, see, generally, J Hathaway, *The Rights of Refugees under International Law* (New York: CUP 2005); on whether a refugee claim can succeed on health grounds, see M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from deprivation* (Cambridge: CUP 2007), pp. 226–35.

12 Reg. 3 and Sch. 1; Free treatment is available, for example, in emergency situations, for compulsory treatment under the Mental Health Act 1983, or for listed dangerous and transmissible diseases. HIV treatment is not exempted, though free HIV testing and counselling is available.

13 NHS (Charges to Overseas Visitors) Charging (Amendment) Regulations 2004, SI 2004/614 (the 2004 Regulations)

14 See, for an early discussion, J D McClean, "The meaning of residence" (Oct 1962) 11(4) *The International and Comparative Law Quarterly* 1153–68.

15 "I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration." per Lord Scarman [1983] 2 AC 309, 343.

16 1989 Regulations, reg. 1.

and asylum seekers.[17] It stated in para. 6.24 that exemption for asylum seekers only lasts until their claim is determined and that a refused asylum seeker should be charged for a new course of treatment. It also provided that "once they have completed 12 months [sic] residence, they do not become exempt from charges" – "they" presumably refers to "failed" asylum seekers, but the guidance is poorly phrased and unclear. The advice appeared therefore to endorse the view that refused asylum seekers ought to be charged for new treatment as they were not deemed to be ordinarily resident. This was the case even where a refused applicant was unable to return home and was in receipt of support from the government (known as "section 4 hard-case support").[18]

An interesting aspect of these Regulations is that there is some acceptance that an obligation is owed to asylum seekers pending determination of their claim. Although the reason for this is not articulated, it could be argued that the obligation arises from the original aim of the NHS to provide health services free at the point of need, and that no distinction should be made between, say, asylum seekers and nationals. Indeed, in 1952, Aneurin Bevan wrote that: "One of the consequences of the universality of the British Health Service is the free treatment of foreign visitors."[19] He did acknowledge that:

> This has given rise to a great deal of criticism, most of it ill-informed and some of it deliberately mischievous. Why should people come to Britain and enjoy the benefits of the free Health Service when they do not subscribe to the national revenues? So the argument goes.[20]

For Bevan, visitors to Britain subscribed to the national revenues as soon as they started consuming certain commodities, such as drink and tobacco and entertainment. He argued that they made no direct contribution to the cost of the NHS any more than did a British citizen.[21] It was unwise as well as mean to withhold the free service from a visitor to Britain. What is uncertain is whether Bevan, in referring to foreign visitors, only had *lawful* visitors in mind and not irregular entrants; after all, even the "illegal" migrant purchases commodities, thereby contributing to the Exchequer in the manner Bevan describes.

The truly universal view advocated by Bevan is at odds with the secondary legislation on charging of overseas visitors and the NHS Act 2006. There, the Secretary of State's duty is described as "the promotion in England of a comprehensive health service designed to secure improvement in the physical and mental health of the people *of* England" (emphasis added). No longer is the duty towards those in the state; they must be of the state. Yet elements of Bevan's core belief still pertain: entitlement to free health care in the Regulations is, in fact, not based on nationality, previous residence, payment of national insurance or of taxes, but on the rather peculiar legal notion of ordinary residence with its requirement of lawfulness.

The difficult moral or medical questions concerning entitlement to free health care, and at what level – primary and/or secondary – were rather lost in the debates in 1989 and 2004. The 2004 Regulations, for example, were implemented in order to deal with the hot political issue of the time: health tourism. The then Home Secretary, John Reid, put it thus:

17 DoH, *National Health Service Implementing the Overseas Visitors Hospital Charging Regulations Guidance for NHS Trust Hospitals in England*, January 2007 version.

18 Immigration and Asylum Act 1999, s. 4(2), grants a power to the Secretary of State to accommodate rejected asylum seekers; see also Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005.

19 A Bevan, *In Place of Fear* (London: Heinemann 1952), p. 80.

20 Ibid.

21 Ibid; claims to the contrary were due, he felt, to a misunderstanding about the role played by national insurance contributions in payment for the NHS.

> If there are bona fide tourists dropping ill in the street, of course we will do what we have to do, but we are not mugs. There is a difference between being civilised and being taken for a ride.[22]

The crackdown would target refused asylum seekers who, in his words, were "effectively stealing treatment from the people of this country".[23] When pressed, neither he nor the Minister for Public Health, Melanie Johnson, could produce concrete statistical evidence of substantial health tourism and, in particular, HIV tourism. Johnson admitted to the Select Committee on Health:

> [i]t is very difficult to produce figures. Historically, figures have not been collected by the Health Service, over decades – never, basically – about levels of people using the service who are not resident or normally resident in the UK.[24]

The government, it emerged, did not have reliable information.[25] The evidence, in fact, pointed to the opposite conclusion: many people who came into the country with HIV sought treatment long after arrival, suggesting they were not health tourists at all.[26] When confronted, the minister responded with a telling change of position, declaring that amendment to the legislation was necessary to ensure that the UK did not, in future, become a magnet for health tourists.[27] Here, after all, was the real concern.

The Regulations clearly apply to asylum seekers temporarily admitted to the UK, but not all those seeking asylum are granted temporary admission.[28] Some are detained on arrival and sent to purpose-built fast-tracking facilities if their applications are deemed capable of being decided quickly; others who are regarded as at risk of absconding may also be detained, as may those who have reached the end of the appeal process and are due for imminent removal.[29] Provision is made through secondary legislation for medical health care provision while in detention.[30] Under the Detention Centre Rules, there is an obligation to assess the physical and mental health needs of detainees within 24 hours of admission.[31] Medical practitioners must report the case of any detainee who may have been the victim of torture, or whose health is likely to be affected by detention, including suicidal intentions or mental health deterioration.[32] The cost of health care while in detention is covered by the state.

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22 BBC News, "'Health tourism' rules unveiled", 30 December 2003 http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/3355751.stm.

23 Ibid.

24 House of Commons Health Committee, *New Developments in HIV/AIDS and Sexual Health Policy*, third report of session 2004–05, vol. II, 8 March 2005, HC 252-II, Q210.

25 Ibid. Q211.

26 Ibid. Q211; and see Project: London, *Improving Access to Healthcare for the Community's Most Vulnerable* (2007), report and recommendations, p. 12, www.doctorsoftheworld.org.uk/lib/docs/104524-report2007light.pdf.

27 See Health Committee, *New Developments*, n. 24 above, Q212.

28 Temporary admission is a technical term which has been described as "half way between leave to enter or remain and detention" (Macdonald and Toal, *Macdonald's Immigration Law Practice*, n. 2 above, para. 3.42). Anyone granted temporary admission is deemed not to have legally entered the UK.

29 See for current policy, UK Border Agency, *Immigration Directorate's Instructions* (November 2009), ch. 13, s.1, "Detention and detention policy in port cases", www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idichapter31detention/section1/section1detentionpolicyinport?view=Binary ; *Enforcement Instructions and Guidance* (August 2010), ch. 55, "Detention and temporary release", www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55?view=Binary.

30 The Detention Centre Rules 2001, rr. 33–7.

31 Ibid. r. 34.

32 Ibid. r. 35.

European Union legislation also sets out minimum standards owed to asylum seekers. The relevant directive charges member states to ensure that asylum applicants receive the necessary health care, including, at least, emergency care and essential treatment of illness.[33] While the meaning of "emergency care" is self-evident, "essential treatment of illness" is less clear-cut and may vary from state to state and from clinician to clinician. A key unanswered question in the directive is whether essential treatment of illness necessitates a search for a cure or whether it is purely palliative. The directive is also less clear on obligations owed by member states to asylum applicants for mental health treatment. One issue about which there is no uncertainty is to whom the directive applies. The directive defines asylum seekers as those for whom a final decision has not yet been taken; it does not apply, therefore, to refused asylum seekers who are placed in a particularly vulnerable position vis-à-vis all "reception conditions" including health care. As will be seen from the cases referred to below, this group has been forced, in the main, to seek assistance from the courts.

The revelation that reception conditions differ widely across EU states has led the European Commission to propose recasting the Reception Directive, amongst others,[34] to ensure that all states "guarantee a dignified standard of living, in line with international law".[35] The proposed recast directive extends minimum standards to all those seeking international protection, not just asylum seekers, as is contained in the current directive. Furthermore, in response to criticisms that mental health was somewhat sidelined in the 2003 directive, the clause on health care is redrafted to include mental health treatment and demands, in the case of applicants with special needs, equal provision of mental health care as for nationals.[36] Given the prevalence of mental health problems amongst asylum seekers, particularly those in detention, and refugees, this amendment is to be welcomed. The UK has chosen, however, not to opt-in to the recast directives.[37]

33 Council Directive 2003/9/EC laying down minimum standards of reception for asylum seekers, Article 15. As well as being directly effective, the directive's principles are contained in the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7, Asylum Support Regulations 2000, SI 2000/704 (as amended), and the Statement of Changes in Immigration Rules (HC 395).

34 EC Commission, Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Standards for the Reception of Asylum Seekers (Recast), COM (2008) 815; EC Commission, Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (Recast), COM (2009) 551; EC Commission, Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Granting and Withdrawing International Protection (Recast), COM (2009) 554; See also Green Paper on the future of the Common European Asylum System, COM (2007), p. 30. For a discussion of the UK's decisions not to opt in, see House of Lords, EU Committee, *First Report on Asylum Directives: Scrutiny of the opt-in decisions*, session 2009–10, HL paper 6, 4 December 2009; House of Lords, EU Committee, *The United Kingdom Opt-in: Problems with amendment and codification*, 7th report, session 2008–09, HL paper 55.

35 COM (2008) 815, Explanatory Memorandum, para 3.

36 Recast Article 19: (1) "Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of *illness or mental disorders*." (2) "Member States shall provide necessary medical or other assistance to applicants who have special needs, *including appropriate mental health care when needed, under the same conditions as nationals*." (redrafting in italics).

37 In the case of the recast Reception Directive, the reason given to the House of Lords EU Committee was that while the government intended to maintain the minimum standards currently laid down by the directive, the amendments dealing with wider access by asylum seekers to the labour market after six months, specific elements of financial support to be given to individuals, and arrangements on detention would be too onerous: EU Committee, *The UK Opt-in: Problems with amendment and codification*, n. 35 above, Minutes of Evidence, 25 February 2009, Q22.

The case law

While governmental concerns about resources and "pull factors" are not new, and are in many ways to be expected,[38] the reaction of the judiciary is arguably less predictable. Courts have been called upon to adjudicate on both the narrow, technical wording of secondary legislation and the broader universal principles of human rights law. In both contexts, the impact of the decision on the life chances of the individual can be most serious.

The case of *YA*

In April 2008, in *R (on Application of A)* v *West Middlesex University Hospital NHS Trust* (High Court),[39] a refused asylum seeker famously challenged the lawfulness of the DoH guidance on the ordinarily resident point. A, a Palestinian, suffered from a chronic liver disease. On refusal of his asylum claim, he agreed to return to the West Bank but was unable to do so due to travel restrictions. He sought treatment from West Middlesex University Hospital but was refused surgery based on secondary legislation and the DoH's own guidance;[40] in its place, he was offered painkillers. After an examination of the legislation and caselaw on ordinary residence, Mr Justice Mitting concluded that it was unlawful insofar as para. 6.24 advises NHS Trusts to charge refused asylum seekers who would otherwise be treated as ordinarily resident.[41] A, who could not leave the country, was entitled to treatment pending departure. Permission was granted to the respondent to appeal.

The press reported the case as ruling that "all asylum seekers who have not been ordered to leave the UK must be given free NHS healthcare" and that "the ruling could apply to anywhere between 200,000 and half a million people".[42] Sensationalist, certainly, and statistically questionable, since the number of refused asylum seekers in the country is unknown. In response to the judgment, the DoH issued further instructions to NHS trusts advising that they:

> must consider whether each failed asylum seeker that they treat can be considered ordinarily resident in the UK, in the same way as they would do with any other patient, taking into account the judge's opinions as to what would be likely to be sufficient proof of ordinary residence.[43]

Trusts were directed to delete para. 6.24 from the original guidance pending an amendment to take account of the *A* case. They continued to be placed in the invidious position of having to check the immigration and residency status of potential patients – no simple process, as made clear in *A* where the judge referred to two contrasting House of Lords' decisions.[44] Many doctors believed they had no choice about whom to treat and some managers considered that all foreign nationals were required to pay except in

38 See, for example, P Legrain, *Immigrants – Your country needs them* (London: Little Brown 2007) and n. 2 above.

39 [2008] EWHC 855 (Admin), 11 April 2008.

40 DoH, *Guidance*, n. 17 above.

41 Ibid. para. 27.

42 S Boseley, "Asylum seekers have right to full NHS care, high court rules, but government considers appeal", *The Guardian*, 12 April 2008.

43 Letter from R Douglas, Director General for Finance and Chief Operating Officer, DoH, to Chief Executive entitled "Subject: failed asylum seekers and ordinary residence – advice to overseas visitors managers", 1 May 2008 (available at www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_084480.pdf).

44 *R* v *Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 and *Szoma* v *Secretary of State for the Department of Work and Pensions* [2006] 1AC 564.

extreme emergency.[45] Adam Hundt, the solicitor acting for A, stated that clients of his had died following treatment being refused. Although, as Mr Hundt rightly acknowledged, they may have died in any event, they were never given a chance to survive.[46] The government appealed.

On 30 March 2009, the Court of Appeal handed down its judgment in *R (on Application of YA)* v *Secretary of State for the Home Department*.[47] After close examination of the authorities, Lord Justice Ward concluded that asylum seekers were not ordinarily resident for the purposes of the legislation.[48] "Residence by grace and favour is not ordinary", he said. "Failed asylum seekers" were in an even worse position: the judge felt that they "ought not to be here" and that "they should never have come here in the first place".[49] This striking observation seems in apparent contradiction of the universal right to seek asylum.[50] While asylum seekers (and refugees) were not ordinarily resident, they were still exempted from charges under reg. 4(1)(c) of the 1989 Regulations (as amended).[51] No such loophole existed for refused asylum seekers. The judge assessed whether they could be brought within another exception to charging, reg. 4(1)(b), which entitles an overseas visitor to free medical treatment following a year's lawful residence in the UK. He deduced, however, that refused asylum seekers – and, more significantly, asylum seekers – were not *lawfully* resident; neither was therefore entitled to free treatment as of right:

> One resides here lawfully when one has the right to do so. An indulgence is granted to a claimant for asylum, not a right, and in this context the word "lawful" means more than merely not unlawful but should be understood to connote the requirement of a positive legal underpinning. Being here by grace and favour does not create that necessary foundation.[52]

The connection made by the judge between lawful and indulgent residence is very telling. Temporary admission to proceed with one's asylum claim is not perceived as authority or right to reside. It is lawful presence only.[53] And the right to reside is significant since it reasserts the link between territory and rights. The state grants permission to enter; the state says who is lawful or otherwise; and only when that decision is formally taken by the state can there be a question of a right to certain rights. Once an asylum claim is rejected, agency appears to return to the claimant. He or she must return to his or her own country. But what if that is not possible and the refused asylum seeker has pressing health needs? In considering whether an NHS trust has discretion to provide or withhold treatment for a refused asylum seeker, Lord Justice Ward threw the responsibility back to the health trust. In his view, it was implicit in the DoH guidance on the Regulations (discussed above) that there was a discretion about whether to administer or withhold treatment, even where there was no prospect of payment by the patient. How that discretion should be exercised might depend on how long a refused asylum seeker remained in the UK, particularly if he or she could not be returned to the home country;

45 BBC News, "NHS 'confusion' over asylum rules", 1 August 2008 http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/7537216.stm.

46 Ibid.

47 [2009] EWCA Civ 225.

48 Ibid. para. 61.

49 Ibid.

50 Universal Declaration of Human Rights 1948, Article 14(1).

51 SI 1989/306.

52 [2009] EWCA Civ 225, para. 64.

53 In the case of *Szoma* v *Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, temporary admission was deemed lawful presence for the purposes of entitlement to welfare benefits.

these were all details requiring further clarification in the guidance, which therefore needed amending.[54]

While this judgment is viewed as disastrous by many advocates representing refused asylum seekers, it did, in fact, leave the door slightly ajar. Within days, the Director General (DG) of NHS Finance, Performance and Operation had written to all NHS trusts calling upon them to revert to the position prior to the High Court decision in April 2008.[55] In his letter, the DG clarified the approach to be adopted in the case of immediate treatment, of urgent treatment, and of non-urgent treatment, applicable to all chargeable overseas visitors, not just refused asylum seekers. Following the direction provided by the court, it appears that treatment is generally advocated where the patient is unlikely to quit the UK in the near future. However, in making this evaluation, the NHS trust has to determine the future migration potential of its patients! Furthermore, as each NHS trust is free to make its own assessment, there is no guarantee of national consistency (though one might note that a "health care lottery" exists more broadly). The redrafting of the guidance on the Regulations is currently underway, alongside the review by the Home Office and DoH of access to the NHS by foreign nationals. Clarity across the board is certainly urgently required.

The case of *N*

In seeking redress for clients suffering ill health, legal advisers have not only tackled the interpretation of national rules but have also explored a human rights angle. The European Convention on Human Rights (ECHR) does not encompass a "right to health"[56] as such but a number of the provisions can be used in support of health care and access to health: Articles 2, 3, 8 and 14 being the most relevant. In the case of a refused asylum seeker, the legal argument normally revolves around Articles 2, 3 and 8 in an attempt to resist removal to a state where medical treatment is unavailable or ineffective. This was the position of N in *N* v *UK*,[57] a case that has been discussed in depth,[58] and that continues to have significant consequences, having adjudicated on the circumstances in which a breach of Article 3 might arise. Like *YA*, the *N* case concerned the politically sensitive issue of continued health treatment of a foreign national with no ostensible right to remain in the UK. As in *YA*, the applicant was very ill but not yet at a terminal stage. Both were refused asylum seekers.

54 Ibid. para. 77. The guidance is yet to be published.

55 DoH letter to NHS trusts, 2 April 2009 available at: www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_097384.

56 As outlined in: Universal Declaration of Human Rights (UDHR), Article 25(1): "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ."; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12(1): "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Under Article 12(2), states are only expected to take steps necessary for: "(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

57 *N* v *UK*, Grand Chamber, App. No 26565/05.

58 For further analysis of the case, see C Sawyer, "Insufficiently inhuman: removing AIDS patients from the UK" (2004) *Journal of Social Welfare and Family Law* 281–8; J Chalmers, *Legal Responses to HIV and AIDS* (Oxford and Portland, Oregon: Hart 2008), ch. 5; V Bettinson and A Jones, "The integration or exclusion of welfare rights in the ECHR: the removal of foreign nationals with HIV after N v UK" (2009) 31 *Journal of Social Welfare and Family Law* 83–94; V Mantouvalou, "*N* v *UK*: no duty to rescue the nearby needy?" (2009) 72 *Modern Law Review* 815–28.

The facts of *N* are now well known: the applicant, a young woman who arrived in the UK from Uganda in March 1998 apparently unaware of her condition was quickly diagnosed as HIV positive with "considerable immunosuppression and . . . disseminated mycobacterium TB". Within a week of her arrival, and while she was in hospital, she claimed asylum on the grounds of ill-treatment and rape by the National Resistance Movement in Uganda; she claimed to be associated with the Lord's Resistance Army. By August 1998, she was extremely ill having developed a second AIDS-related illness, Kaposi's sarcoma. Her asylum claim was refused in March 2001 on grounds of credibility; in addition, the Secretary of State did not consider her to be at risk from the Ugandan authorities. With no right to remain, she was subject to removal to Uganda. N appealed and the adjudicator dismissed the asylum claim but did allow her to appeal on the ground that her return to Uganda would breach Article 3 of the ECHR. In his view, the evidence indicated that the case for protection was "overwhelming".[59] In February 2003, the Immigration Appeal Tribunal found for the Secretary of State.[60] N appealed to the Court of Appeal,[61] the House of Lords,[62] and then to the European Court of Human Rights (ECtHR). Following treatment with antiretroviral drugs and careful monitoring, she had stabilised and was relatively well by the time the House of Lords heard her case in May 2005. Both higher courts dismissed her case, as did the ECtHR.[63]

Several judges both in the UK and Strasbourg were evidently nervous about the consequences of a negative determination for N. Her prognosis on return was bleak: in the words of Lord Hope in the House of Lords, she would "face an early death after a period of acute physical and mental suffering".[64] Yet the facts of her case were determined not to be sufficiently "exceptional" to prevent removal under Article 3. N's illness had not reached the requisite advanced or terminal stage, and some level of medical care was available in her own country. Once she was differentiated from the applicant in the earlier case of *D* v *UK*[65] her chances of success were poor. D, by contrast, was regarded as having been "critically ill" appearing "close to death", and could not be guaranteed any nursing or medical care in his country of origin, nor had any family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.[66]

The uncompromising effect of the judgment is severe. Individuals suffering serious ill health and with no right under immigration or asylum law to remain in a signatory state will be removed in the vast majority of cases. The interpretation of earlier ECtHR case law by the majority, in particular *D* v *UK*,[67] ensures that the economic – and perhaps political – interests of signatories far outweigh the medical needs of the individual; for human suffering to be deemed sufficiently exceptional to override state interests, it will have to be verging on the nigh unattainable. And with advances in medicine, the exact scenario in *D* is unlikely to be repeated: such is the tragic irony for N and those in a similar position.

It is arguable that both the Strasbourg court and the House of Lords were engaging in "real-jurisprudence": Contracting states should not be led too far down the path of positive obligations, particularly one as far reaching as health provision with its onerous financial

59 *N* v *Secretary of State for the Home Department* [2005] UKHL 31, para. 6.

60 [2002] UKIAT06707 - HX05310-02.

61 *N* v *Secretary of State for the Home Department* [2004] INLR 10, para. 40 per Laws LJ.

62 *N* v *Secretary of State for the Home Department* [2005] UKHL 31.

63 *N* v *UK*, Grand Chamber, App. No. 26565/05.

64 *N* v *Secretary of State for the Home Department* [2005] UKHL 31, para. 20.

65 *D* v *UK* (1997) EHRR 423.

66 *N* v *UK*, Grand Chamber, App. No 26565/05, see paras 39 and 42.

67 *D* v *UK* (1997) EHRR 423.

implications, for fear that to do so might prompt withdrawal from the ECHR. States may well consider the *N* decision a victory for common sense and the public purse, but it provides a limited analysis of the complexity surrounding health care access and makes only passing reference to the difficult underlying ethical and political issues. Lord Justice Sedley hints at such concerns elsewhere in *ZT* v *Secretary of State for the Home Department* and his comments are worth citing in full:

> When in *N* v *Home Secretary*, §14, Lord Nicholls described these questions as "not capable of satisfactory humanitarian answers" he might have added "or jurisprudential ones". If HIV were a rare affliction, readily treatable in the UK but not treatable except for the fortunate few in many other countries, the courts would have little hesitation in holding removal of sufferers to such countries to be inhuman treatment contrary to Article 3. It is the sheer volume of suffering now reaching these shores that has driven the Home Office, the Immigration Appellate Authority and the courts to find jurisprudential reasons for holding that neither Article 3 nor Article 8 can ordinarily avail HIV sufferers who face removal. Only cases which markedly exceed even the known level of suffering – an example is the expectant mother in *CA* v *Home Secretary* [2004] EWCA Civ 1165 – now qualify for protection.
>
> We have in consequence had to set the bar in both Article 3 and Article 8 cases unusually high for removal cases. The reasoning of the House in *N* accepts, in effect, that the internal logic of the Convention has to give way to the external logic of events when these events are capable of bringing about the collapse of the Convention system.[68]

So while the judge acknowledges the reality and extent of the suffering, he is unable to assist the vast majority of sufferers for practical reasons – namely, the political and legal consequences for the ECHR if the courts liberally sanction treatment. He does not quantify the number of HIV sufferers that it might be regarded as acceptable to treat within a contracting state, such as the UK. The stringent requirement of exceptionality suffices to ensure that very few are permitted to remain on health grounds under Article 3.

While *N* was concerned with HIV, its findings have now been extended to other medical conditions, including mental health. In *KH (Afghanistan)* v *Secretary of State for the Home Department*, the appellant, a young man from Afghanistan, applied for asylum and was rejected.[69] He then raised mental health problems as a basis for a fresh claim to remain in the UK: there was considerable evidence of depression, symptoms of post-traumatic stress disorder, self-harming, and a future risk of suicide, particularly if the appellant were returned to Afghanistan. The Secretary of State decided that the new material did not constitute a fresh claim for immigration purposes. Discussion in the Court of Appeal revolved around two issues: (i) whether the case should be treated as medical – which the court felt it should; and (ii) whether there was a divide between the jurisprudence of *N* v *UK* and *Pretty* v *UK*[70] – which it did not consider pertinent in view of the fact that the *N*

68 [2005] EWCA Civ 1421, Court of Appeal, 27 November 2005, paras 41 and 42.

69 [2009] EWCA Civ 1354, Court of Appeal, 14 December 2009.

70 35 EHRR 1.

jurisprudence was the later more considered view of the Strasbourg court and was specifically applicable to mental illness cases.[71] To be permitted to stay, therefore, KH needed to show that his circumstances were exceptional as per *N*, or, as Lord Justice Sedley suggests, he suffered from a "rare affliction". This he failed to do. The court said:

> The truth is that the presence of mental illness among failed asylum seekers cannot really be regarded as exceptional. Sadly even asylum seekers with mental illness who have no families can hardly be regarded as "very exceptional" . . . Perhaps a very old or very young person would qualify but hardly an ordinary adult.[72]

Unfortunately, there is much evidence to suggest that the stress and insecurity created by applying for asylum, the lengthy wait for a decision, the possibility of detention, and the fear of removal all contribute significantly to mental health problems of this vulnerable group.[73] For mental health issues, then, to be labelled as unexceptional for the purposes of Article 3, when they might in fact have been caused or exacerbated by the asylum process itself, is a sad indictment of the asylum system in the UK.

The case of *Ama Sumani*

The cases of *N* and *YA* are the starkest reminders of the impact of restricted health care access: the serious decline in health and possible death of an individual. Both decisions received press coverage and some notoriety, but it is the plight of Ama Sumani, that caught the public attention, once more highlighting the complex issues at stake. Though this was not a case involving an asylum seeker, the outcome would have been the same had she sought asylum and been refused. Ama Sumani, a widowed 39-year-old Ghanaian mother of two who was suffering from terminal cancer, was removed to Ghana in January 2008 after her appeals failed. She arrived in the UK in 2003 on a visitor's visa which was changed to a student visa as she intended to enrol on a banking course; it transpired, however, that her English was not adequate. Contrary to the conditions of her admission, she started working. She travelled to Ghana in 2005 to attend a memorial service for her husband and, on her return to the UK, her student visa was revoked but she was granted temporary admission. In January 2006, she was diagnosed with multiple myeloma and a case was made to the Home Office to allow her to remain on compassionate grounds. This was rejected and removal took place once her doctors deemed her fit to travel. The apparent lack of the requisite treatment in Ghana, accompanied by her inability to pay, guaranteed an early death for Ms Sumani, and so it proved. Despite many donations to assist her, which enabled her to receive dialysis treatment shortly after arriving in Ghana, she died in hospital in Accra on 19 March 2008. For many, the removal of such an ill woman was scandalous, as reflected in a forthright editorial of *The Lancet*:

> To stop treating patients in the knowledge that they are being sent home to die is an unacceptable breach of the duties of any health professional. The UK has

71 [2009] EWCA Civ 1354, Court of Appeal, 14 December 2009, para. 28; *Pretty*, a non-migration case, held in para. 52, that: "The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see the above mentioned *D.* v. *the United Kingdom* and *Keenan* v. *the United Kingdom* judgments and also *Bensaid* v. *the United Kingdom*, no. 44599/98, (Sect. 3), ECHR 2000-I."

72 Ibid. para. 33.

73 See, for example, Mind, *Improving Mental Health Support for Refugee Communities* (London: Mind 2009); Mind; *A Civilised Society – Mental health provision for refugees and asylum-seekers in England and Wales* (London: Mind 2009); A Keller et al., "Mental health of detained asylum seekers" (2003) 362 *The Lancet*, issue 9397, 1721–3.

> committed an atrocious act of barbarism. It is time for doctors' leaders to say so – forcefully and uncompromisingly.[74]

In summary, the caselaw to date establishes that jurisprudential reasons will be found to ensure that access to health care is limited for those who have failed to obtain legal entitlement to remain. The courts are not prepared to disaggregate a state's obligation to provide health care from lawful residence, unless government itself chooses to do so, as in the exemption provided to asylum applicants. Human rights arguments will rarely reverse such an outcome and the courtroom is seldom a forum for moralising, unless, implicitly, about the ongoing primacy of state sovereignty.

Access to health care: government policy

For the government, decisions such as that of the High Court in *A* are extremely troubling. "[I]t cannot be right" stated the Parliamentary Undersecretary of State on Health "that someone living in the UK without any authority should have the same inalienable right of access to services as someone living here with that authority".[75] On the other hand, one could argue, the morality of refusing treatment for someone suffering painful, debilitating or life-threatening diseases, but who is unable to leave the UK through no fault of his or her own, is certainly questionable. The government's response to this point has, hitherto, been limited. It has focused largely on the perceived burden on the UK taxpayer and NHS service user of migrants and asylum seekers in need of health care. Asylum seekers have long been regarded as a threat to a sovereign state in many ways – mainly because they are seen as uninvited, largely "bogus" and seriously resource-intensive.[76] Refused asylum seekers pose a double threat: they have failed to prove any entitlement to call upon our hospitality, yet they may disappear or be difficult to remove. Refused asylum seekers who are incapacitated are most vilified – they are often deemed exploitative, abusive, undeserving, a drain on resources, and, at worst, a serious risk to health.

Yet, a humanitarian approach is not completely counter-intuitive to politicians. In a surprising move in May 2008, and following the decision in *A*, the Welsh Assembly government decided to provide NHS services free of charge to refused asylum seekers. In the face of some stringent opposition, Welsh Health Minister, Edwina Hart, declared that the mark of a civilised society was how it treated its sick and dying:

> I'm simply looking at the human being at the end of the chain and saying if they've got severe health problems and they require help and assistance, as a civilised country we should give it.[77]

This appeal to a hitherto unacknowledged morality was a new departure. Yet, many of her Welsh constituents were unmoved, complaining that the NHS could not cater for its own UK citizens, never mind foreigners. Fears were also voiced that the policy would act as a pull factor to the world's migrants, not least from England into Wales.[78] Such concerns were ignored. In July 2009, the Welsh Assembly amended reg. 4(1)(c) of the principal 1989

74 "Editorial" (19 January 2008) 371 *The Lancet* 178.

75 Letter from Ann Keen MP to Lord Avebury, 28 July 2008.

76 See Stevens, *UK Asylum Law and Policy*, n. 2 above, for a discussion of the history of asylum seeking to the UK.

77 BBC News, "Failed asylum seekers' free NHS", 20 May 2008 http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/7409265.stm.

78 D Williamson, "Free NHS services for failed asylum seekers 'won't drain resources'", *Western Mail*, 21 May 2008 www.walesonline.co.uk/news/wales-news/2008/05/21/free-nhs-services-for-failed-asylum-seekers-won-t-drain-resources-91466-20939869/.

Regulations to ensure that refused asylum applicants would not be charged in Wales for services forming part of the health service.[79]

While Wales appeared to buck the trend, the UK government continued to explore further restrictions on health access for overseas visitors. Thus, in 2004, a case was made to bring the rules on access to *primary* health care into line with those on secondary health care, and charging, amongst others, refused asylum seekers as if they were private patients, unless the treatment was emergency or immediately necessary.[80] The then government's position was that GP practices should already be charging refused asylum seekers for non-emergency care. However, since GP practices can, if they wish, register a patient without consideration being given to asylum or immigration status, considerable variability exists between practices on how they handle overseas visitors. The government had hoped to address this anomaly.

Though many organisations objected in the strongest possible terms to the withdrawal of primary health care,[81] the government seemed unmoved, announcing, in June 2007, a joint review of the rules on access to health care by the DoH and the Home Office. Under consideration, once more, was the withdrawal of free access to primary health care from certain categories of "overseas visitors", including "failed" asylum seekers. Doctors and lawyers maintained that: any change to the law could endanger the lives of torture survivors who had been refused asylum but who qualified for hard-case support;[82] medical practitioners would be placed in an unacceptable ethical position;[83] there was a very high level of stress-related physical illness, depression and anxiety amongst those seeking immigration and asylum advice; and applicants who did not have free medical treatment were often unable to present the best possible case to the Home Office or on appeal.[84]

The legal and medical professions were not alone in their doubts. A reported disagreement between the Home Office and DoH on the best way to proceed delayed publication of the conclusions of the 2007 review.[85] The alleged "wrangling throughout Whitehall" apparently came to a head when *The Observer* newspaper reported that the

79 National Health Service (Charges to Overseas Visitors)(Amendment)(Wales) Regulations 2009, SI 2009/1512 (W 148).

80 DoH consultation paper, *Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services*, May 2004, in which it was stated: "The Government is considering changing and more clearly defining the rules on the eligibility of overseas visitors to free NHS primary medical services . . . to make the rules more transparent for the person accessing those services and for the frontline staff in practices and Primary Care Trusts (PCTs) who operate them." (para. 2.1); see also Annex A, para. 14.

81 For example, the Refugee Council, the Medical Foundation for the Care of Victims of Torture, the BMA, and the Immigration Law Practitioners' Association (ILPA). See also, Global Health Advocacy Project, *Four Years Later: Charging vulnerable migrants for NHS primary medical services*, June 2009, available at www.medsin.org/downloads/page_attachments/0000/2384/Four_Years_Later.pdf, pp. 29–30; J Doward, "Failed asylum seekers face health care ban", *The Observer*, 2 December 2007.

82 Medical Foundation for the Care of Victims of Torture, "Revisions on health care threaten to increase vulnerability of torture survivors", 8 November 2007, available at www.torturecare.org.uk/news/latest_news/1289.

83 See the online petition by doctors: "We are appalled by government plans to further restrict the rights of [refused asylum seekers] to primary care. This would impose serious health risks on them and on the general public. It would also interfere with our ability to carry out our duties as doctors. It is not in keeping with the ethics of our profession to refuse to see any person who may be ill, particularly pregnant women with complications, sick children or men crippled by torture. No one would want such a doctor for their GP. We call on the government to retreat from this foolish proposal, which would prevent doctors from investigating, prescribing for, or referring such patients on the NHS.": available at www.gopetition.co.uk/petitions/medical-justice-for-asylum-seekers.html.

84 ILPA, *ILPA's Response to: Proposals to exclude overseas visitors from eligibility to free NHS primary medical services*, 13 August 2004.

85 G Hinsliff, "GPs demand right to treat refugees", *The Observer*, 3 August 2008.

government was ready to scrap the plans after accepting that there was, after all, no concrete evidence that free primary health care was an inducement to seek asylum in England and Wales.[86] Final confirmation of a possible stand-down emerged in July 2009 with the announcement that there would not, in fact, be any significant changes to either primary or secondary health care. Rather, in autumn 2009, a number of proposals were put forward for further public consultation:

- asylum seekers whose claim has been refused but who are being supported because there are recognised barriers to their return home should be exempt from charges;
- unaccompanied children, including those in local authority care, should be exempt from charges;
- UK residents may be absent from the country for up to six months in a year before being considered for charges for NHS hospital treatment;
- working with the UK Border Agency to recover money owed to the NHS and exploring options to amend the Immigration Rules so that visitors will normally be refused permission to enter or remain in the United Kingdom if they have significant debts to the NHS;
- investigating the longer-term feasibility of introducing health insurance requirements for visitors.[87]

The then government also promised to commission further research on the current policy of charging non-residents for HIV treatment beyond the initial diagnosis and counselling.[88]

The very clear impetus of the two consultation papers published in February 2010 – *Review of Access to the NHS by Foreign Nationals*[89] and *Refusing Entry to Stay to NHS Debtors*[90] – was the on-going anxiety about health tourism, despite the lack of concrete evidence, as indicated earlier. There also appeared to be a perception that some refused asylum seekers are worthier of free treatment than others – namely those receiving basic welfare support (under s. 4) after refusal of their claim; not all agree. Dr Vivienne Nathanson, Head of Science and Ethics at the British Medical Association (BMA), said:

> We believe no-one whose asylum claim has been refused should be turned down for care which cannot be delayed, and which clinicians determine they need. Doing so affects our ability to control communicable disease, and ultimately puts additional pressure on the NHS, particularly on emergency services.[91]

It should be noted, however, that while the BMA supports access to "immediate and necessary care" by foreign nationals, it is not in favour of free access to all NHS services.[92]

86 G Hinsliff, "GPs win care fight for asylum seekers", *The Observer*, 12 October 2008.

87 See DoH and Home Office statement of 20 July 2009, available at http://www.dh.gov.uk/en/News/Recentstories/DH_102993.

88 HC Hansard, Ministerial Statement, 20 July 2009, col. 97WS; J Meikle, "Government plans crackdown on 'health tourism'", *The Guardian*, 20 July 2009.

89 Available at: www.dh.gov.uk/en/Consultations/Liveconsultations/DH_113233; see also, on same webpage, *Draft NHS Guidance on Implementing the Overseas Visitors Hospital Charging Regulations*, and Draft National Health Service (Charges to Overseas Visitors) Regulations 2010.

90 Here, amendments to the Immigration Rules are proposed to make non-payment of NHS charges specific grounds for refusal of entry or further stay in the UK. Available at www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/nhs-debtors/consultation-document.pdf?view=Binary.

91 http://web.bma.org.uk/pressrel.nsf/wlu/SGOY-7U5GFW?OpenDocument&vw=wfmms.

92 www.bma.org.uk/whats_on/annual_representative_meeting/arm09_tuesday/arm09bmanewstuesday06.jsp.

The consultation ended on 30 June 2010, and the new Liberal Democrat–Conservative Coalition appears happy to proceed with the review as outlined.

Impact of policy

Non-detention

A number of valuable reports and studies have identified specific problems faced by refused asylum seekers and other migrants.[93] Many of the stories make distressing reading. Quite a number of migrants (and others) who were entitled to free services were unable to gain access due to the incorrect application of the Regulations by service providers. This was particularly true of maternity services for "failed" asylum seekers Though maternity services fall under the exception for treatment that is "immediately necessary", the DoH guidance on maternity care was not always followed. Women can be charged for such treatment, but they should always be treated irrespective of their eligibility for free treatment or ability to pay.[94] The same principle applies to other categories of overseas visitors. While the provision of early and preventive care through primary care helps avoid expensive hospital treatment later, people suffering from cancer, diabetes, trauma and HIV/AIDS had been turned away from care; as a result, some were unable to work, study or care for the family, or even suffered very painful deaths. In addition, the public health risks appeared to be disregarded: those with communicable diseases such as HIV were not receiving adequate advice and treatment and were therefore likely to spread infection or disease. The researchers found no evidence of health tourism; in fact, the majority of people needed access to primary care or antenatal services rather than expensive specialist treatment. It was concluded that barring GP access would inevitably increase the pressure on accident and emergency departments and the pull-factor argument was weak since most European countries were providing better health care to migrants than the UK.[95]

In a further development, Iain Duncan-Smith MP,[96] former chair of the Centre for Social Justice (CSJ),[97] has championed greater rights for asylum seekers. In an extensive report, *Asylum Matters: Restoring trust in the UK asylum system*, published in December 2008, the CSJ analysed the current asylum system with a view to improving removal or integration of applicants following the asylum decision. The report sought to "put an end to the current 'black hole' of destitution and illegal working that so many asylum seekers fall into within the UK".[98] On the specific issue of health, it observes:

> Denial of free access to health care for failed asylum seekers could be dangerous for the whole community, even if those barriers are perceived and not real. Communicable disease might not be identified and treated within the asylum seeking community if it was thought that they were not eligible to access

93 Refugee Council, *First Do No Harm: Denying health care to people whose asylum claims have failed*: www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/researchreports/Healthaccessreport_jun06.pdf; Médecins du Monde UK, *Improving Access to Healthcare for the Community's Most Vulnerable: Report and recommendations* 2007: www.doctorsof the world.org.uk/lib/docs/10452-report2007light.pdf.

94 See DoH, Table of Entitlement to NHS Treatment (correct as of May 2008).

95 Médecins du Monde UK, *Improving Access*, n 93 above, pp. 4–6, ; for a recent analysis of health care for undocumented migrants, see Médecins du Monde European Observatory on Healthcare, *Access to Healthcare for Undocumented Migrants in 11 European Countries*, 2008 survey report, September 2009: www.mdmuk.org.uk/lib/docs/121111-europeanobservatoryfullreportseptember2009.pdf.

96 Former Conservative Party leader and, currently, Secretary of State for Work and Pensions.

97 An organisation he founded in 2004 to "put social justice at the heart of British politics".

98 CSJ, Asylum and Destitution Working Group, *Asylum Matters: Restoring trust in the UK asylum system* (London: CSJ December 2008), "Preface": www.centreforsocialjustice.org.uk/client/downloads/Asylum%20Matters%20Full%20Report%20_Web%20New_.pdf.

> treatment, or if there was a breakdown of trust between GP practices and asylum seekers who wanted to avoid detection from the authorities.[99]

Significantly, the report calls for practical and sensible solutions to help lift refused asylum seekers out of the trap of destitution into which so many fall:

> For those asylum seekers that have been refused but cannot be returned home, a temporary licence for paid employment and the opportunity to contribute to their own support is recommended. This temporary right should entitle the asylum seeker free access to primary and secondary health care as well as access to English Language Classes. It should be reviewed every year.[100]

It is notable that this proposal links employment with entitlement to access health care. This could be regarded as counter to Bevan's original vision, but more in line with the views of those who find the resourcing implications of such a positive obligation antithetical. Despite Duncan-Smith's membership of the current government, the right to work for asylum seekers is not being embraced with alacrity. Indeed, following a recent Supreme Court judgment granting refused asylum seekers with fresh claims of a right to seek employment,[101] the Immigration and Borders Minister, Damian Green, is seeking to restrict the jobs for which asylum applicants can apply to industries with staff shortages.[102]

Detention

While much of the focus on the health care of asylum seekers has centred on those with temporary admission, a number of reports have also questioned the standard of mental and physical care administered in fast-track detention and removal centres,[103] and some have highlighted actual ill-treatment within the detention estate itself.[104] A Medical Justice[105] study of 56 refused asylum seekers held in detention found that torture victims had been "neglected and re-traumatised by detention in the UK"[106] and that many detainees were "denied treatment for serious medical conditions", including a number with tuberculosis. Detainees had been denied HIV tests and results, while those who were HIV positive often had their treatment disrupted during detention. Children and pregnant women who were being deported to high-risk malarial areas were not always offered appropriate prophylaxis or bed nets, and hunger strikers, objecting to conditions in detention, were found to be in "imminent danger of organ failure". The reported findings related not only to physical ailments: many detainees were found to be depressed or to have post-traumatic stress disorder, and were at risk of self-harming or attempted suicide. Children are particularly

99 CSJ, *Asylum Matters,* n 98 above, para. 4.7.

100 Ibid. "Executive summary", para. 7.7.

101 *R (on the application of ZO (Somalia))* v *Secretary of State for the Home Department* [2010] UKSC 36.

102 A Travis, "Home Office bids to restrict jobs for asylum seekers", *The Guardian*, 29 July 2010.

103 See P Aspinall and C Watters, *Refugees and Asylum Seekers: A review from an equality and human rights perspective*, research report No 52 (London: Equality and Human Rights Commission 2010), ch. 3; HM Chief Inspector of Prisons, *Report on an Unannounced Full Follow-up Inspection of Yarl's Wood Immigration Removal Centre*, 9–13 November 2009: www.justice.gov.uk/inspectorates/hmi-prisons/docs/Yarls_Wood_2009_rps.pdf

104 See, for example, *Medical Justice et al., Outsourcing Abuse: The use and abuse of state-sanctioned force during the detention and removal of asylum seekers*, July 2008, and subsequent government-commissioned report in response, Baroness N O'Loan, *Report to the UKBA on "Outsourcing Abuse"*, March 2010: www.medicaljustice.org.uk/images/stories/reports/reportonoutsourcingabuse.pdf; see also Medical Justice, *Beyond Comprehension and Decency: An introduction to the work of medical Justice*, July 2007.

105 In 2005, Medical Justice, a registered charity, was established to provide independent medical and legal advice and representation to detained asylum seekers. It also promotes change to policy and practice in detention and removal centres.

106 See n. 104 above. This is contrary to the guidelines of the Istanbul Protocol (*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 August 1999).

prone to psychological damage from incarceration[107] and, as a consequence, the present government has pledged to end the detention of children for immigration purposes.[108]

It is evident from these and other findings[109] that, despite excellent work undertaken by many medical practitioners working in the detention estate, there are some real concerns about assessment and treatment of those in detention,[110] and about the perceived high level of mental health problems.[111] One of the possible reasons for sub-standard health care in detention is that management of removal centres is contracted out to Serco Ltd, G4S Group and GEO Group,[112] and medical services are provided by private companies such as Drummonds Medical Support Services and Serco Health. Though health care in detention is monitored through health needs assessments, and inspection by the Chief Inspector of Prisons, the commissioning of health care by the Home Office rather than the DoH is regarded by some as deeply problematic and will remain so until the NHS is fully responsible for the health of immigration/asylum detainees.[113]

Access to health care: some ethical and philosophical considerations

As is clear from the discussion so far, the UK government upholds certain obligations towards refugees and those seeking asylum, but often regards others – amongst whom are the majority of refused asylum seekers – as outwith its responsibility. For its part, the judiciary has interpreted the law narrowly, permitting non-nationals to be treated for medical conditions only in the most "exceptional circumstances" when they have no right

107 According to a report by Medical Justice in September 2010, two-thirds of children became ill or were injured after being held in detention. See also the Children's Commissioner, *The Arrest and Detention of Children Subject to Immigration Control*, February 2010, and the Royal Colleges of Paediatrics and Child Health, General Practitioners and Psychiatrists and the UK Faculty of Public Health, Intercollegiate Briefing Paper, "Significant harm: the effects of administrative detention on the health of children, young people and their families": www.rcpsych.ac.uk/press/pressreleases2009/immigrationdetention.aspx.

108 Queen's Speech, 25 May 2010.

109 For a useful recent study of detention in Europe, see Jesuit Refugee Service-Europe, *Becoming Vulnerable in Detention*, June 2010: www.jrseurope.org/publications/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_PUBLIC_28Jun10.pdf.

110 See, for example, the complaint lodged with the General Medical Council against three doctors working at Yarl's Wood removal centre relating to numerous accusations of poor patient care: K McVeigh, "Demand for investigation of three doctors at Yarl's Wood", *The Guardian*, 22 March 2010; see also the reports of HM Chief Inspector of Prisons available at: www.justice.gov.uk/inspectorates/hmi-prisons/immigration-removal-centre-inspections.htm

111 See K Robjant, R Hassan and C Katona, "Mental health implication of detaining asylum seekers: systematic review" (2009) 194 *British Journal of Psychiatry* 306–12.

112 There are currently 11 immigration removal centres. Serco is responsible for the running of Colnbrook and the problematic Yarl's Wood removal centre. GS4 operates Dungavel, Oakington, Tinsley House and Brook House removal centres. GEO runs Campsfield House and Harmondsworth. The rest are managed by HM Prison Service.

113 Interview with Dr Frank Arnold, Medical Justice, June 2010. In 2008, a *Report on Healthcare in Private Immigration Removal Centres* was undertaken to examine, inter alia, the transfer of commissioning services to the NHS. While this was not formally recommended, a number of significant changes were proposed: www.medicaljustice.org.uk/images/stories/reports/csip%20report%20private%20irc%5C%27s.pdf. The DoH issued guidelines in January 2010 on the clinical management of people refusing food in immigration removal centres and prisons: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_111690.pdf).

to remain in the UK.[114] Their reasons for so doing often appear policy-based, rationalised on the basis of unwillingness to elevate social, economic and cultural rights to the status of civil and political, or for fear of over-burdening signatory states. While lauded by some as the triumph of realism, such an approach, it is contended, is limited. It fails to examine all aspects of the argument in the globalised world of the twenty-first century, particularly questions of morality and responsibility. If, as the judiciary suggests, it is inappropriate to impose seemingly burdensome obligations on states to treat certain non-nationals requiring medical attention,[115] it is essential to examine the ethical grounds for such a position – certainly more than has been done hitherto. It can no longer be acceptable to hide behind restrictive legal reasoning when such fundamental moral questions are at stake and when state-centred notions of justice are no longer accepted as inviolable.

At a legal and philosophical level, the notion of a generic "right to health" is widely debated and contested, even when applied to a state's own citizens.[116] Some regard a "right to health" – implying as it could a right to "be healthy" – as rather meaningless, without obligation, preferring in its place a "right to the highest attainable standard of health"[117] or a "right to health care" alongside a "right to health conditions", which do imply a duty.[118] This suggests granting "the right to a number of health-related services, claims and freedom, taking into account the available resources of a State and the health needs of its people".[119] These can entail significant demands upon a state.[120] Others contend strongly that it is a *basic* human right without which an individual is unable to realise his or her

114 See further *EM (Lebanon) (FC) (Appellant) (FC)* v *Secretary of State for the Home Department* [2008] UKHL 64 in which *N* v *UK* was cited as indicative of justified restriction: "Yet even in such a case [involving Article 3], where there was a very real risk that the harm that would result from the applicant's expulsion to the inferior system of health care in her country of origin would reach the severity of treatment prescribed by that Article, the court held that, other than in very exceptional cases, there was no obligation under the Convention to allow her to remain here. This was because it was not the intention of the Convention to provide protection against disparities in social and economic rights. To hold otherwise, even in an Article 3 case, would place too great a burden on the Contracting States.": Lord Hope, para. 10.

115 This is often a hypothetical assumption, not economically costed or factually evaluated.

116 A full analysis of these issues is outside the remit of this article. See, for wider discussion: J Harrington and M Stuttaford (eds), *Global Health and Human Rights: Legal and philosophical perspectives* (Abingdon: Routledge forthcoming 2010); S Anand, F Peter and A Sen (eds), *Public Health, Ethics, and Equity* (Oxford: OUP 2004); N Daniels, *Just Health Care* (New York: CUP 1985); N Daniels, *Just Health: Meeting needs fairly* (New York: CUP 2008); S Gruskin et al. (eds), *Perspectives on Health and Human Rights* (New York: Routledge 2005).

117 As per Article 12(1) of the 1966 ICESCR, which delivers a "right to health" in the following terms: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." For further information on the legal right to health see the website of the International Federation of Health and Human Rights Organisations, which contains, inter alia, the reports of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (2002–08): www.ifhhro.org/.

118 M Kirby, "The right to health fifty years on: still sceptical?" (1999) 4 *Health & Human Rights* 13; J Asher, *The Right to Health: A resource manual for NGOs* (London: Commonwealth Medical Trust 2004); Office of the UN High Commission for Human Rights/World Health Organisation, *The Right to Health*, Factsheet 31, available at www.ohchr.org/Documents/Publications/Factsheet31.pdf.

119 B Toebes, *The Right to Health as a Human Right in International Law* (Antwerpen: Intersentia/Hart 1999), p. 19.

120 See the description of "Key aspects of the right to health" contained in Factsheet 31, n. 118 above, pp. 3–6.

potential or is often (but not always) unable to live in dignity.[121] More recently, there has been growing support for considering access to health care alongside the issue of poverty, under an umbrella of social or distributive justice, thereby avoiding theoretical disputes about the meaning and content of a "right to health".[122]

While the notion of a right to health, or indeed any economic, social or cultural right, can be seen as morally problematic, even as between state and citizen, such a right is arguably more contentious when understood to involve the provision of health care by a state to non-citizens or "foreigners".[123] General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) on the Right to the Highest Attainable Standard of Health (Article 12) has no such doubts. It explicitly states that:

> States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including. . . . asylum seekers and illegal immigrants, to preventative, curative and palliative health services.[124]

This may be the position from a human rights perspective but it does not necessarily encompass the range of philosophical perspectives. Naturally, there are numerous theoretical positions vis-à-vis the treatment of foreigners, in its non-medical sense, within a state. It is therefore the intention here to consider some of the more significant arguments in order to provide the crucial ethical and philosophical contexts to the specific debate on access to health services by asylum seekers.

Reasons to treat foreigners

For advocates of the right to health (care), the right is fundamental, enabling each individual to realise his or her full potential, thereby satisfying the Rawlsean notion of "equality of fair opportunity"[125] as developed by Norman Daniels.[126] With this as a central premise, it follows that all, wherever they are based, should be entitled to exercise this right. But acceptance of the premise alone accomplishes little. An answer is still required to some core questions: for the right to health (care) to be effective, a judgment must be made on *who* bears the duty, *what* contribution should be made towards health improvement, and for *whom*? These issues can be addressed at a global or a national level. Some concepts of justice presume that there is a moral duty to assist those who are worse off or in need through no

121 Clearly, many who are ill and/or suffering are able to live dignified lives. For the commitment that "health is a fundamental human right indispensable for the exercise of other human rights", see, inter alia, ICESCR, General Comment 14, "The right to the highest attainable standard of health" (Article 12), 25 April–12 May 2000, E/C.12/2000/4, ICESCR, para. 3: "[t]he right to health is closely related to and dependent upon the realization of other human rights . . . including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement." See also the special issue of *The Lancet*, vol. 372, issue 9655, 13 December 2008, focusing on the right to health, and H Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton NJ: Princeton UP 1980).

122 See n. 116 above, and S Hurley, "The 'what' and the 'how' of distributive justice and health" in N Holtug and K Lippert-Rasmussen (eds), *Egalitarianism: New essays on the nature and value of equality* (Oxford: Clarendon Press 2006), ch. 13; N Daniels, "Health-care needs and distributive justice" (1981) 10(2) *Philosophy and Public Affairs* 146–79.

123 See, for broader analysis, D Weissbrodt, *The Human Rights of Non-citizens* (Oxford: OUP 2008); for a useful compilation of the international legal documents relevant to migration and health see International Organization for Migration, *Migration and the Right to Health: A review of international law*, International Migration Law No 19, available at: http://publications.iom.int/bookstore/free/IML_19.pdf.

124 ICESCR, General Comment 14, n. 121 above, para. 34, see www2.ohchr.org/english/bodies/cescr/index.htm.

125 J Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard UP 1999), s. 14.

126 Daniels, *Just Health Care*, n. 116 above.

fault of their own. National boundaries do not lessen such a duty. The duty exists on account of the humanity of those in need, irrespective of where in the world they might be situated. One of the more famous pleas for such an expansive, impartial moral obligation was provided by Peter Singer in 1972 in his article entitled "Famine, affluence and morality"; in it, he reflected on the nature of the obligations, if any, of affluent states or their citizens towards the (distant) poor.[127] He argued that proximity makes no moral difference in the obligation of the affluent to assist the starving and favoured a utilitarian concept of cosmopolitanism:

> I begin with the assumption that suffering and death from lack of food, shelter, and medical care are bad. . . . if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.[128]

Critics of Singer tend to dispute that there is an equivalent obligation to assist both a stranger and a neighbour's child.[129] Certainly, this seems, at the very least, counter-intuitive and unrealistic, and in a more recent piece, Singer acknowledges that:

> Very few human beings can live happy and fulfilled lives without being attached to other particular human beings. To suppress these partial affections would destroy something of great value, and therefore cannot be justified from an impartial perspective.[130]

However, his acceptance of a degree of partialism is somewhat limited and may not include a neighbour's child over a stranger.

Since Singer's 1972 article, moral and political philosophers have increasingly assessed the duties owed to the distant needy, and, as a consequence, the arguments pro and contra have been wide-ranging and myriad.[131] At the forefront are those theorists who have sought to develop plausible theories based on principles of distributive justice, utilitarianism, liberalism, or human rights. Much of the discussion in the literature has focused on the scourge of poverty and how to achieve equality of opportunity for all human beings. While some have rejected a global equality of opportunity,[132] many cosmopolitan and global justice theorists believe that justice can only be achieved through greater distribution of resources from developed (rich) states to the less developed (poorer) states; they argue that rich states bear a greater responsibility towards the poor, on account of their former colonialist or current political and economic activities (described by Thomas Pogge as a "negative duty").[133] Similar lines of argument can surely be employed in relation to health. Poor health and poverty are often closely intertwined. If it is accepted that states, or individuals within those states, owe cross-border duties to help alleviate poverty, it is a short step to suggesting that a similar responsibility is owed in relation to health, particularly

127 P Singer, "Famine, affluence and morality" (1972) 1 *Philosophy and Public Affairs* 229–43.

128 Ibid. p. 231.

129 Singer stated that: "it makes no moral difference whether the person I help is a neighbour's child ten yards from me or a Bengali whose name I shall never know, ten thousand miles away': ibid.

130 P Singer, "Outsiders: our obligations to those beyond our borders" in D K Chatterjee (ed.), *The Ethics of Assistance: Morality and the distant needy* (Cambridge: CUP 2004), p. 16.

131 See, for example, Shue, *Basic Rights*, n. 121 above; J Rawls, *The Law of Peoples* (Cambridge, Mass: Harvard UP 1999); Chatterjee, *The Ethics of Assistance*, n. 130 above; S Caney, *Justice Beyond Borders* (Oxford: OUP 2005); A Buchanan, *Justice, Legitimacy and Self Determination* (Oxford: OUP 2004); D Miller, *National Responsibility and Global Justice* (Oxford: OUP 2007); K-C Tan, *Justice Without Borders* (Cambridge: CUP 2004).

132 See, for example, Miller, *National Responsibility*, n. 131 above, and Shue, *Basic Rights*, n. 121 above, who discusses an argument in favour of prioritising compatriots on account of their nationality, at least in the case of a duty to provide aid.

133 T Pogge, *World Poverty and Human Rights* (Cambridge: CUP 2002).

where, as Pogge suggests, foreigners' medical conditions are due to "avoidable poverty engendered by global economic institutions".[134]

Within the global justice framework outlined above, the question of proximity is seen as broadly immaterial; the (health) suffering of all – like poverty – is of moral import to each of us. Yet proximity or distance is also often identified as a significant factor in establishing or denying moral obligations.[135] Proximity can imply, inter alia, economic, political, cultural, racial, familial or geographic closeness. For the purposes of health care provision, geographic proximity may seem the most pertinent. Morally, the decision to offer treatment could be regarded as far less problematic in relation to foreigners already in the UK as for those based outside. In the case of the foreign national who reaches the UK and asks to be treated by the NHS, such an obligation could be said to arise on account of spatial proximity. The greater moral claim over that of his or her compatriots still living in the country of origin arises simply on account of physical presence in the territory of the host state; the encounter between stranger and national creates a moral relationship,[136] biblically equivalent to the parable of the Good Samaritan.[137] Proximity, therefore, has normative significance. Clearly, the relational proximity that is said to exist between compatriots, and which does not exist between foreigner and citizen, could be prioritised over geographical proximity to limit any moral obligation to treat the foreigner present in the host state. However, the suggestion that there is something special about the relationship between fellow-citizens can be questioned. Most would agree that there are special duties owed to close family, but beyond this close-knit group, it becomes, for some, increasingly difficult to defend partiality towards friends, neighbours, compatriots. The health concerns of the distant foreigner are as relevant as those of the near, or, in fact, of fellow countrymen.

An alternative case for treating foreigners in the UK, whatever their circumstances, might be made under the principle of hospitality, though this is perhaps the least convincing moral argument. Here we do not mean simply the Kantian view of hospitality[138] – the right of the stranger not to be treated with hostility – nor the biblical commandment to be hospitable to strangers,[139] but the remarkable unconditional hospitality imagined by Jacques Derrida:

> absolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with the social status of being a foreigner, etc.), but to the absolute, unknown, anonymous other, and that I *give place* to them, that I let them come, that I let them arrive, and take place in the place I offer them, without asking of them either reciprocity (entering into a pact) or even their names.[140]

134 T Pogge, "Relational conceptions of justice: responsibilities for health outcomes" in S Anand, F Peter and A Sen (eds), *Public Health, Ethics, and Equity* (Oxford: UP 2004).

135 See, for wide-ranging discussion, the full volume of *The Monist*, July 2003, which considers "Moral distance", and Chatterjee, *The Ethics of Assistance*, n. 131 above; see also, Singer, "Famine", n. 127 above; P Nortvedt and M Nordhaug, 'The principle and problem of proximity in ethics' (2008) 34 *Journal of Medical Ethics* 156–61.

136 See S Reader, "Distance, relationship and moral obligation" (July 2003) *The Monist* 367–81.

137 See J Waldron, "Who is my neighbour?: Humanity and proximity" (July 2003) *The Monist* 333–54.

138 "Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place, one may not treat him with hostility.": I Kant, *Perpetual Peace: A philosophic sketch* (1795), Third Definitive Article for a Perpetual Peace.

139 For example, Hebrews 13:2.

140 J Derrida and A Dufourmantelle, *Of Hospitality* (Chicago: Stanford UP 2000), p. 25.

Under this vision of hospitality, one would admit the foreigner without question and treat the foreigner as an equal in one's "place" – be that home, town, state. What might this mean, then, for entitlement to basic needs? Such absolute hospitality would necessitate treating the foreigner unconditionally as one's own; if hungry, there would be an obligation to feed; if unwell, there would be an obligation to administer treatment. To some extent, one could argue that current rules on treatment of foreign nationals in the UK pays partial credence to such a principle, in so far as certain vulnerable foreigners – such as asylum seekers – are entitled to free health care; present policy fails, however, to be all encompassing and is unlikely ever to be so.

A principle of hospitality may be closely aligned to the belief in the inherent human dignity of all people, as can a cosmopolitan stand-point. Endorsement of "human dignity" is prevalent in human rights instruments and is understood, generally, to mean:

> that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa.[141]

This approach to human dignity could certainly support an argument in favour of providing equal free medical treatment to citizens and non-citizens alike where failure to treat could be regarded as an affront to human dignity. Indeed, the Welsh Health Minister's justification for providing free health care to refused asylum seekers was expressed in such humanitarian terms:

> I'm simply looking at the human being at the end of the chain and saying if they've got severe health problems and they require help and assistance, as a civilised country we should give it.[142]

Ultimately, the cases of *N* and *Ama Sumani* can also be seen in this light: removal to Uganda or Ghana and the certainty of (a painful) death does not appear to respect the intrinsic worth of the individual. While this interpretation of human dignity is not universal, for the moment, there is no consensus on the definition of "human dignity", despite its wide usage in international and European law.

Alongside moral philosophy, medical ethics has a significant contribution to make to the debate.[143] Traditional biomedical ethics, as conceived by Beauchamp and Childress, is generally regarded as comprising four elements: autonomy,[144] beneficence – acting in the best interests of the patient – non-maleficence,[145] and justice.[146] For many doctors, beneficence is the most important principle, though inevitably constrained by the other three.[147] Such constraint, particularly when imposed by a duty of justice, can create practical problems. As Gillon suggests, doctors may accept as part of their moral purpose not only the health of their patients, but the health of all sick people.[148]

If they do so, they clearly commit themselves and medical ethics to require justice in the distribution of resources: justice not only for their patients, not only for their country's

141 C McCrudden, "Human dignity and judicial interpretation of human rights" (2008) 19 *European Journal of International Law* 655, at 723.

142 BBC News, "Failed asylum seekers", n. 77 above.

143 See the seminal works of R Gillon, *Philosophical Medical Ethics* (Chichester: John Wiley & Sons 2000) and of T Beauchamp and J Childress, *Principles of Biomedical Ethics* (Oxford: OUP 2001).

144 This requires respect for the individual and his or her ability to make decisions regarding his or her health.

145 The ethical principle of doing no harm (similar to the principle of *primum non nocere*, "first do no harm", and to the classic version of the Hippocratic Oath: "from what is to their harm and injustice I will keep them").

146 Beauchamp and Childress, *Principles*, n. 143 above.

147 Gillon, *Philosophical Medical Ethics*, n. 143 above, p. 74.

148 Ibid. p. 78.

patients, but for all the world's sick, present and future (and even perhaps the world's potentially sick).[149]

Such a commitment to justice, which for many is requisite for medical practice, could influence treatment decisions about non-nationals, asylum seekers, refused asylum seekers, and would result in a radical redistribution of resources.[150] From a justice perspective, society would need to choose to which *moral* value it gave priority, taking account of autonomy, beneficence, non-maleficence, as well as possible judgments on equity, impartiality and fairness.[151]

The medical community has long recognised a need to provide further guidance on universal ethical principles and the prevailing trend is to base these on human rights norms. The 2005 UNESCO Universal Declaration on Bioethics and Human Rights, for example, calls for full respect for human dignity and human rights,[152] but also states that "the interests and welfare of the individual should have priority over the sole interest of science or society".[153] Such prioritisation of the individual *qua* individual would seem to justify the treatment of non-nationals on an equal basis as citizens, similar to arguments based on justice, humanitarianism or human dignity. Yet the human rights paradigm has not always been welcomed within the medical community,[154] especially when seen as somehow usurping the traditional framework. For its part, the Ethics Department of the BMA has issued guidance on "Doctors and asylum seekers"[155] and on "Access to health care for asylum seekers and refused asylum seekers",[156] in which it repeats its view that "the timely provision of appropriate care to this vulnerable group of patients" is based on both humanitarian and public health arguments. It is the health needs of the individual that are of paramount import.

Some reasons not to treat (refused) asylum seekers

Nationals of a state, it might be argued, owe few obligations to non-nationals who have been granted no permission to remain on the state's territory. But on what basis? Clearly, the notion of a bounded duty can be traced to the notion of bounded territory – particularly that derived from the creation of the modern state. Within the modern state, nationality is regarded as "the paramount form of social identity",[157] the principle being that "everyone who resides permanently in the territory should share in a common national identity, and that this identity should override other characteristics that might cause social boundaries to be drawn differently, whether within the state or between states".[158] Citizens within this nation-state system might be prepared to look after one another through a

149 Gillon, *Philosophical Medical Ethics*. n. 143 above.

151 Ibid. p. 98.

152 Article 3(1).

153 Article 3(2).

154 See for a discussion of pros and cons, J Mann, "Medicine and public health, ethics and human rights" (1997) 27 *The Hastings Centre Report* 6–13; P Farmer and N Gastineau, "Rethinking health and human rights: time for a paradigm shift" (2002) 30(4) *Journal of Law, Medicine and Ethics* 655–66; TA Faunce, "Will international human rights subsume medical ethics? Intersections in the UNESCO Universal Bioethics Declaration" (2005) 31(3) *Journal of Medical Ethics* 173–8; dedicated volume (2009) 34(3) *Journal of Medicine and Philosophy*, critiquing the UNESCO Declaration, in particular R Andorno, "Human dignity and human rights as a common ground for global bioethics", 223–40.

155 BMA, *The Medical Profession and Human Rights: Handbook for a changing agenda* (London: Zed Books/BMA 2001).

156 2008, available at: www.bma.org.uk/ethics/asylum_seekers/asylumhealthcare2008.jsp.

157 D Miller and SH Hasmi (eds), *Boundaries and Justice: Diverse ethical perspectives* (Princeton NJ; Princeton UP 2001), p. 5.

158 Ibid.

variety of means, including redistribution, but they are less likely to feel anything much is owed to non-nationals. Citizens take priority. Michael Walzer famously articulated such a view as the right of the community to decide its own membership; for him, a community of citizens was "the ideal political order".[159] Yet he also recognises the limitations of such "communitarian justice" when confronted by the particular problem presented by asylum seekers: "Are citizens bound to take in strangers?"[160] Should victims of political or religious persecution be admitted?[161] While recognising that some duty might be owed to refugees, his response seeks to be practical as well as humanitarian and, as such, is arguably of limited assistance to the asylum seeker, who lives in a limbo world of uncertain status. Without doubt most states – at least the most developed – will favour the "right to restrain the flow" over any moral considerations to protect *all* those seeking sanctuary:

> The call "Give me . . . your huddled masses yearning to breathe free" is generous and noble; actually to take in large numbers of refugees is often morally necessary; but the right to restrain the flow remains a feature of communal self-determination. The principle of mutual aid can only modify and not transform admission policies rooted in a particular community's understanding of itself.[162]

Walzer's communitarianism is not alone in prioritising citizenship. Nationalists too, such as David Miller, strongly favour a society built upon the mutual historical, linguistic and cultural bonds that are said to exist between citizens; it is these bonds that give rise to greater obligations: "nations are ethical communities . . . The duties we owe to our fellow-nationals are different from, and more extensive than, the duties we owe to humans as such."[163] Indeed, while "the claims of would be immigrants must be recognised", for Miller "they do not have to be counted in the same way as the interests of those who are already citizens, including their interests in self-determination".[164] But immigrants are not asylum seekers. Miller advocates a generous approach towards "refugees" – those he describes as "people who have fled their home country as a result of well-founded fear of persecution or violence";[165] a state has an obligation to let in a refugee applying for admission.[166] He even, somewhat remarkably, goes on to argue that "there is clearly a good case for broadening the definition to include people who are being deprived of rights of subsistence, basic health care, etc".[167] While this view is considerably more munificent than the current legal or political position vis-à-vis refugees, there are limits to his generosity. Reflecting Walzer's views, he suggests that states must be given "considerable autonomy to decide how to respond to particular asylum applications", taking a range of factors into consideration such as overall numbers and the demands placed on the host population.[168] Ultimately, the human rights of refugees cannot override the legitimate claim of a state that its obligation to admit refugees has been exhausted, even if resulting in tragic consequences.[169]

159 M Walzer, "Response to Chaney and Lichtenburg" in P Brown and H. Shue (eds), *Boundaries: National autonomy and its limits* (Totowa: Rowman & Littlefield), p. 101.

160 M Walzer, *Spheres of Justice* (Oxford: Blackwell 1983), p. 45.

161 Ibid. p. 49.

162 Ibid. p. 51.

163 D Miller, *Citizenship and National Identity* (Cambridge: Polity Press 2000), p. 27.

164 Miller, *National Responsibility*, n. 131 above, p. 223.

165 Ibid. p. 225.

166 Ibid.

167 Ibid.

168 Ibid. pp. 226–7.

169 Ibid. p. 227.

Following this line of reasoning, if a proper assessment has been undertaken of a state's ability to cope, which should include demand on resources such as education, housing and health care, refugees – and, presumably, asylum seekers as well – should be admitted so long as the state's own citizens are not inordinately jeopardised by such a policy. Putting aside for the moment the immense difficulty of justly determining who is a "refugee", once admitted, what then should happen? Is it justified to prioritise fellow citizens over foreigners in the provision of health care? Utilitarians might favour denying a universal "right to health" if its fulfilment is so resource-intensive as to undermine the greater good. This could lead to a prioritisation of entitlement dependent on migration status or the length of connection with the state. In this scenario, the order of priority might be: citizens; refugees and long-term immigrants with indefinite leave to remain; refugees with limited leave (currently five years); asylum seekers during the determination period of their claim; refused asylum seekers who cannot leave due to no fault of their own; and those with no right to remain, awaiting deportation, subject to removal. In many ways, this approach reflects current government policy.

While partiality towards compatriots is a tenable moral stance under nationalism, and permits differential health treatment; conversely, impartiality may also lead one to conclude that the foreigner reaching the shores of the UK is not deserving of preferential treatment. If it were shown that the money spent on saving one foreigner in poor health in the UK – such as a case akin to *N* – could in fact save many more suffering similarly in a developing country, then most would prefer to save the greater number.[170] To conclude otherwise might be considered illogical. Furthermore, it has been contended that even liberal theory[171] – other than perhaps liberal universalism – struggles with the issues raised by borders and national self-interest.[172] Liberal realism dictates that "a liberal democracy cannot sustain a welfare system or other liberal institutions without restricting membership and access" and therefore, though counter-intuitive for many liberal theorists, restricting access to the NHS to citizens is the only morally acceptable outcome.[173] Ultimately, for both those in favour of treating (refused) asylum seekers, and those against, the issue will come down to a decision on the best distribution of resources. It will be rare that there be agreement on moral priorities. Perhaps the best that can be hoped for in any decision on health is careful consideration of all the fundamental moral, ethical and public health principles.

Conclusion and outlook

Migration forces one to confront head on major themes such as sovereignty, membership, rights and justice. The reluctance by many theorists, until recently, to attend fully to the consequences of migration for a theory of justice has been surprising.[174] This lacuna is now beginning to be filled.[175] However, there are many outstanding issues to be resolved, one of which is the relationship between migration and health care. Health care provision is, in

170 I am grateful to Victor Tadros for this point.

171 Which commits itself to the moral equality of all persons.

172 P Cole, "Human rights and the national interest: migrants, health care and social justice" (2007) 33 *Journal of Medical Ethics* 269, at 272.

173 Ibid.

174 The most notable is Rawls in *The Law of Peoples*, n. 131 above, who restricts discussion to a footnote: "a people has at least a qualified right to limit immigration, I leave aside here what these qualifications might be", p. 39, n. 48.

175 See for, example, S Benhabib, *The Rights of Others: Aliens, residents and citizens* (Cambridge: CUP 2004); P Cole, *Philosophies of Exclusion: Liberal political theory and immigration* (Edinburgh: Edinburgh UP 2000); H Lindahl (ed.), *A Right to Inclusion and Exclusion?: Normative fault lines of the EU's area of freedom, security and justice* (Oxford: Hart 2009).

its own right, a political and ethical minefield.[176] Decisions on the equitable distribution of scarce healthcare resources by the state for its own citizens are fraught with difficulty and have given rise to considerable debate. When questions emerge on the application of a right to health to non-nationals, or on the economics or politics of treating various categories of migrant, the answers can often be controversial and the consequences divisive. Some contend that assistance to a suffering individual takes priority over all else; others of a more practical persuasion point to limited resources and to the inability of the UK to offer succour to the world's less fortunate.

The law in this area has largely endorsed the interests of politicians. There is no obligation to treat those who have no right to remain. The hugely noble sentiments of the International Bill of Rights,[177] as well as the ECHR, to place human dignity before all else and to treat all human beings as equal have repeatedly been declared unrealistic, particularly as far as certain social, economic or cultural rights are concerned. Such a view was candidly articulated by Lord Hope in a 2008 non-health case: *EM(Lebanon) (FC)(Appellant) (FC)* v *Secretary of State for the Home Department (Respondent)*.[178] Offering his (arguably distorted) summary of the decision in *N*, he said:

> In *N* v *United Kingdom* a distinction was drawn between civil and political rights on the one hand and rights of a social or economic nature on the other. Despite its fundamental importance of the Convention system, article 3 does not have the effect of requiring a Contracting State to guarantee unlimited health care to all aliens who are without a right to stay within its jurisdiction.

In an apparent volte-face, the previous government appeared to stall its proposals to withdraw access to primary health care from refused asylum seekers, amongst others, and suggested a more generous approach to refused asylum seekers who cannot leave the country through no fault of their own. The change in heart towards certain categories of refused asylum seekers in the statement of July 2009 was an important development. It recognised that not all refused asylum seekers can depart the UK immediately their claim is turned down, and that there should be some ongoing entitlement to health care. This seems based on moral principles – on the needs of the suffering individual – rather than a belief in a *right* to health as such. Until recommendations in the ongoing review are implemented, the current policy persists: to permit asylum seekers access to (limited) health care during the course of the asylum claim but to make every effort to return refused asylum seekers who can be removed. There is also some acknowledgment now of the implications of non-treatment for public health. In the words of the former Health Minister, Ann Keen: "These measures strike the right balance between controlled access, the protection and promotion of wider public health, and ensuring that the health care of the most vulnerable groups are [sic] protected."[179]

The tension between what is perceived as just and what is perceived as practical within a liberal democracy, highlighted so starkly in the *N* case, endures. On World Aids Day in December 2008, the former Labour MP, Neil Gerrard, then chair of the all-party parliamentary group on refugees, criticised the contradiction inherent in government policy of the day: on the one hand, the UK had pledged, alongside other G8 members, to help poor states obtain access to universal drugs for AIDS; on the other, it continued to deport

176 As evidenced by the debate on health care reform in the US.

177 UDHR and two covenants.

178 [2008] UKHL 64.

179 Statement by Minister for Health, "Access to NHS services for foreign nationals", 20 July 2009: www.dh.gov.uk/en/MediaCentre/Pressreleasesarchive/DH_102993; see also HC Deb, col 97WS, 20 July 2009.

HIV patients, with no right to remain in the UK, to their countries of nationality, often with the certain knowledge that such action would be seriously detrimental to health. Gerrard put it thus:

> I think when you have got someone who has been put on treatment here and then they are removed back to a country where they can't get treatment, it is virtually a death sentence.[180]

In an inspirational appeal to mercy, the Archbishop of York, John Sentamu, suggested that the famous "neighbour principle" from *Donoghue* v *Stevenson*[181] might assist us in determining which duties we owed one another within society. Reflecting on the case of *Ama Sumani*, he said:

> What would have been the consequences of applying Lord Atkin's "Neighbour Principle" to Ama Sumani? Sadly the separation of Religion, Morality and the Law has gone too far, leading to such dire unintended consequences. Did those responsible "*take reasonable care to avoid acts or omissions which they could reasonably foresee would be likely to injure*" her? Was she "*a person so closely and directly affected by [their] acts that [they] ought reasonably to have them in contemplation*?" Clearly if Lord Atkin's neighbour principle had been applied in this case, Mrs Sumani might well still be alive today.[182]

While many might concur with Archbishop Sentamu's compassionate message, in practice, the expanded duty of care he advocates is unlikely to be realised beyond the field of negligence. Government appears reluctant to engage fully with the complex medico-ethical issues at stake. The judiciary continues to back away from creating a universal right to (free) health care, or from applying Article 3 to non-national healthcare cases without the sanction of Parliament. Currently, then, no principle of hospitality, egalitarianism, global justice, or even human dignity is likely to rescue those whose permission to remain continues to be viewed, in the words of Lord Justice Ward, as an "indulgence", however worthy their cause or pressing their need.[183] As shown by this article, the importance of a multidisciplinary approach to the subject of health access by asylum seekers cannot be denied. It is only through a comprehensive assessment of law, policy, medicine and ethics that one can hope to arrive at a fitting response to this and other social rights for the twenty-first century. The recent move towards treatment for hard-case refused asylum seekers is a move in the right direction.

180 S Boseley, "Britain is criticised for deporting HIV patients", *The Guardian*, 1 December 2008.

181 [1932] AC 562

182 Address by the Archbishop of York John Sentamu to the Evangelical Alliance, "The road to recovery: neighbourliness and mercy, community and service", the Royal Society, 28 November 2008: www.archbishopofyork.org/2042?q=immediately.

183 See n. 52 above.

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Multilateral governance of financial markets: the case of sovereign wealth funds

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Abstract

The glaring deficiencies of the US sub-prime market in 2007 evolved through 2008 and 2009 into a fully blown global financial crisis (GFC), the worst since the Great Depression of the 1930s. That in turn has spawned sovereign debt crises in a number of European countries in 2010, most dramatically in Greece and Ireland. These events have prompted not only national responses, such as the austerity budgets that have been handed down by a large number of European governments including Greece, Spain and the UK, but also multilateral regulatory initiatives under the auspices of organisations such as the G20[2] and the International Monetary Fund (IMF). Governments across the world have felt compelled to hurl billions of dollars into saving financial institutions from collapse, in some jurisdictions effectively the nationalisation of some banks. The regulatory landscape of the financial sector both nationally and internationally is being dramatically reshaped. This increasing regulatory activism of the state is clearly recognised and has received widespread support. What is less widely known is the increasing number of jurisdictions in recent years that are ramping up their levels of investment activity and the potential regulatory repercussions of larger state-related pools of capital in international financial markets. This paper considers the issue of multilateral regulation of financial markets through the lens of Sovereign Wealth Funds (SWFs),[3] discussing their evolution, especially the implications of their increasing size and prevalence in relation to developments in multilateral governance of the financial sector. The paper incorporates the findings of a number of semi-structured interviews (n = 42) with SWF stakeholders in Australia, China, Norway, the UK and the US. Those interviewed include: SWF personnel, regulators (both national and international), analysts, bankers, brokers, fund managers, governance professionals, academics and financial journalists.

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2 The Group of Twenty (G20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialised and developing economies to discuss key issues in the global economy. The inaugural meeting of the G20 took place in Berlin, on 15–16 December 1999, hosted by the German and Canadian finance ministers. The G20 is made up of the finance ministers and central bank governors of 19 countries: Argentina; Australia; Brazil; Canada; China; France; Germany; India; Indonesia; Italy; Japan; Mexico; Republic of Korea; Russia; Saudi Arabia; South Africa; Turkey; United Kingdom; United States of America. The European Union, which is represented by the rotating council presidency and the European Central Bank, is the 20th member of the G20. See www.g20.org/about_what_is_g20.aspx.

3 The difficulties and ambiguities surrounding the definition of SWFs are discussed in more detail in the paper, but a working definition is that they are state-owned investment funds comprised of financial assets.

Introduction

The aftermath of the GFC[4] that for many is symbolised by the collapse in mid-September 2008 of the giant US investment bank Lehman Brothers[5] is still unfolding. There have been substantial regulatory reactions and reform proposals at a national level, most notably in the US. In June 2009, President Obama and Treasury Secretary Timothy Geithner officially launched the Financial Regulatory Reform Program.[6]

These reforms have five key objectives:

i) promote robust supervision and regulation of financial firms;

ii) establish comprehensive regulation of financial markets;

iii) protect consumers and investors from financial abuse especially through the establishment of a new Consumer Protection Agency;

iv) provide the government with the tools it needs to manage financial crises;

v) and raise international regulatory standards and improve international cooperation.

They represent the most significant set of financial reforms in the US since President Roosevelt's Great Depression New Deal reforms of the 1930s that established the Securities and Exchange Commission (SEC).[7] Much of that June 2009 program survived the inevitable and often fractious political *horse-trading arena* that is the US Congress as part of HR4173 the Wall Street Reform and Consumer Protection Act 2009 (comprising more than 1700 pages and 11 separate Bills), that passed the House of Representatives in December 2009. As it moved through the US Senate it stretched to 2300 pages and became S3217 Restoring American Financial Stability Act of 2010.[8] Eventually the reforms were packaged as the Wall Street Reform and Consumer Protection Act 2010 and signed into law on 21 July 2010 by President Obama, who affirmed that they "represent the strongest consumer financial protections in history", but acknowledged that his administration had

4 An enormous and growing literature is available on the GFC. This paper does not analyse the GFC in great detail but some of the many available commentaries on the GFC include: CJ Arup, "The global financial crisis: learning from regulatory and governance studies" (2010) 32(2) *Law and Policy* 363; E Avgouleas, "The global financial crisis, behavioural finance and financial regulation: in search of a new orthodoxy" (2009) 9 *Journal of Corporate Law Studies* 23; P Booth (ed.), *Verdict on the Crash: Causes and policy implications* (London: Institute of Economic Affairs 2009); Essential Information and Consumer Education Foundation, *Sold Out: How Wall Street and Washington betrayed America* (Washington DC: 2009); GB Gorton, *Questions and Answers about the Financial Crisis*, NBER Working Paper No w15787, (2010), www.nber.org/papers/w15787; International Monetary Fund, *Global Financial Stability Report: Meeting new challenges to stability and building a safer system* (Washington DC: April 2010); International Monetary Fund, *Fiscal Implications of the Global Economic and Financial Crisis*, SPN/09/13 (Washington DC: 2009); CM Reinhart and KS Rogoff, *This Time is Different: Eight centuries of financial folly* (Princeton: Princeton UP 2009.

5 The interviews that are referred to in this paper were conducted just before and during the GFC in 2008 and 2009 and had a specific focus on SWFs, but nevertheless hopefully they add a sense of *coalface pragmatism* to the analysis. One of the most memorable interviews was with US financial regulators in their Wall Street offices on Groundhog Day as the Lehman Brothers collapse was unfolding live on television screens in the US and around the world.

6 Department of the Treasury, *Financial Regulatory Reform, a New Foundation: Rebuilding financial supervision and regulation* (Washington DC: 2009).

7 The SEC, which is probably the world's most influential securities regulator, was created by s. 4 of the Securities Exchange Act 1934 (codified as 15 USC 78d). The SEC enforces this Act as well as the Securities Act 1933, the Sarbanes–Oxley Act 2002 and other statutes.

8 Open Congress, HR 4173 Wall Street Reform and Consumer Protection Act 2009 www.opencongress.org/bill/111-h4173/show, and S3217 Restoring American Financial Stability Act of 2010 www.opencongress.org/bill/111-s3217/show.

to: "overcome the furious lobbying of an array of powerful interest groups and a partisan minority determined to block change".[9] It is not surprising that interest groups' activity should be high regarding national financial sector reform and, as discussed below, it is very significant in the development of multilateral regulatory initiatives. In the UK, the Chancellor of the Exchequer announced in June 2010 that the new Coalition government (major partner the Conservative Party, minor partner the Liberal Democrats) would abolish the old tripartite regulatory regime and that the Financial Services Authority (FSA) would cease to exist in its current form. The government would create a new Prudential Regulatory Authority (PRA) that would be a subsidiary of the Bank of England and be responsible for the day-to-day prudential supervision of financial institutions. Also, a new Consumer Protection and Markets Authority (CPMA) would be established with responsibility for the conduct of all retail and wholesale financial firms.[10]

There has been significant regulatory activity in the international sphere as well as in national environments. The key avenue for multilateral regulatory progress post-GFC has been the G20, which at its summit in Toronto in June 2010 announced that its financial sector reform agenda is based on four pillars:

i) a strong regulatory framework;

ii) effective supervision;

iii) resolution and addressing systemic institutions;

iv) and transparent international assessment and peer review.

The G20 Declaration stated "that the core of the financial sector reform agenda rests on improving the strength of capital and liquidity and discouraging excessive leverage".[11] However, with regard to multilateral arenas the constitutional and jurisdictional challenges for post-crisis regulatory reform are obviously much greater than in national contexts.[12] It is not yet clear how the international financial regulatory architecture will change during 2010 and 2011 but there will be significant change with the G20 and the IMF sure to be lead actors in these processes.

For example, in September 2010 the Basel Committee on Banking Supervision announced the details of changes to capital adequacy standards for banks, increasing the minimum common equity requirement from 2 per cent to 4.5 per cent and an additional conservation buffer of 2.5 per cent.[13] Together with the introduction of a global liquidity standard, these capital reforms were endorsed as part of the Seoul Action Plan by the Seoul G20 leaders' summit in November 2010 and will be phased in between 2011 and 2019.[14] They represent substantial changes in the calibration of international capital frameworks and are intended to militate against future global financial crises. Political economy factors have been, and will continue to be, crucial in shaping these international reform processes

9 *The White House Blog*, "President Obama signs Wall Street reform: no easy task", 21 July 2010, www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task.

10 HM Treasury, *Reform and Regulation: The government's approach to financial services regulation* (2010), www.hm-treasury.gov.uk/reform_and_regulation.htm.

11 G20 Toronto Summit Declaration, 26–27 June 2010, p. 15, www.g20.org/Documents/g20_declaration_en.pdf.

12 For a discussion of these issues with a focus on initiatives in the UK and how they are affected by European Union responsibilities, see J Black, *Managing the Financial Crisis: The constitutional dimension*, LSE Legal Studies Working Paper No 12/2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619784.

13 Bank for International Settlements, "Group of governors and heads of supervision announces higher global minimum capital standards", press release, 12 September 2010, www.bis.org/press/p100912.htm

14 The G20 Seoul Summit Leaders' Declaration, 11–12 November 2010, www.g20.org/Documents2010/11/seoulsummit_declaration.pdf

and it is useful to consider how similar pressures were highly influential in recent regulatory initiatives surrounding SWFs. SWFs and other state-related pools of capital such as State Owned Enterprises (SOEs),[15] State Pension Funds and Commodity Stabilisation Funds are acknowledged as increasingly valuable sources of liquidity in capital markets that have been drained of liquidity in recent years,[16] and this issue[17] – what SWFs are and what they do – is discussed in more detail below. As GFC ramifications, such as governments part-nationalising/saving failing banks (e.g. Royal Bank of Scotland and Lloyds TSB in the UK), or nationalising them (e.g. Fannie Mae and Freddie Mac in the US, Northern Rock in the UK), continue to impact so heavily on contemporary political, economic and legal agendas,[18] the entwined regulatory/investment role of the state comes into sharper focus. SWFs are an example of a space where this dual role is at work and where there have been concerns raised in many fora (discussed in more detail below), about how the state can manage simultaneously the potential conflicts of being an active investment actor, a detached and independent regulator, a recipient of inward investment from both state and non-state sources and the promoter of the national interest. The increasing investment role of SWFs, SOEs and other state-related pools of capital reflect changing relationships in the global economy, especially the economic rise of Asian players, such as China and India. As their strategic economic and political importance grows, so does the need to understand how international regulatory infrastructures need to evolve in order to accommodate such changes. This is why it is worth examining multilateral regulatory initiatives regarding SWFs as it reveals some of the challenges and potential benefits that are applicable to other sectors and contexts, for example, climate change.

The activities of SWFs and other state-related pools of capital have to be understood within the context of an era of globalisation, in which economic and political ties between many jurisdictions are deepening, and jurisdictions increasingly are playing a mediating role regarding the interests of much business that may be conducted within their spheres of influence.[19] One significant effect of globalisation has been to further elevate deficits and surpluses run by countries and the subsequent macro-economic trade imbalances that they bring. As ever with regard to international trade, the political context remains crucial and almost inevitably it is intertwined with expectations regarding vested interests. These developments are affecting the sovereignty of jurisdictions as local political priorities become more intertwined with international politics and the requirements of international business. The regulatory world reflects the realities of those domains, which it purports to

15 A working definition of SOEs is that they are widely deemed to be state-owned operating companies rather than investment mechanisms as SWFs are.

16 For example, Abu Dhabi's Investment Authority (ADIA) in November 2007 invested US$7.5 billion for a 4.9 per cent share of Citigroup, which allowed the latter to immediately make US$6.8 billion in sub-prime write-offs and thus ward off potential bankruptcy in the midst of the global financial crisis.

17 There is uncertainty about how big SWFs actually are and this is discussed in more detail below, but the general view is that SWFs control circa US$3 trillion of assets and some analysts have projected that accumulated SWF assets will reach US$ 12 trillion by 2015.

18 There has been significant academic and media coverage of these events and their implications. For example: DA Oesterle, *The Collapse of Fannie Mae and Freddie Mac: Victims or villains?*, Ohio State Public Law Working Paper No 127, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645330; P Aldrick, "RBS and Northern Rock to unveil radical strategies", 22 February 2009, www.telegraph.co.uk/finance/newsbysector/banksandfinance/4782762/RBS-and-Northern-Rock-to-unveil-radical-strategies.html; RA Tomasic, "The rescue of Northern Rock: nationalization in the shadow of insolvency" (2008) 1(4) *Corporate Rescue and Insolvency* 109; RJ Rhee, "Nationalization of corporate governance and purpose during crisis" (2010) 17 *George Mason Law Review* 661.

19 See, for example: JA Frieden, *Global Capitalism: Its fall and rise in the twentieth century* (New York: WW Norton & Company 2006); JA Scholte, *Globalization: A critical introduction* (Houndmills: Palgrave Macmillan 2005); and J Stiglitz, *Globalization and its Discontents* (New York: WW Norton & Company 2003).

influence, and so a major consequence of these developments is that regulatory structures and processes have become more internationalised. A variety of modes of governance are emerging that have a capacity for impacts of broad international scope. This political reality reflects an era of networked governance as regulatory relations are reconfigured, driven by trends towards hollowed-out government and hollowed-out corporate governance. It is in this environment that SWFs and other state-related pools of capital have been increasing, not only in their number, but also in the scale of their effect. As the effects of the GFC continue to unwind, a new era of more proactive state-led investment capitalism is emerging in which SWFs and other state-related pools of capital form part of the key advance guard of this process.

Recently there has been multilateral regulatory innovation regarding SWFs and so they may provide indicators as to how one might expect global prudential financial regulatory reform more generally to evolve in the coming years. This is because of the way many of the intrinsic challenges associated with regulating the international finance sector in a post-GFC era have come into play in recent years in multilateral efforts to mediate the increasing levels of activity and influence exercised by the diverse constituency of financial sector actors that have been bundled together under the SWF label. These mutual challenges include: balancing the interests of state and private actors; the transnational nature of much financial sector activity; creating market regulatory conditions that can deliver appropriate balances between liquidity supply and opportunity for profit; the need to protect the national interest of jurisdictions but not encourage protectionism; and the increasing hybridisation of financial sector actors, products and services

The evolution of SWFs

The first question one must ponder regarding SWFs is: what are they? This is not as simple a proposition as one might at first think as was confirmed by the responses to Question 3.[20] Although some SWFs have been in existence for more than 50 years,[21] respondents agreed that public recognition of the label SWF is quite recent.[22] The category SWF is problematic in many ways because numerous types of actor have been collapsed into popular understandings of the term. There is definitional uncertainty about not only SWFs but other forms of state-related capital and how they should be classified. Truman defines SWFs as "a descriptive term for a separate pool of government-owned or government-controlled financial assets that includes some international assets".[23] Lowery (at the time US Undersecretary for International Affairs) defined SWFs as "a government investment vehicle which is funded by foreign exchange assets, and which manages these assets separately from official reserves".[24] The European Commission (EC) notes that SWFs are"generally defined as state-owned investment vehicles, which manage a diversified

20 The questions that guided the interviews and which were sent to the respondents prior to meeting are reproduced as an appendix at the end of this article, see p. 410.

21 The Kuwait Investment Office was established in London in 1953 as an asset manager for Kuwait's Foreign Ministry.

22 The term "sovereign wealth fund" appears to have been introduced by Rozanov in 2005; A Rozanov, "Who holds the wealth of nations?" (2005) 15(4) *Central Banking Journal* 52–7.

23 EM Truman, *A Blueprint for Sovereign Wealth Fund Best Practices*, Policy Brief No PB08-3, Petersen Institute for International Economics, Washington DC, 2008 www.iie.com/publications/interstitial.cfm?ResearchID=902, at p. 1.

24 US Department of Treasury, "Remarks by Acting Undersecretary for International Affairs Clay Lowery on sovereign wealth funds and the international financial system", press release hp-471, San Francisco, 21 June 2007, www.ustreas.gov/press/releases/hp471.htm.

portfolio of domestic and international financial assets".[25] The IMF sees SWFs as a heterogeneous group with five sub-categories based on their main objective:

i) stabilisation funds whose primary objective is to help insulate the economy from the effects of commodity (usually oil) price swings;

ii) savings funds for future generations and so mitigate the effects of Dutch disease;[26]

iii) reserve investment corporations;

iv) development funds;

v) and contingent pension reserve funds that provide for unspecified pension liabilities on the government's balance sheet.[27]

Jen believes SWFs have five basic ingredients:

i) sovereign;

ii) high foreign currency exposure;

iii) no explicit liabilities;

iv) high risk tolerance;

v) and long investment horizon.[28]

It is only very recently that the SWFs themselves have combined as an interest group in any meaningful way (this process is detailed later in this paper), and they offered their own definition in September 2008 as part of their Generally Accepted Principles and Practices (GAPP):

> SWFs are defined as special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets.[29]

So, it can be seen that SWFs are a slippery beast to classify and respondents confirmed this. A senior Finance Ministry official who helps to administer an SWF emphasised that classification of SWFs is difficult and there are many grey areas, for example, between central banks' foreign reserves management and other types of investment vehicles. Pension funds are not SWFs even though they may be government sponsored, but they do have a clear link to the beneficiaries via fiduciary duties. Some SWFs are legal entities (e.g. ADIA/ADIC –

25 Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2008, Brussels, XXX, COM (2008) 115 provisional, p. 3, http://ec.europa.eu/internal_market/finances/docs/sovereign_en.pdf.

26 Dutch disease is defined by investorwords.com as: "The deindustrialization of a nation's economy that occurs when the discovery of a natural resource raises the value of that nation's currency, making manufactured goods less competitive with other nations, increasing imports and decreasing exports." The term originated in the Netherlands after the discovery of North Sea gas in the 1970s and is an ongoing concern for resource-rich jurisdictions, prompting several to establish SWFs: www.investorwords.com/1604/dutch_disease.html. See also P Krugman,. "The narrow moving band, the Dutch disease, and the competitive consequences of Mrs Thatcher." (1987) 27(1–2) *Journal of Development Economics* 50.

27 IMF, *Sovereign Wealth Funds: A work agenda* (Washington DC: 2008), p. 5, www.imf.org/external/np/pp/eng/2008/022908.pdf.

28 S Jen, *The Definition of a Sovereign Wealth Fund* (Hong Kong: Morgan Stanley Research October 2007), www.morganstanley.com/views/gef/archive/2007/20071026-Fri.html.

29 IWG of SWFs, Generally Accepted Principles and Practices (GAPP): The Santiago Principles, 2008, p. 3: www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

Abu Dhabi), others are corporations (e.g. Temasek – Singapore) and others are not legal persons (e.g. Norway Government Global Fund). Thus, there needs to be an unbundling of what constitutes an SWF and this conundrum was reiterated by most respondents.

One international banker noted that it is extremely difficult to measure SWFs and their impact because even though one might argue that their two main functions are long-term returns and the provision of liquidity through credit resource management: "where do SWFs, resource managers and credit managers begin and end, and where and how do you discriminate between them?" Another international banker made the obvious point that "categorisation of SWFs depends on the questions asked". A respondent who works for a global investment bank stated that their organisation had done some work on SWF measurement through categories such as: funding sources (e.g. Norway); fixed transfer (e.g. China); foreign transfer (e.g. Korea); stabilisation (e.g. Russia); general investment (e.g. GIC – Singapore); and holding companies (e.g. Temasek – Singapore). An international regulator believes SWFs are "a historical new class of investment actor in financial history, but they will always remain *close cousins* with Central Bank surpluses".

One national regulator suggested that SWFs could be classified in terms of source of funds, levels of development, sustainability of funds and capacity for investment, but nevertheless there would always be measurement problems politically, especially in relation to energy security. This reflects what another respondent (an analyst) referred to as "underlying anxiety about *The Sputnik Moment*", in reference to the decoupling effects of contemporary fundamental changes in East–West capital flows with attendant global imbalances regarding the management of exchange rates and reserves. The most obvious example of this is the rapidly increasing global economic influence of countries such as China, India and Brazil. For instance, China has increased its foreign reserves from $21 billion in 1992 (5 per cent of its annual gross domestic product (GDP)) to $2.4 trillion in 2009 (almost 50 per cent of its GDP).[30] Interestingly, the same respondent felt that – although a difficult process due to data access etc. – SWFs could be classified and measured in similar ways to other non-listed pools of capital such as private equity and hedge funds, based on variables such as: asset portfolio make-up; capital ownership; executive control; institutional framework; investment strategies; and source of funding. The same analyst went on to say that, as all SWF countries are members of the IMF, then the IMF may be the best place to measure SWFs and their effects. The IMF through the International Finance Corporation has 187 members, including all jurisdictions that have SWFs, so it does possess significant clearing-house potential in relation to SWFs. The jurisdictions that operate SWFs are extremely diverse. Some are authoritarian one-party states. Others are sophisticated democracies, ranging from highly developed oil/gas exporters in Europe (e.g. Norway, Russia) to less-developed ones in the Middle East (e.g. UAE, Kuwait). Some are large and small manufacturing/trading entrepots in Asia (e.g. China, Korea Singapore), others broad-based commodity exporters (e.g. Australia, Chile), or smaller emerging economies (e.g. Mauritania, Uzbekistan).

Despite the definitional uncertainties and the lack of uniformity surrounding SWFs, various commentators and organisations have sought to tabulate which jurisdictions operate SWFs and estimate the scale of assets that they have under management. For example, in 2008, Truman identified 54 separate SWFs (44 non-pension funds, 10 pension funds), from 39 different jurisdictions and he estimated that they held US$5294 billion in assets, with

30 ZM Song, K Storesletten and F Zilibotti, *Growing like China*, Centre for Economic Policy Research, Discussion Paper No DP7149, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345675.

US$3483 billion held in foreign assets.[31] Kambayashi estimated SWF holdings to have risen from $US500 billion in 1990 to $US2.5 trillion in 2007.[32] Based on February 2008 data, the IMF estimated the total assets of SWFs to be between US$2–3 trillion and projected that they would be between US$6–10 trillion by 2013.[33] 2008 data from Global Insight confirms their growth and places funds under the control of SWFs at US$3.5 trillion. To put this total in context, assets under the control of SWFs are greater than the combined funds of private equity and hedge funds, estimated at US$1.5 trillion.[34] They are therefore a significant element of global equity market capitalisation, which is estimated at US$50 trillion.[35] In terms of how significant SWFs are in relation to the conventional global economy in goods and services, Deutsche Bank in 2009 estimated global GDP at US$61 trillion and SWFs at US$3 trillion or 5 per cent.[36] More recently in June 2010 the Sovereign Wealth Funds Institute (SWFI) released a ranking of 50 SWFs estimating their total combined holdings at US$3938.4 billion, with oil-and-gas-related SWFs managing US$2256.8 (60 per cent) and other SWFs, underpinned by minerals or non-commodity, controlling assets of US$1681.6 (40 per cent).[37] The current recessionary influences in the global economy mean that it is more difficult to be certain of trend forecasting, but some analysts project that SWF assets will surpass the size of the world's total official reserves by 2011 and reach $US12 trillion by 2015.[38] To put the latter figure into perspective $US12 trillion is the size of the GDP of the United States.[39]

As mentioned earlier, there have been a number of motivations that have stimulated so many jurisdictions to establish an SWF. These include: diversification away from non-renewable commodities (most commonly, oil); investing currently unneeded liquidity (most commonly away from US dollars or gold); increasing the return on national savings; implementing domestic economic development objectives; and enhancing the value and capability of national assets.[40] A specific objective such as the inter-generational transfer of wealth can lead to the establishment of an SWF, for example, the Future Fund in Australia. Whether motivated by commodity price booms (e.g. Abu Dhabi) or trade-generated fiscal surpluses (e.g. China), a key factor common to many of these SWF stimuli has been to increase the capacity of jurisdictions to manage cyclical trends, because global trade imbalances lead to savings gluts and SWFs are a useful mechanism to help manage these gluts. Many of the respondents saw SWFs as a story largely of commodities and inextricably linked with the priorities of the state, so going forward the input of state capitalism is likely to grow, especially in emerging markets. One international regulator emphasised the importance of past history:

> Recent increases in the number of SWFs are a reaction to problems that are similar to the 1980s and 1990s. In the intermediation of the 1970s, concerns regarding the liquidity from oil production led to a flood of Eurodollars, which

31 Truman, *A Blueprint*, n. 23 above, pp. 2 and 4.

32 S Kambayashi, "The world's most expensive club", *The Economist*, 24 May 2007.

33 IMF, *Sovereign Wealth Funds*, n. 27 above, pp. 6–7.

34 Global Insight, *Sovereign Wealth Fund Tracker* (London: 2007).

35 European Commission, Communication, n. 25 above, p. 4.

36 S Kern, *Sovereign wealth funds – state investments during the financial crisis* (Franfurt: Deutsche Bank Research 2009), p. 5.

37 SWFI, *Sovereign Wealth Fund Rankings*, June 2010, www.swfinstitute.org/fund-rankings/.

38 S Jen, *How Big Could Sovereign Wealth Funds Be by 2015?* (Hong Kong: Morgan Stanley Research 2007).

39 S Johnson, "The rise of sovereign wealth funds" (2007) 44(3) *Finance and Development* 56.

40 BW Bean, "Attack of the sovereign wealth funds: defending the republic from the threat of sovereign wealth funds?" (2010) 18(1) *Michigan State University College of Law Journal of International Law* 65.

> in turn led to a large number of non-performing loans which led to short-term priorities and a number of consortium bank collapses prompting a retreat from emerging markets. Intermediation therefore failed although better regulation did emerge e.g. Basel Principles. Today the totals of capital involved are much bigger. The more seminal change today is not to hold portfolios weighing heavily in US Treasuries, so there is a drive to increase liquid assets by China and other sovereign actors. The big shift is to move some sovereign assets into long-term positions. This more mature activity shows a big switch in mentality by SWFs. SWFs do not control other players in their country but they can have informal influence (e.g. re China Investment Corporation). Also, it is just as important to consider what the SWFs have NOT done – for example, they have not dumped their UK assets and so remain a stabilising influence on capital markets.

These are very salient points and emphasise the value in academic research to garner the views of "those at the coalface", so to speak. This is especially true in times of crisis and in the context of debates on the supposed fears of foreign investment/ownership and possible reactionary lurches towards protectionist lawmaking. For example, is it not better both economically and in other areas, such as social development and geo-political stability, that excess capital does not fuel a liquidity boom promoting excessive risk-taking (whether in the 1970s or 2000s), but rather helps to underpin growth more organically?

Question 1 asked respondents to evaluate the impacts of SWFs and, as one international banker noted, there are different ways of evaluating the effects of SWFs, for example: impact on recipient countries; impacts on different types of investors; impacts on national policy issues; and impacts psychologically on investors and policy makers. Nevertheless, it is important to remember that SWFs are long-term investors that can be a true provider of liquidity in times of crisis and have large "holding power". The often long-term investment horizons of SWFs were stressed as a great positive by virtually all respondents who noted that SWF owners had a lower need for volatility than other investment actors. However, there is an increasing trend amongst SWFs towards investment diversification and a growing desire and capacity for risk and several respondents stressed the implications these developments have for cross-border foreign exchange liquidity, potential economic overheating and inflationary issues.

If SWFs are taken as an example of the changing significance of the broader pools of state-related capital, then in recent years they have become more varied and aggressive in their investment strategies, raising fears that forms of financial protectionism will be thrown up by nation states to defend against such activity, subsequently threatening the momentum and gains of globalisation.[41] The most strident and high-profile criticism of SWFs and SOEs came from elements of the US Congress and media.[42] In particular, protectionist sentiment was stoked by the takeover in 2006 by Dubai Ports World (DPW), a state-owned company in the UAE, of the management of port management businesses of a number of seaports in the US that were already in foreign ownership by the UK firm P&O. Even though the Bush administration gave approval for the deal, protectionism sentiment stimulated the spectre of *cross-border nationalisation* because state-related capital was behind DPW and this gained public and congressional traction, including the House Panel voting

41 SJ Weisman, "Concern about sovereign wealth funds spreads to Washington", *International Herald Tribune*, 20 August 2007.

42 Some of the media coverage was quite hostile, for example, DR Francis, "Will sovereign wealth funds rule the world?", *Christian Science Monitor*, 26 November 2007, p. 16.

62:2 on 8 March 2006 to block the deal.[43] The controversy contributed to DPW in December 2006 selling the seaport management businesses to the American International Group.[44] The DPW controversy attests to sensitivities in the US towards investment by foreign government entities. One survey of 1000 registered US voters (weighted by race and education in an effort to be a representative sample), conducted by Public Strategies Inc. revealed significant levels of distrust about foreign investment in the US in general and SWFs in particular. Seventy-two per cent believed that foreign governments do not reveal enough about their investment portfolios; 68 per cent of those surveyed opposed government investment from Saudi Arabia; and similar scores were recorded for other jurisdictions, e.g. Abu Dhabi (62 per cent), China (65 per cent) and Russia (61 per cent).[45] The sample of course was not comprehensively representative of the US population in general but ongoing public pressure of this sort contributed to legislative change in the form of HR 556: Foreign Investment and National Security Act of 2007, which passed in the House 423:0 and was signed into law by President George W Bush on 26 July 2007. The US was not the only jurisdiction in which there was negative media coverage of state-sponsored investment, for example, in 2007 and 2008 there were a number of articles in the UK press that were not that favourable about China's investments in the UK.[46] Of course, most recipient countries including the US and the UK have foreign investment regimes to help in monitoring and partially controlling inward investment, but they are sensitive to the ongoing need to balance the national interest with trade openness. For example, in Australia the Treasurer is advised by the Foreign Investment Review Board on the issue of foreign investment, and this has been a controversial issue at times, especially with regard to state sponsored-entities acquiring Australian resources' assets. In February 2008, the commonwealth government released six principles to improve the transparency of foreign investment screening processes that more clearly distinguish between investments by private entities and by foreign governments.[47]

However, it seems inevitable that there will be a geo-political security element to reporting about SWFs and that there will be some level of anxiety in the established West about the rising influence of SWFs. This can be seen in the comments of former US Treasury Secretary in the administration of President Bush, Mr Henry Paulson, who expressed concern about political motivations influencing the investments of SWFs and called for a multilateral regime to monitor their activities.[48] One US respondent commented in these terms on the increasing scrutiny of SWFs in the US:

> In 2007, FINRA [Financial Industry Regulation Authority] slightly increased requirements around sovereign investment, making mandatory what previously

43 For example, Senator Carl Levin, "Opening remarks at the Senate Armed Services Committee briefing on port security", press release, 23 February 2006, http://levin.senate.gov/newsroom/release.cfm?id=251838; SR Weisman, "Concern about 'sovereign wealth funds' spreads to Washington", *International Herald Tribune Business*, 20 August 2007; R Gay, "US feels power of cashed-up foreign funds", *Australian Financial Review*, 29 November 2007, p. 1.

44 "AIG buys DPW's US assets", *World Cargo News*, 11 December 2006, www.worldcargonews.com/htm/n20070118.117570.htm

45 Public Strategies Inc, "Survey reveals voters wary of foreign government investment", 21 February 2008, www.pstrategies.com/index.php/survey-reveals-voters-wary-of-foreign-government-investment.htm.

46 For example, M Kleinman and D Reece, "Revealed: Chinese bank's £9bn raid on British shares", *The Sunday Telegraph*, 7 September 2008, Business Section, p. 1.

47 Treasurer of the Commonwealth of Australia, "Government improves transparency of foreign investment screening process", press release Np.009, 17 February 2008 http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType=0.

48 T Walker, "Call to keep funds free of political bias", *Australian Financial Review*, 22 October 2007.

> had been discretionary.[49] There has been a substantial increase in the numbers of examinations by the US Government of overseas investment in the US. This could be viewed as significant because in the US there almost has to be a national security issue for a Government examination to take place.

This comment reflects the reality that most countries are capital dependent and it is not feasible to screen all inward investment, so most will inevitably be approved. Other members of the G8 and the European Central Bank have expressed similar concerns.[50] The EC stated that it "cannot allow non-European funds to be run in an opaque manner or used as an implement of geo-political strategy" and reserved the right to introduce specific European legislation if increased transparency from SWFs was not achieved through voluntary means.[51] These concerns largely centred on whether the investment activities of these actors could lead to distortions in asset prices or excessive risk-taking. As one respondent noted:

> Continental countries seem to be seeking the best regulatory stick and Anglo American ones the best regulatory carrot. Middle East investors praise the UK's "Open Door" investment policy, whereas Continental Europe and Asia apply a lot more discretion regarding foreign investment.

Another respondent, a UK regulator, stressed in response to Question 3: "The FSA does not see SWFs as all that special and SWFs do not require authorisation from the FSA. The FSA has sufficient powers and rules already with which to deal with SWFs."

It is also important to note that many jurisdictions with SWFs, such as Australia and Norway, are not only recipient countries of SWF investment but also have high levels of foreign investment generally, for example, 44 per cent of all listed assets in Norway are owned by foreign investors. This scenario is likely to become more common amongst those jurisdictions with SWFs, in the words of one respondent (an analyst with a global investment bank): "The *clock is ticking* for many SWF countries in terms of becoming recipient countries themselves." The activities of SWFs raise issues of the implications of cross-nationalisation of assets and industries for jurisdictions all over the world. For example, states that are downstream consumers of commodities potentially could use their state-related pools of capital and investment vehicles such as SWFs to acquire the foreign companies that produce or own the rights to such commodities, leading to what one international regulator referred to as "potential entrapments of governance in some domestic contexts". Scenarios of this nature could have far-reaching implications for the securities regulation, corporate governance, competition and tax policies in the recipient countries of such investment and governments around the world are increasingly taking note of these issues.[52] Several respondents saw the taxation–SWF linkage as critical. For example: "How SWF activities should/will be taxed is an important issue, especially as time goes on, especially the notion/concept of the *Sovereign Immunity Card*. Undoubtedly, taxation will be a key dynamic in how SWFs choose to structure themselves and their activities." For example, Australia with its resource-rich corporate entities is potentially a "juicy" target for

49 US Department of the Treasury, "Committee on Foreign Investment in the United States (CFIUS), s. 721 of The Defense Production Act of 1950", notice, October 2007, http://cfius.us/modules/news/.

50 F Cheng, "Sovereign funds' war chests alarm G7", *The Australian*, 16 October 2007.

51 J M Barroso, "Statement by Jose Manuel Barroso President of the European Commission on sovereign wealth funds", press release, Oslo, 2008, http://ec.europa.eu/commission_barroso/president/press/releases/index_en.htm

52 For example, the Australian Treasury released a discussion paper in June 2010: *Greater Certainty for Sovereign investment: The framework rules*, Australian Government Consultation Paper, www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1842.

many state-related pools of capital and also may become a potential SWF-aggressive investor itself through the Future Fund. So what may be the taxation revenue implications of such developments? These are the thorny types of issues that have prompted some hostility in certain quarters towards SWFs, raising the spectre of trade protectionism and/or conflict and consideration as to how these might be avoided or mediated.[53]

As one respondent cautioned, a major tension about SWFs is that many of the largest ones are in the most protectionist countries that to an extent do not trust foreigners and this concern compounds the lack of transparency around SWFs, as indeed do issues of regional harmonisation. Where SWFs are based does matter, as illustrated in the discussion above about political tensions and SWFs. The SWFI evaluated the geographical origins of SWFs and estimated that, based on total SWF funds held: 38 per cent are in Asia; 37 per cent in the Middle East; 18 per cent in Europe; 3 per cent in Africa; 2 per cent in the Americas; and 2 per cent in other areas of the world.[54] These geo-political realities matter to Western jurisdictions such as the US and the political element in debates about SWFs is unlikely to go away, just as SWFs are likely to continue increasing in size and influence.

Most respondents agreed that the activities of SWFs had become politicised to some extent, but there was disagreement as to how much, and as one respondent stressed there is often "a sunken national interest" in some policy responses to SWFs. Also, the debate around SWFs is permeated by contrasting historical and cultural perspectives. As one Chinese respondent who worked for an organisation owned by an SWF noted, many SWFs face difficulties regarding related-party transaction obligations/expectations in many recipient jurisdictions because in their home jurisdiction (for example, China or Abu Dhabi), Western-standard conflicts of interest are almost unavoidable because so many enterprises are state-owned. Another respondent made the point that:

> The West has a very blinkered view of its own past – for example, the East India Company was essentially a Sovereign Wealth Fund. The British and Dutch went on to merge their respective East India Companies in order to increase their domination of the region.[55]

So, there would seem to be vestiges of colonialism intertwined with SWFs and their ongoing evolution and, of course, these relationships are crucially affected by prevailing economic conditions. This can be seen in action as the impacts of the credit crunch and subsequent GFC have deepened during 2008, 2009 and 2010, driving both major and less developed economies around the world into recession, so there has been a softening in the rhetoric of criticism directed towards SWFs and other state-related pools of capital. For the most part, this has been due to the large totals of liquid capital that SWFs injected into international financial markets during 2007 and 2008. Deutsche Bank aggregates that SWF investment into financial assets between 1995 and 2008 was US$109.8 billion, with two-thirds of that investment occurring in 2007 and 2008.[56] Some of that more recent investment was terrible in terms of its timing due to the GFC and incurred significant

53 See, for example: E Chalamish, *Protectionism and Sovereign Investment Post Global Recession*, OECD Global Forum on International Investment, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554618; M Plotkin, "Foreign direct investment by sovereign wealth funds: using the market and the Committee on Foreign Investment in the United States together to make the United States more secure" (2008) 118 *Yale LJ Pocket Part* 88.

54 SWFI, *SWF Rankings*, n. 37 above.

55 For a discussion of how various interest groups interacted in shaping the policy priorities of the East India Company, see HV Bowen, *The Business of Empire: The East India Company and imperial Britain, 1756–1833* (Cambridge: CUP 2006).

56 S Kern, *SWFs and Foreign Investment Policies: An update* (Frankfurt: Deutsche Bank Research 2008), p. 7.

short-term losses, especially some of the high-profile financial acquisitions. One respondent (an international banker) believes that in several of these instances: "SWFs were the final option in terms of a source of capital. US investment banks chose SWFs because if they had gone to US Insurance Funds the latter would have sacked the senior management of these poorly-performing firms." Whether this is a pervasive view across the market one cannot know, but one can be more certain of the massive losses to date that these SWF investments have incurred. For example, in February 2008, the SWFI estimates that the Abu Dhabi Mubadala (ADIA) fund had a -49.2 per cent return in only three months on its US$700 million investment in Advanced Micro Devices and China's CIC suffered a -52.1 per cent return in eight months on its US$3 billion investment in the Blackstone Group and a -15 per cent return in only two months on its US$5 billion investment into the global investment bank Morgan Stanley.[57] Current debates about multilateral regulation of financial markets and policy development to date regarding SWFs have to take account of the valuable liquidity that they can bring to capital markets as the GFC's effects continue to unfurl across the global economy.

Multilateral regulation and SWFs

The gathering global recession of 2008 coincided with some interesting multilateral developments regarding SWFs and how they chose to present themselves as a grouping to the world. In May 2008, in Washington DC, 25 SWFs from jurisdictions as varied as Australia, Botswana, Chile, China, Norway, Russia, Singapore, Trinidad and Tobago, the United Arab Emirates and the US formed the International Working Group (IWG) in cooperation with the IMF, but also the World Bank, and as a partial response to some of the criticism about their investment activities and motivations. Composition of the IWG has been largely finance industries and central banks. The IWG established a small secretariat and gave it the task of developing a set of principles that reflected the investment practices and objectives of SWFs. The IMF's role was as a facilitator of the process and recipient countries were involved all the way. Only five months later, at a meeting in Santiago, Chile, in October 2008, the IWG formally declared the GAPP – also known as the Santiago Principles. IWG members committed to operate by the GAPP, which have as their core 24 voluntary principles emphasising good governance, accountability, transparency and a commitment to financially motivated investment strategies.[58]

Most of those interviewed felt that the Santiago Principles are a fairly impressive achievement considering that 25 very different countries were involved. A range of highly technical complex issues were covered in a short space of time and several respondents believe that the principles will come to be seen as more comprehensive than first thought. For example, they will view transparency more widely than has been reported, e.g: clarity of purpose; who is making investments and for what purposes; and clear division of responsibilities. One respondent summarised in this way:

> The Santiago Principles has been and will continue to be a living document and reflect perceptions of what constitutes best practice. So, they can act as a guide for other countries that will establish SWFs in the future and they will have to be reviewed at various intervals. There has to be a transitional phase and there has to be flexibility in the rules because for some countries the Principles will be aspirational. It is something that the SWFs have done by themselves for

57 SWFI, "Do SWFs make smart equity purchases?", 19 February 2008, www.swfinstitute.org/swf-research/do-swfs-make-smart-equity-purchases/.

58 IWG, GAPP, n. 29 above.

themselves. They are not an IMF process of the IMF setting standards for SWFs but rather an "Industry Standard".

Some of those interviewed who were closely involved with the Santiago Principles felt that the Santiago Principles project had been one of the most challenging that they had been associated with over the last 20 years and emphasised that peer pressure had been a significant factor in establishing the principles. One commented that: "the process has worked really well so far and given that initially many of the SWFS were against any interventions, it has been one of the brightest moments in multi-lateral regulation in recent years".

Several respondents noted the key role played behind the scenes by the IMF in moderating media perceptions of SWFs, especially in calming anxieties surrounding China's "carve-out of sovereign wealth" that had put much of the intensity into contemporary debates about SWFs. In their view, the most important decisions were taken at the May 2008 Washington meeting in relation to the terms of reference,[59] and, although it was inevitable that the end product of the principles themselves would not be legally binding, it was the only basis on which there could be progress now in relation to SWF oversight in multilateral contexts.

At the media conference formally announcing the Santiago Principles, the IWG drafting chair Mr David Murray (chair of Australia's Future Fund) stated that the key task was to establish trust in recipient countries based on notions of openness and legitimacy. His sentiments were echoed by Joaquin Almunia, European Commissioner for Economic and Monetary Affairs, who also added that the long-term investment horizons of state-related pools of capital like SWFs would be extremely important in preserving mutual trust across international financial markets and their associated regulatory environments.[60]

Unfortunately, however, in respect of SWFs, and despite the positive developments associated with the IWG and the proclamation of the Santiago Principles, the comments in 2007 of the IMF still carry weight: "there's a lot we don't know about sovereign funds. Very few of them publish information about their assets, liabilities, or investment strategies."[61] One of the more cynical (pragmatic?) respondents predicted in mid-2008 that: "A relatively informal protocol will be agreed to by the SWFs and international organisations, but it will never be policed in any real sense." In reality, where national self-interest and international trade collide, as they do with SWFs, can we expect much more than this? It will always be a series of fluctuating scenarios that seek to balance a range of forces and interests. As one international regulator summarised in response to Question 11: "Sovereigns are always sovereigns and so can deny access or discriminate, but there are only limited opportunities for anyone to do so repeatedly." This response reflects the realities of international trade and regulatory interaction.

On the issue of where to locate regulatory responsibility for SWF activity in multilateral contexts, amongst the respondents there was an overwhelming view that such responsibility should lie not with any international regulatory body, but rather with the recipient jurisdictions and the domestic regulation that inevitably impacts upon an SWF. This pragmatic response is to be expected given how investment norms are shaped and operationalised on international financial markets. Past attempts by international organisations to embed a top-down multilateral regulatory infrastructure to shape behaviour

59 IWG of SWFs, "International Working Group of Sovereign Wealth Funds is established to facilitate work on voluntary principles", press release, 1 May 2008, www.iwg-swf.org/pr/swfpr0801.htm.

60 S Willson, "Wealth funds group publishes 24-point voluntary principles", http://www.imf.org/external/pubs/ft/survey/so/2008/new101508b.htm.

61 S Johnson, "The rise of sovereign wealth funds", n. 39 above.

by investment actors have not been successful. This was demonstrated by the Organisation for Economic Co-operation and Development's (OECD) failure regarding its proposed Multilateral Agreement on Investment (MAI) in the late 1990s.[62] The key reason why the MAI failed was its lack of process legitimacy and, if international regulatory mechanisms are to emerge for SWFs, then inherent process legitimacy will be essential.[63] If further SWF-related regulatory initiatives are to follow the Santiago Principles then it is unlikely to be through a specialist regulatory agency, but rather, initially, through codes of best practice, such as the GAPP, and perhaps, ultimately, instruments such as the OECD Convention on Corruption to which jurisdictions could become signatories and give binding commitments if appropriate. However, there was general opposition to the notion that treaty law should be used to regulate companies or asset managers. As one respondent commented: "Innovation is not really required as the necessary regulatory mechanisms are already there. As always the 'rub' of jurisdiction versus sovereignty is there, especially if there is a Memorandum of Understanding (MOU)." The emphasis should be on intermediation rather than new regulatory institutions. This gradual approach was viewed as not only congruent with market realities but also as a legitimate exercising of regulatory power. For example, in response to Question 9 about what regulatory innovations, if any, there should be regarding SWFs one respondent suggested that:

> If adequate disclosure is not there then that actor should be disqualified from the capital markets of the recipient jurisdiction of that actor's investments. However, it is incumbent on the recipient jurisdiction to articulate its position and seek to influence SWFs to change their practices if necessary. There are some industries (e.g. utilities, ports) where there are real national security issues and these may merit some protection from the investment strategies of SWFs. There may be increasing reluctance by many jurisdictions to open their doors to SWF investment due to some not having sufficient levels of disclosure.

Across the respondent cohort there was a sense that a market evolutionary approach is probably best and a pervading sense of resigned acceptance that multilateral regulatory activity would and should be pretty limited.[64] Several respondents commented that perhaps the most important questions for citizens to ask of their SWFs are not ones of regulatory strategy but rather: "are costs of investment rising", "are you making good investment decisions" and "are you wasting my money"? In the words of one respondent: "Is SWF money the people's money or the state's money?" Speaking in mid-2008 before the GFC broke, one banker respondent stated that:

> The financial bubble in markets has been partly caused by excess liquidity leading to interest rates being lower than they should have been and SWFs cannot invest all the money that they have, never mind leveraging these funds, so they are stable

62 OECD, Multilateral Agreement on Investment, 1998, www.oecd.org/document/22/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html. For an examination of the MAI and why it failed, see K Tieleman, (2005), *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Policy Network*, Case Study for the UN Vision Project on Global Public Policy Networks, www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf.

63 For a critical analysis of the paramount importance of legitimacy in multilateral regulatory activity in the financial sector, see G Gilligan, "Multi-lateral regulatory initiatives: a legitimation-based approach", in J O'Brien (ed.), *Governing the Corporation: Regulation and corporate governance in an age of scandal and global markets* (Chichester: John Wiley & Sons 2005), ch. 7, pp. 121–39.

64 This pragmatic stance reflects economic and political realities. For a discussion of this issue with a particular emphasis on the rising importance of China as a state investor, see LC Backer, "Sovereign investing in times of crisis: global regulation of sovereign wealth funds, state owned enterprises and the Chinese experience" (2009) 19(1) *Transnational Law and Contemporary Problems*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444190.

> investors just when they are going to be most needed by financial markets. The coming financial crisis will be very bad, so most of the current objections to SWFs will dissipate.

These words have indeed been prescient as the GFC unfolded through 2009 and 2010. Regulatory hostility from national governments and regional actors such as the EU has not been directed at SWFs but rather towards other elements of the finance investment sector such as over-the-counter derivative products,[65] credit ratings agencies,[66] and hedge funds and private equity funds.[67] These moves reinforce again that pragmatic commercial and political realities help both national and regional parliaments and regulatory organisations frame what may be deemed desirable and achievable in terms of multilateral regulatory contexts, whether in the finance sector or elsewhere in the global economy.

Conclusion

All respondents saw little that was inherently wrong in jurisdictions setting up and running SWFs, indeed, the IMF published its own "operational roadmap" for policymakers who were considering establishing an SWF.[68] As one China-based corporate governance specialist summarised:

> Essentially it is investing national savings in a fiduciary capacity and SWFs are too indirect an approach to be gaining political advantage. If so, they would be buying into defence companies and not more conventional arrangements. It would be pretty obvious if governments were utilising SWFs in a heavily political manner.

That same respondent in reflecting on the political debates about SWFs feels that there has been an over-reaction to SWFs and outside China there has been a lack of appreciation of the sophistication of China's financial markets. In some ways, this is not surprising given the relative opacity of China's financial markets in comparison to their Western counterparts and, similarly, SWFs will inevitably be affected by broader political developments. However, in terms of whether SWFs merit special regulatory scrutiny, there was overwhelming consensus amongst respondents that they do not and perhaps *the real evil* as it were is not SWFs, but the conflicts of interest within financial conglomerates. This begs the question that, if it is sensible for there to be more disclosure regarding SWFs, the same could be said for major conglomerates. Should all fund managers be made to disclose more and how can such developments be reconciled with the market reality that fund managers can perform better if their movements are more opaque, so that they can gain advantage over competitors? This is typical of the conundrum facing governments in fora such as the G20 and regulators everywhere as they seek to balance nurturing competitive self-interest with the promotion of market integrity. So, on an ongoing basis, there needs to be careful thought about how much disclosure SWFs and fund managers should be subject to.

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65 European Commission, "Making derivatives markets in Europe safer and more transparent", press release IP/10/1125, Brussels, (2010) http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1125&format=HTML&aged=0&language=EN&guiLanguage=en.

66 HR4173 Dodd–Frank Wall Street Reform and Consumer Protection Act 2010, www.govtrack.us/congress/bill.xpd?bill=h111-4173.

67 In November 2010, the European Parliament, by a vote of 513 to 92, passed the Directive on Investment Fund Managers introducing regulations for hedge funds, private equity funds and other alternative investment funds such as real estate funds, see: http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm.

68 U Das, Y Lu, C Mulder and ANR Sy, *Setting up a Sovereign Wealth Fund: Some policy and operational considerations*, IMF Working Paper Series No WP/09/179, 2009, www.imf.org/external/pubs/ft/wp/2009/wp09179.pdf.

It is inevitable it seems that SWFs will get bigger and become increasingly important vehicles for the recycling of global finance, namely, channelling capital from surplus (balance of payments) generating countries, to deficit countries. However, as one respondent stressed, their fundamental size, number, growth and scale will still depend at root on the corresponding size and trends in global macroeconomic imbalances themselves as their proximate cause. Exchange rate regimes, namely the prevalence or otherwise of dollar-type pegs and domestic inflation issues will also have an influence on their size, growth and number. Real and nominal rates of return on benchmark sovereign assets in the major advanced economies will also have an influence in as far as sovereign wealth portfolio shifts are affected. The public accumulation of assets by energy exporting countries is expected to continue if constraints on energy supply relative to demand remain, which does seem likely over the medium to longer term. Essential sovereign foreign exchange cash management requirements have already been met in most cases from earlier years' accumulated external surpluses, which suggests further/additional surpluses will increasingly shift to higher risk and return investment assets and their vehicles. It is highly likely that SWFs increasingly will be seen as favoured pools of available liquid capital. Continuing relatively low growth rates and subsequently low returns on investment capital can be expected in major advanced economies, so investment will be channelled increasingly into emerging markets and SWFs will be an important conduit in such processes.

In effect, recent months have seen a dramatic re-casting away from the pre-dominant philosophy that has driven financial markets development and their regulation in the last three decades, i.e. a commitment to free market ideology underpinned by light-touch regulation under the canvas of regulatory competition in order to attract increasing amounts of inward investment. Since 2008, liquidity in global markets has reduced significantly and concerns about sovereign debt have grown as appetite for risk has diminished globally. Interwoven with this, a new era of more proactive state-led investment capitalism is emerging with state-related pools of capital part of the key advance guard of this process. This drastic change has been driven by what the Australian Treasurer Wayne Swan has described as "spectacular regulatory failure" and he stresses the new prevailing international consensus that the state must be a more active investor in markets as well as a more active overseer of their design and regulation.[69] Mr Swan's comments are congruent with the views expressed by G8 leaders following their October 2008 summit meeting in the US,[70] and the Board of Governors of the IMF.[71] This is the new international financial environment and geo-political reality in which existing and future state-related pools of capital are likely to become increasingly proactive and influential, contributing to financial markets in Australia and around the world, beginning the road to economic recovery. As the GFC and its affiliated difficulties of economic management rumble on through 2010 and beyond, the dilemmas surrounding SWFs and their appropriate regulation typify many of the issues associated with financial regulation more generally in both national and international contexts.

Where should research efforts be directed on these issues? To gain some clues on this, Question 10 asked respondents what research projects about SWFs they would like to see. Overall, there was a desire for projects that had a value-added emphasis. Interesting suggestions included: how to align investment resources to notions of intergenerational

69 M Franklin, "Wayne Swan calls for new controls on free market", *The Australian*, 24 January 24.

70 IMF, "G8 leaders statement on the global economy", 2008 http://www.imf.org/external/np/cm/2008/101508a.htm.

71 IMF, *Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund*, 2008, www.imf.org/external/np/cm/2008/101108a.htm.

equity; how much liquidity is the *right* amount of liquidity; and how should SWF activities be aligned with the national budget? Looking at the need for increasingly sophisticated custodianship relationships and the corporate governance role played by SWFs, for example, what criteria should SWFs give to fund managers regarding voting policies, environmental risks or governance systems? Another respondent proposed that SWF investment patterns and decision-making be compared over time to other investment actors, especially in relation to why SWFs decide to invest and/or disinvest domestically or internationally. There should be increased comparative research between SWFs, for example: does it make a difference if an SWF is located in a large or small country, or commodity-funded SWFs in comparison to general trade-stimulated SWFs?

In response to Question 11, which asked those interviewed to project how SWFs might develop over five- and 10-year time spans, there was agreement that there would be increasing finance industry professionalisation within SWFs and they would become more like private equity actors. Some respondents felt that growth rates for SWFs would slow as recessionary influences in the global economy grew, especially if this pushed down commodity prices, in particular, oil. One national regulator in an SWF jurisdiction felt that there are good ways of recycling trade surpluses (including SWFs) and that indirectly SWFs will contribute to greater stability in the petroleum sector, as keeping oil in the ground becomes a more attractive option, this may be important for international debates about climate-change policy. One respondent interviewed in mid-2008 felt that the constant variable in relation to SWFs would be trade imbalances, with two key associated elements of i) oil price; and ii) the levels of China's economic policy openness allied with how much China's inward investment increases. They projected that oil price ranges would settle for the medium term at US$80–100 a barrel, but even at those lower prices there would be substantial accumulation by many SWF jurisdictions. However, prediction can be a fraught process, as one respondent remarked: "Measurement processes in capital markets are still something of an unknown dimension and subject to change and market sentiment. For example, the Nikkei Index was 40,000+ in 1989 and constituted 40 per cent of global equity capitalism – look at it now!"[72]

As several respondents noted, another important issue for SWFs is exchange rates. Some of those jurisdictions with managed exchange rate regimes use SWFs as a relief mechanism for surplus capital to avoid overheating in their domestic economy, so SWFs perform a sterilisation bonds function. If under conditions of increasing globalisation floating exchange rates became the norm across all SWF jurisdictions, how might this change SWF strategies and structures? This in turn has broader implications for the more general issue of likely increased levels of states becoming proactive investment actors, which may well include establishing their own SWFs. Many of the respondents commented that in the future there is likely to be increased overlap of the spectrums of activity between central banks and SWFs. This in turn has implications for the likely increasing synergy between national economic well-being and the health and vitality of international finance, which in turn endows increasing strategic significance upon multilateral regulatory activity *to keep the plates spinning as it were*. As the GFC has demonstrated so graphically in recent times, this raises a host of issues on non-economic areas, sprawling across social, political and cultural boundaries.

How proactive for the "public good" SWFs might become was discussed by a number of the respondents. Norway was often referred to as a "model" citizen in terms of how its

72 At the time of writing, 23 November 2010, the current level of the Nikkei Index is 10,115, http://e.nikkei.com/e/app/fr/market/nikkeiindex.aspx.

SWF, the Government Pension Fund Global (GPFG) operates and is regulated. Of particular interest is the role of the Council of Ethics for the fund. A member of that council explained that the Council of Ethics has a very limited mandate, eliminating the worst of what it sees as the "bad" companies (for example, Rio Tinto, Walmart, Freeport) from the Fund's investment portfolios (there are approximately 7000 companies in the pension fund's investment portfolio). The key criteria for the activities of the council are: law of human rights; law of armed conflict; corruption; environmental issues. On average the council works with about 80 companies whose identity is kept secret and only the excluded companies are named (about four or five in an average year). The council is appointed by the government and not the Ministry of Finance (so in theory there may be less chance of regulatory capture) and the ministry has to publicise the council's advice even if it disagrees with it. The value of the council lies in its capacity to leverage on reputational risk. The exclusion capacities of the council give leverage to the Norges Bank to influence the governance of companies in which it invests and so there is an important synergy between the council and the central bank.[73] It will be interesting to see in the future whether other jurisdictions equip their SWFs with this "institutionalised ethical leverage" in the way that Norway has done.[74] It is already being recognised at the highest levels of government and international organisations that SWFs could promote the development of social capital and the public interest. For example, speaking on ways to promote development in Africa in particular, World Bank President Robert B Zoellik has actively argued for what he calls his one per cent solution, whereby SWFs "invest 1 percent of their funds in Africa".[75] As one respondent noted, another potential public interest pathway for SWFs is to integrate into their investment decision-making the concept of social licence – under which large plants (funded through SWF investment) should buy local products so that there is mutual benefit for local communities and the foreign firms. If these socially positive and potentially transformative investment strategies come to be construed as economically rational by investment actors and subsequently ingrained in business practice, they may help to reduce risks of trade protectionism in the future.

So, how should one sum up the activities of SWFs to date and their likely future influence? One respondent (a national financial regulator) summarised in this way:

> On balance SWFs have been a positive. They are symptomatic of broader developments in cross-border investment. The increasing numbers of stakeholders in financial markets is a positive development. SWFs can be a force for geo-political stability and global inter-dependence, thereby acting as a mitigating factor regarding potential conflicts.

This view may well be borne out in the future. On the issue of the rise and rise of state capitalism, another respondent (a European banker) noted that it tends to be the US that defines what capitalism is or what it should be, especially about whether the state should be an investment actor. In a post-GFC world, as the twenty-first century progresses and the economic power of Asian countries in particular grow, market perceptions about appropriate levels of activity by the state as an investor in capital markets may well change.

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73 This notion is not as fanciful as might first appear because the GPFG has revealed that it holds around 1 per cent of the world's listed equities, so it is very much a player on global financial markets, see: Norges Bank, "Management of the Government Pension Fund Global", 18 May 2010, www.norges-bank.no/templates/article____76831.aspx.

74 See S Chesterman, "The turn to ethics: disinvestment from multinational corporations for human rights violations: the case of Norway's sovereign wealth fund" (2008) 23 *American University International Law Review* 577–615; C Ochoa and P Keenan, *The Human Rights Potential of Sovereign Wealth Funds,* Illinois Public Law Research Paper No 08-27, 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374880.

75 "Zoellick wants wealth funds to invest 1 per cent in Africa", World Bank, press review, 3 April 2008.

Much of the post-GFC global financial reform agenda has been about leverage and increasing the capability of jurisdictions to know what levels of investment and leverage are in their markets. In terms of SWF and other state-related pools of investment activity, there remains considerable ambiguity about their levels of investment but, in general, they tend to be less leveraged than many of their private sector counterparts and therefore less of a threat to market stability. However, the limited reach and impact of the GAPP post-Santiago illustrate that multilateral regulation of the financial sector will continue to be on the soft side of the soft law continuum. Any regulatory advances are likely to be in the area of increased cross-border surveillance rather than the production of binding agreements upon sovereign states.

Appendix: Questions used to guide the semi-structured interviews

TOPICS FOR DISCUSSION

"The implications for Australia of the growing influence of Sovereign Wealth Funds"

(Dr George Gilligan, Senior Research Fellow)

Q1 How would you evaluate the impact of Sovereign Wealth Funds over the last five years?

Q2 What has been the influence, if any, of Sovereign Wealth Funds upon your jurisdiction?

Q3 What has been the influence, if any, of Sovereign Wealth Funds upon your organisation?

Q4 Do you think the impacts of Sovereign Wealth Funds can be classified and measured, and if so, what measurement processes should be applied?

Q5 Do you think that the activities of Sovereign Wealth Funds have been presented in an overtly political way in the media?

Q6 Who, if anybody, should be responsible for the regulation of Sovereign Wealth Funds?

Q7 If Sovereign Wealth Funds should be regulated, are they regulated appropriately in your jurisdiction?

Q8 If Sovereign Wealth Funds should be regulated, are they regulated appropriately in international contexts?

Q9 What regulatory innovations, if any, should there be regarding Sovereign Wealth Funds?

Q10 What research projects, if any, would you like to see regarding Sovereign Wealth Funds?

Q11 How do you perceive Sovereign Wealth Funds developing during the following periods:

i) Five years;

ii) Ten years.

NILQ 61(4): 411–29

Human rights in the courts of Northern Ireland 2009-10

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It is now over a decade since the Human Rights Act 1998 came into force in Northern Ireland, thereby effectively making European Convention rights (the ECHR) part of domestic law. During that time innumerable cases have come before the courts raising not only Convention rights but also human rights deriving from other sources, including the common law. This article presents a flavour of current judicial approaches to human rights arguments in Northern Ireland by surveying all relevant decisions of the courts of Northern Ireland during the 2009–10 legal year.[1] It aims to convey a sense of not just the variety of claims dealt with but also the depth of treatment to which they were subjected by the judges. Northern Ireland is clearly a jurisdiction where human rights jurisprudence is a very live topic, one which is constantly developing and which requires lawyers and commentators to be always on the alert.[2]

The right to life

The extent to which the right to life is protected by law in Northern Ireland was at issue in no fewer than six cases, including one decided by the Court of Appeal. Three involved troubles-related deaths, two required examination of the law on threats, and one concerned the law on abortion.

Two of the troubles-related cases involved inquests. In *Re McCaughey and Quinn's Application*, the applicants challenged the rulings by the House of Lords in *Re McKerr*[3] that the Human Rights Act had no retrospective application and that the substantive and procedural aspects of Article 2 were not severable. They relied on the recent judgment of

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1 I.e. from September 2009 to August 2010. The survey does not include tribunal decisions.

2 For other relevant surveys see R McQuigg, "A 'very limited' effect or a 'seismic' impact? A study of the impact of the Human Rights Act 1998 on the courts of Northern Ireland" (2010) *Public Law* 551; B Dickson, "Northern Ireland", in A Lester, D Pannick and J Herberg (eds), *Human Rights Law and Practice* 3rd edn (London: LexisNexis 2009), ch. 6; B Dickson, "The impact of the Human Rights Act in Northern Ireland" in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition and Human Rights* (Oxford: OUP 2007), ch. 11.

3 [2004] 1 WLR 807.

the Grand Chamber of the European Court of Human Rights (ECtHR) in *Šilih* v *Slovenia*,[4] where the Court said:

> The procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference". . . In this sense it can be considered to be a *detachable obligation* arising out of Article 2 capable of binding the State even when the death took place before the critical date.[5]

The Grand Chamber's reasoning appears to contradict the House of Lords' finding in *McKerr* and the applicants argued that it should be preferred. Both Weatherup J[6] and, on appeal, the Court of Appeal[7] adopted the approach laid down by the Law Lords in *Kay* v *Lambeth LBC*, where they held that, unless there are exceptional circumstances, lower courts should follow the domestic precedent and then grant leave to appeal.[8] The Court of Appeal was particularly wary of the applicability of *Šilih* to the domestic sphere, because the United Kingdom had not been a party to the case, but it did note that it was "arguable, given the constructive dialogue engaged in by the highest court in the United Kingdom with the ECtHR, that the Supreme Court may choose to extend *Šilih* to our domestic law".[9] The Court of Appeal therefore granted leave to apply for judicial review on Article 2 grounds but, when it then proceeded to consider the judicial review, it held against the applicants on the merits. Shortly afterwards, however, it granted leave for the applicants to appeal to the Supreme Court, a bold move in view of the Supreme Court's growing desire to have complete control over its own docket.[10] The case will provide a further opportunity for that court to clarify how it views the function of the ECtHR with regard to Convention rights in a common law setting, a matter that has already elicited strong views from senior British judges.[11] The Attorney General for Northern Ireland, John Larkin QC, who will be an intervener in the Supreme Court case, has already intimated that he considers *Šilih* to have been wrongly decided.[12]

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4 (2009) 49 EHRR 37.

5 Ibid. para. 159 (emphasis added).

6 [2009] NIQB 77.

7 [2010] NICA 13.

8 [2006] 2 AC 465, paras 42–5 (per Lord Bingham). See too *Rush* v *Chief Constable of the Police Service of Northern Ireland* [2010] NIMaster 6, the third of the year's cases involving troubles-related deaths, where the applicant argued that the police and government had failed to take reasonable steps to protect the life of his wife (who was killed in the bombing of Omagh in August 1998) and to properly investigate her death. The Master struck out the claim after the parties accepted that in light of *McKerr* no challenge to a pre-2000 death could be sustained on the basis of Article 2.

9 [2010] NICA 13, para. 16 (per Deeny J).

10 Adverse comments about the readiness of the Court of Appeal of Northern Ireland to grant leave to appeal were made by the House of Lords in *McE* v *Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 2 WLR 782, para. 77 (per Lord Carswell).

11 See, e.g., the Supreme Court's ruling in *R* v *Horncastle* [2010] 2 WLR 47; Lord Hoffmann's comments in *Secretary of State for the Home Department* v *AF (No 3)* [2009] 3 WLR 74, para. 70; Lord Hoffmann's Judicial Studies Board Annual Lecture, "The universality of human rights", 19 March 2009, available at www.jsboard.co.uk/aboutus/annuallectures.htm; and Arden LJ's "Is the Convention ours?", an intervention made during an event to mark the start of the legal year in Strasbourg, 2010, available at www.echr.coe.int/NR/rdonlyres/9D841412-0F36-411B-ABEC-3517B0364A44/0/20100129_Speech_Lady_Arden_Seminar.pdf.

12 Speech at the Annual Conference of the Northern Ireland Human Rights Commission, Belfast, 16 September 2010 (on file with the authors).

The second decision on inquests was *Re Chief Constable of the PSNI's Application.*[13] The Senior Coroner had suggested that he may, following the ruling by the House of Lords in *Jordan* v *Lord Chancellor*,[14] re-open several inquests into the deaths of individuals killed during the troubles in Northern Ireland. He indicated that his final decision would depend on whether he was able to get access to the Stalker/Sampson reports, which are reports into allegations that the security forces in Northern Ireland conducted a "shoot-to-kill policy" in the 1980s. He said it was his intention to furnish "properly interested persons", such as the bereaved families, with copies of the reports so that they could participate effectively in the inquest proceedings.[15] The Chief Constable argued that the coroner had failed to consider the Article 2 rights of third parties who may be identified in the reports, but in rejecting the challenge Gillen J noted that "the Coroner must be invested with a wide-ranging discretion as to how he conducts his inquiry and a greater flexibility of approach than might be appropriate in other civil or criminal proceedings".[16] He added that the coroner had indicated his "readiness to accept redacted copies of the reports for dissemination to enable the applicant to make a public interest immunity request if the Coroner considers that those redacted areas are relevant to his inquiry".[17] For that reason, Gillen J held that here the Article 2 rights of third parties were "amply" protected.[18]

The year's two cases on threats each gave the judges an opportunity to affirm that the Article 2-based right to protection of life arises only if there is a "real and immediate risk" to the claimant's life. In *Re JR 20's (Firearms Certificate) Application*,[19] the applicant sought to challenge a decision by the Secretary of State to refuse his appeal against the revocation of his firearms certificate. He had previously been allowed to hold a firearm as a personal protection weapon but the police now believed that he had been involved with a proscribed organisation and in criminal activity. The applicant asserted that the revocation of his certificate violated his Article 2 right because the police had informed him on several occasions that threats had been made against his life. Weatherup J confirmed that Article 2 imposes a positive obligation on the state only where authorities "knew or ought to have known . . . of the existence of a real and immediate risk to the life of an identified individual"[20] and he relied on *Re Officer L*[21] to assert that the threshold for measuring that risk was high.[22] Here the available evidence did not establish such a risk. The judge added, *obiter*, that even if the threshold had been crossed it did not necessarily follow that the applicant should be issued with a personal protection weapon. Moreover, the applicant's private interest in disclosure of the information detailing his apparent association with a proscribed organisation had to yield to the public interest in protecting the source of that information.[23] This is reconcilable with the earlier ruling by the House of Lords (not cited in *Re JR 20's Application*) that a person who is the subject of a control order has to be given sufficient information about the allegations made against him or her to allow effective

13 [2010] NIQB 66.
14 [2007] 2 AC 226.
15 [2010] NIQB 66, para. 6 (per Gillen J).
16 Ibid. para. 25.
17 Ibid. para. 46.
18 Ibid.
19 [2010] NIQB 11.
20 *Osman* v *United Kingdom* (2000) 29 EHRR 245, para. 116.
21 [2007] 1 WLR 2135.
22 Ibid. para. 20.
23 Ibid. para. 31.

instructions to be given to a legal representative.[24] What was at stake in that case was a person's liberty, or at least freedom of movement, while what was at stake in *Re JR 20's Application* was only a person's right to possess a firearm: the former deserves to be told much more than the latter about the reasons for the administrative decision in question.

The second case on threats was *Re RA's Application*,[25] where the applicant sought to quash a ruling by a District Judge that a reporting restriction, imposed under the Contempt of Court Act 1981,[26] could not be extended. He wanted the court to consider, when assessing whether a restriction was "necessary for avoiding a substantial risk of prejudice to the administration of justice", the existence of a real and immediate risk to his life. The Divisional Court noted that pre- and post-Human Rights Act authorities indicated that the issue of risk should be excluded from the judges' examination as to whether a reporting restriction should be made,[27] since the main issue was the effect of the restriction on the administration of justice when viewed in light of the fundamental principle of open justice.[28] Nevertheless, the court also held that judges, as public authorities, were obliged to consider the applicant's Convention rights[29] and it cited with approval the comments of Lord Rodger in *In re Guardian News and Media Ltd*, where he indicated that a court could help protect a claimant by, for example, replacing his or her name with a letter or number.[30]

The nexus, if any, between Article 2 and abortion has long been controversial and it was again at issue in *Re Society for the Protection of Unborn Children's Application*.[31] The society was challenging guidance issued by a government department, which sought to clarify the law relating to abortion in Northern Ireland. It argued that the guidance failed to make reference to the interests of the unborn child, citing not just Article 2 of the ECHR but also Article 3 of the Universal Declaration of Human Rights (UDHR), the preamble to the UN Convention on the Rights of the Child (UNCRC), and the International Covenant on Civil and Political Rights (ICCPR). Girvan LJ was quick to confirm that the UDHR, the UNCRC and the ICCPR are unincorporated treaties and "cannot confer on the unborn child rights which do not exist under domestic law".[32] He also recognised that, in cases such as *Vo* v *France*[33] and *Paton* v *UK*,[34] the ECtHR "has not construed Article 2 as giving rise to rights vested in the unborn foetus"[35] but he noted that a case against Ireland was pending

24 *Secretary of State for the Home Dept* v *AF (No 3)* [2009] 3 WLR 74.

25 [2010] NIQB 27.

26 S. 4(2).

27 The court cited *Re Belfast Telegraph Newspapers Ltd Application* [1997] NI 309 and *In re Times Newspapers Ltd and another* [2009] 1 WLR 1015.

28 The court recognised that the principle of open justice was enshrined in both Article 6 of the ECHR and in the caselaw of the European Court, such as *Diennet* v *France* (1996) 21 EHRR 554.

29 [2010] NIQB 27, para. 27 (per Coghlin LJ). In reaching this conclusion the court drew upon recent pronouncements by the Supreme Court in *In re Guardian News and Media Ltd* [2010] 2 WLR 325, where Lord Rodger said (at para. 27) that "States are, of course, obliged by Articles 2 and 3 to have a structure of laws in place which will help to protect people from attacks on their lives . . . Therefore, the power of a court to make an anonymity order to protect a witness or party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of expression obviously has to yield."

30 [2010] 2 WLR 325, para. 28 (per Lord Rodger).

31 [2009] NIQB 92.

32 Ibid. para. 27. Girvan LJ made reference to *Re McCallion* [2009] NICA 55, which looked specifically at the effect of such unincorporated treaty provisions.

33 (2005) 40 EHRR 12.

34 (1981) 3 EHRR 408.

35 [2009] NIQB 92, para. 28.

at that court and that the decision there might well have implications for the conclusions he had reached.[36]

The right to liberty

In this field, five cases were decided. One was about the need for an oral hearing in a dispute about liberty, while the other four turned on whether there was a legal justification for the deprivation of liberty. Judgment in one other important case was still awaited at year's end.

The most significant judgment issued in relation to Article 5 was *Re Reilly's Application*,[37] where a man serving a life sentence (imposed automatically under the Powers of Criminal Courts (Sentencing) Act 2000 because he had been convicted of a second serious offence) complained that the Parole Board of Northern Ireland had refused to give him an oral hearing when it was considering whether to release him on licence. After referring to relevant English and European precedents, Treacy J ruled that not every person applying to the Parole Board is entitled to an oral hearing, but he went on to hold that the case before him could be distinguished from the House of Lords' decision in *R (West and Smith)* v *Parole Board*[38] because there the prisoner was serving a determinate sentence whereas here he was serving an indeterminate one. This meant that what was at stake for the applicant when he applied to the Parole Board was more significant. Decisions by the ECtHR showed that an oral hearing would be required in most, if not all, cases involving indeterminate sentences,[39] and the Parole Board could not argue that it would have made no difference to its decision if it had allowed the applicant an oral hearing because there was no way of knowing what impact new information might have had on its conclusions. Consequently, there had been a violation of Article 5(4) in this case, the provision that guarantees the right to a speedy court decision as to the lawfulness of a person's detention. There was an interesting follow-up a month later, when Treacy J ruled on what remedy Mr Reilly should be granted. The judge opted for an order of *certiorari* to quash the Parole Board's decision. He would not issue an order of *mandamus* because this would have had the effect of allowing Mr Reilly to jump the queue in the "serious backlog" of oral hearing cases. Nor was he prepared to award any compensation for the breach of Article 5(4), following two precedents of the English High Court.[40] The case is a good illustration of what a hollow success winning an application for judicial review can be.

In a further case involving the revocation of a life prisoner's release on licence, *Re Knight's Application*,[41] the position of one of the most notorious murderers of the Northern Ireland troubles was under consideration. Knight had been convicted in 1995 of murdering 12 people. Having served just over five years of his life imprisonment he was released under the terms of the Northern Ireland (Sentences) Act 1998, which was enacted to implement part of the Belfast (Good Friday) Agreement.[42] In 2009 he was convicted of disorderly behaviour and common assault on two sisters but before he was sentenced for those crimes his licence was suspended by the Secretary of State on the basis that he was a danger to the public and he was returned to prison. He argued that this was a breach of Article 5(1) of

36 The case is *A, B and C* v *Ireland* App. No 25579/05. It was heard by the Grand Chamber of the ECtHR on 9 December 2009. At the time of writing, judgment was expected before the end of 2010.

37 [2010] NIQB 46.

38 [2005] 1 WLR 350.

39 *Singh* v *UK* (1996) 22 EHRR 1; *Waite* v *UK* (2003) 36 EHRR 54.

40 *R (KB)* v *South London and South and West Region Mental Health Review Tribunal* [2004] 1 QB 936; *R (Degainis)* v *Secretary of State for Justice* [2010] EWHC 137 (Admin).

41 [2010] NIQB 30.

42 Strand 3, section headed "Prisoners", esp. paras 1 and 4.

the ECHR because there was no judicial authorisation for the detention. Treacy J rejected this argument, following the decision of the Court of Appeal of Northern Ireland in *Re Mullan's Application*.[43] The applicant's return to prison was "in pursuance of his [original] sentence" as authorised by s. 9(3) of the 1998 Act. There was therefore no violation of Article 5(1). This was undoubtedly a decision on the lawfulness of the detention, to which the applicant was entitled under Article 5(4) of the ECHR, but his lawyers did not, unfortunately, raise any challenge based on the fact that more than four months had elapsed since the detention had begun and Article 5(4) requires a "speedy" decision from a court. While it is obvious that there was a legal justification for the detention, Knight should surely have had this confirmed by a court decision much sooner. As the law currently stands, it seems that in the context of recalls to prison the requirement for a "speedy" decision is applied very loosely in Northern Ireland.

Re Gerard O'Neill's Application[44] required the High Court to decide if the transfer of a remand prisoner to police custody for questioning in relation to another offence had been conducted under the wrong piece of legislation and therefore constituted a breach of Article 5. The report indicates that it had not been entirely clear to the court why there were difficulties in using an alternative piece of legislation, but Weatherup J ruled that it did not make any difference which piece of legislation was used as far as Article 5 was concerned – each of them provided legal justification for the transfer. The point to bear in mind here is the important one that Article 5 requires states to adhere strictly to their own national laws on deprivation of liberty, even if those laws set standards that are higher than those on the face of the ECHR itself. If states do not do so, the European Court will rule that Article 5 has been violated.[45]

The Divisional Court had occasion to rely on Article 5 in two extradition cases, each involving Spain. In *Juana Chaos* v *Kingdom of Spain*,[46] a suspected Basque terrorist had failed to comply with bail conditions imposed on him during extradition proceedings. The Spanish government sought a court order revoking the man's bail but, remarkably, there was no statutory provision expressly authorising such an order and the court was reluctant to imply authority from legislation or to say that it was part of the court's inherent jurisdiction. To do either of those things would have been to fall foul of Article 5 of the ECHR, which requires detention to be "in accordance with a procedure prescribed by law". An implied statutory power, or a power based on inherent jurisdiction, would lack the essential qualities of accessibility and foreseeability.[47] The concept of "inherent jurisdiction" was described as "unpublished, undefined and unparticularised". The court went on to hold that there *was* statutory authority for the police to arrest the suspect for the offence of failing to surrender to custody while on bail,[48] but the judges are nevertheless to be commended for disallowing revocation of bail and surrender of the suspect directly to the court without express statutory authority to support such actions. The decision is further evidence of the way in which Convention rights have become embedded in judicial reasoning in Northern Ireland, a phenomenon that in turn is partly due to references to the ECHR being embedded in the statute book. The Extradition Act 2003 imposes a specific duty on judges, before authorising a person's extradition, to ensure that it would be compatible with Convention

43 [2008] NI 258.

44 [2010] NIQB 8.

45 See, e.g., R White and C Ovey, *The European Convention on Human Rights* 5th edn (Oxford: OUP 2010), at p. 216.

46 [2010] NIQB 68.

47 Ibid. paras 25 and 27.

48 Criminal Justice (NI) Order 2003, article 5(1). The suspect subsequently went on the run: *Belfast Telegraph*, 20 April 2010.

rights.[49] The point also arose in the second Divisional Court case, *Kingdom of Spain* v *Arteaga*,[50] where lawyers for the extraditee argued that he was being sought in connection with behaviour that was not criminal at the time it was committed, in breach of Article 7 of the ECHR. In the end the court approved the extraditee's discharge on the separate ground that there was a lack of specificity in the accusations being made against him. That too could be seen as a failure to meet the requirement to act "in accordance with a procedure prescribed by law".

Throughout the year observers eagerly awaited the judgment of the Divisional Court in *Re Duffy's Application*, where the issue is whether Part III of Schedule 8 to the Terrorism Act 2000, which regulates the extension of detention periods for persons reasonably suspected of involvement in terrorism, is wholly compatible with Article 5 of the ECHR.[51] This is obviously a very important question, not just from a human rights point of view but also a political one, as the length of permissible detention periods in terrorist cases has long been a subject of heated debate in UK parliamentary and media circles. The core conundrum is whether the grounds that Part III requires to be satisfied before an extension to detention can be granted are thorough enough to ensure that the procedure is "lawful" in light of the standards set by the ECtHR. Another provision in the Terrorism Act is also relevant, as it states that a detained person "shall be deemed to be in legal custody throughout the period of his detention".[52] On the face of it, this seems hard to reconcile with Article 5(4) of the Convention, which guarantees to a detainee the right to "take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". It is not entirely satisfactory that the Divisional Court has taken so long to issue its final judgment in this case, given that the matter was heard by the court in September 2009. Ironically, during the course of the year the Court of Appeal had cause to upbraid a lower court for being slow to deliver a judgment (the delay was three-and-a-half years in that instance!).[53] In doing so it cited the recent ruling by the ECtHR in *Anderson* v *UK*,[54] which the Court of Appeal said "highlights the need for all courts to be vigilant to the need to manage their case load efficiently, not least at the decision making stage".

The right to a fair trial

Article 6 of the ECHR applies only in situations where a determination is being made of a person's civil rights and obligations or of a criminal charge against him or her. In 2009–10 there were four decisions on whether the applicant's "civil rights" had indeed been engaged, and a number of other decisions (both criminal and civil) on whether, given that Article 6 was engaged, its requirements had been violated.

Re JR 26's Application[55] concerned a long-serving police officer who was transferred to other duties in the Police Service of Northern Ireland because his superiors had received

49 S. 21.

50 [2010] NIQB 23.

51 The Divisional Court has already held in the same case that a period of detention can be extended only if the judge deciding that matter also rules that the arrest of the detainee was lawful in the first place: [2009] NIQB 31. For further commentary, see B Dickson, "Article 5 of the ECHR and 28-day detention of terrorist suspects" (2009) 60 *NILQ* 231.

52 Sch. 8, Part I, para. 5.

53 *Laverty* v *Dept of the Environment for Northern Ireland* [2010] NICA 10, para. 11 (per Girvan LJ).

54 App. No 19859/04 (9 February 2010). The European Court found a violation of Article 6(1) because of delays in the Court of Session in dealing with the applicant's case against a commercial property company and Glasgow City Council alleging that statutory notices in respect of his property were invalid on grounds of fraud and illegal conspiracy.

55 [2009] NIQB 101.

several intelligence reports that he was engaged in illegal drug activity. The main question was whether this was the kind of decision that was even amenable to judicial review, and Weatherup J held that it was not. He followed the test applied by the Court of Appeal of England and Wales in *R (Tucker)* v *Director General of the National Crime Squad*,[56] which said that if a decision taken in relation to a police officer involved no disciplinary element then it was a purely operational decision, "a run of the mill management decision involving deployment of staff or the running of the force".[57] Article 6 was not therefore engaged. The judge added, *obiter*, that even if the decision in this case was justiciable there was no unfairness on the facts because the applicant had been supplied with the gist of the available information relied upon for the decision. In a subsequent case concerning a challenge to a decision by the Nursing and Midwifery Council to strike off a nurse for professional misconduct, the council accepted that the applicant's Article 6 rights were engaged and Treacy J endorsed that.[58] But he went on to rule that the applicant had forfeited her Article 6 right to be present at the disciplinary hearing because she had in fact elected not to attend.

The Court of Appeal upheld another decision by Treacy J in relation to the non-applicability of Article 6. The applicant was a woman whose UK passport had been withdrawn because it appeared that she was not, after all, entitled to British citizenship.[59] It seems that, if she had been entitled to citizenship, the withdrawal of her passport would have been judicially reviewable. But as the applicant admitted that she was not entitled to British citizenship – because she was not in fact the daughter of a British man – she could not be considered as being deprived of something she never had.[60] The argument that she was a putative British citizen, and therefore entitled to have her Article 6 and 8 rights considered, was rejected. The view of Treacy J, in the court below, that Article 6 rights cannot be relied upon by someone who is denied entry into, or permission to stay within, a country, citing *Maaoui* v *France*,[61] was impliedly approved.

Access to legal representation was at issue in *Re AB's Application*,[62] where a young man was requested to attend a disciplinary investigation meeting at his place of employment. He was allowed to be accompanied by an appropriate work colleague or an accredited trade union representative, but not by a legal representative. Treacy J held, in line with European and English authorities,[63] that Article 6 does not guarantee a right to such representation unless the applicant's right to practise his or her profession is at stake. The risk of losing a job is not itself sufficient to trigger the right in an employment context. The judge helpfully pointed out, however, that because the young man in this case was of limited intellectual capacity, his employers, a district council, might want to make a reasonable adjustment in his favour under the Disability Discrimination (NI) Order 2006.[64]

The exact moment at which Article 6 rights become available to someone who is suspected of a criminal offence, and the extent of the protection then granted, have been issues of some contention for many years. In *Re Arthurs' Application* they were explored in

56 [2003] EWCA Civ 57, [2003] ICR 599.

57 [2009] NIQB 101, para. 16.

58 *Re Colton's Application* [2010] NIQB 28, para. 28 and [2010] NIQB 42, paras 6 and 16.

59 *Re Burnett's Application* [2010] NICA 2.

60 The court relied on a decision by the Immigration Appeal Tribunal in England for this proposition: *Christodoulidou* v *Secretary of State for the Home Dept* [1985] Imm AR 179.

61 (2001) 33 EHRR 42.

62 [2010] NIQB 19.

63 *Le Compte* v *Belgium* (1982) 4 EHRR 1; *Kulkarni* v *Milton Keynes Hospital NHS Foundation Trust* [2009] EWCA Civ 689.

64 [2010] NIQB 19, para. 28.

relation to a decision by the Director of Public Prosecutions (DPP) in Northern Ireland to proceed with the trial of two people charged with serious offences of dishonesty in the absence of a jury.[65] He did so under the Justice and Security (NI) Act 2007, which allows for trial without a jury if certain conditions have been met.[66] These provisions replaced those governing the use of "Diplock Courts", which had been in place since 1973. Many had hoped that the peace process in Northern Ireland would have been far enough advanced by 2007 to allow for non-jury trials to be dispensed with altogether, but sadly that was not the case, given the level of residual "dissident" paramilitary activity in Northern Ireland. The 2007 Act differs from its predecessors in that it effectively establishes a presumption in favour of jury trial and requires the DPP to issue a certificate if he or she suspects that one or more of the conditions allowing for non-jury trial has been met. However, it then severely limits the grounds upon which such a certificate can be challenged. It allows for challenges only on the basis of "dishonesty, bad faith or other exceptional circumstances".[67] The applicants in *Re Arthurs' Application* sought judicial review of a certificate, alleging that it was "substantively flawed, procedurally unfair and contrary to Article 6".[68]

The Divisional Court, in a judgment delivered by Girvan LJ, rejected the applicants' challenge, concluding that the wording of the legislation was clear and that a decision as to whether a defendant should be tried with or without a jury was not one that even engaged Article 6.[69] It followed its own earlier decision in *Re Shuker's Application*.[70] The court considered the apparently contrasting views expressed by Lord Judge LCJ in *R* v *T*,[71] where the Court of Appeal of England and Wales gave guidance on the proper approach to another statutory provision (also applicable in Northern Ireland) concerning the discharge of a jury when jury tampering has allegedly occurred.[72] But the court in Belfast was able to reconcile its position with that guidance because in the case before it there was express statutory language requiring it to reject the challenge to the DPP's certificate. Later in the year Lord Judge very strongly reiterated his view that jury trial should be withdrawn only in extreme cases and as a last resort.[73] But even he would have to admit that the wording of the 2007 Act in Northern Ireland is (unfortunately) sufficiently different from that of the 2003 Act as to require a less strict approach. The 2003 Act was considered in a further Northern Ireland case during the year, *Re Clarke's Application*,[74] where McCloskey J meticulously analysed the provisions concerning jury-tampering.[75] On the facts (which concerned a so-called "tiger-kidnapping")[76] the judge was satisfied that tampering had indeed occurred and that there would be no unfairness to either defendant in continuing the

65 [2010] NIQB 75.

66 Ss. 1–9.

67 S. 7. When first presented to Parliament this provision had been worded in an even more draconian way (freeing it from having to comply with the Human Rights Act!), but it was amended after protests from, amongst others, Parliament's Joint Committee on Human Rights and the House of Lords' Select Committee on the Constitution.

68 [2010] NIQB 75, para. 19.

69 Ibid. para. 29.

70 [2004] NI 367.

71 [2009] 3 All ER 1002.

72 Criminal Justice Act 2003, s. 7.

73 *R* v *KS* [2010] EWCA Crim 1756; *R* v *J, S and M* [2010] EWCA Crim 1755.

74 [2010] NICC 7. The Court of Appeal later dismissed an appeal from this decision (unreported).

75 In particular, s. 46(3).

76 Where one or more persons is held captive while a family member or friend is forced to assist the criminals in committing a crime.

trial without a jury. Like the court in *Re Arthurs' Application*, he drew upon the words of Lord Judge LCJ in *R* v *T*[77] (while reminding us that decisions of the Court of Appeal in England and Wales are only persuasive, not binding, authorities in Northern Ireland).[78] Lord Judge had intimated that a judge should usually continue the trial without the jury rather than terminating it and allowing a retrial to occur.[79] This was because there would be huge inconvenience and expense involved in a retrial and a continuation of the trial would reduce any possible advantage accruing to those responsible for jury tampering. Later in the year, McCloskey J convicted the two defendants in this case, drawing adverse inferences from their silence on certain matters;[80] he did so after noting that this too was not incompatible with the ECHR.[81]

In *R* v *McAnespie*,[82] Coghlin LJ declared admissible statements made by witnesses who were too frightened to give evidence in person. In doing so he preferred to follow a persuasive authority of the Court of Appeal of England and Wales[83] rather than what appeared to be a conflicting decision by the ECtHR in *Khawaja* v *United Kingdom*.[84] This was the legally correct way to proceed (as already noted),[85] and it also proved prophetic, for when the Supreme Court later decided *R* v *Horncastle* it enthusiastically endorsed the Court of Appeal's position and went out of its way to include an annex to the judgments[86] that was intended to inform the Grand Chamber of the ECtHR (to which Al-Khawaja had meanwhile been referred) of how English common law was not, in the eyes of senior UK judges, incompatible with the Convention in this field.[87]

In recent years several convictions dating from the 1970s to 1990s in Northern Ireland have been quashed by the Court of Appeal on the basis that, in the light of evidence about police brutality, or failure to tell the truth, or failure to allow legal advice to be made available to suspects during police interrogations, the convictions were unsafe. A notable success during the past year was the appeal brought by Christopher Walsh, who in 1992 had been sentenced to 14 years' imprisonment for possession of a coffee jar bomb.[88] He had twice before lost an appeal in the Court of Appeal. But it is clear that not all victims of these miscarriages of justice are entitled to compensation. In *Re MacDermott's Application*,[89] the Court of Appeal confirmed its own previous ruling[90] that under the relevant statutory

77 [2009] 3 All ER 1002.

78 [2010] NICC 7, para. 20.

79 [2009] 3 All ER 1002, para. 20.

80 [2010] NICC 13.

81 Ibid. para. 53, citing *Averill* v *UK* (2001) 31 EHRR 36. The same judge reassured himself that he was not acting incompatibly with the ECHR in a case concerning the admissibility of bad character evidence (and when sentencing the accused for murder): *R* v *Cruickshank and McEleney* [2010] NICC 69 and 78. Coghlin LJ did likewise in a case where two men were prosecuted in 2007 for a murder carried out in 1981: *R* v *McAnespie* [2009] NICC 61. See also (on the same point about sentencing for murder) *R* v *Meehan* [2010] NICC 59, para. 16 (per McCloskey J).

82 [2009] NICC 62.

83 *R* v *Horncastle* [2009] EWCA Crim 964.

84 (2009) 49 EHRR 1.

85 See the text at n. 8 above.

86 Annex 4 (compiled by Lord Judge LCJ). It runs to 96 paras.

87 *R* v *Horncastle* [2010] 2 WLR 47.

88 [2010] NICA 7.

89 [2010] NICA 3.

90 In *Re Boyle's Application* [2008] NICA 35.

provision,[91] which was intended to give effect to a requirement of the UN's ICCPR,[92] compensation was payable only to people who could demonstrate that they were innocent or that they *should not* have been convicted.[93] The latter category does not include people who can only demonstrate that they *might not* have been convicted. Such people are left to their remedies under the law of tort, but of course such remedies are extremely difficult to obtain so long after the events have occurred. The case for an *ex gratia* payment on the part of the state is surely very strong in such cases.[94]

There was a reminder during the year, in *Quinn* v *McAleenan*,[95] that Article 6 is not incompatible with the grant of a civil judgment in default of defence. The consideration of this matter (on appeal from a District Judge in a county court) was conducted on the papers alone, without a hearing. As this appellate procedure was adopted with the consent of the parties,[96] it too was ruled not to be incompatible with Article 6.[97]

The right to a private and family life

In recent years, the rights protected by Article 8 of the Convention have been interpreted widely by the ECtHR.[98] This is reflected in the very differing contexts in which Article 8 challenges arose in Northern Ireland's courts during 2009–10. They ranged from environmental planning, through misuse of private information, to family relationships and the treatment of prisoners.

Re Boswell's Application[99] was concerned with a judicial review of a refusal to grant planning permission within a green belt area to an Irish traveller family. The applicant argued that the Planning Appeals Commission had failed to properly consider the evidence that there was no alternative available to the family other than the proposed site and that it had not given special consideration to the specific needs and vulnerability of travellers. Weatherup J noted, in accordance with *Chapman* v *UK*,[100] that states have a positive obligation to "facilitate the Gypsy way of life",[101] but he found that the planning framework in Northern Ireland did provide for special consideration of traveller needs and their different lifestyles.[102] However, he also found that the suitability of alternative accommodation had not been taken into account and so the positive obligation had not been fully discharged.[103] That aspect was remitted to the Commission for reconsideration.

91 Criminal Justice Act 1988, s. 133. The right to compensation for a wrongful conviction is set out in Article 3 of Protocol 7 to the European Convention, but the UK (unlike Ireland) has not ratified that Protocol.

92 Article 14(6).

93 [2010] NICA 3, para. 12. In the leading House of Lords' authority on this point, *R (Mullen)* v *Secretary of State for the Home Dept* [2004] UKHL 18, [2005] 1 AC 1, Lord Steyn would have restricted compensation to people who could show that they were clearly innocent.

94 See the then Home Secretary's statement to Parliament in 1985 (HC Debs, 29 November, vol. 87, cols 691–2), discussed by the House of Lords in *In re McFarland* [2004] UKHL 17, [2004] NI 380.

95 [2010] NIQB 31.

96 [2010] NIQB 31, para. 2 (per Gillen J), following *Kerr* v *Ulsterbus Ltd* [2010] NIQB 2.

97 In *Re McCafferty's Application* [2009] NICA 59, the Court of Appeal rejected the argument that a decision to revoke a convicted person's release on licence could not be taken by a minister who also had responsibility for security: he could not be considered a biased individual either under the common law or under Article 6.

98 D Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* 2nd edn (Oxford: OUP 2009), pp. 363–81.

99 [2009] NIQB 95.

100 (2001) 33 EHRR 18.

101 Ibid. para. 96.

102 [2009] NIQB 95, para. 18.

103 Ibid. para. 26.

In *Ewing* v *Times Newspapers Ltd*,[104] the High Court had to consider Article 8 within the developing parameters of the newly titled tort of "misuse of private information".[105] The claimant had issued proceedings alleging that the defendant had breached his right to privacy or confidentiality by publishing a number of items of personal information. The defendant made an application to have the claim struck out on the grounds that it did not reveal any reasonable cause of action. After examining some of the recent English authorities pertaining to Article 8 and privacy, such as *Campbell* v *MGN Ltd*[106] and *McKennitt* v *Ash*,[107] Coghlin LJ confirmed that the first limb of the newly formed tort was to identify whether the subject in question had an objectively reasonable expectation of privacy in relation to information or material that was central to the proceedings. Coghlin LJ then ruled, again in line with English authorities,[108] that if there was a reasonable expectation of privacy one had to balance "the claimant's interest in keeping the information private against the countervailing interests of the recipient in publishing it",[109] in other words the recipient's Article 10 rights.[110] On the facts of this case, Coghlin LJ was not persuaded that the claimant had any realistic prospect of demonstrating a reasonable expectation of privacy in respect of any of the pertinent information, because the information in question was either of a trivial nature or already in the public domain.[111] Even if he was wrong in this, he held that, as the information related to wrongdoing, "no reasonable court approaching the balancing exercise in a proportionate a manner could do other than give precedence to the defendant's Article 10 rights".[112] The claim was therefore struck out.

The tort of misuse of private information was also discussed in *McGaughey* v *Sunday Newspapers Ltd*,[113] during the course of which McCloskey J clarified that the purpose of damages in privacy proceedings is to provide the plaintiff with "fair and reasonable compensation for any proven injury to his feelings and mental distress".[114] This is a significant pronouncement, as there had previously been much discussion about the nature of damages in privacy actions.[115]

The High Court had cause to revisit Article 8 in *Re Success's Application*,[116] a challenge by way of judicial review to a decision of the UK Border Agency. The agency had rejected an application to revoke both a deportation order and a later certificate,[117] saying that

104 [2010] NIQB 7.

105 *Campbell* v *MGN Ltd* [2004] 2 AC 457, at para. 51 (per Lord Hoffmann).

106 [2004] 2 AC 457.

107 [2005] EWHC 3003.

108 The judge made specific reference to Buxton LJ in *McKennitt* v *Ash*, ibid. para. 11. See too *Max Mosley* v *News Group Newspapers Ltd* [2008] EWHC 1777 and *David Murray* v *Express Newspapers plc and Big Pictures (UK) Ltd* [2008] 3 WLR 1360 (CA).

109 [2010] NIQB 7, para. 19.

110 In *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para. 11, Lord Steyn indicated that there are four stages to any balancing act between Articles 8 and 10. He stated that those stages are "first, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

111 [2010] NIQB 7, para. 28.

112 Ibid. para. 30.

113 [2010] NICh 7.

114 Ibid. para. 16.

115 See, e.g., the judgment of Eady J in *Max Mosley* v *News Group Newspapers Ltd* [2008] EWHC 1777, paras 185–97 and 212–31.

116 [2010] NIQB 35.

117 Issued under the Nationality Immigration and Asylum Act 2002, s. 96(1).

matters raised by the applicant in relation to his Article 8 right to a family life could have been raised on a first appeal from a former decision but were not. Weatherup J found that the immigration judge and the review judge had not taken into account the continuing family relationship between the applicant, his partner and their child. He therefore ruled that "the ongoing relationship with the applicant's partner was not decided upon under the old decision".[118] This meant that he could set the certificate aside. He also made some *obiter* comments regarding the application of Article 8 within the context of deportation, noting that contact proceedings "may provide a ground for consideration of the right to family life under Article 8 as removal from the jurisdiction could interfere with the ability to advance the contact claim".[119] This illustrates the multifaceted nature of Article 8 rights in deportation proceedings and highlights the overlap with access to court rights under Article 6.[120]

Article 8 was also referred to several times in family proceedings. In *Re L (Removal from the Jurisdiction – Holiday)*,[121] Stephens J was faced with an application to remove children who were subject to a residence order[122] from the jurisdiction for the purposes of a holiday. The judge noted that the application engaged all of the actors' Article 8 rights and so in reaching his conclusions he had specific regard to those. In *G and D (Risk of forced marriage: Forced marriage protection order)*[123] the High Court was asked to make a forced marriage protection order under the Forced Marriage (Civil Protection) Act 2007.[124] It is obvious that such an order has the potential to have a detrimental impact on a number of persons' Article 8 rights. Stephens J therefore indicated that any proposed order would need to be justified in accordance with the requirements of Article 8(2). On the facts he held that an order was a proportionate response. In *McK* v *McK*,[125] Master Redpath applied *R* v *Qureshi*[126] when holding that, when an assets recovery order is made against one spouse, the Article 8 rights of the other spouse are not abrogated and so have to be given express consideration before any further order is made.

In a further family law case, arguments based on the EU's Charter of Fundamental Rights, rather than the ECHR, were raised. *Re Jakub and Dawid*[127] was an appeal by the mother of two children against the registration and enforcement of an order made by a Polish court granting residence rights to her husband, the father of the children. The mother contended that the views of the children, who did not wish to go to Poland, should be taken into account in accordance with their age and maturity, relying on Article 24(1) of the

118 [2009] NIQB 35, para. 17.

119 Ibid. para. 9.

120 Arguably Weatherup J's observations about the applicant's ability to advance a contact claim are representative of the growing importance of the right of access to a court. In recent years, this right has attained the status of a "constitutional right" and the courts have attached more significance to it. See R Clayton and H Tomlinson, *Fair Trial Rights* (Oxford: OUP 2009), paras 11.44–122.

121 [2009] NIFam 21.

122 Under the Children (NI) Order 1995, article 8. Article 13 provides that, when a child is subject to a residence order, he or she must not be removed from the jurisdiction unless the person wishing to remove the child has obtained either the consent of all those who are endowed with parental responsibility or leave of the court.

123 [2010] NIFam 6.

124 Sch. 1, Part 1.

125 [2009] NIMaster 76.

126 [2005] 1 WLR 122.

127 [2009] NIFam 23.

Charter[128] and the Preamble to "Brussels II Revised",[129] both of which provide protection to the rights of the child. On the facts, Stephens J felt that the order of the Polish court was in the best interests of the children, and in reaching that conclusion he took their views into account.[130] Even though the United Kingdom negotiated an opt-out from the enforceability of the EU Charter in domestic courts, through a Protocol to the Treaty of Lisbon in 2009, the exact import of that opt-out has still to be clarified by the courts.[131]

Article 8 issues were also raised in several cases involving prisoners. In *Re Craig's Application*,[132] the applicant sought judicial review of a Prison Service policy on the passing of money to and from prisoners.[133] He argued that his Article 8 rights were being unlawfully and disproportionately interfered with in that he was being prevented from passing on to his daughter money he had earned in prison.[134] But Stephens J held that the policy and the decisions based on it did have an adequate legal foundation[135] and on the proportionality point he accepted that the Prison Service had "carefully balanced the considerations that lie at the heart of the policy".[136] He highlighted recent comments by Northern Ireland's Lord Chief Justice, Sir Declan Morgan, in *Re Phillips' Application*, where he indicated that a considerable degree of weight should be given to the evaluations of the Prison Service in light of their "particular insights" into prison issues.[137] The judge also dismissed the applicant's argument based on the European Prison Rules by holding that the "spirit and intent" of the rules had informed the Article 8 duty on the respondent during the formulation and promulgation of the policy and also during the making of the governor's decisions.[138] The governor had taken into account the availability of other schemes that allowed the applicant to provide for his daughter.

In *Re Barron's Application*,[139] the applicant sought leave to judicially review both the policy and the decisions of the Prison Service in relation to strip searches. It was alleged, amongst other things, that the policies and practices violated the applicant's rights under Articles 3 and 8. But Treacy J refused leave on the ground that the matter was more suitably disposed of in tort proceedings.[140] In *Re McAree's and Watson's Application*,[141] the applicants challenged the Prison Service's decision to transfer them to the Harm Reduction Unit

128 "Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity."

129 This is actually Council Regulation (EC) No 2201/2003 (27 November 2003). Para. 33 of its Preamble states: "This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union."

130 [2009] NIFam 23, para. 45.

131 See *R (Saeedi)* v *Secretary of State for the Home Dept* [2010] EWHC 705 (Admin), which the Court of Appeal has since referred to Luxembourg for a preliminary ruling from the European Court of Justice.

132 [2009] NIQB 45.

133 The policy is contained in a Prison Service document entitled "Inmate's personal cash accounts".

134 The applicant also sought to rely on Article 1 of Protocol 1. However, the parties accepted that, in light of the conclusions of the House of Lords in *Belfast City Council* v *Miss Behavin' Ltd* [2007] 1 WLR 1420, the arguments based on this provision added nothing to the challenge based on Article 8.

135 Namely, the Prisons and Young Offenders Centre Rules (NI) 1995, r. 18.

136 [2010] NIQB 45, para. 32.

137 [2009] NIQB 64, para. 13.

138 [2010] NIQB 45, para. 35.

139 [2010] NIQB 21.

140 In which case the ECtHR's decision in *Wainwright* v *UK* (2007) 44 EHRR 809 will no doubt be relied upon.

141 [2010] NIQB 79.

(HRU) of Magilligan Prison. Both relied on Article 6 (and largely succeeded on that ground because of the lack of information they had been given about the grounds for their transfer) but the first applicant also cited Article 8, Article 9 and Article 2 of Protocol 1 (the right to education). Treacy J found no breach of Article 8 or of Article 2 of Protocol 1, and as regards Article 9 he held that the applicant had been placed in the HRU for the legitimate purpose of maintaining order and discipline within the prison.

In *Re Maguire's Application*,[142] a decision of the Prison Service not to give assurances to the applicant that he would not be subjected to covert surveillance during his prison visits was judicially reviewed. The applicant also sought a declaration that a statutory code of conduct and a prison rule were incompatible with Article 8.[143] He argued that the code did not contain the minimum safeguards required by the ECHR, being neither "in accordance with the law" nor "necessary". The issues were not directly addressed in this initial judgment, which focused on confirming that the High Court, rather the Investigatory Powers Tribunal, had jurisdiction to hear the matter. The Article 8 arguments will doubtless be aired more fully in later proceedings.

The applicants in *Re McNamee and McDonnell*[144] were a firm of solicitors who sought to question a decision by the police not to allow an arrested person, who had been detained on suspicion of fraud and money laundering, access to a solicitor from the applicants' firm. This decision had been made as a result of the belief that a conflict of interest might arise because of the firm's involvement with the arrested person's transactions. McCloskey J granted leave to pursue a judicial review on the basis that Article 8 and Article 1 of Protocol 1 of the ECHR may have been breached.

Probably the oddest case raising Article 8 during the year was *Re Carter's Application*,[145] where Treacy J refused leave to judicially review the Smoking (NI) Order 2006. The applicant had argued that the order and his conviction under it were incompatible with his rights under Articles 3, 8 and 14, but the judge, citing the English Court of Appeal in *R(G)* v *Nottingham Health Care Trust*,[146] noted that there was "no unfettered right to smoke provided by the Convention". The "limited prohibition" placed on the applicant did not violate any of his Convention rights.[147]

The right to freedom of expression

Both privacy and libel proceedings raised Article 10 issues during the year, as already indicated in the discussion of *Ewing* v *Times Newspapers Ltd*.[148] In the high-profile libel action of *Allister* v *Paisley*,[149] which involved two well-known local politicians, Gillen J was faced with an application for an interlocutory injunction aimed at restraining both publication and distribution of allegedly defamatory statements contained in an election leaflet. The judge observed that it has long been recognised that such injunctions should be granted only in exceptional circumstances,[150] a reflection of the importance attached to the

142 [2010] NIQB 18 (Treacy J).

143 The code was issued under the Regulation of Investigatory Powers Act 2000, s. 71; the rule was the Prisons and Young Offenders Centre Rules (NI) 1995, r. 67(8).

144 [2010] NIQB 29.

145 [2010] NIQB 69.

146 [2008] HRLR 42.

147 [2010] NIQB 69, para. 13.

148 See the text at n. 104 above.

149 [2010] NIQB 48.

150 See *Coulson* v *Coulson* (1887) 3 TLR 846 and *Bonnard* v *Perryman* (1891) 2 Ch 269.

right of free speech by the common law, now underpinned by Article 10.[151] Gillen J then moved to examine the procedural requirements imposed by s. 12 of the Human Rights Act 1998, which provides, amongst other things, that "no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed".[152] This provision had been interpreted by the House of Lords in *Cream Holdings Ltd* v *Banerjee*,[153] where it was held that courts will "be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (more likely than not) succeed at trial".[154] In applying this approach Gillen J stated that "the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".[155] He added that this was particularly true in cases involving political speech at times of an election.[156] With this in mind, the judge found that, as it had not been proven that the statements were defamatory or that there were no defences open to the defendants, this was not an exceptional case warranting the granting of an interlocutory injunction.

In *McDonnell (t/a Microclean Environmental)* v *Adair*,[157] the plaintiff was appealing against an order of a Master striking out his libel claim on the grounds of abuse of process. In denying relief McCloskey J relied heavily on the English Court of Appeal's decision in *Jameel* v *Dow Jones & Co Inc.*,[158] where Lord Phillips MR asserted that, as public authorities, courts were under a statutory duty[159] "to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so",[160] and where he added that, in defamation proceedings:

> keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must . . . require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.[161]

Not to stop the proceedings could constitute an unnecessary interference with freedom of expression.[162] Dismissing a libel action on this basis does not constitute a breach of the plaintiff's Article 6 rights, because Article 6 does not require "the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial".[163] Applying this test, McCloskey J held that the facts before him did "not give rise to a real and substantial tort".[164] There had only been limited

151 [2010] NIQB 48, paras 15–16.

152 S. 12(3).

153 [2005] 1 AC 253.

154 Ibid. para. 22 (per Lord Nicholls). The House of Lords also said that this approach was to be applied pragmatically: depending on the factual matrix of the case at hand "it may be necessary for the court to depart from this general approach and a lesser degree of likelihood will suffice" (ibid.). For an example of the application of the House's reasoning see *John* v *Associated Newspapers Ltd* [2006] EMLR 27.

155 [2010] NIQB 48, para. 23.

156 In this respect the judge cited the case of *Bowman* v *UK* (1998) 26 EHRR 1.

157 [2009] NIQB 93.

158 [2005] QB 946.

159 Imposed by the Human Rights Act 1998, s. 6.

160 [2005] QB 946, para. 55.

161 Ibid.

162 Ibid. para. 40.

163 Ibid. para. 71.

164 [2009] NIQB 93, para. 28.

publication and what publication there had been had not made the recipients think less of the plaintiff.

The prohibition of discrimination

As is to be expected, claims of discrimination tended to arise as adjuncts to claims that other Convention rights had been violated. Those other rights were the right to property, the right to liberty and the right to a fair trial.[165]

The most prominent Article 14 judgment of the year was undoubtedly *Re Morrison's Application*,[166] which concerned a challenge to the lawfulness of the Police Service and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006. These sought to limit eligibility for benefits to "a surviving spouse or surviving civil partner of a police officer who dies or has died as a result of an injury . . . in the execution of duty".[167] The applicant, whose partner had been killed during the execution of his duty, challenged the regulations on the ground that they discriminated against her as an unmarried partner, in violation of Article 14 taken in conjunction with Article 1 of Protocol 1. In finding for the applicant, Treacy J embarked upon a detailed examination of the recent European and domestic case law pertaining to Article 14. He readily accepted that authorities showed that the claim was within the "ambit" of Article 1 of Protocol 1,[168] notwithstanding that the benefits in question did not arise under a contributory scheme.[169]

The judge then held, following a recent decision by the House of Lords in an appeal from Northern Ireland,[170] that being unmarried could be a "status" for the purposes of Article 14. On whether there was a valid comparator he acknowledged that there have been instances when the ECtHR has dismissed applications because the applicant was unable to identify a suitable comparator,[171] but he said those cases had to be viewed in light of the recent comments of Baroness Hale in *AL (Serbia)* v *Secretary of State for the Home Department* to the effect that it was rare for the ECtHR to find that the chosen comparator was not in a relevantly analogous position.[172] Baroness Hale had approved an approach that glosses over the comparability test and focuses instead on the justification test, that is, on whether the reasons for the difference in treatment amount to an objective and reasonable justification.[173] Treacy J agreed with this approach and, on the facts, held that the difference in treatment here was not capable of being justified.[174] This case reflects the move from formal to substantive equality that has been evident in many recent judgments of the

165 This article does not summarise developments in discrimination law in Northern Ireland's industrial and fair employment tribunals during 2009–10.

166 [2010] NIQB 51.

167 Regs 12(1) and 13(1).

168 Article 14 is not a free-standing equality guarantee. Rather, for Article 14 to be engaged, the issue in question must fall within the "ambit" of one of the other Convention rights (*EB* v *France* (2008) 47 EHRR 21), although this does not mean that that particular right must have been violated. For a discussion of the operation of Article 14, see S Livingstone, "Article 14 and the prevention of discrimination in the European Convention on Human Rights" [1997] EHRLR 25.

169 He cited *Stec* v *UK* (2006) 43 EHRR 47 and *R (RJM)* v *Secretary of State for Work and Pensions* [2009] 1 AC 311.

170 *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173.

171 The judge identified *Shackell* v *UK* App. No 45851/99 (27 April 2000) and *Burden and Burden* v *UK* (2008) 47 EHRR 38 as such cases. The concept has also been used in *Carson* v *UK* (2009) 48 EHRR 41; see n. 186 below.

172 [2008] 1 WLR 1434, para. 25.

173 Ibid.

174 [2010] NIQB 51, paras 36 and 53.

ECtHR and the House of Lords/Supreme Court.[175] A growing emphasis has been placed on the justification or proportionality stage of an Article 14 inquiry rather than on prior issues such as the "ambit" of the other Convention article involved. The courts are thereby applying a more "piercing standard" of equality.[176]

The position adopted in *Re Morrison's Application* contrasts sharply with that preferred in *Re McIlwaine's Application*,[177] which concerned a claim that a prisoner's release date had been miscalculated. The Divisional Court held that it had not, applying its own decision in an earlier case in which double counting of remand time had been prohibited when a person was being sentenced for two different offences.[178] Unfortunately, the court rather summarily dismissed the applicant's additional claim that he had been improperly discriminated against under Article 14 of the ECHR. He argued that if he had not already been in prison when he was remanded in custody for a subsequent offence he would have had the full benefit of that remand period when sentenced for that offence. The report of the case does not explain why this difference in treatment is not a sufficient difference for the purposes of Article 14. The court merely stated that, as it did not consider that Article 5, or indeed Articles 7 or 8, were even engaged in the case, it did not propose to give further consideration to Article 14. With respect, this seems a cursorily dismissive approach. There was surely a plausible argument that this prisoner had been deprived of his liberty in a discriminatory way. Even if Article 5 had not itself been violated, this did not mean that there had been no violation of Article 14. The court should have explored in more detail whether the prisoner had a different "status" from that of a prisoner who had been released after the earlier sentence.

A further claim alleging a breach of the right to a fair trial fell at the first hurdle in *Re Mac Giolla Cathain's Application*,[179] where the Court of Appeal ruled that the applicant, who was a member of a band that wanted to play at a cultural centre, which was applying for an occasional liquor licence, had no standing to challenge the Administration of Justice (Language) Act (Ireland) 1737. That Act requires proceedings for such a licence (and all other court proceedings) to be held in English and no other language, such as Irish. Even if the applicant had had standing and could argue that his Article 6 rights were engaged,[180] the court found that the difference in treatment between English speakers and non-English speakers was in this matter "manifestly necessary and proportionate".[181] This must be right, and any change in policy on this matter must surely be left to the legislature. Controversially, the court observed that the 1737 Act was not originally designed as an anti-Irish law but as a pro-litigant law, because it prevented people from being misled by court documents written in Latin, French or other foreign languages.[182]

The conjunction of Article 6 with Article 14 was further considered in a case where leave was sought to apply for judicial review of a decision by the Legal Services

175 For a more in-depth discussion of the move towards substantive equality, see R O'Connell, "Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR" (2006) 29 *Legal Studies* 211.

176 Sandra Fredman, *Discrimination Law* (Oxford: Clarendon Press 2002), p. 88.

177 [2009] NIQB 91.

178 *Re McAfee's Application* [2008] NIQB 142.

179 [2010] NICA 24.

180 It was on the latter point that in the court below Treacy J had held against the applicant: [2009] NIQB 66, para. 44. He also ruled that the applicant could not rely upon Article 7(2) of the European Charter for Regional or Minorities Languages because, although the Charter had been ratified by the UK, it had not been incorporated into domestic law.

181 [2010] NICA 24, para. 8.

182 Ibid. para. 9.

Commission to refuse free legal aid to a woman who was to be interviewed by social security officers in relation to alleged benefit fraud.[183] She argued that it was discriminatory for her not to be entitled to free legal aid, given that someone being interviewed by a police officer in connection with a serious offence would have been so entitled.[184] But Weatherup J held that, even assuming Article 6 was engaged on these facts, the difference in treatment was not based on a "status", as required by Article 14. As the ECtHR put it in *Beale* v *UK*,[185] the different treatment arose not in relation to a personal characteristic but to the applicant's circumstances, which was not enough. This is a fine line to draw, and its positioning can divide very senior judges, as is clear from recent litigation involving the non-payment of pension upgrades to some pensioners living outside the United Kingdom.[186]

Conclusion

In 2009–10 the judges in Northern Ireland considered Convention rights in a wide variety of contexts and took full account of relevant Strasbourg caselaw. They continued to develop a corpus of home-grown precedents and to make use of English precedents when available. Occasionally, the exploration of Convention points might have been more thorough, but whether this was due to a failure by counsel to present appropriate arguments or to too summary an approach by the judges when composing their judgments is hard to say. Difficult issues around the protection of human rights will continue to come before the courts, thereby realising one of the central aims of the Human Rights Act 1998 – the development of a rights-based culture within the legal professions and the judiciary. That culture is further evidenced by the increasing number of references to other international human rights treaties such as the ICCPR and the EU's Charter of Fundamental Rights, even if the judges are still reluctant to apply such standards unless they have been formally incorporated into domestic legislation. There continues to be scope for further judicial activism in developing the common law in a way which brings it more into line with the UK's human rights obligations at the international level.

183 *Re Stokes' Application* [2009] NIQB 102.

184 Under the Legal Advice and Assistance Regs (NI) 1981, reg. 7A.

185 App. No 16743/03 (12 October 2004). Here, the court declared inadmissible a claim by an applicant convicted of mistreating sheep, because he had chosen not to be legally represented at interviews conducted with him by local trading standards officers.

186 In *R (Carson)* v *Secretary of State for Work and Pensions* [2006] 1 AC 173, the House of Lords held by 4:1 that this did not amount to a violation of Article 14 (taken in conjunction with Article 1 of Protocol 1). A Chamber of the European Court agreed by 6:1 (2009) 48 EHRR 41 and the Grand Chamber also agreed, but only by 11:6 (2010) 51 EHRR 13.

NILQ 61(4): 431–47

Ancillary relief in Northern Ireland: the jurisprudence of "the noughties"

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Recent Northern Ireland jurisprudence has addressed many contentious issues which arise from the exercise of judicial discretion in ancillary relief proceedings. This is of particular significance since the seminal decision of *White* v *White*,[1] which has redrawn the map of ancillary relief and revitalised the approach of the courts on divorce. A decade has passed since *White* was decided by the House of Lords, and so the time has come to review the decisions that have followed it, and to examine what the response of the Northern Ireland courts has been to this "big money"[2] case.

The caselaw in Northern Ireland has untangled many of the issues left unresolved by the *White* decision in Northern Ireland courts. Examples of such issues are what constitutes conduct that it would be inequitable to disregard; when a clean break is appropriate; and how the yardstick of equality[3] should be applied in the wake of *White* v *White*. Other recent jurisprudence has considered more specific matters such as the appropriate approach in situations where a child of the family is disabled or when there has been a conflict of evidence between the parties. This paper pinpoints the most significant developments in caselaw from 2001[4] until the present date. It considers many issues stemming from the application of Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978.[5] In short, it aims to provide a reference point for practitioners navigating more difficult ancillary relief cases "where there is no perfect financial solution to the problems caused by the marriage breakdown".[6]

As the majority of ancillary relief judgments in Northern Ireland are written by Masters, the role of the Master in ancillary relief clearly should not be underestimated. Unlike in England and Wales, the Master does not principally deal with procedural matters. Although in many respects a Master has a similar role to a District Judge in the Principal Registry of

1 [2000] UKHL 54.

2 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 28.

3 This requires equitable distribution of property on divorce, as spouses are treated as equal partners within the relationship pursuant to Lord Nicholls' promotion of the non-discrimination principle.

4 This is because the computerised publication of judgments began in 2001. All judgments mentioned in this paper may be found on www.bailii.org/nie/cases/NIHC/Master/.

5 In this paper, comparisons will be drawn between caselaw in Northern Ireland and England. As such, it is important to note that the equivalent legislation to the Matrimonial Causes (Northern Ireland) Order in England and Wales is the Matrimonial Causes Act 1973.

6 *ED* v *JD* (2007) Master 48 per Master Bell.

the Family Division, a Master is not limited by jurisdiction. For example, it is not uncommon for a Master to hear cases that in England or Wales would be heard by a High Court Judge. Not only this, but cases are often referred to a Master due to various complexities and contested issues. As a result, the cases mentioned in this paper are not limited to application in matters heard by Masters. They are of wider significance to the law of ancillary relief in England, Wales and Northern Ireland.

When examining the recent caselaw, it is necessary to consider the legislative framework within which the courts are developing the principles to be applied. The basis of this framework is Article 27 of the Matrimonial Causes (Northern Ireland) Order, which specifies what the court must take into account when an application for ancillary relief has been made. As such, the court has a duty to give first consideration to the welfare of any child of the family, have regard to all circumstances of the case, and should consider the possibility of ending the parties' financial obligations to each other (facilitating a "clean break").

When taking all matters into consideration, the court is asked to focus on factors listed in Article 27(2), which are as follows;

a) the income, earning capacity, property and other financial resources that each of the parties to the marriage has or is likely to have in the foreseeable future;
b) the financial needs, obligations and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future;
c) the standard of living enjoyed by the family before the breakdown of the marriage;
d) the age of each party to the marriage and the duration of the marriage;
e) any physical or mental disability of either of the parties to the marriage;
f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension), which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The application of these principles is developed by the law of ancillary relief. In particular, *White* v *White* establishes the current approved interpretation of what Article 27 means for divorcing couples.[7] Prior to these cases, much weight was placed on the financial needs of the parties.[8] However, in *White* it was decided that the law should no longer place a cap on the claimant's award as soon as their needs and reasonable requirements had been met. As a result, previous precedent, which gave homemaking spouses relatively small awards even in high-income cases,[9] was made obsolete. Instead, judges should now regard the value of homemaking and breadwinning contributions during the marriage as equal and measure these contributions against a "yardstick of equality", which cannot be departed from unless

7 It is important to note that whilst English authorities mentioned in this paper (such as *White* v *White*) are not strictly binding in Northern Ireland, they are applied in Northern Ireland courts because the Matrimonial Causes Act 1973 and Matrimonial Causes (Northern Ireland) Order 1978 are almost identical.

8 For example, in *Dart* v *Dart* [1997] 1 FCR 21, the wife needed to show that she had made more than a special contribution in order to receive more than her "reasonable requirements".

9 See *O'D* v *O'D* [1975] 2 All ER 993, *Page* v *Page* [1981] 2 FLR 198 and *Preston* v *Preston* [1982] 1 All ER 41.

"there is good reason for doing so".[10] It is submitted that these developments represent a new perspective whereby the ethos of one's claim on divorce is now based on entitlement rather than dependency and need. As Miles explains, the spouse who undertook parenting and homemaking roles during the marriage is no longer regarded as "needy", they are instead perceived to require reimbursement for their investment in the relationship.[11]

The caselaw in this paper is also underpinned by *Miller*; *McFarlane*,[12] which was eagerly anticipated in post-*White* terrain. This judgment built upon the *White* principles of non-discrimination and equality, and teased out three strands of fairness; needs,[13] compensation and sharing. Whilst need has traditionally been influential to property distribution on divorce, Baroness Hale explained that in certain situations spouses should also receive compensation for any disadvantage that had been generated by the marriage (in the *McFarlane* case this was the wife's loss of career). The prospect of sharing was also brought to the fore by Lord Nicholls, who asserted that marriage should be perceived to be a partnership of equals. Prior to *White*, the emphasis on need, even in higher income cases, displayed an emphasis on individual property rights rather than the joint acquisition and enjoyment of property by both spouses.[14] Alternatively, the sharing principle propounded by *Miller*; *McFarlane* ensures equitable (but not equal) property redistribution on divorce that reflects the reality of the marriage partnership.[15] Nevertheless, the relationship between the principles of need, compensation and sharing remains unclear. As such, one must look to recent caselaw in order to extrapolate the practical realities for family lawyers from this new concept of fairness.

1 Non-matrimonial assets

The exposition of the sharing principle in *Miller*; *McFarlane* means that each party is "entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary".[16] However, it is widely accepted that not all property owned by parties in ancillary relief proceedings is treated the same way. Indeed, Wilson has said that "the treatment of inherited assets in the context of ancillary relief claims was thrown into sharp relief by the decision"[17] of *White* v *White*. In this case, Lord Nicholls noted that there is a distinction between different kinds of property, which is in "recognition of the view . . . [that] the property owned by one spouse before the marriage, and inherited property when acquired, stand on a different footing from what may loosely be called matrimonial property".[18] Northern Ireland caselaw has cultivated this distinction between non-matrimonial and matrimonial property; a divide that can sometimes be difficult to ascertain. The complexity of articulating this distinction is further exemplified by the ambiguous definition of non-matrimonial property in *Miller*; *McFarlane* as representing "a contribution

10 *White* v *White* [2000] UKHL 54, at p. 9e.

11 J Miles, "Equality on divorce?" (2001) *Cambridge Law Journal* 46

12 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24.

13 At p. 38 of the *Miller*; *McFarlane* judgment, ibid., Baroness Hale emphasised the continued relevance of need: "in the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage".

14 *Dart* v *Dart* [1997] 1 FCR 21.

15 This is the case particularly in longer marriages where property sharing is more apparent.

16 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 16.

17 J Wilson, "Inherited wealth and ancillary relief claims", 2 June 2005, at www.familylawweek.co.uk/site.aspx?i=ed426.

18 *White* v *White* [2000] UKHL 54, at p. 1578.

to the marriage by one of the parties".[19] Therefore, it is useful to examine the recent judgments regarding inherited property, business assets, pre-marital property and assets that have accumulated after the parties have separated in order to establish what constitutes non-matrimonial property.

Inherited property

Inheritance is important to the law of ancillary relief, and is an issue that is constantly evolving. As inherited property comes from a source "wholly external to the marriage",[20] there has been some dispute as to whether it should be excluded from the matrimonial pot of assets or if it should be merely taken into consideration as one of the Article 27 factors. *C and C*[21] indicates that judicial opinion favours the latter. In this case, inheritance submissions were made by the petitioner and respondent with respect to two specific properties. The respondent purchased the first property with his father prior to the marriage, and subsequently inherited his father's share. Similarly, the petitioner acquired a one-third share of the second property upon her father's death. Therefore, it was considered by Master Bell how these shares should be divided on divorce and whether they should be included in the Article 27 exercise. English jurisprudence, such as *Norris* v *Norris*,[22] was influential to his decision, as it enunciates that it would be "artifice and contrary to the express words of . . . the Matrimonial Causes Act . . . to exclude . . . non marital assets from the pool of assets to be divided".[23] Thus, Master Bell decided that the inherited property in this case was "one of the factors to be taken into consideration in applying the Article 27 checklist".[24]

The judgment of *G and G and J*[25] is also relevant simply because Gillen J did not attribute any particular importance to the matter of inherited property. In this case, a substantial amount of the parties' large estate was acquired through inheritance, yet this was not considered to be a significant factor during the court's discretionary exercise. As such, one can assume from this decision that the weight of the inheritance issue may be lessened in cases where the marriage has been lengthy.

To date, *A* v *A*[26] is the Northern Ireland courts' most comprehensive statement of the principles in *White* v *White*. Therefore, it is important to note that this case is not merely the most recent decision with regards to inherited property; it is regarded as being the most patent illustration of the changes made by *White* within the context of Northern Ireland.[27] The case is important within this section because it demonstrates that inherited property can be important to the exercise of judicial discretion when it represents a large portion of what the couple owns. The majority of the assets in *A* v *A* were inherited by the husband from his father. This was effectively part of Master Redpath's rationale for ordering a transfer of 37 per cent of the matrimonial assets to the husband by way of a lump sum. With reference to the "reverse check" recommended in *M* v *M (Financial Provision: Evaluation*

19 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 25.

20 Ibid.

21 (2007) Master 44.

22 [2003] 1 FLR.

23 Ibid. p. 125.

24 *C and C* (2007) Master 44, at p. 18.

25 [2003] NIFam 19.

26 (2009) Master 72.

27 Practitioners may find it useful to read the judgment of A v A (2009) Master 72, as it enunciates the general principles of ancillary relief (as listed in P Duckworth, *Matrimonial Property and Finance* (London: Family Law 2000)).

of Assets),[28] the Master emphasised that the corollary of this is that the husband will retain an award 50 per cent greater than that of the wife.[29] Therefore, this judgment is evidence that, as one of the circumstances of the case, inherited property may justify a departure from equality in a medium-term marriage. However, it is important to note Master Redpath's assertion that, when inherited wealth represents a contribution towards marital property (as in the present case), it should "not in any sense [be] ring fenced in the ancillary relief exercise".[30] In other words, although the inheritance factor may justify a departure from equality in some cases, this departure essentially does not encourage the absolute retention of inherited property by one spouse.

Indeed, Northern Ireland caselaw consistently weighs the inheritance factor against the impact it will potentially have on the overall fairness of the case. This is a welcome guide in comparison with English caselaw, as commentators have noted[31] conflicting approaches by different judges regarding this issue. On one hand, Bennett J[32] held that inherited assets should not be quarantined, and should be considered as a contribution to the welfare of the marriage by the beneficiary. On the other hand, Mr Peter Hughes QC argued[33] that inheritance should be excluded from the matrimonial pool because a fair balance can still be struck without accounting for these assets.

Amid this confusion, family lawyers will be relieved to know that, in Northern Ireland, the caselaw appears to concur with Bennett J in *Norris*, and so inherited assets will generally be taken into account on divorce. A helpful summary explaining the accepted approach of the courts towards inheritance can be found in *P v P (Inherited Property)*:[34]

> The judge should . . . [according to *White* v *White*] decide how important [inheritance] is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered . . . Fairness might require quite a different approach if the inheritance was a pecuniary legacy that accrued during the marriage than if the inheritance were a landed estate that had been within one spouse's family for generations and had been brought into the marriage with an expectation that it would be retained in specie for future generations.[35]

The most recent and comprehensive judgment in England and Wales on how the principles in *Miller*; *McFarlane* should be applied and how non-matrimonial assets such as inheritance should be considered is *J* v *J*.[36] However, it is emphasised that the Northern Ireland caselaw is also a valuable source of information on the specific matter of inherited assets.

Business assets

In *McG* v *McG*,[37] the issue arose as to how the wife's business should be taken into account during ancillary relief proceedings. The evidence in this case suggested that the husband

28 [2002] 33 Fam Law 509, at p. 39.

29 This is so when accounting for the combined value of matrimonial and non-matrimonial assets.

30 *A* v *A* (2009) Master 72, at p. 8.

31 Wilson, "Inherited wealth", n. 17 above.

32 *Norris* v *Norris* [2003] 1 FLR.

33 *H* v *H (Financial Provision: Special Contribution)* [2002] 2 FLR 1021.

34 [2004] EWHC 1364 Fam (2005) 1 FLR 576.

35 Ibid. pp. 33–7.

36 [2009] EWHC 2654 (Fam).

37 (2008) Master 58.

"took much more out of [the business] than he put into it".[38] As a result, value was only ascribed to the business premises (as opposed to the business as a whole). Furthermore, despite a lengthy marriage, the division of the business assets was unequal as Master Redpath stated that the business "would have no value worth talking about"[39] were it not for the petitioner. He also alluded to the fact that the continuation of the business depended upon the current premises. Nevertheless, one can assume that this division hinged upon the specific circumstances of the case. Indeed, it is important to note the Master's assertion that:

> in the normal course of events a respondent in a case such as this could expect to receive a significant portion of these premises, if not quite 50 per cent, due to the fact that the premises would be considered part of a business unnecessary for the continuation of that business.[40]

An example of what the Master meant by a more "normal course of events"[41] is the English case *H* v *H*.[42] This case highlights how difficult it is to cleanly slice non-matrimonial assets from a couples' bundle of property, as a large amount of capital was tied up in the husband's business. On the basis of needs and sharing, the wife attained a capital award of 67 per cent of non-business wealth, and the husband was awarded 68 per cent of the total assets. Grandfield has noted that it was justified for the husband to retain his business because he had worked there for 33 years (most of which was prior to his marriage).[43] Furthermore, Moylan J quoted *Miller*; *McFarlane*, and insisted that "in the case of a business, it can be artificial to attempt to draw a sharp dividing line at the parties' wedding day."[44] Indeed, as "fairness is a broad horizon"[45] the apportionment of business assets in most cases will vary according to whether the parties' needs are greater than their assets.

Premarital property

H and *W*[46] is an example of when premarital assets can have an impact on the court's distribution of assets during ancillary relief proceedings. In this case, almost all of the properties had been acquired by the husband before he met the respondent. In addition, the husband made virtually the entire financial contribution within the marriage, and so Gillen J saw this as "good reason for departing substantially from equality with regard to non-matrimonial property."[47] However, it is important to remember that the respondent recovered less in this case because the marriage was short.

Assets acquired post-separation

The question of how post-marital assets should be divided has also surfaced in recent ancillary relief judgments. Vigus has said that, in practice, the issue of post-separation earnings usually surfaces in "middle class, and middle-aged, divorces".[48] This was certainly

38 (2008) Master 58, p. 19.

39 Ibid.

40 Ibid. p. 22.

41 Ibid.

42 [2008] EWHC 935 (Fam).

43 J Grandfield, "Ancillary relief update", 22 August 2008, at http://www.familylawweek.co.uk/site.aspx?i=ed25329.

44 *H v H* [2008] EWHC 935 (Fam), at p. 116.

45 Ibid.

46 [2006] NIFam 15.

47 Ibid. p. 24.

48 K Vigus, "Post-separation accrual and the search for fairness" (2008) *Private Client Business* 404, at p. 408.

the case in *H* v *H*.[49] After marrying in 1974 and separating in 1996, a substantial amount of assets had accrued due to the lengthy separation between the parties and so Master Redpath decided how the court should treat property that is not "strictly speaking"[50] matrimonial. The Master held that it was appropriate in this case to give the wife less than 50 per cent of the assets in order to reflect the post-separation accrual of assets. The departure from equality in this case was not significant because the court felt that "in some respects . . . the respondent under provided for his wife, given his very large income".[51] However, Master Redpath placed particular emphasis on the fact that unequal division was justified because the increase in value of the parties' assets was partly "attributed to the husband's continuing work in the business".[52] With reference to the English authority *Rossi* v *Rossi*,[53] *H* v *H* reinforces the principle that mere inflationary economic growth is insufficient reason to depart from equality. Rather, post-marital wealth born out of inflation is not a non-matrimonial asset; thus the court will treat it as an increase in value of the parties' original matrimonial property.

Consequently, the fact that economic inflation is not relevant to ancillary relief proceedings also means that, amid the current recession, a deflation in the value of parties' assets will generally be immaterial also. This point was highlighted in *S* v *S*,[54] where a periodical payments order was not varied even though the impact of the recession on the petitioner's farm had made it difficult for him to afford such payments.

In short, what is clear is that the accretion of assets after the parties have separated will only justify a departure from equality when that increase can be attributed to an extra investment of time and money by one of the parties.

The issue of the division of post-separation assets was again considered by Master Redpath in *A* v *A*.[55] After the parties' separation, the family business increased in value because the husband had floated it. Therefore, pursuant to *Rossi* v *Rossi* the court took into account:

> whether litigation has been unduly delayed and, whether the parties have been financially linked throughout and whether or not the respondent, usually the husband, has failed to make adequate interim provision.[56]

In this case, Master Redpath concluded that there was no financial delay, the parties had remained financially interlinked and the husband had provided for the wife. Therefore, the fact that a substantial amount of the husband's wealth was acquired post-separation was to be taken into account as part of the court's discretionary exercise.

Practitioners may find it useful to corroborate these points with recent English authority. Vigus astutely noted that in these English cases

> it is easier to draw the line [between matrimonial and non-matrimonial property for] . . . wealth acquired by one spouse in a business started post-separation . . . than it is in cases where the post-separation accrual is a result of earnings from long-held employment.[57]

49 (2007) Master 52.
50 Ibid. p. 10.
51 Ibid. p. 12.
52 Ibid. p. 11.
53 [2006] EWHC 1482 (Fam).
54 (2009) Master 63.
55 (2009) Master 72.
56 Ibid. p. 10.
57 Vigus, "Post-separation", n. 48 above, at p. 408.

An illustration of the more troublesome latter scenario is *H* v *H*.[58] In this case, Charles J disagreed with the principle from *Rossi* that a post-separation bonus would become non-matrimonial property after one year of separation. He argued that the court should not define matrimonial and non-matrimonial property too rigidly, as this may "impede a fair settlement".[59] As a result, *H* v *H* did not apply *Rossi*, and the outcome instead facilitated a gradual adjustment for the wife towards independence by awarding her one-third of the husband's bonus in 2005, one-sixth of the bonus in 2006 and one-twelfth of the bonus in 2007. At face value, it appears that this case conflicts with *Rossi* because it rejects the one year rule, however, Vigus has emphasised that "the *H* v *H* 'run off' bore more than a passing practical resemblance to the *Rossi* approach of proximity".[60] Therefore, it appears that the general principles of *Rossi*, which have been applied in Northern Ireland courts, remain orthodox.

Crucially, the issue of non-matrimonial property within the above jurisprudence has not been viewed in isolation by the courts. It may be considered as part of the parties' contribution to the welfare of the family pursuant to Article 27. Furthermore, the distribution of non-matrimonial assets is significantly influenced by other factors, such as the duration of the parties' marriage and whether or not the needs of the parties can be effectively met. Ultimately, it is apparent that Northern Ireland courts are developing their thinking based on the *White* themes of fairness, sharing and entitlement.

2 Conduct

Article 27 of the Matrimonial Causes Order 1978 provides that the court shall have regard to the conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Master Bell has noted that such conduct "is often divided into three categories: marital, financial and litigation".[61] Recent caselaw has further refined what kind of behaviour may come within the remit of the marital and financial categories of conduct.[62] The development of each of these categories will be considered in turn.

Marital conduct

Since the introduction of no-fault divorce, marital conduct is rarely relevant to the exercise of judicial discretion pursuant to Article 27. As a result, *C and C (Ancillary Relief: Conduct – Rape and Attempted Murder)*[63] is a significant case as it denotes the exceptional context of when marital conduct is important within ancillary relief proceedings. In this case, it was held that spousal abuse amounts to marital conduct that it would be inequitable to disregard. The petitioner developed severe chronic depression that her doctor attributed to the violent conduct of the respondent. The petitioner successfully attained a non-molestation order against the respondent, which was breached by him, thus a second non-molestation order together with an occupation order was subsequently obtained. Despite this strong evidence of domestic abuse, it was necessary to consider a number of factors

58 [2007] EWHC 459 (Fam).

59 Vigus, "Post-separation accrual", n. 38 above, at p. 408.

60 Ibid.

61 *C and C (Ancillary Relief: Conduct – Rape and Attempted Murder)* [2009] Master 68, at p. 26.

62 Litigation conduct is not considered here because it has not surfaced in recent caselaw. Unlike marital and financial conduct, litigation conduct does not have any impact upon a final ancillary relief order. Rather, it should be penalised in costs.

63 [2009] Master 68, at p. 26.

when deciding the "vexed issue"[64] of parties' conduct within financial ancillary relief proceedings. That is, Lord Nicholls has said that divorce is now based upon "the neutral fact that marriage has broken down irretrievably",[65] and so it is deemed undesirable for the judiciary to become involved in "pick[ing] over the events of a marriage [to] decide who was the more to blame for what went wrong, save in the most obvious and gross cases".[66] As a result, in the present case, Master Bell applied *S* v *S*[67] and asked whether the respondent's conduct was so exceptional that it could be described as possessing a "gasp factor".[68] Counsel for the respondent submitted that the alleged behaviour did not have a gasp factor, because conduct should occur as specific instances rather than as part of a "course of behaviour".[69] Nevertheless, Master Bell did not find this argument persuasive and asserted that the nature of abuse in this case, which included rape and attempted murder, "clearly possess[ed]"[70] the gasp factor. He compared the present case with English authority, which stated that the husband's attempted murder of his wife consequently placed "her needs . . . as a much higher priority".[71] Furthermore, Master Bell agreed with this authority in the sense that the petitioner should receive a greater share because of her mental ill-health, which has been "in a very real way, his fault".[72] As a result, the Master considered that the conduct in this case was such that it was inequitable to disregard it despite the high threshold set by Parliament for consideration of conduct. Consequently, a departure from equality was justified, and the petitioner received 75 per cent of the assets. This included the matrimonial home even though the respondent had made a significant contribution towards the purchase of the property. Therefore, the conclusion one may draw from this case is that domestic violence will not be disregarded simply because it is marital conduct. Rather, the respondent's rape and attempted murder of the petitioner in *C and C* indicates that this kind of exceptional behaviour may not be simply one of the Article 27 factors to consider; it could be the principal justification of a departure from equality.

It is useful to compare the example in *C and C* as to what will constitute conduct that it would be inequitable to disregard against cases demonstrating conduct that is irrelevant to the Article 27 exercise. One such example is *H and W*,[73] where the petitioner submitted that it would be inequitable to disregard the fact that the respondent had allegedly caused articles about their private lives to be printed in Northern Ireland newspapers. His case was that these articles had a detrimental impact upon his practice and upon his professional and personal reputation. As above, Gillen J considered English authority as to the extent to which conduct can come within a court's consideration in ancillary relief cases.[74] It has already been emphasised that only extreme conduct will be considered and so Gillen J held that in the present case the alleged conduct was "most certainly not the 'obvious and gross' conduct necessary to invoke the principle [as it] . . . falls far short of that test".[75] Furthermore, Gillen J stressed that the introduction of such conduct as a factor to be

64 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 59.

65 Ibid.

66 *Miller* v *Miller* [2006] 1 FLR 151, at p. 145.

67 *S* v *S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496.

68 *C and C* [2009] Master 68, at p. 36.

69 Ibid.

70 Ibid.

71 *H* v *H (Financial Relief: Attempted Murder as Conduct)* 2005 EWHC 2911 (Fam), at p. 44.

72 Ibid.

73 [2006] NIFam 15.

74 *Miller* v *Miller* [2006] 1 FLR 151.

75 *H and W* [2006] NIFam 15, at p. 14.

considered was an "improper and . . . unnecessary impediment to the cause of resolution",[76] thus it is advised that in future parties should be wary of mentioning conduct in ancillary relief proceedings unless it can be described as outrageously unjust.

Financial conduct

Like marital conduct, the recent jurisprudence regarding financial conduct has also provided guidance as to what kind of conduct is and is not inequitable to disregard. In *B and B*,[77] Master Bell observed that it is "clear that financial improvidence may be taken into account as conduct".[78] Consequently, in this case, his decision was influenced by the respondent's financial conduct during the marriage. The respondent incurred a number of debts without the knowledge of the petitioner, which included a charge registered against the matrimonial home. The charge was executed fraudulently, as the petitioner's signature on the Deed of Charge was a forgery. It was held that this conduct "does not fall into the category of an error of judgment . . . it was instead deceitful and dishonest conduct".[79] As a result, the Master ordered the transfer of the respondent's interest in the matrimonial home to the petitioner. He noted that this outright transfer could only be justified by a "special factor",[80] which in this case was conduct[81] within the context of Article 27. It is submitted that the main reason Master Bell considered the factor of conduct to be "strongly present"[82] was the fact that the respondent's behaviour "may possibly have led to prosecution for a criminal offence had the petitioner or the bank decided to report the matter to the police".[83] Therefore, it appears that if one party deliberately defrauds their spouse, this will constitute conduct that it would be inequitable to disregard.

N and N[84] is another recent example where the issue of financial conduct was raised. The petitioner alleged that her husband had received a lump sum of £25,000 in compensation from his employer, but he had not informed her of this. Furthermore, she alleged that her husband had misled her about the amount of his income in order to fund a 20-year relationship with another woman during the marriage. Master Bell emphasised that "the mere fact of an affair will not be relevant in ancillary relief proceedings",[85] yet the "financial dimension"[86] of such conduct has implications within the context of Article 27. Thus, the financial conduct in this case was used in part to justify a departure from equality, awarding 65 per cent to the petitioner. Interestingly, the respondent's conduct was accorded sufficient weight even though the petitioner's allegations were based on hearsay evidence.

The financial behaviour of the respondent in *C and C (Ancillary Relief: Conduct – Rape and Attempted Murder)* should also be considered in this section. The petitioner's evidence was that her husband "generally spent his money selfishly, squandering it on both drinking and gambling".[87] This behaviour affected the family detrimentally and therefore Master

76 *H and W* [2006] NIFam 15.

77 (2008) Master 54.

78 Ibid. p. 27.

79 Ibid. p. 28.

80 Ibid. p. 41.

81 It should be noted that pursuant to Duckworth, *Matrimonial Property*, n. 27 above, s. B4, paras 32–8, three other possible special factors that will justify an outright transfer of the matrimonial home are; if the husband has been a poor provider, a general ground of need and a risk of bankruptcy.

82 *B and B* (2008) Master 54, at p. 35.

83 Ibid. p. 28.

84 [2009] Master 64.

85 Ibid. p. 16.

86 Ibid.

87 *C and C* [2009] Master 68, at p. 19.

Bell took it into account when assessing the parties' contributions to the welfare of the family. Accordingly, the husband's financial behaviour was not taken into account as conduct. Nevertheless, one can assume that if this type of conduct was not considered as a factor of contribution, it could be considered as financial conduct that it would be inequitable to disregard.

Indeed, the importance of accounting for certain kinds of financial misconduct within ancillary relief proceedings was highlighted by the English authority *Martin* v *Martin*:[88]

> Such conduct must be taken into account because a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably.[89]

Nevertheless, *Freeman and Freeman*[90] demonstrates that not all variants of financial improvidence will be taken into account in ancillary relief proceedings. In this case, Master Bell concluded that the respondent's disposal of his voluntary redundancy money could be taken into account as conduct because the petitioner received none of it. However, the fact that the matrimonial home had been repossessed due to the respondent's debts was considered inappropriate to be taken into account. As a result, it appears that the definition of financial misconduct is limited, as poor money management will not be considered as part of the Article 27 exercise. Similarly, the type of expenditure in *A* v *A*[91] was not "regarded as wanton or reckless"[92] enough. In this case, Master Redpath followed *McCartney* v *Mills McCartney*,[93] which said that "clear evidence of dissipation"[94] is required.

One should note that the above caselaw has helped to develop what constitutes conduct that it would be inequitable to disregard based on *Miller* v *Miller* and *McFarlane* v *McFarlane*. This recent jurisprudence has consistently emphasised the principle in *Miller*; *McFarlane* that conduct should only be taken into account in very limited circumstances. Interestingly, developments in Northern Ireland correspond with Hood's reports that, in England, conduct "cases with a financial flavour have become more common recently".[95] Therefore, although it is difficult to "reach the extremities of behaviour [especially] in financial dealings that a finding of conduct requires"[96] the above cases importantly highlight the kind of behaviour that is of sufficient significance to be considered in ancillary relief proceedings.

3 Clean break

This section will discuss the jurisprudence surrounding the circumstances in which a clean break order should and should not be made, and what the caselaw says about reopening clean breaks.

When a clean break is appropriate

Pursuant to Article 27A, the court must consider whether a clean break is appropriate so that the financial obligations of each party can be terminated as soon after the grant of the

88 [1976] Fam. 335.
89 Ibid. p. 342.
90 (2007) Master 49.
91 (2009) Master 72.
92 Ibid. p. 335.
93 [2008] EWHC 401 (Fam).
94 Ibid. p. 160.
95 H Hood, "The role of conduct in divorce suits and claims for ancillary relief" (2009) 39 *Family Law* 948–53.
96 Ibid.

decree nisi as is just and reasonable. The court's decision as to whether or not a clean break is appropriate will evidently depend on the individual circumstances of the case.

Indeed, as Duckworth has aptly noted, "plainly a clean break would be more 'appropriate' in some cases than in others".[97] For example, a clean break was recently considered to be just in *Stevenson*,[98] as the parties had not lived together for a number of years and had both moved on. Indeed, Waite J is frequently cited as stating the importance of enabling divorcing couples "to go their separate ways without the running irritant of financial interdependence or dispute".[99] Nevertheless, as this is not always possible it is worthwhile considering recent decisions where a clean break has been deemed inappropriate. *C and C*[100] is an interesting judgment because a periodical payments order was made even though the parties had a substantial pool of matrimonial assets. The petitioner gave up her job when the couple's first child was born, but when the marriage ended, she sought to obtain further qualifications to improve her career prospects. As the petitioner was re-entering the workforce in her late forties after being married to "a well paid executive",[101] the court felt that a periodical payments order instead of a clean break would allow the petitioner to "adjust without undue hardship".[102] As a result, it appears that a clean break is less likely when there is significant disparity of income between the parties.[103]

Indeed, it is often impossible for the court to facilitate a clean break for the majority of families with modest incomes. Despite this, Baroness Deech has recently opined that judges have "largely ignored the statutory direction to achieve a 'clean break' wherever possible".[104] However, it is submitted that the judiciary has not simply dismissed this factor. Rather, the court cannot allow a clean break unless the parties have adequate resources to live completely independently of one another. Thus, it could be argued that Baroness Deech has overlooked the fact that the court will rarely encounter a couple who have the same economic comfort living separately as they had when they lived together.

When a clean break may be reopened

The issue of when clean break orders may be reopened has become quite topical in recent months due to the economic downturn. This is because a suitable clean break settlement agreed last year may now be unsuitable when land and property have depreciated in value. The caselaw[105] concedes that a clean break order may be reopened if there has been a mistake in the valuation of the property at the time the order was made. Alternatively, an

97 Duckworth, *Matrimonial Property*, n. 27 above.

98 [2008] NIFam 8.

99 *Tandy* v *Tandy* (unreported) 24 October 1986 per Waite J.

100 (2007) Master 44.

101 Ibid. p. 10.

102 Ibid. p. 9.

103 The facts of this case are resonant with *Miller*; *McFarlane*, where at p. 39 Lord Nicholls emphasised that the clean break principle could not be used to prevent one party from receiving compensation that would ameliorate significant economic disparity between both parties after separation.

104 "Divorcing women should not get half husband's wealth", *The Telegraph*, 14 September 2009, at www.telegraph.co.uk/news/6188765/Divorcing-women-should-not-get-half-husbands-wealth-says-leading-law-expert.html (last accessed 18 October 2009).

105 *Cornick* v *Cornick* [1994] 2 FLR 530.

order can be reopened if it satisfies the *Barder* principle[106] and something unforeseen and unforeseeable has happened since the order was made. However, fluctuation in price as a result of the recession does not fit within these options. In *MG McG and B McG*,[107] the issue was whether an agreement facilitating a clean break between the parties could be altered when it hinged upon a business and former matrimonial home that had significantly decreased in value since the agreement was made. In his judgment, Morgan J (as he then was) considered a series of English cases including *Cornick* v *Cornick*,[108] which concluded (on the basis of similar facts to *McG*) that the cause of a difference in valuation of assets coincided with the following situation:

> An asset which was taken into account and correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation. The court should not then manipulate the power to grant leave to appeal out of time to provide a disguised power of variation which Parliament has quite obviously and deliberately declined to enact.[109]

This statement indicates that even if there has been a dramatic change in the value of property, the court is not keen to interfere when this change merely relates to price fluctuation. Morgan J also referred to *S* v *S*,[110] which the reader will note from above did not vary a lump-sum payment despite a considerable depreciation in the value of the inherited farm. As such, Morgan J opined that there is no "basis for a contention that it was a fundamental assumption of this agreement that prices would not fluctuate and the fact that they did so dramatically was foreseeable".[111] However, despite doubting the merits of this case, Morgan J granted the petitioner leave for appeal. His reasoning was that creating an opportunity for the court to consider the merits of the case would allow for an "authoritative indication in this jurisdiction of the approach which courts should take to these applications".[112] It is submitted that an indication such as this would be extremely useful given the fact that the issues in this case are likely to arise again within ancillary relief cases due to the ongoing recession.

4 Equality

In *Miller*; *McFarlane*, Baroness Hale famously stated that, in ancillary relief proceedings, "the ultimate objective is to give each party an equal start on the road to independent living".[113] However, *G and G and J*[114] has underlined the crucial point that one should not assume that an "equal start" automatically means a 50/50 split of the parties' assets. In this case, Gillen J stated that "the courts must be wary of relying too heavily on formal equality as a means of ensuring real fairness at the expense of applying the tests in [the Matrimonial Causes

106 According to *Barder* v *Calouri* (1988) AC 20, three conditions must be met before the *Barder* principle can be satisfied. These are as follows; "1. New events have occurred since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed. 2. The new events should have occurred within a relatively short time of the order being made. While the length of time cannot be laid down precisely . . . it [is] extremely unlikely that it could be as much as a year, and . . . in most cases it will be no more than a few months. 3. The application for leave to appeal is made reasonably promptly."

107 [2009] NIFam 6.

108 [1994] 2 FLR 530.

109 *MG McG and B McG* [2009] NIFam 6, at p. 12.

110 *S* v *S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496.

111 *MG McG and B McG* [2009] NIFam 6, at p. 13.

112 Ibid. at p. 15.

113 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 144.

114 [2003] NIFam 19.

Order]".[115] For example, in *G and G and J*, he noted that, "on a basis of pure equality",[116] the wife would receive over 89 per cent of the liquid assets, leaving the husband with only 10.3 per cent of the liquid assets. This illustrates that equitable division pursuant to Article 27 is not always the same as a mathematical equal split upon divorce. As the court must have regard for the financial responsibilities, financial resources and financial needs that each of the parties may have in the foreseeable future, it appears that in reality the yardstick of equality must be moulded to fit what is equitable for the individual. This could mean that strict equality is departed from, as in *G and G and J*, where the husband and wife received 54.35 per cent and 45.64 per cent of the assets respectively.[117]

5 Specific developments

A number of recent judgments have clarified important yet specific points of law, which will be considered in turn.

Definition of "child of the family"

One of the principal issues in *H and W*[118] was whether or not the petitioner's child (K) from her first marriage should be regarded as a child of the family. The respondent's case was that he had never treated the child as his daughter and that the petitioner's arguments to the contrary were a device to attain more money from the divorce. This difficult debate was confronted by Gillen J, who avoided the minutiae of the parties' evidence and instead adopted a broad approach (applying *M* v *M*)[119] He concluded that the child was treated as a daughter by both parties, on the basis of the wife's description of the respondent's behaviour towards the child and the fact that the child had lived in the same household as the parties during their entire five-year relationship. Therefore, satisfied that K was indeed a child of the family, the court ordered for provision to be made for her by way of capital in the clean break settlement. One can assume that in subsequent cases the court will look to the nature of the relationship between the child and the parties when deciding whether he or she is a child of the family. In *H and W*, relevant evidence of a close family relationship included the fact that the respondent introduced K as his stepdaughter on a number of occasions and behaved as her parent in dealings with the child's school.[120]

Disability of a child of the family

F and F[121] is concerned with how a disabled child may affect the outcome of ancillary relief proceedings. Article 27 requires the court to give first consideration to the welfare of any child under 18. Thus, the court in this case was obliged not only to account for the general welfare of the child, but also to consider the fact that the petitioner will have an ongoing commitment due to her child's disability. As this commitment invariably invokes financial responsibility, Master Redpath stated that the courts could require the respondent to pay

115 [2003] NIFam 19, p. 49.

116 Ibid. p. 51.

117 The principle of equality within ancillary relief proceedings has been of paramount importance since the decision of *White* v *White*. However, a comprehensive and academic examination of the development of this principle is outside the remit of this article, which simply aims to outline the main developments apparent in the caselaw of ancillary relief in Northern Ireland.

118 [2006] NIFam 15.

119 [1980] 2 FLR 39.

120 Some examples of such dealings would be giving permission on the child's behalf, providing signatures for the child or attending parent's evenings.

121 (2007) Master 56.

maintenance beyond the time the child is in full-time education.[122] Furthermore, the court ordered that the special circumstances of the child's disability justified an award of 65 per cent in favour of the petitioner. The effect of this decision meant that the petitioner received almost twice the capital assets awarded to the respondent.

In addition, it appears that the age of a child is less important when he or she is disabled. Although priority will usually not be given to a child over the age of 18, in *B and B*[123] an award was made in favour of the primary carer of a 21-year-old with severe learning difficulties. The fact that the child could neither live independently nor be left on her own at any time was "unquestionably relevant"[124] to the outcome of the case. Hence, when a child of the family has a disability, which imposes a significant responsibility on the primary carer, a considerable departure from equality may be necessary.

Conflicting evidence

One of the focal issues in *Eladhame and Eladhame*[125] was what the appropriate approach should be when there is a conflict of evidence between the parties. In this case, there were various discrepancies, for instance the way in which the couple's finances were used to support the respondent's family in Egypt. In his judgment, Master Bell pinpointed the difficulties with reconciling conflicting evidence by citing Lord Bingham:

> How is [the judge] to resolve which witness is honest and which dishonest, which reliable and which unreliable?[126]

However, the Master concluded that the truth could be uncovered by examining the consistency of the parties' evidence, and the credibility and demeanour of each party. After cross-examination it was revealed that the respondent had been untruthful with regard to one of the financial issues, and so on the balance of probabilities Master Bell concluded that the petitioner had been telling the truth with regards to the parties' financial contributions towards the outgoings. The Master also mentioned that there may have been additional confusion in the mind of the respondent as English was not his first language. Accordingly, it appears that when parties in ancillary relief proceedings present conflicting evidence, the court will take the circumstances as a whole into account, including the credibility and consistency of each party. On the other hand, when reconciling inconsistent evidence, it is important to emphasise Master Bell's point that:

> Article 27(2)(f) does not . . . provide a mechanism whereby any conflict on financial matters which was unresolved during the marriage may subsequently be resurrected as a new battleground.[127]

Gifts

Master Redpath has recently opined that:

> It is distasteful in the extreme to have to enter into a debate about how much of a gift, freely given, should be taken into account in [ancillary relief] proceeding . . .[128]

122 This kind of order was imposed by the court in *C* v *F (Disabled Child: Maintenance Orders)* [1998] 2 FLR 1.

123 (2008) Master 66.

124 Ibid. p. 19.

125 (2008) Master 56.

126 Ibid. p. 33.

127 Ibid. p. 35.

128 *McG* v *McG* (2008) Master 58, at p. 26.

Nevertheless, this kind of debate is unfortunately common when couples divorce. In *McG* v *McG*,[129] there was contention as to whether or not allegedly valuable jewellery given by the respondent to the petitioner should be taken into account by the court. After accepting that the jewellery was worth £19,000 (based on a valuation produced by the petitioner), Master Redpath concluded that within the circumstances of this case the jewellery should not be considered. This indicates that the court will not look favourably upon parties seeking to wrangle over gifts in ancillary relief proceedings unless such gifts are worth a substantial sum of money. Indeed, it appears that in most cases gifts made during the marriage are irrelevant to the court.

Khanna summonses

In certain cases, a "Khanna" summons may be very useful to practitioners, particularly in ancillary relief proceedings.[130] However, an almost complete absence of caselaw on the matter makes it difficult for those whose practice does not include their frequent use to become familiar with their complexities. Therefore, it is submitted that *M* v *M (No 2 of 2007)*[131] is one of the best examples of how a Khanna summons operates in the context of ancillary relief. Briefly, a Khanna summons is used to subpoena a third party to give evidence at trial. In the present case, a Khanna summons was served on a solicitor who had acted in a property transaction that conveyed the title of a villa in Portugal from the respondent's parents to the petitioner and respondent as joint tenants. On divorce, the respondent alleged that this transaction was never completed. Therefore, the principal issue was whether the solicitor's documents pertaining to the transaction in question could be produced despite objections on the basis of legal professional privilege. It was held that the file should be produced for a number of reasons. Firstly, the case of *Khanna* v *Lovell White Durant*[132] sets a precedent that documents may be received from a non-party. Secondly, the application of *Regina* v *Inner Court London Crown Court, ex parte Baines & Baines (a firm) and Anor*[133] clearly indicates that a conveyancing file is not within the scope of legal professional privilege as defined in the *Three Rivers Case*.[134] Thirdly, it is possible for specific elements in a file, which attract legal professional privilege, to remain undisclosed. Finally, the documents were not being produced to any third party; the person seeking disclosure of the file was a party to the original conveyance. Thus, a Khanna summons was successfully used to compel disclosure of the details of the contested transaction. As a result, this case shows how a Khanna summons can be an effective remedy when one party has endeavoured to conceal assets from the other party; a problem that is unfortunately becoming prevalent in ancillary relief proceedings.

Conclusion

One may find it frustrating to finish reading this article without a definitive answer to many of the above issues. That is, there is no formula to calculate the specific apportionment of non-matrimonial property, and the equal sharing principle does not guarantee each party 50 per cent. This is simply because the division of property on divorce hinges upon what is

129 (2008) Master 58.

130 Derived from *Khanna* v *Lovell White Durant* [1994] 4 All ER. This type of summons is now covered in England and Wales by the Rules of the Supreme Court. However, in Northern Ireland this common law mechanism (Khanna summons) is prevalent in the absence of similar legislation.

131 (2007) Master 50.

132 [1994] All ER 269.

133 [1988] QB 579.

134 *Three Rivers District Council & Ors* v *Governor & Company of the Bank of England* [2004] UKHL 489.

fair within the context of each case. As a result, when wondering how proceedings will be affected by inheritance, conduct or contribution, the short answer can only be: it depends.

Nevertheless, even though the nature of ancillary relief means that the outcome of each case will largely depend upon the circumstances of the individual, the principles from recent jurisprudence are still crucially relevant. The above developments appear to be following a similar tack to England and Wales, and give a clear indication of how various issues are being resolved in the courtroom post-*White* v *White* and *Miller*; *McFarlane*. One can be confident that non-matrimonial assets will be treated as one of the circumstances of the case and will not be ignored. It is also more apparent what kind of conduct is relevant to proceedings. Furthermore, it is submitted that each case in this paper has uncovered the fact that Northern Ireland courts are applying a yardstick of equality that is flexible enough to facilitate equitable (but not always equal) division according to the facts of the case. In conclusion, it appears that "need is the most important player of the three principles"[135] from *Miller*; *McFarlane*, because for the majority of divorcing couples, the main worry is not how their fortunes will be divided, but whether their assets will merely stretch to satisfy their needs. Indeed, amid the present economic climate, millionaire divorces are not representative of ancillary relief proceedings. The above jurisprudence exacerbates this reality, as in many cases the court has divided property in a way that will cause least hardship for the parties involved. As a result, recent ancillary relief judgments in Northern Ireland provide an excellent indication of how the "big money"[136] cases have filtered down into everyday divorce where parties' need is not subsumed by riches.

135 Vigus, "Post-separation", n. 48 above, at p. 406.

136 *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UKHL 24, at p. 28.