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FOREWORD BY THE HON. LORD WOOLMAN

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Lawyers sometimes say that if you do something once, you are experienced. If you do something twice, you are an expert. That is pitching matters too high. However, with the publication of its third issue, it is clear that the *Aberdeen Student Law Review* is now firmly established.

Writing and editing legal work is exacting work. The authors and the editorial board are to be congratulated on managing to bring forth this volume while attending to other duties. I look forward to reading each contribution.

Stephen Woolman
July 2012

INTRODUCTION TO VOLUME THREE

We are delighted to welcome you to the third issue of the Aberdeen Student Law Review (ASLR). Since the inaugural issue of 2010, the ASLR has gone from strength to strength. With a UK-wide circulation and holdings in libraries of some of the leading universities in the United States, the ASLR continues to provide an international platform for both students and alumni of the University of Aberdeen to offer fresh insight and analysis on contemporary legal problems. This year we have the pleasure of publishing the work of authors at various stages in their careers: undergraduate, DPLP, LL.M, Ph.D. and alumni in professional practice. In so doing, we hope that the content is of interest and relevance to students, academics and practitioners alike.

The editorial board is indebted to a large number of people who have assisted in ensuring the success of this year's issue. The ASLR thrives on the energy, drive and determination of the authors whose work is submitted for publication. Whether their submission was successful or not, we would like to thank each author for their hard work. We thank those members of staff whose encouragement, advice and support has spurred us forward and also the anonymous peer reviewers whose detailed feedback has helped sculpt submissions into polished publications. We extend our gratitude to the founder of the ASLR, Dominic Scullion, and to Leanne Bain whose experience as Managing Editors of previous issues has provided invaluable guidance on the intricacies of running a student law journal. Finally, we would like to express our utmost gratitude to our sponsors, Stronachs LLP, for their support and generosity. Without their belief in both the ASLR and its aims, this issue would not have been possible.

We have thoroughly enjoyed collating the content of this issue and we hope that you find the variety of articles interesting. If they provoke thought and sow the seeds for future contributions to legal scholarship then we have fulfilled our aim. We urge students and alumni to continue to critique the law in their chosen field and submit the high quality of work which has become the hallmark of the ASLR.

The Editorial Board

July 2012

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In Memoriam: Lord Rodger of Earlsferry (1944-2011)

CAROLINE M. HOOD

*'Non nobis solum nati sumus ortusque nostri partem patria
vindicat, partem amici'¹*

In delivering the address at a memorial service for the late Lord Davidson in July 2009, Lord Rodger commented: 'What to say about Kemp Davidson when so much has already been written and said since his death? More especially, what to say when he himself would have wished so little to be said?'² By the same token, one must remain acutely aware that very little can either be written or said about Lord Rodger that has not already been imparted in adoration elsewhere and, perhaps, that the subject himself would humbly wish to receive. Nonetheless, the ASLR would like to add a modest contribution to mark the passing of an individual who had a substantive impact upon not only the legal profession but the development of the law in the United Kingdom and for that, his presence in the Supreme Court will be sorely missed.

When reflecting upon a life, it appears trite to list professional achievements. However, when confronted with such an extraordinary career it would be remiss not to highlight the successes of an academic, legal and judicial life so lamentably cut short. A Glaswegian by birth, Alan Rodger graduated with an MA from the University of Glasgow where he remained to read Law. Following a D.Phil. at the University of Oxford,³ under the supervision of the eminent Roman law scholar Professor David Daube, he was called to the Bar in 1974 and held the position of Clerk of the Faculty of Advocates from 1976-1979. Taking Silk in 1985, he was appointed Advocate Depute before becoming Solicitor General for Scotland in 1989 and, finally, Lord Advocate in 1992. His rise to the bench was swift, seeing appointment as a Senator of the College of Justice in 1995, ultimately assuming the role of Lord Justice General and Lord President in 1996. In 2001, he was made a Lord of Appeal in Ordinary and following the dissolution of the Appellate Committee of the House of Lords and constitution of the Supreme Court, subsequently became a Justice of the United Kingdom Supreme Court. These professional achievements were complimented by a number of honorary doctorates - from Glasgow, Aberdeen and Edinburgh - in addition to his appointment as a Fellow of the British Academy and the Royal Society of Edinburgh.

As both academic and judge, Lord Rodger excelled; selecting writings and cases from which to quote is an onerous task as they can only, at best, allude to the

¹ 'We are not born, we do not live for ourselves alone; our country, our friends, have a share in us', Cicero *de officiis*, 1, 22. This text appeared on the cover for the Order of Service at a memorial service held for Lord Rodger on Friday 26 November 2011 at St Giles' Cathedral, Edinburgh.

² Lord Rodger, 'Appreciation' 2009 SLT 157, 157.

³ 'Owners and Neighbours in Roman Law'.

abilities of their author. He was equally respected for his research and writing in the field of Roman law as he was for his career in the legal profession. Reflecting upon his expansive judicial legacy, law students can likely recount the significance of the cases of *Paterson v Lees*,⁴ *Drury v HM Advocate*,⁵ and *Galbraith v HM Advocate*⁶ in the field of criminal law. More recently, he delivered the unanimous judgement of the Supreme Court in *Re Guardian News Media*⁷ and was also part of the bench in *HJ & HT v Secretary of State for the Home Department*.⁸ The latter case serves well to illustrate his capacity for 'lively judicial commentary',⁹ for, in addressing the deportation of gay and lesbian asylum seekers in the face of the 'reasonable tolerability test', he commented:¹⁰

(...) just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.

Of course, these cases are to name but a few and can only superficially reflect his capacity for debate and his justly earned reputation on the bench. The practice of extra-judicial writing which has developed in the United Kingdom in recent decades saw Lord Rodger reflecting upon the utility of humour in the judicial opinion;¹¹ the need for clarity when passing down judgements;¹² and the requirement for civil justice reform in Scotland.¹³ Again, these are but select highlights of an expansive career but confirm the belief that Lord Rodger did not place the law and particularly Scots law, on a pedestal but recognised the need for continuing improvement and reform. Above all, he was conscious that in an era of devolution where statutes may be unique to Scotland, courts should be encouraged to provide the requisite guidance on their interpretation: 'If the Scottish courts are not to provide that guidance, where in the world is it to come from?'¹⁴

Lord Rodger's final contribution to the development of the law of Scotland would become the judgement of the Supreme Court in *Fraser*.¹⁵ The adversarial scene within which this judgement is set draws its background from the Court's decision in

⁴ 1999 JC 159.

⁵ 2001 SCCR 583.

⁶ 2001 SCCR 551.

⁷ [2010] UKSC 1.

⁸ [2010] UKSC 31.

⁹ Owen Boycott, 'Supreme court judge Lord Rodger dies aged 66' *The Guardian* (London, 27 June 2011) < <http://www.guardian.co.uk/law/2011/jun/27/supreme-court-judge-rodger-dies> > accessed 12 June 2012.

¹⁰ *HJ & HT* (n 8) [78] (Lord Rodger).

¹¹ Lord Rodger, 'Humour and Law' 2009 SLT 202.

¹² Lord Rodger, 'The form and language of judicial opinions' (2002) 118 LQR 226.

¹³ Lord Rodger, 'Civil Justice: where next?' (Conference on Civil Justice, Edinburgh, 20 June 2008) < <http://www.journalonline.co.uk/Magazine/53-8/1005571.aspx> > accessed 12 June 2012.

¹⁴ *ibid.*

¹⁵ *Fraser v HM Advocate* [2011] UKSC 24.

Lord Rodger of Earlsferry (1944-2011)

Cadder.¹⁶ As the two Scottish Justices of the Supreme Court, Lord Hope and Lord Rodger were acutely aware of the likely impact of their decision. Per Lord Hope:¹⁷

In one of my last emails to him I wrote my comment in Latin about what we should expect after it was given: *ruat caelum, fiat just itia* – let the skies fall in, justice must prevail. He did not reply, but I am sure that those words express exactly how he felt. He was not one for making the slightest compromise on the principles that he believed in.

We can indeed only speculate as to how Lord Rodger would have responded to the scathing political reception which *Fraser* was granted in Scotland. However, his comments in concurring with the judgement of Lord Phillips in *Home Secretary v AF*¹⁸ hint that he would, as Lord Hope notes, have been unperturbed: '*Argentoratum locutum, iudicium finitum*: Strasbourg has spoken, the case is closed'.¹⁹ Even within such brief sentiments an appreciation can be gleaned of the 'clarity of thought' and 'rigorous intellect' of which his fellow Justices speak in their tributes to him and, ultimately, the fearsome intellect which he brought to the bench.²⁰

In closing, I refer back to the comments of Lord Hope regarding the *Fraser* case: *ruat caelum, fiat just itia*.²¹ It is easy to be dismissive of such sentiments as either the lofty truths of those housed in ivory towers or the idealism of young lawyers. However, it is a principle which all lawyers should be unafraid to adhere to and one which Lord Rodger's judgements were undoubtedly governed by. For that and his many other personal and professional qualities, his death truly is a profound loss to the legal community in both Scotland and the wider United Kingdom. In the words of Lord Hope:²²

It goes without saying that his contribution to the work of the Court is sorely missed. But I think that we can feel that the main steps forward that had to be taken have been taken. The pattern of our jurisprudence has been settled, and so have the tests that have to be applied. That is not to say that there is not more work to be done. But the path should be easier from now on. We must all be grateful to Lord Rodger for all that he has done to point us in the right direction.

We mourn his loss.

Alan Ferguson Rodger, Justice of the United Kingdom Supreme Court, was born on 18 September, 1944. He died on 26 June, 2011, aged 66.

¹⁶ *Cadder v HM Advocate* [2010] UKSC 43.

¹⁷ Lord Hope, 'The role of the Supreme Court of the United Kingdom' (SASO Annual Conference, Edinburgh, 19 November 2011) 2 < http://www.supremecourt.gov.uk/docs/speech_111119.pdf > accessed 12 June 2012.

¹⁸ [2009] UKHL 28.

¹⁹ *ibid* [98] (Lord Rodger).

²⁰ United Kingdom Supreme Court, 'Lord Rodger of Earlsferry: Tributes from the Supreme Court' (28 June 2011) < http://www.supremecourt.gov.uk/docs/lord_rodger_tributes.pdf > accessed 12 June 2012.

²¹ Let the skies fall in, justice must prevail.

²² Lord Hope (n 17) 25.

Forced Marriage: the Evolution of a New International Criminal Norm

JAMES M. CLARK*

Abstract

For the first time in international criminal law, forced marriage was recognised by the Appeals Chamber of the Special Court for Sierra Leone as a distinct crime against humanity. Setting it apart from other offences such as sexual slavery, the court acknowledged the gravity of the suffering caused to women and young girls by giving it a definition which captures the complexity and entirety of the criminal conduct. By tracking the evolution of this new offence through the case law of the Special Court, it is argued that there is a unique crime of forced marriage which, should it be allowed to do so, has the potential to progress into a category of offence which adequately captures the trauma experienced by “bush wives” both in Sierra Leone and beyond.

1. Introduction

Following World War II, considerable and praiseworthy efforts have been made to ensure that those responsible for perpetrating crimes against women and girls during times of war are no longer immune from prosecution. This is reflected both in the 1998 Rome Statute of the International Criminal Court (the ‘Rome Statute’), which contains specific provisions relating to gender-based crimes against humanity,¹ as well as in the case law of the *ad hoc* international tribunals. The International Criminal Tribunal for Rwanda (ICTR) is one such tribunal. Established following the Rwandan genocide, it has handed down a number of judgments in relation to gender-based offences. For example, in *Akayesu*,² the ICTR found that rape could constitute an act of genocide. Moreover, the court gave a broad definition of ‘sexual violence’ which meant that ordering a woman to undress and perform gymnastics in a public courtyard could be included in this category of crimes.³

Despite these advances in the prosecution of gender-based crimes, not all such offences have been met with prosecution at the ICTR. There is evidence that during the Rwandan genocide, some Tutsi women were abducted by the members of the *Interahamwe* (the trained Hutu youth militia) and kept as ‘wives’ for the purposes of

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¹ See, for example, Art 7(1)(g) of the ICC Statute.

² *Prosecutor v Akayesu* (Case No. ICTR-96-4-T), Judgment, 2nd September 1998.

³ MS Kalra, ‘Forced Marriage: Rwanda’s Secret Revealed’ (2001) 7 U.C. Davies J. Int’l L. & Pol’y 197, 200.

sexual violence and domestic slavery.⁴ Many women remain trapped in these marriages, both because of the stigma attached to those who have been the 'wives' of combatants and the security that they receive (such as food and protection) by staying with their 'husbands'.⁵ The practice of abducting and keeping wives in the above circumstances has now come to be understood under international law as forced marriage. However, such a charge remains absent from the Statute of the International Criminal Tribunal for Rwanda (the 'ICTR Statute')⁶ and its indictments. In calling for the recognition of forced marriage by the ICTR, Kalra notes that without acknowledging the crime there is little hope that the practice will stop.⁷ With evidence of forced marriages in other conflict zones such as Mozambique,⁸ Uganda,⁹ the Democratic Republic of the Congo (DRC),¹⁰ Cambodia¹¹ and Sierra Leone,¹² this warning is far from empty.

This paper will focus primarily upon the phenomenon of forced marriages which occurred during the civil war in Sierra Leone. As in Rwanda, forced marriages formed part of the violence against women during the war. Despite widespread evidence of this practice, its condemnation remains absent in the text of the Statute of the Special Court for Sierra Leone (the 'SCSL Statute').¹³ However, in a groundbreaking indictment, the Office of the Prosecutor (OTP) made clear its intentions to end the impunity of 'bush husbands' by setting out the charge of forced marriage under Article 2(i) of the SCSL Statute.¹⁴ This is an important and laudable step forward in the prosecution of gender-based crimes under international law. The previous Chief Prosecutor of the Special Court for Sierra Leone, David Crane, emphasised this in a press statement made regarding the new charges:¹⁵

The Office of the Prosecutor is committed to telling the world what happened in Sierra Leone during the war, and gender crimes have been at the core of our

⁴ Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (September 1996) 33-37 <www.hrw.org/legacy/reports/1996/Rwanda.htm> accessed 12 June 2012.

⁵ *ibid.* See specifically the testimonies of Monique and Venautie, 37 and Kalra (n 3) 202.

⁶ UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994 <<http://www.unhcr.org/refworld/docid/3ae6b3952c.html>> accessed 12 June 2012.

⁷ Kalra (n 3) 220.

⁸ BA Toy-Cronin, 'What is forced marriage? Towards a definition of forced marriage as a crime against humanity' (2010) 19 Colum. J. Gender & L. 539, 559.

⁹ *ibid* 561; See Amnesty International, *Uganda: "Breaking God's Commands": the Destruction of Childhood by the Lord's Resistance Army* (September 1997) <<http://www.amnesty.org/en/library/asset/AFR59/001/1997/en/e3d1420e-ea53-11dd-965c-b55c1122d73f/afr590011997en.pdf>> accessed 12 June 2012.

¹⁰ M Frulli, 'Advancing International Criminal Law: the Special Court for Sierra Leone recognizes forced marriage as a "new" crime against humanity' (2008) 6 J. Int. Criminal Justice 5 1033, 1041.

¹¹ See N Jain, 'Forced marriage as a crime against humanity: problems of definition and prosecution' (2008) 6 J. Int. Criminal Justice 5 1013, 1022-1025.

¹² See Human Rights Watch, *"We'll Kill You If You Cry" Sexual Violence in the Sierra Leone Conflict* (January 2003) <<http://www.hrw.org/en/node/12376/section/1>> accessed 12 June 2012.

¹³ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002 <<http://www.unhcr.org/refworld/docid/3dda29f94.html>> accessed 12 June 2012.

¹⁴ This encompasses crimes against humanity and other inhumane acts.

¹⁵ Toy-Cronin (n 8) 564.

cases from the beginning. These new charges recognise another way that women and girls suffered during the conflict.

The suffering of women in Sierra Leone was recognised in the decision of the Armed Forces Revolutionary Council (AFRC) Appeals Chamber,¹⁶ which saw the court overturn a previous Trial Chamber and find forced marriage to be an international criminal offence.¹⁷ The decision provides hope for women in other conflict zones who have been subjected to forced marriage.

The aim of this paper is to demonstrate that the AFRC Appeals Chamber was correct in defining forced marriage as a crime against humanity. Although it has been argued by some commentators that forced marriage is entirely subsumed by the crime of sexual slavery, this paper will contend that the crime of forced marriage is distinguishable from sexual slavery and is a distinct crime in and of itself. In doing so, it will be argued that the criminalisation of this conduct reflects the need for ongoing flexibility in international criminal law as it seeks to combat those behaviours, old and new, which offend against the conscience of humanity.

2. Background to the Sierra Leone Conflict

Following independence from the United Kingdom in 1961, the West African nation of Sierra Leone was governed under a multi-party democracy. At the outbreak of civil war in 1991, the country was under the control of one party, the All People's Congress (APC) and despite an abundance of natural resources, was impoverished, in a state of economic crisis and its institutions were in complete disarray.

It was into this environment of discontent that in March 1991 an armed militia group calling itself the Revolutionary United Front (RUF), backed by Liberian warlord Charles Taylor, invaded Sierra Leone from neighbouring Liberia with the intention of overthrowing the APC's government. When it first came into existence, the RUF was comprised primarily of students frustrated by the state of affairs in their country, along with disaffected youth from both Freetown and the outlying mining areas. However, as the group gained more control, it pressurised and even abducted civilians, including children, to increase its ranks.¹⁸ The militia operated under the leadership of an ex-Sierra Leone Army (SLA) officer named Foday Sankoh and alongside other rebel groups¹⁹ and pro-government forces,²⁰ were responsible for the ensuing violence and bloodshed that plunged Sierra Leone into a decade-long civil war.

¹⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (Case No. SCSL-04-16-A), Appeals Chamber Judgment, 22nd February 2008. Hereinafter, the 'AFRC Appeals Chamber Judgment'.

¹⁷ *ibid* 195-196.

¹⁸ V Oosterveld and DJ Bederman, 'Prosecution v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao' (2010) 104 Am. J. Int'l L. 1 73, 74.

¹⁹ Such as the Armed Forces Revolutionary Council (AFRC) and the West Side Boys, a splinter AFRC group.

²⁰ Including the Civil Defence Forces (CDF), which was an amalgamation of local pro-government militias.

The emergence of a second rebel group in May 1997 resulted in the newly elected President Kabbah being driven into exile following a coup led by a group calling itself the Armed Forces Revolutionary Council (AFRC). This group comprised soldiers of the Sierra Leone Army (SLA)²¹ and it entered into a power sharing arrangement, for a brief time, with the RUF. Finally, in January 1999, a battle for the capital Freetown marked the peak of the war. Escalating aggression at the hands of RUF and AFRC forces as they tried to recapture the capital led the international community to pressurise the still exiled President Kabbah into signing the Lomé Accord, a peace agreement with the rebel groups.²² However, deadlines and ceasefire obligations set by the Lomé Accord were not kept and in May 2000 a number of RUF units, who were refusing to disarm, attacked and abducted five hundred UNAMSIL²³ staff and military observers. This led to a complete breakdown of the ceasefire and once again Sierra Leone was thrown into chaos with fighting erupting across the country. Although a second ceasefire agreement was signed in November 2000, peace was not officially declared until January 18, 2002.

In order to re-establish justice, end impunity and effect reconciliation, President Kabbah wrote to the United Nations Security Council to request the establishment of a court to try those responsible for crimes committed during the war. The Security Council responded positively to this request,²⁴ leading to the creation of the Special Court for Sierra Leone (SCSL) – the first *ad hoc* international tribunal to be established in a country where the conflict occurred.²⁵ It was charged with the task of prosecuting those who bore the ‘(...) greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law’.²⁶ The tribunal started work in December 2002 and since its inception it has issued indictments against leading members of the AFRC and RUF militias as well as the pro-government CDF forces.²⁷

The conflict in Sierra Leone was characterised by the indiscriminate violence by both sides, not just towards one another but also towards non-combatants.²⁸ These attacks included, but were not limited to, brutal abductions and murders, rape and sexual slavery, forced labour and mutilations, amputations, the use of children as soldiers, the wanton destruction of property and forced marriage.²⁹ Gender-based

²¹ Under the leadership of Johnny Paul Koroma.

²² The Lomé Accord led to a new power sharing agreement between the RUF and President Kabbah’s government, establishing the RUF as a political party. It also provided amnesty for atrocities committed by the RUF (with the exception of the AFRC who were not a party to the Lomé Accord) and the deployment of a United Nations peace-keeping operation, United Nations Mission in Sierra Leone (UNAMSIL).

²³ See n 22.

²⁴ See UN Security Council Resolution 1315 (2000).

²⁵ The International Criminal Tribunal for the former Yugoslavia (ICTY) sits at The Hague and the International Criminal Tribunal for Rwanda (ICTR) sits in Arusha, Tanzania. The SCSL is based in Freetown, Sierra Leone.

²⁶ SCSL Statute, Art 1.

²⁷ William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 39.

²⁸ J Gong-Gershowitz, ‘Forced Marriage: A “New” Crime Against Humanity?’ (2009) 8 Nw. U. J. Int’l Hum. Rts. 53, 56.

²⁹ See Human Rights Watch, *Shattered Lives* (n 4).

violence was a defining feature of this conflict. A report undertaken by Physicians for Human Rights (PHR) indicates that as many as 64,000 women and girls experienced sexual violence during the conflict in Sierra Leone.³⁰ As part of this gender-based violence, women and girls were frequently abducted by rebels and assigned 'husbands' in an arrangement known as 'bush marriage'. As described above, this phenomenon involved women being forced to cook, clean and carry their husband's belongings as well as being raped, being forced to abort pregnancies and bearing and rearing children.³¹ Women trapped in these sham marriages were often afforded a certain degree of protection from rape by other soldiers, but this benefit was outweighed by the severe mental, psychological and physical suffering that these 'bush wives' had to endure.³²

As part of the overall aim to end the impunity from prosecution of the perpetrators, the OTP of the SCSL sought to criminalise this practice by including in the AFRC, CDF and RUF indictments a new charge of 'forced marriage'.³³ The charge was added successfully to the AFRC and RUF indictments but, despite evidence of sexual violence, was not added to the list of charges being brought against CDF indictees.³⁴ At trial, the prosecution failed to convince the court of the merits of the new charge and, for reasons which will now be discussed, chose to reject the charge of forced marriage.

3. The Decisions of the SCSL

A. Introduction

To date, three judgments have been issued by the SCSL which address forced marriage. The case law begins with the AFRC Trial Chamber's³⁵ rejection of the charge on the basis that the crime could not be distinguished from that of sexual slavery. The Appeals Chamber overturned this ruling, deeming the trauma and stigma caused by a 'forced conjugal association' grave enough to constitute a separate, distinguishable crime against humanity of forced marriage.³⁶ Following the AFRC trials, for the first time in history, the RUF Trial Chamber convicted individuals accused of forced marriage. These convictions were upheld on appeal. The recent trial of the former President of Liberia, Charles Taylor, is also significant

³⁰ Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone, A Population Based Assessment* (June 2002) 8 <<http://physiciansforhumanrights.org/library/reports/war-related-sexual-violence-sierra-leone-2002.html>> accessed 12 June 2012.

³¹ AFRC Appeals Chamber Judgment, para 190.

³² *ibid.*

³³ SCSL Statute, Art 2(i).

³⁴ André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Volume IX: The Special Court for Sierra Leone 2003-2004* (Hart Publishing 2006) 279.

³⁵ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (Case No. SCSL-04-16-T), Trial Chamber Judgment, 20th June 2007. Hereinafter, the 'AFRC Trial Chamber Judgment'.

³⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*. (Case No. SCSL-04-16-A), Appeals Chamber Judgment, 22nd February 2008. Hereinafter, the 'AFRC Appeals Chamber Judgment'.

here. Although there was no explicit charge of forced marriage in the indictment against him, evidence relating to the practice was heard during court proceedings.

By examining the abovementioned cases, this section aims to demonstrate the following: firstly, how the new offence of forced marriage has evolved; secondly, why the offence is distinctive; and thirdly, the remaining problems that the courts must address if the offence is to be formulated correctly.

B. The AFRC Trial Chamber Judgment

The AFRC was an anti-government militia formed in 1997 after a successful coup led by officers of the SLA against the elected government of President Kabbah. Like the RUF, the AFRC claimed to be intent on restoring democracy and freedom to the people of Sierra Leone.³⁷ Three of the highest-level leaders involved in AFRC activities during the war were singled out for indictment by the OTP: Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu.³⁸ These individuals were arrested in 2003 and were convicted at trial of 11 of the 14 counts listed in the indictment. The convictions resulted in prison sentences of 50 years for the first and third accused (Brima and Kanu) and 45 years for the second accused (Kamara). Significantly, however, none of the indictees were successfully prosecuted for the new charge of forced marriage.

The factual circumstances of forced marriages in Sierra Leone were outlined by the Trial Chamber. The court described the way in which many women, often following violent abductions, were forcibly assigned to men or boys for whom they were expected to undertake domestic duties such as cooking, cleaning and carrying loads. The women, who were labelled as 'wives', were also abused sexually by their 'husbands' and lived in an environment of fear. They were warned that they would be severely punished or killed if they did not submit to the wishes of their husband or show them loyalty.³⁹ In addition to physical traumas as a result of the sexual abuse, many of these so-called 'bush wives' suffered severe consequences to their sexual health including the contraction of HIV, neither of which, due to the lack of health care provision in the bush, could be attended to.⁴⁰ These women were also forced to bear and rear children.⁴¹ Far from the usual mutual obligations to be expected in a marriage relationship, bush wives were afforded little reciprocity, although, as mentioned above, they were sometimes protected from sexual violence at the hands of other soldiers and had better access to food supplies.⁴² Combined with the conferral of a status of marriage in a threatening or coercive environment, it

³⁷ *ibid* 169.

³⁸ The whereabouts of the key leader of the AFRC, Johnny Paul Koroma, are unknown and he is presumed to be either dead or missing: see Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support* (September 2004) 11 <<http://www.hrw.org/en/node/11983/section/1>> accessed 12 June 2012.

³⁹ AFRC Trial Chamber Judgment, paras 1455 - 1458.

⁴⁰ AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde, para 15.

⁴¹ *ibid* para 10.

⁴² AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty, para 30.

is these elements that make up the crime of forced marriage. This is reflected in the Prosecution's submissions, which stated that the crime,⁴³

(...) consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.

Viewed from this perspective, forced marriage consists of a package of separate criminal offences that can be listed under two distinct headings: (i) sexual offences (such as forced pregnancy, rape, and sexual slavery); and (ii) non-sexual offences (including abduction, enslavement, forced labour, humiliating or degrading treatment and violence to life and health). These elements of the crime of forced marriage are, in and of themselves, well established as offences in international criminal law.

However, a definition of the forced marriage that ends here, according to the Trial Chamber, reflects best the crime of sexual slavery rather than a distinct offence of forced marriage.⁴⁴ The court was also concerned that given the sexual violence inherent in a forced marriage, the charge should not appear under 'other inhumane acts' but would be better placed under Article 2(g) of the SCSL Statute. This provides for the prosecution of the crime of sexual slavery and 'any other form of sexual violence'. Noting this, the court ruled that the charge of forced marriage was entirely subsumed within the crime of sexual slavery and that '(...) there is no lacuna in the law that would necessitate a separate crime of "forced marriage" as an "other inhumane act"'.⁴⁵ When the definitive elements of the crime of forced marriage are left here, charging the conduct as sexual slavery is the appropriate course of action. However, it is submitted that the charge of forced marriage is better suited to address the plight of the many women who were trapped in these associations as there is more to a forced marriage than can be encapsulated by the crime of sexual slavery alone.

Sexual slavery was first codified as a crime against humanity in the Rome Statute. The wording of Article 2(g) of the SCSL Statute largely reflects this codification.⁴⁶ Prior to this, the charge had been developed by *ad hoc* international tribunals, including the ICTY, in particular in the case of *Kunarac*.⁴⁷ In this case, the accused was found guilty of the crimes of abduction, enslavement and rape of two Muslim girls who were held in an abandoned house. The ICTY took into account the following factors in considering whether or not the accused was guilty of enslavement:⁴⁸

⁴³ AFRC Trial Chamber Judgment, para 216.

⁴⁴ Sexual Slavery was prosecuted for the first time by the SCSL.

⁴⁵ AFRC Trial Chamber Judgment, para 713.

⁴⁶ Schabas (n 27) 212.

⁴⁷ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Case No. IT-96-23-T & IT-96-23/1-T), ICTY Trial Chamber Judgment, 22nd February 2001, para 742. Hereinafter, the 'Kunarac Trial Chamber Judgment'.

⁴⁸ Gong-Gershowitz (n 28) 59 (original emphasis).

(...) control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, *assertion of exclusivity*, subjection to cruel treatment and abuse, *control of sexuality*, and forced labour.

The Rome Statute's Elements of Crime relating to sexual slavery largely reflect what is noted above:⁴⁹

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature; and
3. The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.

By noting the firmly established principles regarding the crimes of enslavement and rape developed by the ICTY and ICTR⁵⁰ and drawing upon the Elements of Crimes of the Rome Statute,⁵¹ the Trial Chamber concluded that there was not '(...) one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery'.⁵² The court found that use of the label 'wife' in such a context was an indicator of ownership over a woman rather than one which connoted the mutual obligations expected of a marital relationship.⁵³ This term could be conferred at the whim of the perpetrator.⁵⁴ The reasoning expressed by the Trial Chamber thus far is consistent with the crime of sexual slavery as there was evidence of the exercising of ownership and sexual violence. However, both factors are also characteristic of a forced marriage.

The court found that evidence of bush wives being forced to carry out 'conjugal duties' such as cooking and cleaning should not be characterised as facets of a marriage relationship. Rather, they were to be classified as forced labour, providing the element of control required for sexual slavery. This reflects the reasoning of the ICTY in *Kunarac*, where the Trial Chamber heard evidence that the women were forced to carry out domestic chores over and above the sexual violence that they were subjected to.⁵⁵ There, the court held that this meant the women were

⁴⁹ International Criminal Court, *Elements of Crimes*

< http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf > accessed 12 June 2012.

⁵⁰ AFRC Trial Chamber Judgment, para 706.

⁵¹ *ibid* para 708.

⁵² *ibid* para 710.

⁵³ *ibid* para 711.

⁵⁴ *ibid*.

⁵⁵ *Kunarac* Trial Chamber Judgment, para 742.

being treated as the personal property of their captors and that being forced to carry out domestic duties amounted to enslavement.⁵⁶

Some critics believe that the Trial Chamber adopted the correct stance by applying the reasoning of the ICTY in *Kunarac* to the circumstances surrounding bush wives.⁵⁷ Toy-Cronin argues that classifying gender-stereotyped duties such as cooking, cleaning and child rearing as conjugal duties is '(...) not only unpersuasive but is also regressive, rather than progressive, in the development of feminist international criminal law.'⁵⁸ She goes on to conclude that the primary purpose of sexual slavery is not changed by the existence of conjugal duties.⁵⁹ There are also those who maintain that to focus on the non-sexual aspects of a forced marriage undermines the trauma caused by the sexual violence that these women are subjected to.⁶⁰ Accordingly, they argue that the crime is encapsulated best under the charge of sexual slavery because ultimately this is the purpose for which women were held.

When taken in their purest form, both arguments relate to a concern that any distinction between forced marriage and sexual slavery will be blurred by the inclusion of conjugal duties within a definition of the former. While it is true to say that there are elements of sexual slavery and enslavement common to what occurs within a forced marriage, this should not prevent the creation of a new offence. The reasons are twofold: first, as far as over-emphasising the non-sexual elements is concerned, the converse is also true. It has been said that by defining forced marriage as sexual slavery, too little weight was given to the '(...) substantial nonsexual, but gendered, elements of forced marriage.'⁶¹ It is wrong to presume that gender-based offences are purely sexual – the multi-layered nature of forced marriage is evidence of this. Recognising forced marriage as an 'other inhumane act' is appropriate as it does justice to the full nature and weight of the crime and gives due credence to the equally demeaning non-sexual aspects of forced marriage.⁶²

Secondly, international criminal law can cater for the possibility of two crimes bearing similar resemblance. Jain demonstrates this whilst discussing the similarities between enslavement and sexual slavery:⁶³

(...) overlaps between crimes recognized under existing international law already exist, for example between the crimes against humanity of murder and extermination, or between the crimes against humanity and war crimes of torture and rape. While enslavement captured the profound deprivation of liberty characteristic of sexual slavery, it did not sufficiently emphasise the sexual violence vital to the crime.

⁵⁶ *ibid.*

⁵⁷ Toy-Cronin (n 8).

⁵⁸ *ibid* 570.

⁵⁹ *ibid* 571.

⁶⁰ Gong-Gershowitz (n 28) 75.

⁶¹ V Oosterveld and A Marlowe, '*Prosecution v Alex Tamba, Brima Bazzy Kamara & Santigie Borbor Kanu; Prosecution v Moinina Fofana & Allieu Kondewa*' (2007) 101 Am. J. Int'l. L. 848, 854.

⁶² Jain (n 11) 1030.

⁶³ *ibid* 1029.

Therefore, there is clearly an established precedent in international law which permits a certain degree of similarity between offences. Moreover, there is also one aspect particular to forced marriage that is 'not sufficiently emphasised' by the charge of sexual slavery - the physical, mental and psychological trauma experienced by women because of the label 'wife'. The Trial Chamber was of the opinion that no evidence had been adduced to show that either physical or mental trauma had been caused to victims because of the use of the title 'wife'.⁶⁴ Even if such evidence was available, the court did not believe that it could constitute a crime against humanity as it would not be of a gravity similar to other offences referred to under the Article 2(a) to (h) of the SCSL Statute.⁶⁵

The separate concurring opinion of Justice Sebutinde and the partly dissenting opinion of Justice Doherty, although ultimately drawing different conclusions on the viability of a separate offence of forced marriage, both develop the effect of the imposition of the label 'wife' and shed some light on whether or not the latter reasoning of the Trial Chamber is correct.

(i) The label of 'wife': partly dissenting opinion of Justice Doherty

Justice Doherty believed that the charge of forced marriage could be considered as a separate crime against humanity under 'other inhumane acts'. In her dissenting opinion, she drew particular attention to how the use of the label 'wife' along with the expectation that the woman carry out 'conjugal duties' caused mental, physical and moral suffering to the victim.⁶⁶ The stigma attached to those who have been bush wives often led to the victim being rejected by both their families and communities thus affecting their '(...) ability to reintegrate into society and thereby prolonging their mental trauma.'⁶⁷ Coulter notes that often, '(...) people feared that rebel women could become violent and wreak havoc in the community' and so such women were marginalised and excluded from their communities.⁶⁸ This is also reflected in a report by Human Rights Watch:⁶⁹

(...) [bush wives] are often not able to return to their villages out of fear, lack of funds and social stigma, especially if they have given birth to children fathered by rebels. The women are therefore often forced to remain in situations in which they are vulnerable to continuing abuse.

This demonstrates that the stigma inherent with being labelled 'wife' by a rebel is real, as is the suffering it causes. This kind of suffering is generally not present in cases of enslavement such as *Kunarac* which, although sharing elements such as forced labour with forced marriage, do not have this added element of forced conjugal association and the stigma which flows from it. Justice Doherty noted this

⁶⁴ AFRC Trial Chamber Judgment, para 710.

⁶⁵ *ibid.*

⁶⁶ AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty, para 48.

⁶⁷ *ibid.*

⁶⁸ Chris Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press 2009) 210.

⁶⁹ Human Rights Watch, "We'll Kill You If You Cry" (n 12) 44-45.

factor in her opinion as something which differentiates forced marriage from sexual slavery.⁷⁰

Aside from the stigma caused by association with bush husbands, it is also apparent that use of the term 'wife' was both manipulative and strategic.⁷¹ It is submitted that the Trial Chamber and Justice Sebutinde erred in their conclusions when they found that the relationship between bush wife and husband was one of owner-slave rather than husband-wife. Evidence given by the Prosecution Expert Witness, as cited in the opinion of Justice Sebutinde, is instructive in this respect:⁷²

The use of the term "wife" by the perpetrator was deliberate and strategic. The word "wife" demonstrated a rebel's control over a woman. His psychological manipulations of her feelings rendered her unable to deny him his wishes. "Wife" showed that the woman belonged to a man and could not be touched by another.

Therefore, while there are elements of ownership being exercised by rebels when using the term 'wife', it is also clear that such relationships can be described, in the cultural context of Sierra Leone, as husband-wife relationships.⁷³ The Trial Chamber's definition of marriage as one which involves mutual obligations⁷⁴ was distinctly western and would have little currency in Sierra Leone where for a woman to be married meant being 'totally obedient' and 'belonging' to her husband.⁷⁵ Toy-Cronin criticises this view of the Trial Chamber, stating that,⁷⁶

(...) in recognising that the relationship of husband-wife is tantamount to owner-slave, it fails to acknowledge that victims conferred the label of "wife" experience effects that are distinct from those suffered by victims of slavery not given this label.

It is because of the label wife that these women felt obligated to carry out the tasks demanded of them as they were under the authority of their bush husbands in a relationship which perversely reflects that of a traditional Sierra Leonean marriage. This psychological manipulation is absent in cases of sexual slavery where women are kept primarily for the purpose of sexual violence and ancillary to this, forced labour. Forced marriage can be distinguished here from sexual slavery as women did not carry out the demands required of them because of an owner-slave relationship but because carrying out such duties was a cultural expectation of marriage. These women were trapped in an unbearable situation. On the one hand, they felt obligated to carry out conjugal duties because they were afraid and it was also what society expected of them in a marriage. On the other hand, however, they knew that the relationship they were trapped in was a sham – but potentially it was this relationship which was keeping them alive.

⁷⁰ AFRC Trial Chamber, Partly dissenting opinion of Justice Doherty, para 50.

⁷¹ Similar conclusions were drawn by the RUF Trial Chamber: see Oosterveld and Bederman (n 18) 80.

⁷² AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde, para 13.

⁷³ Toy-Cronin (n 8) 575.

⁷⁴ AFRC Trial Chamber Judgment, para 711.

⁷⁵ Coulter (n 68) 79-80.

⁷⁶ Toy-Cronin (n 8) 576.

However, some commentators maintain that the Trial Chamber's decision not to focus upon the marriage aspect of the bush wife and husband association was correct. For example, it has been suggested that '(...) the phenomenon of "bush wives" during the civil war in Sierra Leone does not resemble any form of marriage, whether forced or arranged, in any meaningful way.'⁷⁷ Gong-Gershowitz is criticising the distinction drawn by the Justices between arranged marriages during peace-time and forced marriages occurring during a time of conflict and is, therefore, suggesting that what occurred in Sierra Leone is better described as sexual slavery rather than forced marriage because there was no 'marriage' at all. Viewed from this perspective, drawing comparisons with marriage is seen as unhelpful because it does not encapsulate the sexual violence experienced by bush wives.

The gravity of the psychological and mental suffering that bush wives experience in a forced marriage relationship - precisely because of the sham marriage arrangement - is omitted entirely by such reasoning. It also precludes the possibility that sexual violence can be captured by a crime categorised as an 'other inhumane act'. If the prosecution of those responsible for crimes against humanity is to be effective then the crime must be described in a manner that is understood by victims. David Crane, the first Chief Prosecutor at the SCSL noted that, '(...) justice not appreciated or understood by victims may not be justice at all, and this can impact how that justice brings peace and stability to a region.'⁷⁸ He goes on to say that we should, '[b]eware of the cookie-cutter approach to international justice - it may hinder peace and not enhance it'.⁷⁹ It is submitted that the injustices suffered by bush wives are best remedied by prosecuting the conduct used by the perpetrators to cause the suffering. For women in Sierra Leone, this suffering occurred under the guise of marriage, one which purposefully reflected Sierra Leonean ideals. The term forced marriage, therefore, better reflects the suffering of women as it encapsulates all aspects of the conduct, including sexual violence. It also does not undermine the trauma caused by other aspects of the offence by emphasising one element of the crime over another.

The stigma attached to 'wives' coupled with the expectation that they carry out conjugal duties - and the physical trauma that such duties inflict - is tantamount to the gravity required of a crime against humanity and is unheard of in the jurisprudence of sexual slavery cases. This idea of 'stigma' and the consequences of conjugal association were to prove decisive in the decision of the Appeal Chamber to overturn the reasoning of the Trial Chamber and find that forced marriage did indeed constitute an 'other inhumane act' under Article 2(i) of the SCSL Statute.

It is also important to prosecute the alleged conduct as marriage and not sexual slavery in order that those perpetrating the offence do not see marriage as a loophole. In the context of events in Rwanda, Karla notes that by not addressing forced marriage as a criminal offence, the international community was failing to provide a deterrent for future cases.⁸⁰ She goes on to say that some combatants,⁸¹

⁷⁷ Gong-Gershowitz (n 28) 66.

⁷⁸ DM Crane, "'Back to the Future" - Reflections on the Beginning of the Beginning: International Criminal Law in the Twenty-First Century' (2008) 32 *Fordham Int'l L. J.* 6 1761, 1768.

⁷⁹ *ibid.*

⁸⁰ Kalra (n 3) 204.

⁸¹ *ibid.*

(...) may claim women as wives, rape them, and submit them to various forms of physical and psychological violence with impunity. By not trying these crimes, the international community sends a message that these acts are acceptable as long as they are done under the guise of marriage.

The above underlines the importance of targeting the described conduct as forced marriage rather than placing it in another category such as sexual slavery. In doing so, the courts make it clear that marriage is not to be used as a weapon of war.

Although the decision of the Trial Chamber proved instructive in some aspects,⁸² it is clear that the case was also a missed opportunity to advance the development of gender-based crimes under international law by acknowledging forced marriage as a separate offence.⁸³ This was to change on appeal, however, where the SCSL acknowledged for the first time the existence of forced marriage as a distinct crime against humanity.

C. The AFRC Appeals Chamber Judgment

Following the decision of the Trial Chamber, forced marriage was deemed to be entirely subsumed within the crime of sexual slavery and not an offence in its own right. The Appeals Chamber reversed this decision. In finding that forced marriage was distinguishable from sexual slavery, it ruled that,⁸⁴

(...) forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.

There were two distinguishing factors highlighted by the Appeals Chamber. Firstly, the physical, mental and psychological suffering that was caused to the victim as a result of being compelled by force, or threat of force, into a 'conjugal association'⁸⁵ and, secondly, the implied relationship of exclusivity that existed between a 'husband' and 'wife' which could lead to disciplinary consequences, including death, if breached.⁸⁶ Importantly, in deciding that forced marriage was a new offence under international law, the Appeals Chamber also confirmed that the required standards for conduct to be considered a crime against humanity under an 'other inhumane act' were met.⁸⁷ This is discussed in greater detail later in this paper.

The judgment marks a milestone in the development of the offence of forced marriage. However, difficulties arise in defining the *actus reus* of the crime. For example, the court heard arguments from the Prosecution which set out that forced

⁸² Such as expanding understanding of the war crimes of the use and recruitment of child soldiers.

⁸³ Oosterveld and Marlowe (n 61) 857.

⁸⁴ AFRC Appeals Chamber Judgment, para 195.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid* paras 197-202.

marriage need not involve any sexual violence or, for that matter, forced labour.⁸⁸ Such contentions can also be found in the partly dissenting opinion of Justice Doherty in the Trial Chamber's judgment,⁸⁹ posing the question of whether forced marriage is simply the assignation of the title of 'wife' and nothing more. Such reasoning is incompatible with the evidence that the suffering of the victim comes both from the stigma caused by the label 'wife' and the consequences that flow from it – 'the conjugal duties'. There was no evidence led by the Prosecution, nor is such evidence clear from other sources, which demonstrates that the two aspects of suffering can be separated. Where there were reports of forced marriage in Sierra Leone, there were also other elements such as forced labour and sexual violence.⁹⁰

In describing the circumstances which amounted to a forced marriage, the court implied that features such as violent abduction, forced domestic labour, rape and forced domestic pregnancy were integral elements of the crime.⁹¹ Similar reasoning can be found where the court discussed whether the crime merited classification as an 'other inhumane act'.⁹² This would suggest that the Appeals Chamber was content with holding that forced marriage was a multi-layered charge made up of both the conjugal association and the consequences that flow from it. This is important to establish as such a definition best captures the complete gravity of the suffering experienced by women and girls who were bush wives. However, further clarification of the Appeal Chamber's terminology 'forced conjugal association' is necessary in order to establish precisely what makes up the elements of forced marriage. Such explanation is required if the charge is to avoid being labelled as 'sexual slavery plus'⁹³ and to dismiss outright the notion that the defining feature of the conduct of forced marriage is only the use of the label 'wife'.

The Appeal Chamber judgement marks a positive step in the evolution of this new offence. There are, however, still certain aspects of the definition of forced marriage which require clarification in order to ensure that the crime is not understated. This could happen were 'conjugal duties' to be removed from the description, or the trauma inherent in the label 'wife' underestimated. Without these distinguishing features of the offence, there is a risk of blurring forced marriage with the separate offence of sexual slavery.

D. The RUF Cases

The RUF were responsible for much of the violence that took place during the civil war in Sierra Leone and indictments were issued against three RUF leaders.⁹⁴ Among the eighteen charges brought against the accused were two separate charges for the

⁸⁸ See, for example, AFRC Appeals Chamber Judgment, paras 178 and 189.

⁸⁹ AFRC Trial Chamber Judgment, Partly dissenting opinion of Justice Doherty, para 52.

⁹⁰ See, for example, the evidence of witnesses TF1-094 and TF1-133 in AFRC Trial Chamber Judgment, paras 1113-1118.

⁹¹ AFRC Appeals Chamber Judgment, para 190.

⁹² *ibid* para 199.

⁹³ Gong-Gershowitz (n 28) 70.

⁹⁴ The key leader of the RUF, Foday Sankoh, died of natural causes before he could be brought to trial.

crimes against humanity of sexual slavery and forced marriage.⁹⁵ All three indictees were found guilty of both sexual slavery and forced marriage and were convicted of these offences. This represented the first time in international law that there had been convictions for these two crimes. The Appeals Chamber upheld both the charges and the sentences imposed at trial.

The AFRC Appeals Chamber's definition of forced marriage as an act which involves the imposition of a 'forced conjugal status' upon a woman or girl⁹⁶ was followed in both RUF judgments.⁹⁷ The RUF Appeals Chamber also held that, as with sexual slavery, consent was not to be taken as a mitigating factor as, under the circumstances, genuine consent would always be impossible.⁹⁸ This emphasised the view of the AFRC Appeals Chamber that the benefits conferred upon women in forced marriages neither signifies consent nor vitiates the perpetrator's conduct.⁹⁹

It was hoped that the RUF judgments would clarify uncertainties left by the AFRC Appeals Chamber Judgment. For example, as stated above, the terminology of 'forced conjugal association' is without any clear definition at present. Also, it is not known whether forced marriage is to be categorised as a gender-specific offence or whether boys and men may be victims of forced marriages as well. A ruling on the latter would be particularly instructive in light of evidence that forced marriages took place in Cambodia under the oppressive reign of the Khmer Rouge. Unlike Sierra Leone and the rest of the African continent, in Cambodia both women and men were forced together into marriage relationships.¹⁰⁰ Jurisprudence from the SCSL in relation to this matter would be helpful for the Extraordinary Chambers in the Courts of Cambodia as they discern whether or not charges of forced marriage can be brought against the third parties who instigated them.

Unfortunately, these questions were not answered by the SCSL. In fact, Gong-Gershowitz fears that the RUF judgment at trial blurred the distinction between forced marriage and sexual slavery rather than further distinguishing the two.¹⁰¹

Far from clearing up any ambiguities left open by AFRC Appeals Judgment, the RUF judgment perpetuates the confusion by loosely applying the facts to one or both crimes without maintaining a clear distinction between the elements that must be proven for each. One possible reason for the lack of clarity in the RUF judgment is that the elements of the forced marriage crime are not readily discernible.

Therefore, Gong-Gershowitz suggests that, '(...) the RUF judgment further muddies the waters and leaves this new crime against humanity without a coherent definition

⁹⁵ Forced marriage was, again, listed under 'other inhumane acts'.

⁹⁶ AFRC Appeals Chamber Judgment, para 202.

⁹⁷ See, for example, *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case No. SCSL-04-15-T), Trial Chamber Judgment, 2nd March 2009, para 1295. Hereinafter, the 'RUF Trial Chamber Judgment'.

⁹⁸ *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case no. SCSL-04-15-A), Appeals Chamber Judgment, 26th October 2009, paras 734, 736. Hereinafter, the 'RUF Appeals Chamber Judgment'.

⁹⁹ AFRC Appeals Chamber Judgment, para 190.

¹⁰⁰ See Toy-Cronin (n 8) 549.

¹⁰¹ Gong-Gershowitz (n 28) 73.

in international criminal law.¹⁰² This argument is not without merit. The Trial Chamber failed to adequately differentiate between the two charges of sexual slavery and forced marriage. Evidence for the two charges was heard together as the Trial Chamber considered them to be intertwined. This has been detrimental to the understanding of what defines a forced marriage. It is true that forced marriage is, '(...) a multidimensional, gender-based crime with sexual and non-sexual characteristics'¹⁰³ and evidence given by witnesses during the RUF trial, as in the AFRC trial, emphasises this. Considering evidence regarding sexual slavery, therefore, is inevitable when determining the charge of forced marriage. However, the difficulty with the structuring of the court's ruling becomes evident when conclusions are drawn from the evidence. For example, in the case of witness TF1-093, the court concluded: 'We therefore find that the "forced marriage" of witness TF1-093 constitutes sexual slavery and an 'other inhumane act', as charged under counts 7 and 8 of the indictment'. A similar conclusion was drawn regarding witness TF1-314, where the court reviewed the circumstances which demonstrated that against her will, the witness was abducted, forced into a marriage (which involved domestic chores and sexual intercourse)¹⁰⁴ and held under such circumstances which made her feel unable to escape as she feared for her life. The court concluded that the elements of sexual slavery and forced marriage had been met.¹⁰⁵

On the one hand, the bundling together of evidence relating to sexual slavery and forced marriage highlights the multi-faceted nature of the offence by demonstrating that it is made up of both sexual and non-sexual characteristics. However, by failing to distinguish clearly between where one offence begins and the other ends, not only are we still no closer to establishing what constitutes evidence of a 'forced conjugal relationship' but there is a danger that the charge of forced marriage could be viewed as duplicitous and repetitive. A clear definition of the concept of a forced conjugal relationship is essential if defendants are to know what it is they are being accused of and, therefore, how they can best defend themselves in the face of such accusations. Some commentators¹⁰⁶ have attempted to provide a working definition of the crime. However, any such definition must come ultimately from either the SCSL, another international tribunal or ideally from an amendment of the Rome Statute following approval and debate by the Coalition for the International Criminal Court as these are the primary sources of international criminal law.

The RUF cases proved progressive by highlighting the multi-dimensional nature of the offence, removing the need to examine the issue of consent and recording convictions for the charge for the first time. They also bring to the fore the plight of bush wives. However, the judgment failed to provide further clarification of certain key aspects of the offence, namely a definition of a 'forced conjugal association'.

¹⁰² *ibid* 75.

¹⁰³ Oosterveld and Bederman (n 18) 80.

¹⁰⁴ RUF Trial Chamber Judgment, para 1460.

¹⁰⁵ *ibid* para 1461.

¹⁰⁶ See, for example, Jain (n 11) 1031.

E. The Trial of Charles Taylor

The trial of Charles Taylor, former President of Liberia, represents another landmark in international criminal law. In this case, the court ruled that despite Taylor's position as an incumbent head of state at the time the indictment was issued, this was not a bar to his prosecution.¹⁰⁷ The trial has now concluded, with the Chamber finding Taylor guilty on all eleven counts.¹⁰⁸ The indictment against Taylor contained, amongst others, charges of sexual slavery, abductions and, in Count 8, the charge of crimes against humanity 'other inhumane acts', including mutilations and beatings.¹⁰⁹ No charge of forced marriage was brought against the former president.¹¹⁰ However, in his opening statement to the Trial Chamber, sitting at the ICC in The Hague, the prosecutor stated:¹¹¹

You will hear that Sierra Leonean women captured by the RUF or AFRC were forced to make strategic choices that no women should ever have to make. These women would seek to become attached to a single commander or fighter as a "bush wife" because this was the best way to limit the abuse they would suffer. The alternative was that [*sic*], and I quote a witness, "to be treated like a football in the field," being exposed to one rape after another perpetrated by many men without any consideration for health, feelings or lives.

Evidence was also heard during the trial relating to the use of women as 'jungle wives'¹¹² or 'bush wives'.¹¹³ This demonstrates that in the context of Sierra Leone, a discussion of offences committed against women such as rape and sexual slavery will inevitably lead to evidence of forced marriage. This emphasises that it is difficult to simply compartmentalise gender-based crimes into rape and sexual slavery as such offences are often complex in nature and will have many facets – both sexual and non-sexual. An indictment including the charge of forced marriage captures more effectively all of the elements of gender-based crime because sexual offences may have occurred within the wider context of a forced marriage rather than in isolation.

¹⁰⁷ M Pack, 'Developments at the Special Court for Sierra Leone' (2005) 4 Law & Prac. Int'l Cts. & Tribunals 171, 182.

¹⁰⁸ At the time of writing, the full judgement of the ICC had not been published. Only a summary version was available. As a result, a detailed analysis of the judgement and its reasoning was not possible. For further information on the decision of the court, see the SCSL website <<http://www.sc-sl.org/>> accessed 12 June 2012.

¹⁰⁹ *Prosecutor v Taylor* (Case No. SCSL-2003-01-T), Prosecution's Second Amended Indictment, 7 <<http://www.sc-sl.org/LinkClick.aspx?fileticket=Irn0bAAMvYM%3d&tabid=107>> accessed 12 June 2012.

¹¹⁰ *ibid.*

¹¹¹ *Prosecutor v Taylor* (Case No. SCSL-2003-01-T), Trial Chamber II, Transcript of Prosecution Opening Statement, para 63.

¹¹² *Prosecutor v Taylor* (Case No. SCSL-03-1-T), Trial Chamber, Transcript, April 23 2008 at 8392 (line 23) – 8395 (line 19).

¹¹³ *Prosecutor v Taylor* (Case No. SCSL-03-1-T), Trial Chamber, Transcript, April 27 2010 at 40104 (line 28) – 40105 (line 7) and 40111 (line 27) – 40112 (line 12).

Once the full judgment is available, it will be interesting to see how the Trial Chamber has distinguished the crime of sexual slavery from forced marriage, if indeed it has done so at all. As mentioned above, evidence of forced marriage has been led by the prosecution. If the Trial Chamber has used this evidence to support conviction for sexual slavery under Count 5 of the indictment, then this will blur the boundaries separating these two distinct crimes. This would be unhelpful in the evolution of forced marriage as a distinct and recognisable crime against humanity. Nevertheless, even without a charge of forced marriage in the indictment, the transcripts of the Taylor trial may still prove useful in clarifying certain aspects of forced marriage. Further systematic research of the Taylor transcripts is required and may allow for a clearer picture to be developed of how the crime of forced marriage is approached in court room practice. For example, what sort of evidence does the prosecution seek to draw out from a witness to establish whether forced marriage has taken place? Is it restricted solely to proving the trauma that the label 'wife' caused to the victim or will the prosecutor draw out evidence of conjugal duties as well and, if so, how then does the prosecutor seek to distinguish forced marriage from sexual slavery – if at all? Answers to these questions may allow for a better understanding of the term 'forced conjugal partnership' to be developed.

Conversely, noting how the accused responds to allegations of forced marriage through his counsel may assist in developing an understanding of what defences can be used in charges of forced marriage. 'Consent' was dismissed as a defence by the RUF Appeals Chamber and so it will be interesting to consider what other methods the defence team may use to refute the charge. Could it be argued, for example, that the court should not permit evidence of forced marriage to be heard as a means of proving the charge of sexual slavery as forced marriage is an offence in its own right and such a charge does not appear on the indictment? Whilst such research may prove illuminating, it is ultimately limited in its capacity to develop the law in the area of forced marriage. Court transcripts do not carry the same weight as the final judgment of the court, which is the best authority on points of law. Since the indictment against Taylor contained no direct charge of forced marriage, the court has not dealt with this issue in its ruling. Therefore, until either the SCSL or, indeed, another international tribunal brings an indictment against an individual including a charge of forced marriage, the continued development of the crime will remain in limbo.

F. Conclusions

At the close of this section, two conclusions can be drawn. First, and most importantly, it is submitted that there exists a lacuna in the law which can be filled by the charge of forced marriage. The evolution of the case law of the SCSL demonstrates this by highlighting the trauma experienced by women trapped in 'forced conjugal associations'. Such plight is beyond the scope of a charge of sexual slavery alone. Although the two crimes share some common elements, there are a number of non-sexual distinguishing factors and these set the charge of forced

marriage apart. In an effort to avoid ‘cookie-cutter’¹¹⁴ justice, the SCSL has taken a bold stance in creating an offence which is tailored to meet the sufferings of women in Sierra Leone and properly acknowledges the crimes committed against them.

Secondly, of some concern is the lack of a clear definition relating to this new offence. There are still a number of vital questions to be answered in this respect. To that end, the next section of this paper will look at some of the outstanding issues caused by this before moving on to consider how forced marriage can continue to be developed within the body of international criminal law.

4. Principles and Rights

A. Introduction

In order to ensure that trials of war criminals do not resemble victor’s justice, it is vital that certain rights of the defendant are safeguarded. Two of those rights are of particular importance when assessing the viability of a ‘new’ charge such as forced marriage. Firstly, the right of the accused to know the charges being brought against him,¹¹⁵ safeguarded by the principle of specificity, and secondly, the right not to be held criminally responsible for a crime which, at the time of commission, did not constitute a crime within the jurisdiction of the court.¹¹⁶ The latter is safeguarded by the general criminal law principle of *nullum crimen sine lege*¹¹⁷ or ‘the principle of legality’.

This section will assess whether or not the new charge of forced marriage developed by the SCSL violates either of these important principles of international law, examining first the principle of legality before moving on to consider the principle of specificity.

B. The Principle of Legality

An important safeguard in criminal law, this principle ensures that individuals are protected from arbitrary laws created by the judiciary. There are two means of interpreting this principle: one which views it as a guiding moral ideal (favouring substantive justice) and the other which seeks its strict application (favouring strict legality and legal certainty). On the one hand, it is true that as international criminal law becomes more ‘settled’ there is less need for expansive interpretation and so, ‘(...) the full complement of the principle of legality can take root’.¹¹⁸ However, it is also the case that humanity continues to create new challenges for international criminal law to meet¹¹⁹ and, therefore, in the interests of achieving justice and ending

¹¹⁴ Crane (n 78) 1768.

¹¹⁵ SCSL Statute, Art 4(a).

¹¹⁶ See, for example, ICC Statute, Art 22.

¹¹⁷ Literally meaning ‘there is no crime without law’.

¹¹⁸ B Van Schaak, ‘Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 Geo. L. J. 119, 192.

¹¹⁹ This was acknowledged by the AFRC Appeals Chamber Judgment at para 186.

impunity, a degree of flexibility is required in the application of the principle. This is recognised by the inclusion in the SCSL Statute of a residual category of 'other inhumane acts'¹²⁰ which allows for the prosecution of crimes against humanity that have not been expressly provided for by the SCSL Statute. In order to satisfy the principle of legality, forced marriage must be able to fit into this category.¹²¹

It is clear that forced marriage in Sierra Leone took place in the framework of a widespread and systematic attack against a civilian population with knowledge of the attack on the part of the perpetrator, thus meeting the general requirements of a crime against humanity. The AFRC Appeals Chamber also took the following into account:¹²²

(...) [The infliction of] great suffering, or serious injury to body or to mental or physical health;

(...) [they] are sufficiently similar in gravity to the acts referred to in Article 2(a) to Article 2(h) of the Statute; and

[t]he perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The suffering caused to women trapped in forced marriages is indisputable and is set out in the previous section. The similarity of forced marriage to other offences under Article 2 of the SCSL Statute was made apparent by the AFRC Appeals Chamber, which highlighted that the '(...) acts described as forced marriage may have involved the commission of one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, abduction among others.'¹²³ The gravity of these crimes is well established and as a result it can be presumed that the perpetrators knew that their conduct was criminal and that prosecution was to be expected.¹²⁴

One other means of discerning whether an offence is to be considered a crime against humanity under 'other inhumane acts' is to find guidance in international human rights conventions.¹²⁵ While it is true that such instruments condemn forced marriage, they also place emphasis on consent of the parties to a marriage.¹²⁶ However, the inherent danger on relying upon human rights conventions is that all marriages without consent will become criminalised. This would extend to arranged marriages which, although an infringement of human rights, are not an issue for international criminal law. This was made clear by Justice Sebutinde in her separate opinion as part of the AFRC trial judgment.¹²⁷ Perhaps it was for this reason that the AFRC Appeals Chamber chose not to consider international human rights instruments in determining whether forced marriage could be considered an 'other

¹²⁰ SCSL Statute, Art 2(i). Such a category can also be found in the ICC Statute at Art 7(1)(k) and as far back as the Nuremberg Charter at Art 6(c).

¹²¹ AFRC Appeals Chamber Judgment, para 197.

¹²² *ibid* para 198.

¹²³ *ibid* para 201.

¹²⁴ Frulli (n 10) 1040.

¹²⁵ Schabas (n 27) 225.

¹²⁶ See, for example, Universal Declaration on Human Rights, Art 16.

¹²⁷ AFRC Trial Chamber Judgment, Separate Concurring Opinion of Justice Sebutinde, para 12.

inhumane act'.¹²⁸ With the aforementioned requirements met, the AFRC Appeals Chamber was content to classify forced marriage as a crime against humanity under Article 2(i) of the SCSL Statute. In meeting these requirements, the 'new' offence does not violate the principle of legality as it forms part of customary law under 'other inhumane acts'.

C. The Principle of Specificity

This legal principle exists in order to ensure that those falling under prohibitions of law are aware of exactly which behaviours are allowed and which are not. It requires criminal rules to be detailed and precise so as to make clear the elements of the *actus reus* and requisite *mens rea* of the crime.¹²⁹ Specificity can be difficult to achieve in international criminal law, particularly with regards to indictments as often charges will concern a large number of victims and crimes that have been committed over a long period of time. In the case law examined above, issues of specificity arose both in regard to the amendment of the AFRC indictment in May 2004 and again following the AFRC Appeals Chamber judgment.

An indictment should be specific enough to allow the accused to defend himself adequately.¹³⁰ The amendment of any indictment must take into account the right of the accused to a fair trial which is enshrined generally under Article 17 of the SCSL Statute, particularly at Article 17(4)(a). This codifies the right of the accused, '(...) to be informed promptly and in detail in a language which he or she understands of the nature and cause of charges against him or her'. In May 2004, the AFRC indictment was amended by the SCSL to include the new charge of forced marriage. The defence alleged that there had been a breach of this principle by allowing the indictment to be amended and,¹³¹

(...) objected to all changes in the indictments, and in particular to the count relating to forced marriage, arguing that forced marriage was not a CAH, that bringing such a charge violated the principle of legality, and further that the proposed new crime was "too vague" to constitute "other inhumane acts".

This criticism is not without weight as the AFRC indictment failed to clearly distinguish the facts which were to apply to each offence, charging five separate sex-based crimes under a single set of factual allegations.¹³² Without a specific set of material allegations at the outset, it is questionable as to whether or not the accused were given sufficient notice of the charges being brought against them.¹³³

The lack of clarity of the AFRC Appeals Chamber definition of forced marriage may have proved detrimental to the RUF indictees. These defendants

¹²⁸ AFRC Appeals Chamber Judgement, para 198.

¹²⁹ Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 41.

¹³⁰ Klip and Sluiter (n 34) 278.

¹³¹ Pack (n 107) 191.

¹³² C Rose, 'Troubled indictments at the Special Court for Sierra Leone: the pleading of joint criminal enterprise and sex-based claims' (2009) 7 J. Int. Criminal Justice 2 353, 368.

¹³³ *ibid* 369.

would not have been aware of what the charge of forced marriage was until the AFRC Appeals Chamber issued their judgment on 22nd February 2008, four years after the RUF Trial proceedings began.¹³⁴ It is difficult to conclude that the accused in the RUF Trial would have been able to adequately prepare their defence. They were only made aware of a (vague) definition of the offence late into proceedings and the indictment itself failed to distinguish clearly and specifically between conduct which was to be charged as forced marriage and that which was to be charged as sexual slavery.¹³⁵ However, bearing in mind the similarities that exist between the offences of sexual slavery and forced marriage, this lack of clarity should not have been completely problematic. The evolution of a clear definition of forced marriage in future judgments would provide Prosecutors with a distinct charge to indict those responsible for the practice of forced marriage, which would in turn allow those tasked with defending a more precise idea of what is to be defended.

D. Conclusions

It was important for the AFRC Appeals Chamber to set out exactly why the offence of forced marriage could be classified as an 'other inhumane act'. This meant that the court was acting under well-established customary law rather than out of moral abhorrence to the conduct. The SCSL was criticised for doing this by Justice Robertson regarding the criminalisation of the practice of recruiting and conscripting children as soldiers in the CDF cases. The principle of legality is an important safeguard in international criminal law but the flexibility afforded by the residual 'other inhumane acts' category has proved vital in ensuring the end of impunity for those who have turned marriage into a weapon of war - a challenge that, in the absence of an express forced marriage provision, a strict interpretation of the SCSL Statute could not adequately meet.

However, the lack of specificity and clarity surrounding precisely the sort of conduct envisaged by a 'forced conjugal association' may hamper the evolution of this offence. Descriptions of conduct particular to that which occurred in Sierra Leone, rather than a working definition, will provide little instruction to other courts and tribunals, such as the ICC, which may face the problem of forced marriage in very different contexts.¹³⁶

¹³⁴ The Special Court for Sierra Leone, 'The Prosecutor v Sesay, Kallon and Gbao' <<http://www.scs-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx>> accessed 12 June 2012.

¹³⁵ See *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case no. SCSL-04-15-T), Corrected Amended Consolidated Indictment, paras 54-60 <<http://www.scs-sl.org/LinkClick.aspx?fileticket=ppr39WF8TnM%3d&tabid=105>> accessed 12 June 2012.

¹³⁶ Rose (n 132) 371.

5. Recommendations

At present, the ICC has issued no indictments which include the charge of forced marriage. Evidence of forced marriage has, however, been heard in at least one of the cases presently before the ICC.¹³⁷ Amnesty International has noted the widespread practice of forced marriage in Uganda by the rebel group known as the Lord's Resistance Army (LRA).¹³⁸ In a positive development, ICC Prosecutors, as part of their on-going investigations into violations of international criminal law by the LRA, have indicated a willingness to charge those responsible for forced marriages, should such evidence become available. In a report by the International Centre for Transitional Justice (ICTJ), in the context of bringing such charges of forced marriage, a member of the ICC Prosecution team stated that,¹³⁹

(...) prosecutors knew the LRA called the girls "wives", but this was not evidence that forced marriage had taken place (...) ICC prosecutors now had more evidence in their files, leaving open the possibility that the further charges, including that of forced marriage, could be brought following the arrest of the suspects.

This comment highlights the cumulative nature of the charge of forced marriage. The labelling of 'wife' is not deemed enough on its own to bring a charge of forced marriage. It will be interesting to see what the Prosecution deems sufficient evidence which, when taken in conjunction with the labelling of 'wife', could amount to a charge of forced marriage in Uganda and whether or not such elements of the charge reflect the definition of forced marriage decided by the SCSL.

Unfortunately, forced marriage was absent from the agenda at the most recent Review Conference of the Rome Statute. In a report on the conference, the Women's Initiative for Gender Justice has called on *ad hoc* tribunals, special courts and the ICC to issue stronger and more consistent jurisprudence on forced marriage.¹⁴⁰ Without such a unified approach, any deterrent effect of the charge will be hampered. It must be made clear that forced marriage is not being condemned in Sierra Leone alone. An indictment issued including the charge by another tribunal or the ICC will send a clear message that the prosecution of forced marriage is not an anomalous product of the SCSL jurisprudence but is, in fact, part of a universal effort to end the impunity enjoyed by those who choose to put women through such suffering. Should ICC Prosecutors choose to include this charge on the indictments addressed to members of the LRA in Uganda, this would prove a positive step forward in the continued evolution and development of the criminalisation of forced marriage. Codification of

¹³⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Case no. ICC-01/04-01/07), ICC, Pre-Trial Chamber, Decision on the Confirmation of Charges, 30 September 2008, paras 348 and 434-435.

¹³⁸ Amnesty International (n 9) 15-20.

¹³⁹ Katy Glassborow, 'ICC Investigative Strategy Under Fire' (*Institute for War & Peace Reporting*, 17th October 2008) < <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> > accessed 12 June 2012.

¹⁴⁰ Women's Initiatives for Gender Justice, 'Advancing Gender Justice - A Call to Action' (Review Conference of the Rome Statute, 31 May - 11 June 2010) <<http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf>> accessed 12 June 2012.

the offence into the Rome Statute would, however, certainly be the most efficient and pragmatic means of allowing the ICC to punish the offence. Perhaps this could be considered at the next Review Conference of the Rome Statute.

6. Conclusion

In establishing a new multi-faceted offence of forced marriage that suitably reflects the suffering of women and girls in Sierra Leone, the SCSL has displayed boldness and innovation without offending the principle of legality. However, there remains a strong need for a clearer definition of the offence so as not to violate the right of a defendant to a fair trial. In distinguishing the conduct from sexual slavery, the SCSL drew attention to the grave trauma caused by the label 'wife' and the desperate psychological and physical consequences inherent in that title, both in terms of the conjugal duties expected of women and the stigma attached to them as a result of being bush wives.

Forced marriage continues to plague many conflict torn nations, particularly on the African continent. The SCSL has taken an important step forward in the prosecution of this kind of gender-based offence by condemning the practice and the door has been left open for other courts to do the same. This development demonstrates the readiness and ability of international criminal law to re-establish justice where its course has been perverted, even in the face of new challenges. The women of Sierra Leone who have suffered now have a voice in this new norm and it is imperative that women suffering elsewhere are given the same hope. The need cannot be stressed enough for the offence of forced marriage to be upheld in other international tribunals and at the ICC to ensure that this hope remains a reality.

Mediation: The Future of Dispute Resolution in Contemporary Scots Family Law

THOMAS McFARLANE*

Abstract

The merits of family mediation have been capitalised on throughout the world, with many jurisdictions embracing the method as an alternative to court-based dispute resolution. It has now become routine practice in several countries including the USA, with its influence continuing to grow throughout Europe, South Africa and Australia. Indeed, some countries have even made it compulsory. However, to date, the Scottish Government has failed to exploit its usefulness. This paper will measure the success of the implementation of family mediation domestically and internationally. Through building upon the lessons which these countries have learnt, recommendations will be made which may guide the future approach taken in Scotland. It will be contended that the 'Scandinavian' approach which makes family mediation compulsory not only illustrates how successful the method can be but also provides much needed guidance as to how best to implement legislation to ensure its effective transition into the dispute resolution framework in contemporary Scots family law.

1. Introduction

Mediation is not a new concept. In fact, the idea of parties in dispute turning to someone else to help them 'sort it out' is so obvious that our progenitors did it without much comment. Mediation is said to have been implemented throughout Ancient Greece from around the 8th century BC onwards¹ and in China it can be traced back to the time of Confucius.² Despite this, it is only in recent years that governments across the world have begun to embrace this method of dispute resolution as a viable alternative to civil litigation in disputes encompassing family law issues. Indeed, some countries have even made it compulsory. However, this has not been the case in Scotland where the Scottish Government has failed to capitalise on its usefulness. This is despite the fact that for nearly two decades, academic discussion and popular articles alike have argued for an increased use of mediation in Scotland for determining family law related disputes.

Family law disputes are unique in that they involve heightened emotional considerations which encompass feelings of hostility, bitterness, resentment, fear and embarrassment. Nonetheless, there is a necessity for the preservation of an on-going relationship in many cases due to the fact that children are involved. It is, therefore,

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¹ D Roebuck, 'The Myth of Modern Mediation' (2007) 73 *Arbitration* 105, 106.

² L Parkinson, 'Family Mediation and Mixed Messages Across Europe' (2010) *International Family Law Journal* 193, 193.

imperative that separating couples have the opportunity to consider their problems in family mediation before they are subjected to the adversarial and confrontational atmosphere of the court-process.

This paper will contend that the Scottish Government should take note of the increasing and successful use of mediation internationally and adopt a more proactive stance in embracing this effective alternative by initiating its wider use in family law disputes. This paper will also seek to determine whether this would be best achieved through a move towards mandatory mediation, as is witnessed in Scandinavian countries such as Norway and Sweden. It will be argued that the 'Scandinavian' experience not only illustrates how successful mediation can be but can also provide much needed guidance as to how best to implement the method legislatively to ensure its successful transition into the dispute resolution framework within contemporary Scots family law.

It will be demonstrated that some major flaws exist within the present system in Scotland. A failure to capitalise on mediation is compounded by the fact that there are substantial court back-logs and an average of more than 10,000 divorces every year in Scotland, on top of a rising number of civil partnership dissolutions.³ This is not to mention the number of unmarried cohabiting couples who split every year, with just over half of all children in Scotland born to unmarried parents.⁴ These figures illustrate just how important it is that the Scottish Government implements a more effective method of dispute resolution which can ease the ever increasing work load placed on our civil court system and which, more importantly, better serves the interests of the parties, their children and wider society both financially and otherwise.

However, despite these facts and the long-awaited report of the Scottish Civil Courts Review, chaired by Lord Gill,⁵ the system in Scotland is yet to change. The Gill Review was blunt in its assessment of the current civil justice system, stating that the current service was 'slow, inefficient and expensive', incorporating procedures which were 'antiquated' and remedies which were 'inadequate'.⁶ Family law disputes encompassing separation, divorce and several issues relating to children do certainly fall within these criticisms.⁷ Rather frustratingly, the Gill Review provided meagre, lethargic praise for mediation in general and offered no real commitment to

³ Scottish Government, *Statistical Bulletin: Crime and Justice Series: Divorces and Dissolutions in Scotland, 2009-10* (21 December 2010) 1 <<http://www.scotland.gov.uk/Publications/2010/12/17151409/0>> accessed 12 June 2012.

⁴ General Register Office for Scotland, *2010 Births, Deaths and Other Vital Events - Preliminary Annual Figures* <<http://www.gro-scotland.gov.uk/statistics/theme/vital-events/general/bmd-preliminary/2010.html>> accessed 12 June 2012.

⁵ B Gill, *The Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review, September 2009) hereinafter the 'Gill Review'.

⁶ *ibid* i.

⁷ A study published by Norwich Union (now Aviva) found that the average divorce costs a couple around £39,000 - this figure includes outlays such as the cost of setting up a new home, buying personal items and lost personal savings. As for legal fees, the study estimated that, on average, each divorcee spends around £1,800: Aviva, 'Brits spend over £4 billion on divorce' (13 December 2006) <<http://www.aviva.co.uk/media-centre/story/2935/brits-spend-over-4-billion-on-divorce/>> accessed 12 June 2012.

bring it to the forefront of dispute resolution in Scots law. This is despite evidence that a significant number of respondents could see the value of mediation, particularly as a method of resolving disputes at an early stage.⁸ This is extremely disappointing and ultimately provided the motivation for this paper.

This paper will be structured as follows: Part II will define the concept of family mediation; Part III will consider the background to the method, including the origination of mediation in Scotland, its evolution in Scots family law and how it is implemented at present; Part IV will examine the major strengths of mediation; Part V will encompass a comparative study reflecting upon the use of family mediation internationally; and finally, in Part VI, recommendations will be made as to the steps which the Scottish Government should take in regard to family mediation in Scotland.

2. Defining Family Mediation

There are several definitions of mediation and more specifically, 'family mediation', provided by academics and official sources alike. However, a succinct definition is provided by the United Kingdom Government which defines family mediation as '(...) a process in which an impartial third person, the mediator, assists couples considering separation or divorce to meet together to deal with the arrangements which need to be made for the future.'⁹

In Scotland, family mediation is a voluntary process, during which the mediator acts as a facilitator, aiding the parties to the dispute to reach an agreement. The mediator must remain nonpartisan in order to ensure the success of the process. They will help the parties who have issues or problems to discuss how these issues can be resolved and will focus on effective communication, mutual understanding and information gathering. This allows the parties to identify common ground and to find the best way forward. Importantly, the mediator does not make a decision or 'find' for any of the parties. Essentially, mediation has a multi-disciplinary character and can be seen as a socio-legal process. Indeed, the qualities, skills and qualifications required of mediators are some of the inherent issues at the heart of this topic.

An agreement between the parties to mediation, drawn up by the mediator, is referred to as a Memorandum of Understanding but it does not represent a legally binding contract. It must be transformed into a legally binding contract before it will have any legal force.¹⁰ In this sense, solicitors are not completely removed from the process as they will be required to draft the agreements which the courts will then make legally binding. Arrangements covered in a Memorandum of Understanding may include reaching a decision as to residence and contact agreements regarding any children of the relationship. This is in addition to any property issues to be resolved or financial settlements to be made which may include child maintenance.

⁸ Gill Review (n 5) 165.

⁹ Lord Chancellor's Department, *Looking to the Future: Mediation and the Ground for Divorce* (White Paper, Cm 27990 1995) para 5.4.

¹⁰ Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (3rd edn, Ashgate 2008) 96.

Family mediation is not only implemented in disputes involving children. 'All-issues' family mediation is now available, which can be implemented to deal with all financial and property matters as well as issues relating to children.¹¹

One of the main criticisms levelled at the process is that the mediator is not truly impartial in their role.¹² This may lead to situations where the agreement reached by the parties reflects the views of the mediator as opposed to those of the parties themselves. However, this is a flawed argument in that it is unlikely that two adults who may harbour their own strong views, will be dictated to by a stranger as to what is the best course of action for them. Indeed, research in England has shown that the majority of those who attend mediation believed that the mediator had been impartial.¹³ In any case, mediation avoids the clear 'ordering' by a judge in court as to what the parties should do. This must surely be seen as an advantage, providing the parties with the ability to determine their own future.

In terms of the process itself, it is essential to note from the outset that mediation is not reconciliation. This is a common misconception and indeed can be seen to have held back the progress of mediation as a method of alternative dispute resolution (ADR) in the early days of its implementation. Reconciliation is an entirely different process which is solely an attempt to keep a couple together and which is carried out by counsellors, not mediators. Nonetheless, reconciliation via mediation is not impossible. The coming together of the parties in the same room and the discussion of matters in a civil manner has the ability to help the parties realise that the marriage may be salvageable after all.

3. Mediation in Scotland

A. The Origination of Family Mediation in Scots Family Law

It is widely accepted that family mediation, as we know it today, emanated from the United States in the mid-twentieth century¹⁴ and arrived in Britain in the late 1970's.¹⁵ In the United Kingdom, it was implemented first in Bristol in 1979 as an innovative local service.¹⁶ The pioneering architects of the Bristol Courts Family Conciliation Service, the UK's first local family conciliation service (as it was known

¹¹ The falsely held belief that mediation could only be used when there were children involved can be said to have hindered the uptake of the method.

¹² F Myers and F Wasoff, 'Meeting in the Middle: A Study of Solicitors' and Mediators' Divorce Practice' (2000) SLT (News) 259, 263-265.

¹³ The research on the Family Mediation Pilot Project led by Professor Davis was based on a sample of 4,593 cases in which couples were offered mediation as an alternative to litigation. 82% of participants considered that the mediator had been impartial and 70% had found mediation very helpful or fairly helpful: Gwyn Bevan and Gwynn Davis, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission 2000).

¹⁴ Michael Palmer and Simon Roberts, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (CUP 2005) 45.

¹⁵ Desmond Ellis and Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Sage 1996) 3.

¹⁶ M Martin-Casals, 'Divorce Mediation in Europe: An Introductory Outline' (2005) 9 *Electronic Journal of Comparative Law* 2, 18 <<http://www.ejcl.org/92/art92-2.pdf>> accessed 12 June 2012.

then), may be viewed as the founding fathers of mediation in the United Kingdom. The concept then percolated throughout England, finally arriving in Scotland in the 1980's.¹⁷

Mediation came to the forefront in Scotland in 1984 under the aegis of the voluntary body known as the Scottish Family Conciliation Service.¹⁸ It has since evolved to cover several regions across Scotland, under the general advocacy of a national umbrella body, Family Mediation Scotland ('FMS'),¹⁹ which was created in 1987.²⁰ FMS was originally formed with a remit covering only those cases involving children²¹ but is today part of the larger body, Relationships Scotland,²² and has since developed into an all-encompassing mediation service, dealing with disputes relating to finance and property as well as children. In addition to this founding organisation, the other main provider is Comprehensive Accredited Lawyer Mediators ('CALM'). Furthermore, there are now several commercial mediation services in Scotland, such as Core Mediation, in addition to smaller independent mediation providers. Therefore, mediation is now a widely available service in Scotland but, despite this widespread availability, there is not an equally matched awareness or indeed encouragement of this method and hence uptake remains low in comparison to court-based dispute resolution.

B. Current Rules and Provisions for Family Mediation in Scotland

In contrast with the position in England, mediation services in Scotland are wholly independent from the courts. Consequently, there is very little legislation or indeed case law, with the only tangible reference to the process coming from the Rules of Court. There are two identical Rules which read as follows:²³

In any family action in which an order in relation to parental responsibility or parental rights is in issue, the court may, at any stage of the action where it considers appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.

This empowers but does not oblige the courts to refer relevant parties involved in divorce or child-related disputes to mediation. A referral may be made at any stage in the proceedings, up until the final determination of the action. In reality, most

¹⁷ Anne Griffiths and Lilian Edwards, *Family Law* (2nd edn, W. Green 2006) 538.

¹⁸ *ibid.*

¹⁹ Whilst 'conciliation' was utilised in the name of the original body, this was replaced by 'mediation' in 1992 to reduce confusion surrounding the two different types of service.

²⁰ Griffiths and Edwards (n 17) 539.

²¹ Known as 'all-issues' mediation.

²² A Scottish charity created by the merger between Relate Scotland (previously Couple Counselling Scotland) and FMS.

²³ These are: (1) OCR 33.22 (as substituted by the Act of Sederunt (Family Proceedings in the Sheriff Court) 1996, SI 1996/2167) at Sch, para 12 and OCR 33A.22 for civil partners; and (2) RCS 49.23 (as amended by the Act of Sederunt (Rules of the Court of Session Amendment No.3) (Miscellaneous) 1996, SI 1996/1756 at para 2(17) and by the Act of Sederunt (Rules of the Court of Session Amendment No.5) (Family Actions and Miscellaneous) 1996, SI 1996/2587 at para 2(16). Hereinafter the 'Rules'.

referrals to mediation actually emanate from solicitors,²⁴ voluntary aid agencies or indeed from the parties themselves,²⁵ with the Rules rarely implemented in practice.²⁶ This is primarily due to the recognition that the mediation process is voluntary. However, the courts have, on occasion, made an order in very exceptional circumstances, such as where the parties previously agreed to mediation in writing.²⁷ Thus, at present, the courts in Scotland have a very limited role in the family mediation process.

The only statutory provisions relating to family mediation in Scotland are to be found in the Civil Evidence (Family Mediation) (Scotland) Act 1995 (the '1995 Act'). However, the 1995 Act provides no mechanism for the ordering or indeed encouragement of mediation. It merely provides statutory protection for confidentiality in relation to discussions which take place during the process, specifying that such information is not admissible in any civil proceedings.²⁸ There are, however, some exceptions.²⁹ For example, information regarding any contract entered into is admissible.³⁰ The 1995 Act was enacted due to the ambiguity, which arguably still exists in Scots law, about the extent to which statements made during the course of mediation are admissible as evidence in subsequent court proceedings.³¹ It was thought that this uncertainty would inhibit full and frank discussions at mediation and hence the Government took steps to resolve the issue. The 1995 Act only covers mediation which is carried out by an 'accredited mediator' within an organisation approved by the Lord President.³² Despite confusion arising as to who is indeed an accredited organisation,³³ it is believed that the 1995 Act is a step in the right direction in terms of protecting family mediation's confidentiality.

Separation is a deeply private matter involving sensitive information which many people will wish to remain confidential. In this sense, it could be averred that the confidentiality provided by mediation is actually a positive factor which should be embraced.³⁴ Indeed, Scotland differs from other jurisdictions in the United Kingdom, in that family proceedings are generally conducted in public. It could be

²⁴ Around 80% of parties who attend mediation have already consulted a solicitor at the point of referral: Jane Lewis, *The Role of Mediation in Family Disputes in Scotland*, Legal Studies Research Findings No 23 (Scottish Office Edinburgh 1999) 1. Clearly then, the legal system provides an important context for, and gateway to, mediation.

²⁵ *ibid.*

²⁶ Fiona Garwood, *Trying To Get Us Talking: A Study of Rule of Court Referrals to Family Conciliation (Mediation) Services* (Family Conciliation Scotland, Edinburgh 1992).

²⁷ M Wise, 'New Developments in Mediation in Scotland' (2009) *International Family Law Journal* 42, 43.

²⁸ Civil Evidence (Family Mediation) (Scotland) Act 1995, s 1(1).

²⁹ *ibid* s 2.

³⁰ *ibid* s 2(1)(a).

³¹ This can be compared to the situation in England, where mediation has long since been recognised as a confidential and legally privileged process.

³² Civil Evidence (Family Mediation) (Scotland) Act 1995, ss 1(2) and (3).

³³ Morag Wise QC notes that the legislation invites the interpretation that mediations outwith its ambit are not shielded by the confidentiality cloak (in accordance with the rule of interpretation expressed by the maxim '*expressio unius est exclusio alterius*'): Wise (n 27) 45.

³⁴ This public display of very private matters could actually be deemed to be an abuse of Article 8 ECHR, especially when we consider that the media rarely respect reporting restrictions on divorce matters under the Judicial Proceedings Act 1926.

claimed that Scotland is behind the times in this regard. However, the confidential nature of mediation is not something which is wholly accepted as a positive feature of the process. It has been suggested that the development of Scots law may be harmed if complex and commercial disputes are resolved by mediation,³⁵ hidden away from the courts and the legislature. Whilst this is a relevant consideration, it is questionable whether it is as an important consideration in terms of family law disputes. Such disputes are often very similar in nature, as well as straightforward in terms of legal complexity and in this sense it can be claimed that the law is well developed in this sector. There is also up-to-date legislation with which we are familiar.³⁶ The real issue is the resolution of such issues in a quicker, cheaper and less adversarial manner. In any case, the supposed suffering of the development of the law must be balanced against the considerable benefits to the parties of confidential extrajudicial settlement.

In fact, as we have seen, there is actually an argument that the process should become more confidential in regard to the current narrow scope of the 1995 Act. In order for there to be a greater chance of open mediation, with an increased possibility of success, there must be a guarantee of confidentiality for all parties to mediation conducted by all mediator bodies, not simply those which are 'accredited'. Until this is the case, we cannot claim wholeheartedly that confidentiality is a benefit of mediation. Ultimately, a failure to act upon this will affect the ability of family mediation to become an integral part of the civil justice system in Scotland.

C. Implementation and Success of Mediation at Present in Scotland

Obtaining an overview of the use of mediation and its success in Scotland today is not an easy task. This is partly due to the way in which the process and its use have developed in disparate sectors. In terms of family mediation, it would appear that, as in many parts of the world, awareness of the method amongst the courts and legal profession is growing. However, uptake remains low in Scotland as compared to England and Wales and may be attributed to a distinct lack of publicity in Scotland.³⁷ This is illustrated by Scottish Government research into public awareness and perceptions of mediation in Scotland which showed that in March 2005 and August 2007, only just over 50% of those asked had actually heard of mediation, with awareness actually declining in that two year period.³⁸ Even those who had heard of mediation struggled to define what it entailed.³⁹

Concern has also been expressed by those who claim that mediation is not sympathetic enough to cultural differences.⁴⁰ In itself this is a disappointing finding

³⁵ See Gill Review (n 5) para 5.20.

³⁶ Family Law (Scotland) Act 2006.

³⁷ It may also be attributed to a deeper acceptance of the findings of the Woolf Review in England and Wales. See Part IV below.

³⁸ Scottish Government, *Public Awareness and Perceptions of Mediation in Scotland* (Edinburgh, 2007) fig 4.1.

³⁹ *ibid* fig 4.2.

⁴⁰ Vibha Pankaj, *Family Mediation Services for Minority Ethnic Families in Scotland* (Scottish Executive 2000) available at <<http://www.scotland.gov.uk/Resource/Doc/158076/0042757.pdf>> accessed 12

and it is compounded by the fact that mediation is under-utilised, particularly by ethnic minority groups.⁴¹ These are two very important considerations as we must ensure equality of access to mediation and more importantly, equality of opportunity for all in Scotland. This is an apparent failing of family mediation in Scotland but is one which can and will be resolved by increased promotion of the method and its benefits. Furthermore, increased training of mediators and importantly, the recruitment of mediators from ethnic minorities or those who have specific knowledge of different cultures, will further aid this development.⁴² In fact, the publicising, training, accreditation and regulation of mediators are all important considerations which must be considered by the Scottish Government in more general terms and this is something which will be considered in detail in Part VI.

4. *Litigation versus Mediation: The General Consensus*

In his review of the civil court system, Lord Gill conceded that mediation could provide parties with more potential outcomes and more importantly, a desired outcome.⁴³ However, nothing provides more authoritative endorsement of the method than a recent EU Directive,⁴⁴ which states that, '(...) mediation should not be regarded as a poorer alternative to judicial proceedings.'⁴⁵ This lends support to the method by highlighting the benefits whilst urging Member States to embrace it, declaring that they should, '(...) encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services'.⁴⁶ The preamble to the Mediation Directive summarises many of the advantages of mediation:⁴⁷

The value of increasing the use of mediation rests principally in the advantages of the dispute resolution mechanism itself: quicker, simpler and more cost-efficient way to resolve disputes, which allows for taking into account a wider range of interests of the parties, with a greater chance of reaching an agreement which will voluntarily be respected, and which preserves an amicable and sustainable relationship between them.

June 2012; Parkinson, 'Family Mediation and Mixed Messages Across Europe' (n 2) 194-195.

⁴¹ *ibid.*

⁴² Pankaj (n 40) 4.

⁴³ Gill Review (n 5) para 5.18.

⁴⁴ Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/8 (the 'Mediation Directive').

⁴⁵ *ibid* recital 19.

⁴⁶ *ibid* recital 16.

⁴⁷ *ibid* recital 16.

A. Financial Considerations

Mediation is generally much cheaper in comparison to litigation where the fees can often be disproportionate to the amount in dispute.⁴⁸ In the context of family mediation, the Ministry of Justice has outlined that mediation is both cheaper and quicker than litigation.⁴⁹ Research in Scotland supports these findings.⁵⁰ Access to justice is unaffordable for those members of society who may not be entitled to legal aid and who simply do not have the financial resources to pursue litigation. This is compounded by the fact that substantial awards may be made against the unsuccessful party.⁵¹ These issues are apparent in regard to divorce where there are significant financial considerations arising from the divorce itself. Not only do divorcees stand to suffer significant legal fees but they may also have to make large, often unexpected, payments to the other party. The latter obligation may arise if it is adjudged that they have gained an economic advantage during the relationship or, if the other party stands to encounter serious economic hardship as a result of the separation.⁵² There may also be the economic burden of caring for any child of the relationship. In contrast, mediation costs a fraction of what litigation would entail, with this expense usually shared equally between the parties. In fact, mediation can even be provided for free, especially in cases involving children, as many of the organisations which provide these facilities are comprised of volunteer mediators.

Thus, mediation can benefit an already stretched legal system by saving valuable court time by ensuring less disputes end in litigation and actually go to court.⁵³ Indeed, as will be demonstrated below, family mediation could also save the Scottish Government a considerable sum of money as well as providing several benefits beyond an immediate fiscal advantage.⁵⁴

⁴⁸ See *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002. This case was not a family law case but involved a simple transaction - the purchase of a motor car which had an apparent defect. While the level of dispute was fairly modest - around £6,000 - between them, the parties spent some £100,000 arguing over the claim.

⁴⁹ Statistics show that mediation has proved to be quicker and cheaper than litigation in many cases. Mediated family cases take, on average, 110 days to complete, compared to 435 days for non-mediated cases to proceed through the court system. Meanwhile, Legal Services Commission figures for private family law children and finance cases funded through Legal Aid show an average cost per client of £535 in mediated cases compared to £2,823 in court cases: Ministry of Justice, 'New headquarters for Kent Family Mediation Service' (11 February 2011) <<http://www.justice.gov.uk/news/press-releases/moj/press-release-110211a>> accessed 12 June 2012.

⁵⁰ Lewis (n 24) 3.

⁵¹ Studies suggest that mediation can widen access to justice for those who cannot afford litigation: see Fiona MacDonald, *The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence*, Legal Studies Research Findings No 50 (Scottish Executive 2004) 3.

⁵² See Family Law (Scotland) Act 2006, ss 16-18.

⁵³ MacDonald (n 51) 3.

⁵⁴ Margaret Lynch, Director of the Scottish Mediation Network, has claimed that 'A Scottish Mediation Pledge could save the Scottish Government upwards of £10 million a year or £40 million over one government term': *Scottish Mediation Network* 'Alternative Dispute Resolution can save Scotland money' (29 June 2010) <<http://www.scottishmediation.org.uk/news/article.asp?id=138>> accessed 12 June 2012.

B. Consensual Contact as Opposed to an Adversarial Attack

Not only does family mediation relieve the parties of the often extreme financial burden but it can also relieve them of the heavy emotional burden associated with litigation. Mediation should be conducted in a calm and consensual manner, in stark contrast to the adversarial and confrontational atmosphere of the court room. The prospect of attending court can often be daunting for both parties and can add to the feelings of hostility, potentially eradicating all possibility of a smooth process. Mediation decreases the likelihood of harmful outcomes such as the escalation of conflict, whereby the feelings of resentment, hostility and bitterness are accentuated, leading to increased conflict as opposed to a smoother, quicker resolution of the issues.⁵⁵ Therefore, mediation can significantly reduce the amount of stress the parties encounter during the judicial process. Bringing the parties together to converse and negotiate can only be regarded as beneficial and often leads to a much quicker resolution of the issue.⁵⁶ Furthermore, even if no agreement is reached, the process will at least have facilitated a degree of communication between the parties.

C. Self-Determination

Furthermore, mediation empowers the parties, allowing them to maintain control over their own affairs and assert their autonomy from the courts.⁵⁷ In the judicial process, there are strict rules of procedure, with the lawyers and judges in ultimate control of the agenda and the outcome. As Mayer asserts, 'I believe this work continues to be about helping people keep control of their lives, even when in crisis, and about creating powerful and more democratic ways of dealing with important questions of social justice and peace.'⁵⁸ In so doing, he locates the principle of self-determination in democracy itself, which is indeed an interesting point.

In contrast, litigation may be said to enable couples to offload their problems on to the courts, leaving the judiciary to resolve the issue for them. This is an area all too often neglected by legal commentary on the matter. Quite simply, mediation not only empowers the parties but makes them face up to the issues which encompass not only their relationship but also their family. After all, they began the relationship on their own with no help from the state and it is, therefore, submitted that they should end the relationship with as little interference from the state as possible. Couples should be able to realise the wider benefit of mediation and embrace it by solving their problems via mutual co-operation and non-adversarial dispute resolution. The resolution of family law disputes must be considered from a legal perspective as ultimately it is the law which dictates the resolution of such issues, however, in considering this process, the vast benefits which mediation brings to the

⁵⁵ Ellis and Stuckless (n 15) 7.

⁵⁶ Research conducted by the Scottish Government found that most mediated cases reached resolution and did so earlier than litigated ones: MacDonald (n 51) 3.

⁵⁷ F Raitt, 'Mediation as a form of Alternative Dispute Resolution: A Rejoinder' (1995) 40 *JLSS* 45, 182.

⁵⁸ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass, San Francisco 2000) 11.

parties themselves as well as the state and ultimately society as a whole must be remembered. There may, however, be a role for the state to play where couples have reached a point where they are unable to help themselves. A satisfactory resolution via mediation may not be possible for all domestic disputes, such as in situations of domestic abuse. Nonetheless, we cannot underestimate the value attributed to this consideration of empowering the parties to take control of their own problems and their own future.

One of the main advantages of an agreement between the parties as opposed to the decision of the judge is that there is no notion of winner and loser. This is something which is evident in court-based litigation, fuelling resentment for one party and providing an overwhelming sense of vindication for the 'innocent party'. If the parties voluntarily reach an agreement, there is a much higher prospect that it will be enforced and abided by. Again, this is in stark comparison to a decision ultimately made by a judge in a court of law.⁵⁹ Such a decision is regarded as the best solution to their individual issue by the court and is, therefore, imposed upon the parties. This often leads to further resentment, both of each other and of the justice system, which ultimately leads to a failure of the litigants to follow the decision of the court.⁶⁰

Most importantly, however, is the fact that these decisions often relate to children of the relationship who often stand to suffer most.⁶¹ It is here that we could delve into the complex issue of the 'welfare', 'paramountcy' or 'best interests' principle, as it is known⁶² and consider whether litigation or mediation is the better solution. However, space simply does not allow all such avenues to be exhausted. At the same time, it should be noted that where a couple agree as to residence and contact arrangements for a child, the court is unlikely to intervene under the premise that ultimately 'parents know best'.⁶³ Indeed, an anecdote which illustrates this concept of judges forcing a decision on parties in relation to their children is noted by

⁵⁹ Recent research conducted into general mediation during pilots in Aberdeen and Glasgow Sheriff Courts found that 90% of all mediated cases reached an agreement and then implemented that agreement. This is compared to an implementation rate of 67% of judgements made in traditional court procedures: Margaret Ross and Douglas Bain, *Report on Evaluation of In Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Executive 2010) para 1.15. However, the success rates of family mediation specifically are likely to be much higher due to the self-determination aspect regarding finances and any children to the relationship.

⁶⁰ For example, in relation to child contact orders, although non-compliance is typically reported as 5% or less, it is evident that many other couples return to court in order to vary the terms of original orders as ultimately they are not suitable to the parties: Fran Wasoff, *A Survey of Sheriff Clerks' Perspectives on Child Contact Enforcements in Scottish Sheriff Courts* (Scottish Executive 2006) 3.

⁶¹ See Children (Scotland) Act 1995, ss 11-13 (Court Orders).

⁶² As contained in Children (Scotland) Act 1995, s 11(7)(a). The principle is said to connote: 'A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare (...)': *J v C* [1970] AC 668 (HL) 710-11 (Lord McDermott).

⁶³ There is a multitude of case law relating to considerations the judge must have when making residence orders under the Children (Scotland) Act 1995, s 11(2)(c). These include, the views of the child (*Johnson v Johnson* 1972 SLT (Notes) 15), the age of the child (*Brixey v Lynas* 1997 SC (HL) 1) and the gender or sexual orientation of the parents (*Mouta v Portugal* (2001) 31 EHRR 47). However, it is also clear from such cases that where the parties agree, the court is unlikely to intervene unless neither party is suitable.

Banham-Hall when considering a scheme of court-annexed mediation at Milton Keynes County Court. She remarked that when meeting with parties and encouraging them to proceed with mediation, the judge would often say something along the lines of:⁶⁴

You should know your children better than anyone. Why do you think someone who doesn't know your family at all (like me) should make decisions about it? The chances are no one would like my decision. It would be better to at least try and agree something. You might well be surprised: most people manage to agree at least something and many everything.

This statement encapsulates the many advantages of mediation and provides a measure of its success, while at the same time re-enforcing the point that couples should be made to take responsibility for their own families and their own actions.

Therefore, a successful mediation process can provide benefits to several parties beyond those directly involved with the dispute. Firstly, it can benefit any children involved, with a greater likelihood of agreements concerning them being reached at mediation and subsequently enforced and with the parents themselves on better terms due to the mediation process.⁶⁵ Secondly, it can also be beneficial to any subsequent relationships as it should emphasise to the parties the value of civil conversation and co-operation in these situations, while at the same time reducing the amount of hostility and stress experienced.⁶⁶

5. A Comparative Study - Lessons to be Learned Internationally

A. Reflections from Europe

Several European countries are at various stages of implementation and development of family mediation services. In the United Kingdom, there has been an increased use of general mediation in recent years. This has, however, mainly been confined to England and Wales. This has been, in part, facilitated by the existence of a formalised Community Legal Service and by the Court Procedure Rules brought in following the Woolf Review.⁶⁷ Judges in England and Wales have been equipped with powers which enable them to encourage settlement or reference of disputes to ADR at the earliest stage, with litigation being viewed as a last resort.⁶⁸

⁶⁴ M Banham-Hall, 'Children Act First Appointment Mediation Scheme' (2008) Fam Law 1054, 1054.

⁶⁵ Studies have shown that those who participate in family mediation are more likely to come to a resolution, with three-quarters of cases resulting in a written or oral agreement about all or some of the issues discussed, with issues relating to children rather more likely to be resolved than those relating to finances: Lewis (n 24) 1.

⁶⁶ *ibid* 3.

⁶⁷ Lord Woolf, *Access to Justice - Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996) hereafter the 'Woolf Review.'

⁶⁸ Factors to be taken into account when deciding costs issues include 'the efforts made, if any before and during the proceedings in order to try and resolve the dispute': Parts 1 and 44 Civil Procedure Rules (CPR). In deciding what order, if any, to make regarding costs, the court must have regard to all

The recently enacted Family Proceedings Rules 2010⁶⁹ provide courts with significant powers to refer parties involved in a family dispute to mediation.⁷⁰ The new pre-action protocol requires anyone contesting the terms of their separation and who wishes to issue proceedings in regard to children, property or money to attend a mediation awareness session before they can go to court.⁷¹ Parties may be granted an exemption for reasons such as domestic violence or child protection issues as well as bankruptcy.⁷²

The reforms proposed by Lord Woolf have gained support from the judiciary. Notably, judges across England and Wales have collaborated with mediation providers to set-up schemes offering free or low-cost, time-limited mediation, held on court premises for litigants who had already commenced court proceedings.⁷³ This can only be seen as a positive step. Mediation must indeed provide many benefits to litigation if those at the heart of the traditional dispute resolution process recognise its worth as a viable alternative to litigation.

Evidently, the vast benefits of mediation are being capitalised on in England and Wales. The early success witnessed there is set to continue with the Ministry of Justice reporting that more separating couples in England and Wales were expected to try mediation in 2011 than in previous years.⁷⁴ Official figures for legal aid funded mediations have risen from 400 in 1997 to almost 14,500 in 2009. Of these 14,500 publicly funded cases, more than two-thirds were successful.⁷⁵ Despite this encouraging evidence, the Scottish Government is yet to adopt a similar approach.

There are, however, countries in Europe which have adopted a more radical approach. One such example is Norway, where family mediation is now mandatory but is confined to issues concerning children. Since 1993, married couples with children under the age of 16 must attend a mediation meeting before they can seek a divorce from the County Governor or the court.⁷⁶ This has now been extended to include unmarried-cohabiting parents who have children under 16 years of age. A domestic violence exemption is also employed.⁷⁷ The Norwegian approach has been so successful that the system has had to be expanded, with Denmark also set to follow the same route.⁷⁸ However, a concern arising under such a model is whether the parties must make a concerted effort at the mediation and whether this should be monitored. It would be easy for a party to simply turn up at a meeting and declare

the circumstances, including the conduct of the parties before and during the proceedings. The court also has the power to impose a costs penalty on those who behave unreasonably during the course of litigation: CPR 26.4 and Part 44.

⁶⁹ Family Proceedings Rules 2010, SI 2010/2955.

⁷⁰ *ibid* Part 3.

⁷¹ Ministry of Justice, *Practice Direction 3A Pre-Application Protocol for Mediation Information and Assessment* (2011). Annex A supplements Part 3 the Family Proceedings Rules 2010, SI 2010/2955.

⁷² *ibid* Annex C.

⁷³ H Genn, 'Civil Mediation: A Measured Approach?' (2010) 32 *Journal of Social Welfare & Family Law* 2 195, 197.

⁷⁴ Ministry of Justice, 'Family mediation - an alternative to courts' (2 March 2012) <<http://www.justice.gov.uk/news/features/features-040111a>> accessed 12 June 2012.

⁷⁵ *ibid*.

⁷⁶ Marriage Act 1991(as amended), s 26.

⁷⁷ *ibid* s 23.

⁷⁸ Parkinson, 'Family Mediation and Mixed Messages Across Europe' (n 2) 196.

that they have 'attempted' mediation, thereby satisfying the attendance criteria. Nonetheless, it does in fact seem to be successful and possibly those parties who harbour such attitudes find themselves swayed by the process once actually in attendance. Sweden shares a similar success story with its own form of compulsory family mediation: 'cooperation talks'. It is said that 90% of those parents in Sweden who separate solve the questions regarding custody, residency and access to children with the help of such sessions or even entirely on their own.⁷⁹

Finland may be seen to provide the quintessential example in terms of how family mediation should be implemented in Scotland. The Finnish Marriage Act 1929 contains a whole chapter on family mediation,⁸⁰ encompassing all things in regard to family mediation such as regulation as well as encouraging the parties to mediate. In section 20(1), it lays down that, '[d]isputes and legal matters arising in a family should primarily be settled in negotiations between the family members and decided by agreement.' It does not, however, make mediation compulsory. Nonetheless, the sentiment conveyed by the legislation which stresses the importance of parties taking control of their own affairs is difficult to disagree with and is something which was elaborated upon above. Importantly, the Finnish legislation provides for confidentiality in mediation thus offering a further reason for supporting such a model.

Further success stories of family mediation emanate from Spain. Since the mid-1980's, the method has been implemented successfully by psychosocial teams annexed to the court system.⁸¹ Indeed, by the end of the 1980's, there were family mediation services set-up throughout the Basque Country and in cities such as Madrid and Barcelona. Several of the Autonomous Communities in Spain such as Catalonia, Valencia and Galicia have now enacted legislation which regulates family mediation while at the same time prescribing the principles and procedures of the method. This is in addition to laying down the sanctions which mediators will incur for infringing the law.⁸²

It is evident that Scotland lags behind the rest of Europe in terms of incorporating family mediation into its legal system. The separating couples of Scotland, therefore, stand to lose out on the many advantages provided by this method due to a lack of knowledge and no significant encouragement from the state. The most valuable lessons to be learned emanate from the Scandinavian countries which have embraced family mediation and witnessed high success rates. This is due to the enactment of comprehensive legislation, such as that witnessed in Norway, which diverts parties to mediation at an early stage. More importantly, however, they have maintained a wider recognition that the parties should take responsibility for their own future beyond their relationship. Legislation in line with the Scandinavian approach which incorporates an element of compulsion, such is the case in Norway, appears to be the only way in which family mediation can be

⁷⁹ Eva Ryrstedt, 'The child's right to speak in the process of determining questions of custody, residence or access' in Miquel Martin-Casals and Jordi R Igualada (eds), *The Role of Self-Determination in the Modernisation of Family Law in Europe* (Girona 2005).

⁸⁰ Marriage Act 1929 (as amended), Chapter 5.

⁸¹ Martin-Casals (n 16) 7.

⁸² *ibid.*

quickly, adequately and encouragingly incorporated in Scotland to ensure that the true potential of the method can be realised.

B. Reflections from Australia

Australia has also successfully embraced family mediation. Policy-makers took action in 2006 by enacting reforms which require parties to make a 'genuine effort' to resolve their dispute through a 'family dispute resolution' process before being eligible to apply for court orders.⁸³ This requirement originated in reforms of the mid-1990's, which merely encouraged parents to use mediation as the sole mechanism for resolving post-separation disputes regarding child care. Indeed, this is something which the Scottish Government could consider rather than simply implementing a mandatory provision. However, when compared to the more stringent Scandinavian approach, this provides parties who are set on their day in court with an apparent loophole.

Nonetheless, further lessons can be learned from Australia in that they too, like the European systems considered above, employ an exemption in cases of domestic violence or child abuse.⁸⁴ In fact, around one quarter of cases are effectively 'screened out' of family mediation due to such considerations.⁸⁵ There is a mechanism whereby those who are found to have made a false allegation for this purpose are made subject to a costs order by the court.⁸⁶ In regard to the domestic violence safeguard, however, concern continues to be expressed regarding the protection afforded to victims of domestic violence during family mediation in Australia.⁸⁷ Nevertheless, the Scottish Government could benefit from a similar exemption and this is a consideration which will require further investigation and planning in order to ensure that vulnerable persons are adequately protected during the mediation process. The mediator stands to play a key role in this regard in that their skill set should work to identify such instances and redress the balance in such situations should it be appropriate for mediation to proceed.

In Australia, the mediators or 'family dispute resolution practitioners' are tasked with the responsibility of determining whether or not the parties have indeed made a 'genuine effort' during mediation to reach an agreement.⁸⁸ They will then be responsible for issuing the relevant certificates to such effect.⁸⁹ Yet again, this form of mandatory mediation has led to several positive outcomes which Scotland could

⁸³ Family Law Act 1975 (as amended by the Family Law Amendment (Shared Responsibility) Act 2006), s 60I.

⁸⁴ *ibid* s 60I(9).

⁸⁵ Australian Institute of Family Studies (AIFS), *Evaluation of the 2006 Family Law Reforms* (December 2009) 105-108.

⁸⁶ Family Law Act 1975 (as amended by the Family Law Amendment (Shared Responsibility) Act 2006), s 117AB.

⁸⁷ See R Field and M Brandon, 'A conversation about the introduction of compulsory dispute resolution in Australia: some positive and negative issues for women' (2007) 18 *Australasian Dispute Resolution Journal* 27.

⁸⁸ The term 'genuine effort' is not defined in the legislation.

⁸⁹ Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 26.

benefit from. First, it has significantly reduced the number of court applications for parenting orders.⁹⁰ Secondly, the use of family law dispute resolution programmes has increased.⁹¹ Thirdly, levels of 'client satisfaction' were also reported to be relatively high following the reforms, even amongst those clients who required significant levels of support due to the complex and high conflict nature of their cases.⁹²

Nonetheless, some concerns have been raised regarding the mandatory mediation of family disputes in Australia. For example, unease was expressed over the so-called 'juniorisation' of mediation with under qualified individuals taking on the role of mediator.⁹³ This criticism relates to the swelling of mediator ranks due to the increased use of mediation over a short period of time. A lack of knowledge, understanding and training meant that some mediators were not equipped for the job. This has led the Australian Government to take steps to improve the training of mediators and accreditation standards. However, it is debatable whether or not the Scottish Government would need to take any radical action in this regard, considering the accreditation safeguards already provided by the two main family mediation services in Scotland - Relationships Scotland⁹⁴ and CALM.⁹⁵ Nonetheless, the Scottish Government will have to guarantee adequate safeguards are in place to ensure that these standards are not jeopardised as demand for mediators increases.

It is clear that the 2006 Australian law reforms have succeeded in providing greater awareness of family mediation. This has facilitated the provision of information to separating partners, allowing early intervention and resulting in a greater standardisation and regulation of such services. It is submitted that the Scottish Government could benefit from a consideration of the regulation of mediation in the event of it becoming compulsory as well as ensuring that adequate protection is provided for vulnerable groups within the process. Nonetheless, courts should not be afraid to penalise those who seek to bend the rules and avoid attempting mediation. Again, this supports the submission that mediation should become compulsory in Scots family law.

⁹⁰ AIFS (n 85) 304.

⁹¹ Carol Nader, 'Mediation spares divided couples court pain' *The Age* (Melbourne, 20 August 2009) <<http://www.theage.com.au/national/mediation-spares-divided-couples-court-pain-20090819-eqmk.html>> accessed 12 June 2012.

⁹² AIFS (n 85) 21.

⁹³ D Cooper and M Brandon, 'Navigating the complexities of the family law dispute resolution system in parenting cases' (2009) 23 *AJFL* 1 30, 42-43.

⁹⁴ Initially trainee mediators are recruited by their Local Service and required to complete the Certificate in Family Mediation. This requires approximately 200 hours of learning, after which they become an Accredited Mediator and they can begin practising as a mediator in their Local Service. Accredited Mediators are required to continue their learning and become Registered Mediators.

⁹⁵ All CALM mediators are family lawyers who have at least seven years of relevant family law experience and who have undergone a period of training as mediators before being accredited by the Law Society of Scotland as Family Law Mediators. CALM mediators are bound by a Code of Practice and each year must undergo continuing professional development training and assessment to maintain their accreditation.

C. Reflections from Africa

In parts of Africa, mediation has also been embraced as an alternative method of dispute resolution. The question of family mediation came under the spotlight in the Zimbabwe High Court,⁹⁶ where it was stated by Justice Smith that the adversarial system of litigation is often inimical to the interests of children when questions of divorce, custody and access are involved.⁹⁷ The court referred to a comparative study of parties who went to mediation and others who left it up to the court to adjudicate their differences. This showed '(...) very clearly and definitely, that there was greater satisfaction among both children and parents in those cases where mediation was used as opposed to an adversarial approach.'⁹⁸

The mixed legal system operating within South Africa provides ample scope for comparison with Scotland. Family mediation has played a more prominent role in this jurisdiction in recent times, particularly following recent court rulings which have ordered parties to compulsory mediation.⁹⁹ One of the most significant provisions in South Africa relates to children and mediation. South Africa has, therefore, recognised that mediation can benefit children of the relationship. This is reinforced by the provision in the Constitution which places an obligation on the mediator to ensure that separating couples put the interests of their children first during any mediation negotiations.¹⁰⁰

The implementation of a similar provision in Scotland would ensure that the best interests of the child are paramount, even at mediation. This is a well-established principle of the Scots law of parent and child, embodied in section 11(7)(a) of the Children (Scotland) Act 1995. Research in South Africa has supported the worth of such a provision having shown that those who come through mediation, as opposed to the courts, end with more advantageous agreements serving the best interests of the children.¹⁰¹ This includes better financial provision for their children in terms of maintenance as well as provision for education. Research has also shown that mediated agreements provide better definitions as to the non-custodial parent's rights of access which is said to reduce the possibility of any future disputes in this regard.¹⁰² This means that the terms of such agreements are better understood by the parties themselves as they have produced them, as opposed to a court order being forced upon them by a judge. This reduces confusion and ultimately diminishes the

⁹⁶ *G v G* 2003 (5) SA 396 (Z).

⁹⁷ *ibid* 412A.

⁹⁸ *ibid* 412D-E.

⁹⁹ The most recent judgement dealing with the aspect of divorce mediation specifically was the judgement in *Brownlee v Brownlee* 2008/25274 (unreported) in the South Gauteng High Court. Acting Judge Brassey focussed on the duty of parties to a dispute to attempt to mediate and the obligation of the opposing attorneys to encourage mediation with their clients prior to the commencement of litigation. This ruling emanated from the previous decisions of *Townsend-Turner and another v Morrow* [2004] 1 ALL SA 235 (C) and *Van den Berg v Le Roux* [2003] 3 ALL SA 599 (NC) where the parties were effectively ordered to attend private mandatory family mediation by the court.

¹⁰⁰ Constitution of the Republic of South Africa 108 of 1996, s 28(2).

¹⁰¹ J Kelly, 'Mediated and adversarial divorce resolution processes' (1991) *Family Law Practice* 286-287.

¹⁰² Joyce Hauser, *Good Divorces, Bad Divorces: A Case for Divorce Mediation* (University Press of America, Maryland 1995) 25.

need for subsequent court action as there is a mutually agreed contract between the parties which they understand and have made a commitment to observe.

6. *The Future of Family Mediation in Scotland*

A. Quiescent Government?

It has been contended throughout this paper that Scotland is being left behind in the development of mediation as an alternative method of dispute resolution. During a debate in the Scottish Parliament in 2007, several ministers raised this point with the clear sentiment that Scotland should embrace ADR methods in a fashion similar to their English counterparts.¹⁰³ Despite this, there has yet to be any significant change. This is disappointing, especially after evaluating the many advantages of family mediation. It would appear that the only criticism of such services in Scotland at present is that they are not used widely enough. Roberts and Palmer claim that 'ADR, with its objective in 'settlement' and its principal institutional realisation in 'mediation', is now a virtually unremarkable feature of disputing cultures almost anywhere we look.'¹⁰⁴ Anywhere that is, except in Scotland, which is yet to embrace family mediation at an official level and sadly it looks unlikely to in the near future.

The Gill Review proclaims in its introduction that '(...) minor modifications to the *status quo* are no longer an option'¹⁰⁵ but recommended just that for mediation. Part of its remit was to consider the role of mediation. However, it devoted only a solitary paragraph out of eighty-two to this consideration with no firm commitment to any substantial change. The commonly used sound-bite 'Modern Laws for a Modern Scotland'¹⁰⁶ could quite easily have been termed 'Modern Dispute Resolution for a Modern Scotland', something which seems to have been omitted. However, in order to achieve this feat there are several steps which require to be taken.

B. *De Rigueur* Dispute Resolution?

One of the main reasons that family mediation is not used enough in Scotland is due to its purely voluntary nature. At present, it is not compulsory or indeed actively encouraged to a satisfactory extent. This voluntary system is not working, especially with the existence of parties who will not rest before they have had their 'day in court'. Of course, these parties will not cease to exist, even if mediation is made compulsory. It is highly debatable whether or not they should be afforded such a privilege. It can, therefore, be argued that family mediation should be made

¹⁰³ Scottish Parliament, Official Report cols 2919-3064 (1 November 2007).

¹⁰⁴ Palmer and Roberts (n 14) 359.

¹⁰⁵ Gill Review (n 5) 1.

¹⁰⁶ This is also the name of a report by the Scottish Executive: *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland* (Scottish Executive, February 2007).

compulsory in Scotland, subject to certain qualifications such as exceptions in cases of spousal abuse.

As was considered in Part V, there are several jurisdictions which now have an element of compulsion and in doing so have witnessed unprecedented success in family mediation. Generally, this entails a judge diverting a case to mediation at an early stage in the proceedings and if the parties settle, no further judicial input will be required. Of course, there are some situations in which mediation would be wholly inappropriate and this would require good judgement from all parties involved in the process in order to identify such instances. Such considerations are particularly apparent in relationships where there is a significant power imbalance between the parties or where there has been a history of domestic abuse.¹⁰⁷ With regards to the 'significant power imbalance' test, difficulties may arise in relation to its application. Research in New Zealand has shown that despite the male party often reserving the stronger financial position, they are not necessarily the strongest party in terms of negotiating, particularly in custody disputes.¹⁰⁸ Also, in situations where domestic abuse is suspected, this type of surreptitious control can be difficult to detect. However, it is important to note that mediation is entirely voluntary in Scotland and so a party who harboured any fears in this regard does not have to continue with mediation. Furthermore, even if mediation were to become compulsory, it is submitted that there should be a domestic abuse history exception. Nonetheless, in instances where such couples come through the screening process, adequate training of mediators to spot the signs of any such surreptitious control is essential and is something which is considered in greater detail below. On the other hand, it could be claimed that whilst there are already adequate filtering mechanisms in place to deal with such instances, no screening method is completely foolproof.¹⁰⁹ Having said that, it should be noted that research in other jurisdictions has shown that mediation may still be helpful in some circumstances where an incidence of violence has occurred.¹¹⁰

There are important legal ramifications which must be considered in terms of mandatory family mediation. There is an evident tension between requiring parties to mediate and the rights provided for under the European Convention for the Protection of Human Rights, specifically Article 6.¹¹¹ The question is whether ordering parties to mediate would breach a litigant's right to a fair trial under Article 6. The position remains unsettled.¹¹² Indeed, the nature of the apparently conflicting

¹⁰⁷ Gill Review (n 5) para 5.26.

¹⁰⁸ P Wan, 'Mediating Family Property Disputes in New Zealand' (1999) *Dispute Resolution Journal* 75.

¹⁰⁹ Myers and Wasoff (n 12) 261.

¹¹⁰ L Parkinson, 'Gateways to Mediation' (2010) *Fam Law* 867, 868; D Greatbatch and R Dingwall, 'The marginalization of domestic violence in divorce mediation' (1999) *IJLPF* 175, 185-187.

¹¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, signed on 4 November 1950, entered into force on 3 September 1953 (the 'EHCR'): 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

¹¹² It is out with the scope of this article to consider this issue in detail. The ECtHR decision in *Alassini v Telecom Italia SpA* [2010] 3 CMLR 17 suggests that it would not amount to such a breach of Art 6 ECHR. Whilst in *Hickman v Blake Laphorn* [2005] EWHC 2714 (QB), it was observed that a party cannot be ordered to submit to mediation as that would be a breach of their Art 6 right.

stances is recognised in the Mediation Directive. This is certainly something which the Scottish Government will need to take into consideration as it is prohibited from enacting legislation which conflicts with human rights obligations.¹¹³ Nonetheless, it would appear that this is not a real danger, especially when other countries, such as those in Scandinavia, already have elements of compulsion and yet, do not appear to have breached human rights obligations. As was detailed above, mediated agreements must be passed on to the courts in order to be made legally binding. In this sense, the argument that mediation does not provide the same safeguards as litigation is weak. Courts are unlikely to turn mediation agreements into legally binding divorce orders if they are at odds with the stipulated laws in relation to divorce¹¹⁴ or child welfare¹¹⁵ or are completely unjust or unfair towards one party. In this sense, one of the most significant safeguards currently operating in regards to family mediation in Scotland is that mediation agreements must go through further screening to ensure that they are entirely suitable.

In light of these important considerations, there is still a clear attraction to a compulsory approach. This is true, particularly in Scotland, a jurisdiction which struggles with an already overcrowded and underfunded system. Indeed, Irvine¹¹⁶ supports this view and it is possible to cite studies which characterise compulsory mediation as the necessary 'helping hand' to introduce a new and unfamiliar process.¹¹⁷ For example, in Canada, there were positive outcomes from a large mandatory mediation programme for civil disputes which has given extended credence to the argument.¹¹⁸ Others are more sceptical, raising concerns in regard to forcing people into mediation. Purist mediators have an aversion to compulsion; a cornerstone of mediation is that it is a voluntary consensual process. Other mediators argue, *inter alia*, that mandatory mediation would firstly, unfairly impede the public's right of free access to the courts, and secondly, create another stratum of costly procedure and achieve statistically lower success rates.¹¹⁹

Alternatively, the courts could impose monetary sanctions on those who unreasonably fail to consider mediation by penalising the party with the threat of non-recovery of legal costs.¹²⁰ This, alongside the Government entrusting 'triaging' of family disputes to the legal profession, is believed to be the answer by some critics of the compulsory mediation route.¹²¹ It is submitted that compulsion would rapidly expose a large number of people to the positive experience of family mediation, thus leading to the kind of 'take off' which has been desired in Scotland for so long by so many.

¹¹³ Scotland Act 1998, s 29(2)(d).

¹¹⁴ Family Law (Scotland) Act 2006.

¹¹⁵ Children (Scotland) Act 1995.

¹¹⁶ C Irvine, 'The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation' (2010) *Edinburgh Law Review* 85, 86.

¹¹⁷ See C McEwan and R Maiman, 'Small claims mediation in Maine: an empirical assessment' (1981) 33 *Me.L.Rev.* 237; R Wissler, 'The effectiveness of court-connected dispute resolution in civil cases' (2004) 22 *Conflict Resolution Quarterly* 55.

¹¹⁸ HG Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – the first 23 months* (Ministry of the Attorney General, Ontario 2006).

¹¹⁹ Wise (n 27) 46.

¹²⁰ As has been witnessed in England and South Africa.

¹²¹ S Cobb, 'Compulsory Mediation' (2010) *Fam Law* 1155.

C. The Need for 'Official' Support - Government and Judicial Initiatives

As highlighted above, there are worryingly low levels of awareness of mediation in Scotland. Therefore, there is a clear need for the proactive marketing of family mediation in order to communicate directly with potential beneficiaries and educate them as to the availability of the method. The Scottish Government must publicise its support for family mediation, ensuring that its policy is clear in this regard. The current Rules of Court could be altered to include a compulsory element which, as in so many other jurisdictions, would enable judges to compel litigants to use mediation in appropriate situations. As we have seen, the current Rules are rarely implemented and are unlikely to be in the future absent a form of mandatory provision. This is primarily due to the Scottish Government's lack of emphasis on family mediation and the voluntary nature of the service. This complaint is also evident south of the border where, despite the United Kingdom Government's emphasis on mediation in England and Wales, in over one-third of cases, mediation was not even mentioned to the parties by the solicitors involved.¹²²

Alternatively, a change in policy could in turn lead to a judicial decision comparable to that in the South African case of *Brownlee v Brownlee*.¹²³ Proponents of mediation in South Africa greeted the decision as a landmark comparable to *Dunnett v Railtrack*¹²⁴ in England and Wales, a case whose overall importance should not be overlooked. The decision in *Railtrack* made it abundantly clear that parties and their legal advisers must consider mediation and other forms of ADR, especially where this has been suggested by the court itself. Flatly refusing to consider such methods, as was the case in *Railtrack*, means that costs may not be given to the winning party. Similarly in *Brownlee*, a judge imposed a costs sanction as a direct consequence of a failure of the parties to mediate for the first time. However, rather interestingly, the sanction was imposed not on the parties but on their solicitors. This is something which has not yet been seen in England and Wales and certainly not in Scotland. Indeed, Acting Judge Brassey referred to the English experience, highlighting the benefits and success witnessed in that jurisdiction as well as the support for family mediation in South Africa:¹²⁵

I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent. But (...) I can say with confidence that the parties would have been well served if they had submitted this dispute to mediation and then fought out, if fight they must, the one or two issues of fundamental concern to them.

¹²² National Audit Office, *Legal Aid and Mediation for people involved in family breakdown* (2006-7, HC 256 HMSO) 5.

¹²³ *Brownlee v Brownlee* 2008/25274. South Gauteng High Court (unreported).

¹²⁴ *Dunnett v Railtrack* [2002] 2 All ER 850.

¹²⁵ *Brownlee* (n 123) 18.

Nonetheless, the approach in *Brownlee* presents a fresh warning to the legal profession as to the action judges may take if solicitors fail to advise their clients about mediation. This is something which both the Court of Appeal in *Halsey v Milton Keynes NHS Trust*¹²⁶ and the Solicitors Code of Conduct¹²⁷ have effectively made a professional duty in England and Wales.

A similar decision north of the border would stand Scotland in better stead in terms of ensuring family mediation is actively encouraged and that those in the legal profession who fail to advise to this avail are held accountable for their actions. Indeed, it is submitted that the legal profession has a key role to play in ensuring that mediation is a success in Scotland. However, rather than wait for the profession to take the initiative and encourage the method more fervently, or for a Scottish court to decide the matter on a similar basis to *Railtrack* or *Brownlee*, the Scottish Government would be better advised to reform the existing Rules of Court to incorporate a compulsory element. They could also enact a comprehensive piece of legislation on family mediation which supports this, rather than relying on judicial precedent. As detailed above, such legislation should be comparable to the provisions of Chapter 5 of the Marriage Act 1929 in Finland. This would definitively lay down government policy in regard to family mediation at the same time as publicising and providing for all aspects of family mediation services in Scotland. Such a piece of legislation would provide for mediation to be compulsory except in certain circumstances, such as domestic abuse, as well as providing for all other aspects of family mediation including confidentiality and regulation.

Of course, in order for mediation to succeed, any official support must also encompass financial support. Financial consideration is a topic which has been discussed previously in Part IV. It is clear that the more money the Scottish Government provides for the implementation and maintenance of family mediation services, the more they stand to gain from it. Steps such as offering financial incentives for mediation providers to expand their service, particularly in rural areas, have already been taken in England and Wales.¹²⁸ There is a clear need for publicly funded family mediation both in terms of ensuring availability and more consistent access throughout the country. In the early stages of reform, the Scottish Government may wish to offer a type of incentive similar to that which was witnessed in the Netherlands. In order to promote the use of family mediation through court referral, the Dutch Minister of Justice introduced a temporary incentive contribution whereby the first two and a half hours of mediation were provided free of charge.¹²⁹ However, whatever route the Scottish Government adopts, it must act immediately and should encompass encouragement of mediation both inside and outwith the legal framework of the courts and solicitors as was achieved in England and Wales.¹³⁰

¹²⁶ *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920.

¹²⁷ See Practice Direction 3A which supplements the court's powers in Part 3 of the Family Procedure Rules 2010 to encourage and facilitate the use of alternative dispute resolution.

¹²⁸ See The Legal Services Commission, *Publicly Funded Family Mediation: The Way Forward* (The Legal Services Commission, London 2008).

¹²⁹ M Pel, C van Leuven, G Brands-Bottema and M Hendriks, 'Family Mediation in the Netherlands' (2009) *International Family Law Journal* 255, 262.

¹³⁰ The Access to Justice Act 1999.

D. Training, Education and Regulation

At present, mediation generally and family mediation specifically, is a fragmented profession which ultimately requires regulatory unification. However, such a body would require statutory authority if it is to bring together the service and provide a widely accepted, professional service of family mediation to which parties can confidently be referred. Providing an assurance of quality as well as confidentiality will ultimately lead to an increase in uptake of mediation. The Scottish Government must provide for the regulation of family mediation to provide a mark of quality as well extending the current narrow scope of the Civil Evidence (Family Mediation) (Scotland) Act 1995 in order to provide complete confidentiality for all family mediation services.

As considered above, publicising the availability of mediation and educating the public of its benefits is essential. Likewise, education and training must be extended to the legal profession, encompassing both solicitors and judges to ensure they are aware of the benefits both they and their clients stand to gain. This should include legislation which lays down the qualifications required in order to become a mediator.¹³¹ Furthermore, recruitment and training must incorporate cultural considerations.

Retaining the link with the courts following a successful mediation agreement is also essential. Not only does it serve as a safeguard to ensure that agreements are suitable, equitable and legally binding but it also ensures that parties abide by the letter of the law. Furthermore, the Australian experience of eradicating this link with the courts completely through Family Relationship Centres has been shown to be the wrong course of action, with the Government now performing an embarrassing U-turn on the issue.¹³² However, one concept deriving from Australia which the Scottish Government may wish to adopt is a provision similar to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008, which subjects mediation providers to a number of legal obligations and accreditation standards.

E. Is Timing Everything? – Temporal Considerations in Family Mediation

In the context of whether family mediation should be compulsory, an important consideration is the point at which parties are introduced to mediation. This is particularly in terms of the psychological and emotional stage reached in the process of separation rather than the chronological stage.¹³³ It would appear that the parties stand to derive greater benefits if they are introduced to mediation immediately, with the highest level of crisis being when the couples separate rather than during divorce.¹³⁴ Parties may be more willing to welcome intervention in these early stages, as opposed to later in the process when feelings of hostility, resentment and

¹³¹ It could, for example, require all mediators to be accredited in order to practice.

¹³² H Rhoades, 'Mandatory mediation of family disputes: reflections from Australia' (2010) 32 *Journal of Social Welfare & Family Law* 2 183, 185.

¹³³ Lewis (n 24) 3.

¹³⁴ Parkinson, 'Gateways to Mediation' (n 110) 867.

bitterness become entrenched. This assertion is backed up by research from Australia and indeed other jurisdictions, with Parkinson noting:¹³⁵

There is ample evidence from the history of counselling in Australia and the experience of other jurisdictions that the earlier parents can be involved in negotiating a compromise to their dispute; the more likely it is that the dispute will be resolved.

Effective referral to mediation prior to legal proceedings would, therefore, lead to reduced court caseloads with court referrals to mediation, again saving valuable time and money. Whilst mediation is most likely to be successful at first instance, gateways to mediation need to be open at all stages to encourage both its use and its success.¹³⁶ Hence, in order for family mediation to succeed in Scotland, the parties, the legal professionals, the courts and the service providers alike must work together to ensure suitors are diverted to mediation when possible.

7. Conclusion

Family mediation is an important tool for dealing with family disputes, with multiple advantages to be gained from its use in comparison to court-based litigation. The benefits extend to parties beyond the dispute, encompassing children born of the relationship as well as subsequent partners. Evidence to support the existence of such benefits as well as significant fiscal considerations can be garnered not only from Scotland but throughout the world, with the high regard for family mediation apparent from the increasing adoption of the method internationally. The Scottish Government can no longer ignore such significant support for the method and should adopt measures which will lead to its increased use in Scotland.

It has been argued that family disputes are unique in comparison to other commercial or everyday disputes and they involve heightened emotional considerations, encompassing feelings of hostility, bitterness, resentment, fear and embarrassment. Nonetheless, there is a necessity for an on-going relationship in many of these cases due to the fact that children are involved. It is, therefore, imperative that separating couples have the opportunity to consider their problems in the more sympathetic method of family mediation before they are subjected to the adversarial and confrontational atmosphere of the court-process. The evidence suggests that litigation only makes things worse for the parties, their children, any subsequent partners and indeed wider society. Furthermore, it is apparent that orders made by the court are less likely to be enforced and this can lead to several subsequent court visits, yet further deterioration of relationships and most alarmingly, the increased suffering of the children. Litigation is no longer the best method available for dealing with such disputes; mediation is the future of dispute resolution in contemporary Scots family law.

¹³⁵ Parkinson, 'Keeping in contact: family relationship centres in Australia' (2006) 18 CFLQ 2 157, 170.

¹³⁶ Parkinson, 'Gateways to Mediation' (n 110) 868.

Family mediation services are more widely available in Scotland than ever before and yet there is not an equally matched clientele engaging in the method. The public is simply not adequately informed in regard to the existence of this alternative method and indeed the many advantages it provides. Hence, first and foremost the Scottish Government must take steps to ensure that the availability of family mediation is more widely publicised, eradicating the discrepancies in accessibility at the same time as promoting the benefits. This broad education must not only include the public but also the legal profession. Promotion of family mediation must then be followed by official support, with the Scottish Government adopting a clear change in policy in favour of family mediation, similar to that witnessed in England and Wales.

Following this, tangible legal sources which support and encourage the use of family mediation in Scotland must be implemented. This should entail not only amending the current Rules of Court to encompass an element of compulsion but should also lead to the enactment of a comprehensive piece of legislation on the matter. The Scottish Government now has the privilege of a plethora of knowledge on the subject, with several countries having already witnessed the triumphs and potential pitfalls of implementing policy on family mediation. It is, therefore, in the position to ensure that family mediation and its implementation in Scotland is a success from the outset. In terms of producing effective legislation, it need only look to Scandinavia, with countries such as Norway and Sweden illustrating how to easily and adequately incorporate compulsory mediation into legislation.

Ultimately, take-up of mediation services in Scotland remains low and it would appear that the Scottish Government must resort to some form of mandatory provision akin to the Norwegian model but encompassing all separating couples, including those without children, in order to reverse this trend. There are several examples of other provisions which should be incorporated into a chapter of existing legislation similar to that in Finland or indeed in a wholly separate Act of the Scottish Parliament, such as a prerequisite similar to that in South Africa which ensures the welfare of children is best served during mediation. This is in addition to provisions which address the process of 'screening out' unsuitable cases and the punishment of those who make false accusations in this regard, as has been implemented in Australia. Furthermore, the regulation of family mediation in Scotland should be provided for through the imposition of mediation regulations. For example, the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 of Australia subject mediation providers to a number of legal obligations and accreditation standards. A comprehensive piece of legislation in this regard should also ensure increased confidentiality of family mediation proceedings, as currently the scope of the Civil Evidence (Family Mediation) (Scotland) Act 1995 is too narrow. This is causing confusion amongst mediation attendees and has become a significant barrier in terms of the process' credibility.

Ultimately, if these recommendations are implemented, this would enable Scotland to become a centre of excellence for family mediation implementation, provision, regulation and most importantly success. At the same time, it will provide separating couples in Scotland with a quicker, simpler, cheaper and more beneficial method of dispute resolution. This would ensure a more amicable outcome in

comparison to court-based litigation, providing better arrangements for them and more importantly, their children. Furthermore, considering the wider imminent shake-ups to the criminal and civil justice processes in light of the current economic climate, it is evident that now is the time for the Scottish Government to act. Rocketing criminal legal aid costs alongside criminal court and prison expenditure has led to heightened scrutiny of the civil system as savings have to be made by the Government in these times of ever increasing austerity. It is submitted that the *status quo* is fuelling unnecessary expenditure in respect of civil disputes by both the Government and the parties and reliance upon court processes which do not adequately serve the interests of the parties, their children or indeed wider society. The Scottish Government has the opportunity to rebalance the system; the time to act is now. As Victor Hugo famously said, 'An invasion of armies can be resisted, but not an idea whose time has come.'

The UK Supreme Court's Jurisdiction over Scottish Criminal Cases

TOM A. RICHARD*

Abstract

This paper examines the system of 'devolution issues'¹ in Scottish criminal cases - the only basis on which an appeal lies to the UK Supreme Court ('UKSC') from the High Court of Justiciary sitting as an appeal court. As a consequence of the provisions of the Scotland Act 1998, any act or omission of a member of the Scottish Government is *ultra vires* insofar as it is incompatible with Convention rights.² It will be contended that the link between this constitutional fact and recent controversial decisions of the Supreme Court - such as *Cadder v HM Advocate*,³ where the practice of police interviewing suspects for up to six hours without access to a lawyer was ended, or the high profile case of *Fraser v HM Advocate*,⁴ where a previously upheld conviction for murder was quashed - is far from apparent, let alone recognisable on the basis of a clear constitutional principle. It will be concluded that the scope of the Supreme Court's jurisdiction mirrors a general right of appeal and such a wide-ranging jurisdiction over Scottish criminal matters was neither foreseen nor inevitable.

1. Introduction

The policies of increasing the legal protection for human rights and devolving power to Edinburgh, Cardiff and Belfast were fundamental components of the constitutional reforms announced by the new Labour Government in 1997.⁵ The point at which these two policies intersected was in the measures taken to ensure that powers which were devolved were competent only insofar as they were compatible with the European Convention on Human Rights ('ECHR').⁶ As a consequence of provisions in the Scotland Act 1998, any act or omission of a member of the Scottish Government is *ultra vires* insofar as it is incompatible with Convention rights.⁷ The link between this constitutional fact and recent controversial decisions of

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¹ As defined in Part I, Schedule 6 of the Scotland Act 1998 and the definition that will be adopted throughout this paper.

² Scotland Act 1998, s 57.

³ *Cadder v HM Advocate* [2010] UKSC 43.

⁴ *Fraser v HM Advocate* [2011] UKSC 24.

⁵ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997); Scotland Office, *Scotland's Parliament* (White Paper, Cm 3658, 1997).

⁶ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols No.11 and No.14), 4 November 1950

<<http://www.conventions.coe.int/treaty/en/treaties/html/005.htm>> accessed 12 June 2012.

⁷ Scotland Act 1998, s 57.

the Supreme Court⁸ is far from apparent, let alone recognisable, on the basis of a clear constitutional principle. One legal commentator is undoubtedly correct when she asserted that '(...) the establishment of an explicitly 'UK' court rekindled sensitivities about the continued independence of Scots law.'⁹

The first formal, if brief, consideration of devolution issues and the jurisdiction of the Judicial Committee of the Privy Council (the 'JCPC') appeared in the 2002 Bonyon Report on High Court of Justiciary Reform.¹⁰ The Report spoke of the '(...) tendency for proceedings to be delayed and for the efficient running of criminal trials to be disturbed',¹¹ and highlighted the incongruity with the position in the rest of the UK with issues of fair trial being dealt with only under the Human Rights Act 1998 ('HRA 1998'). Lord Bonyon's report emphasised the extent to which specific criticisms of the system of devolution issues fell into one of two categories: (i) those relating to the constitution; or (ii) those relating to the effective running of the criminal justice system. This distinction must be fully recognised for any criticism to be coherent, particularly with regard to proposals for reform, for the constitution falls within the matters reserved to the Westminster Parliament¹² whereas the justice system is devolved to Holyrood.

This paper will contend that the scope of the Supreme Court's jurisdiction mirrors a general right of appeal for which there is no constitutional justification. Such a wide-ranging jurisdiction over Scottish criminal matters was neither foreseen nor inevitable. This paper will examine the provisions of the Scotland Act 1998 which provide the mechanism for resolving questions of competence, i.e. 'devolution issues' and the decisions of the JCPC, and latterly the UKSC, in which the courts interpreted the extent of the jurisdiction of those provisions. Consideration will then be given to the criticisms of the system of 'devolution issues' and the jurisdiction of the Supreme Court before finally concluding whether the proposals for reform contained in the new Scotland Act 2012 constitute an effective solution.

2. Jurisdiction of the Supreme Court

There is no right of appeal from a decision of the High Court of Justiciary sitting as an appeal court to a higher court. However, there is one exception. As provided by the Scotland Act 1998,¹³ an appeal will be possible where an act of the Lord Advocate

⁸ Such as *Cadder v HM Advocate*, where the practice of police interviewing suspects for up to six hours without access to a lawyer was ended, or the high profile case of *Fraser v HM Advocate* where a previously upheld conviction for murder was quashed.

⁹ Aileen McHarg, 'Final Appeals in Scots Criminal Cases' (UKSC blog, 5 October 2011) <<http://uksblog.com/final-appeals-in-scots-criminal-cases>> accessed 12 June 2012.

¹⁰ Lord Bonyon, *Improving Practice – The 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002) <<http://www.scotcourts.gov.uk/bonyon/documentIndex.asp>> accessed 12 June 2012. Lord Bonyon's opinion was that where there was a lack of 'compelling reasons' for treating issues that could be dealt with under the HRA 1998 as devolution issues, '(...) there can be no justification for the delay and disruption that is caused to certain cases' and recommended the removal of acts of the Lord Advocate from the statutory definition of a devolution issue: *ibid* [17.14].

¹¹ *ibid* [17.10].

¹² Scotland Act 1998, Sch 5.

¹³ *ibid* s 57(2) and Sch 6.

is claimed to be incompatible with EU law or with the ECHR obligations, as incorporated into domestic law by the HRA 1998. Since the advent of devolution, there have been numerous cases heard in London¹⁴ to resolve the question of whether an act of the Lord Advocate has transgressed against either of these areas of law. However, in spite of the repeated assertions made by the Justices of the Supreme Court that the High Court of Justiciary is the highest authority in Scots criminal matters, the effect of the jurisdiction has been very close to that of a general right of appeal which remains at odds with the historical position of the Scottish criminal courts.

A. Historical Position Prior to Devolution

When Scotland and England were joined in Union, provision was made that ostensibly protected the position of Scotland's supreme courts¹⁵ with Article 19 of the Treaty of Union specifying that:¹⁶

(...) no causes in Scotland be cognoscible by the courts of chancery, queen's bench, common-pleas, or any other court in Westminster Hall; and that the said court, or any other of the like nature after the union, shall have no power to judge, review or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same.

While this would seem to be a clear defence of the Scottish courts, two facts render it much more vague than would at first appear. Firstly, the House of Lords did not sit in Westminster Hall alongside the central English courts mentioned; and secondly, immediately prior to union, a right of appeal from the Court of Session to the Scottish Parliament existed.¹⁷ The level to which this ambiguity was calculated has since been subject to debate and analysis by legal historians.¹⁸ Nonetheless, civil litigants, or rather their creative counsel, began to bring cases before the House of Lords with that court accepting jurisdiction thereof. By the latter part of the 18th century, the House of Lords had resolutely rejected entertaining Scottish criminal appeals,¹⁹ despite a few wobbles along the way.²⁰ However, all doubts were finally quashed when the legislature had the last word on the matter confirming no appeal was possible from the High Court of Justiciary.²¹

The history of the appellate jurisdiction is important in considering the foundation of the current appeals position. It is a provision of the Constitutional

¹⁴ By the JCPC and, latterly, the UKSC.

¹⁵ The High Court of Justiciary and the Court of Session.

¹⁶ Union with Scotland Act 1706.

¹⁷ The Claim of Right of 1689.

¹⁸ Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (Scottish Government, January 2010) [3.1], Appendix 1 <<http://www.scotland.gov.uk/Publications/2010/01/19154813/0>> accessed 12 June 2012.

¹⁹ *HM Advocate v Murdison* (1773) MacLaurin 557; *Bywater v Lord Advocate* (1781) 2 Paton 563.

²⁰ *Magistrates of Elgin v Ministers of Elgin* (1713) Robertson 69 was perhaps the only recorded successful Scottish criminal appeal before the Lords. See also *Mackintosh v Lord Advocate* (1876) 3 R (HL).

²¹ Criminal Procedure (Scotland) Act 1887.

Reform Act 2005²² that an appeal from a Scottish court will only be competent '(...) if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section'.²³ Therefore, in light of the fact that no criminal appeal to the House of Lords was possible, there would be no criminal appeal to the Supreme Court from the Scottish criminal courts. In addition, the Criminal Procedure (Scotland) Act 1995 also stresses that the judgements handed down by the High Court of Justiciary '(...) shall be final and conclusive and not subject to review by any court whatsoever'.²⁴ This represented the *status quo* until the Scotland Act 1998 provided for an appeal from a court of two more judges of the High Court of Justiciary in respect of determination of a 'devolution issue'.²⁵

B. The Lord Advocate, Human Rights and Competence in the Devolution settlement

The UK government White Paper, *Rights Brought Home: the Human Rights Bill*,²⁶ made clear that, post devolution, the Scottish Parliament would be unable to pass legislation and the Executive unable to make decisions or engage in acts incompatible with Convention Rights.²⁷ Insofar as devolution issues are concerned, the difficulty in the Lord Advocate's position begins with section 44(1)(c) confirming the place of the Scottish law officers within the Scottish Executive. The situation is further compounded by the restriction placed on members of the Scottish Executive found within section 57:

- (2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with [EU] law.
- (3) Subsection (2) does not apply to an act of the Lord Advocate –
 - (a) in prosecuting any offence, or
 - (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

Thus, both administrative and legislative functions are limited in the above manner. Beyond the narrow exception contained within section 57(3),²⁸ any act of the Lord

²² The statute making provision for a Supreme Court in the United Kingdom.

²³ Constitutional Reform Act 2005, s 40(3).

²⁴ Criminal Procedure (Scotland) Act 1995, s 124(2).

²⁵ Scotland Act 1998, Sch 6 para 13; the Crime and Punishment (Scotland) Act 1997 also made provision for cases to be examined by the Scottish Criminal Cases Review Commission, and if required in the Commission's opinion, to be remitted back to the High Court of Justiciary.

²⁶ Home Office, *Rights Brought Home* (n 5).

²⁷ *ibid* [2.21]. This system being replicated in the other jurisdictions benefiting from the new constitutional arrangements of devolution. See, for example, Government of Wales Act 1998 and Northern Ireland Act 1998.

²⁸ HRA 1998, s 6(1) as mentioned in Scotland Act 1998, s 57(3), provides that '(...) it is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Section 6(2) provides

Advocate is subject to the control of section 57 and, therefore, the supervision of the courts. Therefore, any such acts are capable of being declared incompetent and hence *ultra vires*. The supervision of administrative and legislative functions is the essence of a 'devolution issue',²⁹ with the definition of and mechanisms of operation provided by Schedule 6 of the 1998 Act.³⁰ The 1998 Act also makes reference to the 'retained functions' of the Lord Advocate.³¹ These are any functions exercised by him prior to devolution and, therefore, necessarily imply the conducting of prosecutions. However, the Act does not exclude them from the question of competence and the aforementioned supervision of the devolution regime by the courts. On the other hand, neither does it make any express mention of this important matter either.

C. Interpretation of the Scotland Act 1998 by the Courts

As 'acts of the Lord Advocate' are open to review by the courts, it is their role to interpret and construe the reach of that phrase. From the outset, case law has rejected the argument that his 'acts' should be limited to administrative and legislative acts. The High Court of Justiciary in *Robb v HM Advocate*,³² held there to be '(...) no justification for giving the word 'act' a restricted meaning'³³ when it rejected the argument that section 57(2) should not apply to the act of leading certain evidence. The court looked to the qualification in section 57(3) which it saw as important '(...) in the light it throws on the interpretation of subsection (2)'.³⁴ Furthermore, in Lord Penrose's opinion, as the only qualification of section 57(2) was narrowly contained within section 57(3), scope for interpreting the term 'act' with reference to the term immediately preceding it³⁵ was removed on a *eiusdem generis* basis.³⁶

The earliest case in which the matter was given the most comprehensive consideration was that of *Montgomery v HM Advocate*³⁷ on appeal to the JCPC. The case concerned the murder of Surjit Singh Chhokhar which received intensive media attention due to the nature of the crime and the Crown's handling of the case. Given the pre-trial media coverage, questions about the fairness of the trial were of

an exception to s 6(1) where '(...) as the result of one or more provisions of primary legislation, the authority could not have acted differently'.

²⁹ Scotland Act 1998, s 98.

³⁰ The definition is specified in the form of six questions in Sch 6 para 1: whether an Act of the Scottish Parliament is within its devolved competence (clause a); questions relating to a functions of the members of the Scottish Executive (clause b); whether an exercise of a function of a member of the Scottish Executive is within devolved competence or incompatible with a Convention right or EU law (clause c, d); whether a failure to act on the part of a member of the Executive would be incompatible with EU law or Convention rights (clause e).

³¹ Scotland Act 1998, s 52.

³² *Robb v HM Advocate* 1999 SCCR 971.

³³ *ibid* 976 (Lord Prosser).

³⁴ *ibid* 975 (Lord Prosser). That is, in understanding the subsection (3) exception for a breach that was unavoidable by virtue of primary legislation in relation to 'prosecuting any offence' or '(...) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland', these must be taken to be included in the 'acts' of s 57(2) generally, to which the exception applies.

³⁵ i.e. 'subordinate legislation'.

³⁶ *Robb* (n 32) 975 (Lord Prosser).

³⁷ *Montgomery v HM Advocate* 2001 SC (PC) 1.

relevance to the ability of the Lord Advocate to guarantee a fair trial for the accused. Furthermore, the constitutional question of the role of Lord Advocate as 'master of the instance' of criminal prosecutions in Scotland, and also as a member of the Scottish Executive, rendered him open to claims for breach of Article 6, ECHR.

As one of two Scottish judges sitting on the board of the JCPC in *Montgomery*, Lord Hope considered the position of the Lord Advocate by (i) contrasting his role with parallel offices within the UK's other jurisdictions; and (ii) citing three examples demonstrating the Lord Advocate's role as 'master of the instance' as the '(...) fundamental rule on which the system of criminal justice in Scotland is based.'³⁸ The reasoning behind the three examples ultimately led Lord Hope to conclude that '(...) the approach which...[the Scotland Act]...takes is that the right of the accused to receive a fair trial is a responsibility of the Lord Advocate as well as of the court.'³⁹ However, a 'striking'⁴⁰ distinction between the interpretation of the Scottish judges⁴¹ on the panel and the English judges can be observed. In contrast to Lord Hope, Lord Hoffman expressed the view that while he accepted that the commencement and continuation of proceedings was an act of the Lord Advocate,⁴² the burden of ensuring a fair trial fell to the court alone.⁴³ He also accepted the position of the Scottish prosecutor as being of enhanced power and discretion when compared to his Welsh or English equivalent, but nevertheless felt that ultimately, it was the court that determined the criminal charge.⁴⁴ Lord Hoffman's reasoning would appear to be an argument based upon a logical interpretation of the facts.

In addition to the analysis of Lord Hoffman, Lord Nichols observed the possible *non sequitur* of saying that as it is the responsibility of the Lord Advocate to ensure a fair trial, if a fair trial was not possible for some reason and halted at a preliminary diet, the Lord Advocate would have acted beyond his powers in bringing the prosecution.⁴⁵ Yet, in spite of such significant reservations expressed by Lords Hoffman and Nichols, the court deferred to the judgement of the Scottish judges. However, the need for a concluded opinion on the issue was negated in light of the agreement between the parties that the issue was indeed a devolution issue, thereby preventing the court from offering a conclusive analysis.

The issue was again revisited in the landmark case of *Brown v Stott*,⁴⁶ which represents the first time that a decision of the High Court of Justiciary, sitting as an appeal court, was overturned by a higher court.⁴⁷ Lord Hope built upon and reinforced his earlier judgement in *Montgomery* with regard to the question of whether the Lord Advocate's act of conducting a prosecution constituted the basis of

³⁸ *Montgomery* (n 37) [18 H] (Lord Hope).

³⁹ *Montgomery* (n 37) [19 E - G] (Lord Hope).

⁴⁰ TH Jones, 'Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court' (2004) *Crim.L.R.* 96.

⁴¹ In addition to Lord Hope of Craighead sat Lord Clyde.

⁴² *Montgomery* (n 37) [6G] (Lord Hoffmann).

⁴³ This was on the basis that the court decides whether the evidence brought by the prosecutor will be admissible before the jury. Lord Hoffmann held that '(...) I think the short answer is that criminal charges are determined by courts and not prosecutors': *ibid* [8A].

⁴⁴ *ibid*.

⁴⁵ *Montgomery* (n 37) [5C]-[6D] (Lord Nichols).

⁴⁶ *Brown v Stott* 2001 SC (PC) 43.

⁴⁷ S Di Rollo, 'Section 172 - An Unconventional Approach?' 2001 SLT (News) 13.

a devolution issue. He considered that, with close reference to the wording of the Scotland Act 1998, the devolution system sought to ensure that the right of an accused to receive a fair trial was jointly the responsibility of the court and the Lord Advocate.⁴⁸

In developing the jurisprudence of the court regarding the position of the Lord Advocate within the devolution arrangements, Lord Hope considered that of 'cardinal importance' to this view was the '(...) overall context in which the relevant provisions were enacted'.⁴⁹ Per Lord Hope:⁵⁰

Parliament has chosen to legislate in a way which ensures that those obligations [the Convention rights] are respected both by the Scottish Parliament and the Scottish Executive by limiting their competence (...) one of the matters which was devolved to the Scottish Parliament and to the Scottish Executive was the system of criminal prosecution for which the Lord Advocate is responsible.

In further clarifying the role of the Lord Advocate within the devolution settlement, Lord Hope pointed to the creation of the office of the Advocate General and the functions bestowed upon him by the Scotland Act 1998. These functions include both safeguarding the interests of the United Kingdom within the devolution arrangements and '(...) seeing to the fulfilment of the States' international obligations (...) in particular those to which it owes as a Contracting State under art 13 of the Convention'.⁵¹ Pointing to the provisions that allow the Advocate General to refer devolution issues and respond to those raised by the Lord Advocate, and *vice versa*,⁵² Lord Hope concluded that, 'It seems to me to be clear from these provisions that it was the intention of Parliament that acts of the Lord Advocate in prosecuting offences should be subject to judicial control under the devolved system'.⁵³ His reasoning represents justification of the court's jurisdiction in cases such as *Montgomery* and *Brown*. Therefore, in *Brown* virtually no resistance was shown by the non-Scottish judges to Lord Hope's reasoning as to the fact that a devolution issue had arisen⁵⁴ allowing the jurisdiction of the JPC to continue unchallenged.

However, in *HM Advocate v R*,⁵⁵ the Lord Advocate's policy based submission that '(...) a broad construction of the word [act] could lead to numerous points being taken as devolution issues and to the Judicial Committee becoming the final court of appeal in a wide variety of Scottish criminal matters', was rejected by Lord Hope, again giving the leading judgement, as an irrelevant consideration in statutory

⁴⁸ *Brown* (n 46) 70 [B] (Lord Hope).

⁴⁹ *ibid* 70 [C] (Lord Hope). This context relates to the manner in which the rights set out in the convention were to be secured by Parliament in the legislation enacted at the time, acting on the requirement of Article 13 to ensure an 'effective remedy before a national authority' where a violation of a convention rights was alleged.

⁵⁰ *ibid* 70 [E]-[G].

⁵¹ *ibid* 71 [C].

⁵² Scotland Act 1998, Sch 6, [4] and [33].

⁵³ *Brown* (n 46) 71 [D] (Lord Hope).

⁵⁴ *ibid* [47C] (Lord Bingham).

⁵⁵ *HM Advocate v R* [2003] 2 WLR 317.

interpretation.⁵⁶ The dismissal of this argument is interesting particularly given the many paragraphs in the preceding cases, especially in the judgements of Lord Hope himself, dedicated to considering the intention of Parliament and the relevance of this intent in interpreting the 1998 Act. It may be said that the JCPC preferred an interpretation of the statute which allowed it to retain jurisdiction on the basis of human rights considerations. Therefore, on the basis of the civil law, rather than as a final court of appeal in criminal matters, issues of human rights extend to every part of the criminal justice system.

D. Result of the Interpretation

When combined with the allegation that almost any part of the criminal justice process could potentially raise a devolution issue on the basis of Article 6,⁵⁷ section 57 and schedule 6 create a route of appeal from the High Court of Justiciary in Edinburgh to the Supreme Court. Furthermore, the effect of the broad interpretation of 'acts' of the Lord Advocate is to render all procurators fiscal members of the Scottish Executive for the purposes of devolution issues. Therefore, acting on the authority of the Lord Advocate, fiscals are to be seen as one and the same as the Lord Advocate.⁵⁸ However, this very broad construction of devolution issues was not inevitable.⁵⁹ In addition to the passively-dissenting judicial voices, such as Lords Hoffmann and Nichols in *Montgomery*, several other arguments have been advanced that suggest it was not certain that the JCPC/UKSC's jurisdiction should be interpreted this widely. Indeed, Stewart makes the case that, on the basis of other provisions of the Scotland Act 1998, the categories of 'member of the Scottish Executive' and 'members of the staff of the Scottish Administration'⁶⁰ are mutually exclusive.⁶¹ Reinforcing his point, he cites the example that procurators fiscal are not included in the definition of 'Scottish Executive' but are covered by the definition provided under staff of the 'Scottish Administration'.⁶² Therefore, when certain other provisions of the 1998 Act, which make a clear distinction between fiscals and the Lord Advocate, are considered,⁶³ the argument that within section 57(2) they amount to one and the same becomes less tenable. In sum, the interpretation of 'acts' of the Lord Advocate, as preferred by the JCPC, can be called into question.

The second strand of this argument comes from the need to read the Scotland Act 1998 alongside, or at least appreciating the existence of, the HRA 1998. There is

⁵⁶ *ibid* [39] (Lord Hope).

⁵⁷ In the Lord President's submission to Parliament on the Scotland Bill, his lordship suggests that sentencing, a process that the Lord Advocate has no part to play out with moving that the accused be sentenced, might not come within the remit of a devolution issue. But even this is not clear: Lord President, *Scotland Bill: Written Representations under the Constitutional Reform Act 2005* (Judiciary of Scotland, 2012) [8] <www.scotland-judiciary.org.uk/24/865/Lord-President-Makes-Written-Representations-to-parliament> accessed 12 June 2012.

⁵⁸ A Stewart, 'Devolution issues and human rights' 2000 SLT (News) 239.

⁵⁹ Walker (n 18) [3.4].

⁶⁰ As contained in the list of defined expressions at s 127.

⁶¹ Stewart (n 58) 241.

⁶² *ibid*.

⁶³ Scotland Act 1998, ss 23(10), 27, 29(2) and 48(5).

little controversy in the notion of the fiscal being a 'public authority' in terms of the latter Act.⁶⁴ Aside from the narrow window between the enactment of the Scotland Act 1998 and the HRA 1998, had Parliament truly intended such an overlap of jurisdiction, with an issue of a breach of Convention rights being actionable under two distinct statutory regimes, more unequivocal language would have been used to confirm that this was to be the case. Despite the general consensus of the legal profession at the time, that the systems did offer an alternative,⁶⁵ it has been argued that due to the differing nature of the approach to breaches of Convention obligations in each Act,⁶⁶ they do not offer an alternative procedural approach to each other. If an act of a member of the Executive is incompatible with Convention rights it is *ultra vires*, the effect being essentially that it is void; under the HRA 1998, the act is 'unlawful', but still stands. However, this argument of 'sudden death' on the basis of the *vires* of acts challenged under the Scotland Act 1998 loses its force completely with regard to the Lord Advocate, when it is recalled that his acts in relation to criminal justice are subject to an exception to the *vires* control found at section 57(3). This exception clearly states that section 57(2) does not apply to an act of the Lord Advocate in prosecuting an offence where, by virtue of a provision of primary legislation elsewhere, no alternative course of action is available. This is exactly the same exception for acts of public bodies under the HRA 1998.⁶⁷ This shows the position of the Lord Advocate being subject to less control than the other Scottish Ministers under the Scotland Act 1998, for whom no exception to the *vires* control applies. This is a fact that could be employed to suggest that either, in carrying out his reserved functions, the Lord Advocate was clearly intended to be subject to the *vires* control in all situations, or it was neglected that the exception was followed through to its logical conclusion. However, in either case, it is still unclear that Parliament intended an interpretation of 'acts' capable of encompassing almost any action in a criminal trial.

Giving evidence to the Joint Committee on Human Rights, Lord Bingham said that, 'One of the anomalous, and to me surprising and unexpected, results of devolution is that for the first time one does have judges, Scots prominently among them but nonetheless judges, sitting in London ruling on questions relating to Scots criminal trials'.⁶⁸ During debate on the original Scotland Bill in the House of Lords, the Lord Advocate stated that '(...) most devolution issues will be raised competently only by way of judicial review in the Court of Session'.⁶⁹ That the consequences of such a provision were not foreseen is further reinforced by the statement Lord Dubs, a minister in the Northern Ireland Office, that an amendment to the Northern Ireland Bill '(...) resembles amendments already made to the Scotland Bill to take account of

⁶⁴ HRA 1998, s 6.

⁶⁵ I Jamieson, 'Relationship between the Scotland Act and the Human Rights Act' 2001 SLT (News) 43.

⁶⁶ Acts in breach of s 6 HRA 1998 are merely declared incompatible but will stand, whereas under s 57(2) Scotland Act 1998, the act will instead be deemed *ultra vires* and will be void, leaving aside the narrow s 57(3) exception.

⁶⁷ *ibid* (n 64).

⁶⁸ Joint Committee on Human Rights, *Minutes of Evidence* (2000-01, HC 26) [110]

<<http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1032607.htm>> accessed 12 June 2012.

⁶⁹ HL Deb, 28 October 1998, vol 594, col 79.

the contingency, which again is likely to be infrequent, of devolution issues arising in criminal proceedings'.⁷⁰ The inaccuracy of these predictions is only apparent with hindsight. By mid-2010, at least 10,000 devolution issues arising in criminal proceedings had been intimated to the Advocate General.⁷¹ Further, the most commonly litigated issue by far under the JCPC/UKSC's devolution jurisdiction were proceedings brought on the basis of acts of the Lord Advocate.⁷² Finally, the statement that the limitations on the Welsh Assembly and Executive would mirror those placed on Scotland in the aforementioned White Paper *Rights Brought Home*,⁷³ is again a possible clue pointing to the neglect in appreciating the Lord Advocate's unique position in government when compared to other prosecutors in the United Kingdom.⁷⁴ That the extent and effect of the Supreme Court's jurisdiction was foreseen neither by senior members of the judiciary nor the architects of devolution is abundantly clear.

3. The Effects of the Jurisdiction

While some rumblings of discontent with the system of devolution issues could be detected following devolution,⁷⁵ matters truly came to a head following two separate judgements of the Supreme Court sparking controversy, debate and ultimately change. The cases of *Cadder v HM Advocate*⁷⁶ and *Fraser v HM Advocate*⁷⁷ were heard by the UKSC, under its own authority, in spite of the fact that in neither case a devolution issue was heard by the Scottish Criminal Appeal Court. Although the cases were advanced ostensibly on the basis of an argument that there had been a breach of the Article 6 ECHR, both cases considered and overruled a number of substantive judgements of the High Court of Justiciary. Both cases involved many of the senior Scottish judiciary and, controversially, were both remitted back to the

⁷⁰ HL Deb, 28 October 1998, vol 594, col 818 (Lord Dubs).

⁷¹ Advocate General's Expert Group, *Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate* (Office of the Advocate General, Nov 2010) [3.13]

<<http://www.advocategeneral.gov.uk/oag/225.html>> accessed 12 June 2012. It is noted that out of the issues raised, the Advocate General intervened in only thirty-five.

⁷² Walker (n 18) [3.4].

⁷³ Home Office (n 5) [2.22].

⁷⁴ McCluskey Review Group, *Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases* (Scottish Government, 2011) 41

<www.scotland.gov.uk/About/supreme-court-review> accessed 12 June 2012.

⁷⁵ Lord Bonomy (n 10). For instance, the Bonomy Review criticised the devolution procedure on the basis of constitutional propriety and the disruption caused to the efficient running of the criminal justice system. This is considered further below. The Calman Commission on Scottish also considered the issue slightly later but declined to make a recommendation considering the issue beyond its remit: Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Final Report, June 2009). This was the impetus for the setting up of the Advocate General's Expert Group (n 71). This is discussed in greater detail below.

⁷⁶ *Cadder* (n 3).

⁷⁷ *Fraser* (n 4).

High Court of Justiciary following the quashing of the convictions, under the rule that the Supreme Court has all the powers of the lower court.⁷⁸

A. *Cadder v HM Advocate*

Cadder turned on whether the accused had been capable of having a fair trial given that, as per the standard and accepted practice in Scotland, evidence was led that had been obtained during a police interview at which no solicitor was present. The appeal, by way of a devolution issue was, in the words of Lord Hope, '(...) in effect, an appeal against the decision of the High Court of Justiciary in *HM Advocate v McLean* 2010 SLT 73'.⁷⁹ The court in *McLean* had ruled unanimously that reliance by the Crown on statements made by the accused before they had consulted their lawyer did not itself constitute a breach of Article 6, in the light of other safeguards afforded to the accused by the Scottish system, affirming previous decisions of the High Court of Justiciary on the matter.⁸⁰ It found that it was not obliged to apply the case of *Salduz v Turkey*⁸¹ directly, as the European Court of Human Rights ('ECtHR') had not carefully considered Scottish criminal procedure and protections, and thus the Scottish court could not be required to apply any principle emanating from the decision in Scotland without question or qualification.⁸²

The Supreme Court held that the High Court of Justiciary was not entitled to interpret *Salduz* in the way in which it had done in *McLean*, and that the ECtHR case must be applied directly.⁸³ Lord Rodger's view was that there was not 'the remotest chance' that it would be held in Strasbourg that, on the basis of the unique Scottish safeguards, it would be compatible with Article 6(1) and (3) for access to legal advice to be routinely restricted, and that this was 'the very converse' of what is required by Article 6.⁸⁴

The effect of this judgement was to render the system of Scottish criminal justice, predicated on detention and interview by the police under the Criminal Procedure (Scotland) Act 1995, incompatible with the ECHR where the Crown relied on evidence obtained during interviews at which no solicitor was present. Despite the imposition of the Lord Advocate's interim guidelines that anticipated the Supreme Court's decision by several months, altering the manner in which the police conducted interviews,⁸⁵ over one thousand prosecutions were abandoned, including

⁷⁸ Supreme Court Rules 2009, SI 2009/1603, rule 29(1).

⁷⁹ *Cadder* (n 3) [1] (Lord Hope).

⁸⁰ *Paton v Ritchie* 2000 SCCR 151; *Dickson v HM Advocate* 2001 SCCR 397.

⁸¹ (2009) 49 EHRR 19. The ECtHR held that '(...) the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction': *ibid* [55]

⁸² *HM Advocate v McLean* 2010 SLT 73 [31].

⁸³ *Cadder* (n 3) [40] (Lord Hope). Lord Hope spoke of the Strasbourg court's aims of 'universal' and 'harmonious' application of its principles, not coloured by 'national choices and preferences'.

⁸⁴ *Cadder* (n 3) [93] (Lord Rodger).

⁸⁵ Crown Office, *Lord Advocate Guidelines - Interim Guidelines on Access to a Solicitors* (COPFS, June 2010) <<http://www.crownoffice.gov.uk/publications/2010/06/laguidelines>> accessed 12 June 2012.

nearly eighty solemn proceedings.⁸⁶ Further, in spite of the Lord Advocate's guidelines, the Scottish Government introduced the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (Emergency Bill) to the Scottish Parliament.⁸⁷ The rapid transit of this legislation prompted much criticism and questions as to the justification or necessity of the use of the emergency legislative procedure by the Scottish Parliament.⁸⁸ However, *Cadder* was soon to be followed by a case which would further confirm the Supreme Court's willingness to assert its jurisdiction in this area of law.

B. *Fraser v HM Advocate*⁸⁹

In 2003, Nat Fraser was found guilty of the murder of his wife, Arlene. On the first day of the hearing before the Appeal Court, counsel for the appellant moved the court to allow a devolution minute intimating that the non-disclosure of evidence by the Crown had infringed the appellant's rights under Article 6.⁹⁰ This was repelled by the court, on the basis that (i) in light of the late receipt of the motion, sufficient cause had not been shown for its inclusion and, (ii) that the matters were adequately covered by the original grounds of appeal. Following refusal of the general appeal, the appellant sought leave from the High Court of Justiciary to appeal to the JCPC against the refusal of the devolution minute. This application was repelled:⁹¹

(...) the allowance of leave for such an appeal as this would authorise a procedure under which the Judicial Committee (...) would quite simply, review the merits of the decision reached by this court on 6 May 2008. Whatever was contemplated by Parliament in enacting paragraphs 1(c) and 13 of Schedule 6 of the Scotland Act 1998, we do not think that it was intended to achieve such a result as that.

⁸⁶ 'Cadder bar cases top 1,000' (*The Journal Online*, 5 December 2011)

<www.journalonline.co.uk/News/1010558.aspx> accessed 12 June 2012.

⁸⁷ Upon receiving Royal assent, the Bill became the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2012.

⁸⁸ A Parliamentary motion, lodged by Robert Brown MSP, noted that: 'Parliament...feels that the speed with which the legislation was rushed through the Parliament was unnecessary and represented a *constitutional outrage*, and is appalled that the Scottish Government did not consult the Scottish Human Rights Commission, a body set up for advice on precisely this type of case, on what is considered the biggest human rights issue since the Scottish Parliament was established in 1999': Motion S3M-07333 (3 November 2011) (emphasis added).

⁸⁹ *ibid* (n 4).

⁹⁰ The Crown had placed significant reliance on evidence that jewellery including the wedding and engagement rings of Arlene had been found in the bathroom of the couple's house several days after an initial search had failed to discover them. Following conviction and sentence, it came to light that the Crown had been in possession of a precognition taken from a police officer that had visited the house on three occasions prior to the 7th May and had been of the opinion that he had in fact seen the rings. Following this realisation on the part of the Crown, the officer confirmed this in a further precognition in 2006. A precognition was also taken from the WPC that had accompanied him on the last occasion that he visited the house, to the effect that she had also seen jewellery in the bathroom.

⁹¹ *Fraser v HM Advocate* [2009] HCJAC 27 [13] (Lord Osborne).

Despite the ruling of the High Court of Justiciary, the Supreme Court granted the special leave sought on two bases. Firstly, it was held that the High Court of Justiciary's refusal to allow the minute accordingly '(...) amounted to a determination of that issue' for the purposes of the special leave.⁹² Secondly, and more importantly, it appeared that the High Court of Justiciary had erred in applying the test laid down in the superior court regarding the consequences of a failure to disclose.⁹³ It was accepted by the court that, '(...) it is, of course, clearly established on the cases that not every Article 6 failure to disclose disclosable material automatically results in an unfair trial'.⁹⁴ However, the High Court of Justiciary had failed to ensure that a fair trial had been received in spite of the non-disclosure, as that court had applied the test of 'fresh evidence'⁹⁵ and subsequently treated the appeal on that basis rather than on the basis of non-disclosure. Therefore, in the judgement of the Supreme Court, the Appeal Court had applied the wrong test. It should have asked whether, '(...) the material might have materially weakened the Crown case or materially strengthened the case for the defence'⁹⁶ and '(...) taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict'.⁹⁷ The difference of approach was due to the fact that the High Court of Justiciary considered whether there was a miscarriage of justice, whereas the UKSC said they should have asked whether the trial was fair or not. The Supreme Court, expressing regret at the delay and distress caused to the victim's family, remitted the case back to the High Court of Justiciary to quash the conviction and to consider whether a retrial should be authorised.⁹⁸

Yet, as the High Court of Justiciary had already stated, they were not considering the matter as a devolution issue. Therefore, it makes little sense to say that they should have applied the Article 6 fair trial test due to the fact that determining whether the matter is (i) a devolution issue or (ii) a fair trial issue practically represents the same test. The facts of *Fraser* highlight acutely the problem that, given the broad and all-encompassing nature of the Article 6 right to a fair trial, almost any miscarriage of justice argument can be translated into an Article 6 argument, and hence subject to final determination by the Supreme Court as a devolution issue. Such an outcome, for all intents and purposes, mirrors a general right of appeal.

C. Political reaction and Analysis of Jurisdiction

Following *Cadder*, relying on confessional evidence obtained before an accused person had the benefit of legal advice constitutes a breach of the Article 6 right to a fair trial. This was foreseen by many commentators, and indeed the decision was

⁹² *Fraser* (n 4) [12] (Lord Hope).

⁹³ *McInnes v HM Advocate* 2010 SC (UKSC) 28.

⁹⁴ *Fraser* (n 4) [45] (Lord Brown).

⁹⁵ *Cameron v HM Advocate* 1991 JC 252.

⁹⁶ *McInnes* (n 93) [19] (Lord Hope).

⁹⁷ *ibid* [20].

⁹⁸ *Fraser* (n 4) [44] (Lord Hope).

lauded by many.⁹⁹ On the other hand, the political reaction to the decision by the Scottish Government was fierce and at times vitriolic.¹⁰⁰ What *Fraser* shows is how easily a decision of the High Court of Justiciary can be overturned under the current devolution issue procedure on the basis of a human rights argument that mirrored the original appeal. There is little logic in the ruling of the Supreme Court that the High Court of Justiciary should have applied the test emanating from the devolution issue jurisprudence. Indeed, the High Court of Justiciary regarded the matter as to whether a devolution issue arose as already settled by case law and accordingly rejected the appeal. There is further illogicality in the holding of Lord Hope that the test laid out in *McInnes* should have been applied. There it was accepted that it was exclusively for the High Court of Justiciary, as '(...) the court of last resort in all criminal matters in Scotland', to determine the test to be applied in cases that did not raise a devolution issue.¹⁰¹

It may be suggested that the Supreme Court correctly held that the matter did raise a devolution issue, and in both *Cadder* and *Fraser* it can be argued with ease that the court got the fair trial issue correct and amended Scots law where it was deficient with regards to human rights.¹⁰² Nonetheless, the strain on logic used to justify reviewing and revising substantive decisions of the High Court of Justiciary is obvious. It is plain that the conduct of the High Court of Justiciary was being investigated and the supposed 'act of the Lord Advocate' that is key to the Supreme Court's jurisdiction is not immediately apparent. What has been reviewed and overturned is not the decision or an act of a member of the Scottish Executive, but the rulings of the highest court in Scottish criminal matters in respect of far-reaching areas of criminal law. In spite of the benefit of rigorous protection of Convention rights in Scottish criminal cases, the manner in which this has been achieved was not one that was either provided for, or envisaged by, the Scotland Act 1998.

3. Convention Rights in Scottish Criminal Cases

The current system is regarded as not being fit for purpose and has been described as 'constitutionally inept'.¹⁰³ Criticism regarding the application of the system of devolution issue appeals in securing Convention rights in Scottish criminal cases will now be assessed on the basis of three main grounds: (i) constitutional propriety; (ii) efficiency and effectiveness of the criminal justice system; and, what can perhaps be

⁹⁹ See F Raitt and P Fergusson, 'Re-configuring Scots criminal procedure – seismic shifts?' (2006) *Edinburgh Law Review* 102; P Duff, 'Section 172: why the Privy Council got it right' 2001 *SLT* (News) 87.

¹⁰⁰ First Minister Alex Salmond MSP reserved much criticism for Lord Hope personally, in a tone that drew widespread criticism with some even suggesting as tantamount to 'murmuring' (Joshua Rosenberg, 'Alex Salmond is gunning for the Supreme Court' (*Law Society Gazette*, 9 June 2011) <<http://www.lawgazette.co.uk/opinion/joshua-rozenberg/alex-salmond-gunning-supreme-court>> accessed 12 June 2012.

¹⁰¹ *McInnes* (n 93) [5] (Lord Hope).

¹⁰² C Shead, 'The decision in the Fraser appeal: some brief observations' 2008 *SCL* 664.

¹⁰³ Advocate General's Expert Group (n 71) [4.22].

seen as a mixture of (i) and (ii), but fundamental in its own right, (iii) the status of the High Court of Justiciary and the effect of competing jurisdictions.

The jurisdiction of the Supreme Court in respect of Scottish criminal cases, the devolution issue procedure and the position of the Lord Advocate has recently been considered in three separate reports. All three reviews – the Walker Report, the Expert Group Report and the McCluskey Review – concluded that, provided by a free-standing statutory right of appeal, the Supreme Court should continue to have jurisdiction to hear Scottish criminal appeals advanced on the basis of human rights and EU law arguments, albeit with slightly differing procedures and limitations. Specific representations were made by the Scottish judiciary to the Calman Commission on Scottish Devolution¹⁰⁴ and were the original impetus for the formation of the Advocate-General's Expert Group¹⁰⁵ whereas the 'concern' felt by the Scottish Government following the cases of *Cadder* and *Fraser* prompted the establishment of the McCluskey Review Group.¹⁰⁶ The McCluskey Review made it clear that their consideration of the issues of the constitution was premised on the basis of Scotland remaining part of the United Kingdom, i.e. the 'prevailing constitutional position',¹⁰⁷ while it was accepted that for those who wished full independence, such as the SNP administration, arguments of 'constitutional integrity' would carry no weight.¹⁰⁸ Finally, a wide-ranging review of appellate jurisdiction in the Scottish legal system generally was conducted by Professor Neil Walker,¹⁰⁹ commissioned in 2008 by the Scottish Justice Secretary Kenny MacAskill.¹¹⁰

¹⁰⁴ Commission on Scottish Devolution (n 75).

¹⁰⁵ Advocate General's Expert Group (n 71). Chaired by former European Court of Justice judge Sir David Edward and comprising four QCs, the Advocate General for Scotland asked the group to consider '...whether, and if so under what conditions, the Supreme Court of the United Kingdom should have jurisdiction to consider matters relating to the conduct of criminal proceedings in Scotland': *ibid* [2].

¹⁰⁶ McCluskey Review, *Final Report* (n 74).

¹⁰⁷ *ibid* [35].

¹⁰⁸ McCluskey Review, *First Report: Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases* (Scottish Government, 2011) [34]

<www.scotland.gov.uk/About/supreme-court-review> accessed 12 June 2012.

¹⁰⁹ Walker (n 18).

¹¹⁰ It had the remit of identifying relevant established constitutional principles, to appraise the current system and consider possibilities for reform, all in light of comparatively recent developments in appellate jurisdiction: *ibid* [1.1]. The Report considered six models of appellate jurisdiction, but recommended one where the Supreme Court would be reorganised along 'quasi-federal' lines, having jurisdiction over criminal and civil cases that raised common UK issues. It has been suggested that the report has effectively been shelved, in light of its discounting as infeasible, the preferred option of the Scottish Government of a fully autonomous court system: Peter Nicholson, 'Power struggle' (*Journal of the Law Society of Scotland*, 10 June 2011) <www.journalonline.co.uk/Magazine/56-6/1009838.aspx> accessed 12 June 2012.

A. Constitutional Propriety

The main basis for the submission by the Expert Group that the current system was 'constitutionally inept',¹¹¹ owed to the inclusion of the Lord Advocate's acts in the class of 'devolution issues'. This conclusion of constitutional ineptness was fully accepted by the McCluskey Review Group.¹¹² The vast majority of the Lord Advocate's acts were not conferred by the devolution settlement but were classed and defined as 'retained functions'¹¹³ by the Scotland Act 1998. Indeed, the devolution settlement expressly protects the independence of the Lord Advocate from the other members of the Executive when taking decisions in criminal prosecution and investigation of deaths.¹¹⁴ When juxtaposed with the description of the Lord Advocate's powers as '(...) quite distinct in character from his ministerial responsibility to Parliament',¹¹⁵ the independence of the Lord Advocate was regarded by the Expert Group as significant. The McCluskey Review also considered the 'striking anomaly' of the High Court of Justiciary, regarded and legally recognised¹¹⁶ as the apex court in relation to Scottish criminal matters, being subject to a wider and 'more intrusive'¹¹⁷ jurisdiction in relation to Community law and human rights than the courts in other parts of the UK, as a result of the exercise of devolving more power to Scotland.¹¹⁸ This 'constitutional ineptness', therefore, is a by-product of devolution.

While the Lord Advocate had functions as head of the systems of prosecution and the investigation of deaths prior to devolution, powers over justice and the legal system were devolved to the Scottish Parliament.¹¹⁹ Irrespective of the Lord Advocate's position in government, the holder of the office went from being answerable to the Parliament at Westminster to the Scottish Parliament at Holyrood. Thus with the obligations arising from the ECHR and EU falling on the United Kingdom as the contracting state, it was reasonable to impose a control in respect of those obligations over an office devolved from Westminster to Holyrood.¹²⁰ It could be argued that it would have made less constitutional sense to have the Lord Advocate answerable to Holyrood in respect of administrative actions as a member of the Scottish Executive, and hence subject to a *vires* control, but answerable to

¹¹¹ Advocate General's Expert Group (n 71) [4.22].

¹¹² McCluskey Review, *Final Report* (n 74) [13].

¹¹³ Scotland Act 1998, s 52(6): 'In this Act, "retained functions" in relation to the Lord Advocate means - (a) any functions exercisable by him immediately before he ceases to be a Minister of the Crown, and (b) other statutory functions conferred on him alone after he ceases to be a Minister of the Crown'.

¹¹⁴ Scotland Act 1998, s 48(5). The Lord Advocate's independence is also protected by s 29(2), which limits the competence of an Act of the Scottish Parliament that purports to remove him from his position as head of the systems of criminal prosecution and the investigation of deaths.

¹¹⁵ Advocate General's Expert Group (n 71) [4.21].

¹¹⁶ Criminal Procedure (Scotland) Act 1995, s 124(2).

¹¹⁷ McCluskey Review, *First Report* (n 108) [52].

¹¹⁸ This has also been described as the 'paradoxical' position that, as a result of devolving aspects of the legislature and executive, a degree of judicial centralisation has resulted in power flowing in the other direction, with criminal cases being heard in London: T Jones, 'Splendid isolation: Scottish criminal law, the Privy Council and the Supreme Court' (2004) *Crim.L.R.* 96.

¹¹⁹ Scotland Office, *Scotland's Parliament* (Cm 3658, 1997).

¹²⁰ Jamieson (n 65).

Westminster in respect of actions as head of the prosecution service and limited only as a public authority under the HRA 1998 in that regard. Such a division would have undermined the Lord Advocate's constitutional position, and indeed the authority of the Scottish Parliament in criminal justice matters, by imposing an artificial separation on the role and function of the Lord Advocate.

There is perhaps a more fundamental criticism concerning the constitutional propriety of only 'acts' of the Lord Advocate, and not the trial as a whole, being the subject of a Convention rights breach and that is the shift in focus from the fairness of the proceedings in their entirety. Indeed, this shift in focus away from the fairness of proceedings as a whole, including fairness for victims and families,¹²¹ was highlighted by both the Expert Group and the McCluskey Review Group. As can be concluded in light of the cases cited in the first half of this paper, the 'straightjacket'¹²² of the 'act of the Lord Advocate' has not hampered the activities of the JCPC/UKSC in considering the fairness of the trial overall. Nonetheless, it should be made clear legislatively that what is important is the breach of the Convention right, regardless of how this might arise.¹²³ A particular failing of the Expert Group report is that, despite criticising the tethering of the compatibility question to the 'act of the Lord Advocate', no final recommendation is made in respect of this.¹²⁴

Both groups contrasted the position of Scotland with procedures in the rest of UK as a source of constitutional impropriety. The Expert Group cited the source of '(...) much of the dissatisfaction with the current procedures' as being the fact that issues of compatibility with Convention rights and EU law in criminal trials are not dealt with through normal court procedures as is the case in the rest of the UK, but through procedures designed for enforcing the *vires* of legislative and administrative acts.¹²⁵ This point relates to the reliance placed on the 'act of the Lord Advocate' and the issue of access to the highest court. This is the matter on which views of the Expert Group and the McCluskey review diverged most significantly. The Expert Group appeared to concede that no practical changes should be made to the manner of reference¹²⁶ and no recommendation was made in regard to changing the procedure for leave to appeal being granted by the High Court of Justiciary, or special leave from the Supreme Court itself. This seems somewhat understandable based on their interpretation of the problem associated with the system being only that of the mis-location of 'retained functions' in the list of devolution issues and not on the question of the Supreme Court's jurisdiction in such matters.

The analysis of the McCluskey Report took a different approach, founding on the '(...) anomaly that it is only in the case of Scotland that the Supreme Court has an

¹²¹ Discussed further below.

¹²² McCluskey Review, *Final Report* (n 74) [30].

¹²³ *ibid* [27].

¹²⁴ Advocate General's Expert Group (n 71) [4.31].

¹²⁵ *ibid* [4.30].

¹²⁶ Advocate General's Expert Group (n 71) [4.32]: 'If, as we recommend, Convention and EU issues affecting the prosecution of crime and investigation of deaths were no longer to be treated as devolution issues, then it would, in our opinion, be desirable to maintain the possibility, as at present, for such issues to be referred, as issues of law, to the High Court or the Supreme Court in the same way as 'devolution issues'.

unqualified statutory right to grant special leave'.¹²⁷ Thus, to put the High Court of Justiciary on an '(...) equal footing with its counterparts elsewhere in the UK', it was recommended that the special leave of the Supreme Court should only be exercised after a grant of certificate from the High Court of Justiciary that the appeal raised a point of general public importance.¹²⁸ It appears contrived that the High Court of Justiciary should require to be put on an 'equal footing' with regards to other UK jurisdictions in order to preserve that court's 'historical position' as distinct from the Court of Appeal in England and Wales or Northern Ireland.¹²⁹ Indeed, these courts are subject to a general appeal to the Supreme Court, exercisable only following certification by the lower court. One justification stated by the McCluskey Review for certification was the protection of Scot's law from future, differently constituted, Supreme Courts. While it was accepted that the Supreme Court had made it quite clear on several occasions¹³⁰ that they had no intention of acting as a general appeal court in criminal matters, the entirely logical conclusion was drawn that the very need for the court to stress this suggested the possibility for such an event occurring in the future.¹³¹

B. Competing Jurisdictions and the Position of the High Court of Justiciary

Noting that a tension had developed between the tests used by the High Court of Justiciary and the JCPC/UKSC, the Senators of the College of Justice articulated their concern in a submission to the Calman Commission on Scottish Devolution.¹³² They suggested that the tension arose due to the differing constraints operating on the courts. The High Court of Justiciary must have regard to statute and the common law, as well as complying with its obligations as a public body under the HRA 1998 section 6. However, for the Supreme Court, the issue was much narrower and related to whether the act could be regarded as Convention compliant, or not.¹³³ In showing the practical effect of this division, the example of the various appeals on 'fresh evidence' was used. In such appeals before the Court of Criminal Appeal, that court must have regard to section 106(3A) of the Criminal Procedure (Scotland) Act 1995,¹³⁴ as well as the 'long line of authority'.¹³⁵ However, the Scottish judiciary have averred that, in contrast to the approach of the High Court of Justiciary, the JCPC developed

¹²⁷ McCluskey Review, *First Report* (n 108) [48].

¹²⁸ *ibid* [74].

¹²⁹ McCluskey Review, *Final Report* (n 74) [41].

¹³⁰ Such as in *McInnes v HM Advocate* (n 86).

¹³¹ McCluskey Review, *Final Report* (n 74) [44].

¹³² Submission by the Judiciary in the Court of Session, *The operation of section 57(2) and Schedule 6 of the Scotland Act 1998 and related matters* (10 October 2008)

<<http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf>> accessed 12 June 2012.

¹³³ *ibid*.

¹³⁴ This provides that: 'Evidence such as is mentioned in subsection 3(a) above [the existence and significance of evidence which was not heard at the original proceedings] may found an appeal only where there is a reasonable explanation of why it was not so heard'.

¹³⁵ Judiciary in the Court of Session (n 132) [8]. See *Cameron v HM Advocate* 1991 JC 251; *Kidd v HM Advocate* 2000 JC 509; *Al Megrahi v HM Advocate* 2008 HCJAC 15.

its own test.¹³⁶ Furthermore, that the JCPC court was only able to do so as it remained unshackled by the requirement that a conviction may only be quashed where it can be satisfied that a miscarriage of justice, as defined by Scots law, has occurred.¹³⁷ As noted above, the Scottish Judiciary have suggested that the effect of these two approaches is the creation of two distinct jurisdictions with quite different jurisprudence, either of which may result in the quashing of a conviction. Additionally, the appeal to London is more flexible and open to alternative approaches to established Scots law, not being forced to strictly apply the miscarriage of justice test.

It could be argued that such sentiments demonstrate an 'undertone of apparent resentment'¹³⁸ and that it is petty for the Scottish judiciary to take issue with a higher court not giving regard to judgements of the lower court; or that it is simply for the lower court to apply the test determined by the higher court. However, these would only be valid arguments if the Supreme Court was a court of general appeal in criminal matters, and if the point was not so often repeated that the High Court of Justiciary is the highest court in Scottish criminal matters. It has been said by Walker that '(...) the development of an expansive devolution issue jurisprudence by the JCPC meant that, when coupled with the difficulty of having a dual apex court system, and a dual human rights regime represented by the Scotland Act 1998 and the HRA 1998, the scene was set for conflict'.¹³⁹

The status of the High Court of Justiciary must be addressed. For the McCluskey Review Group, it was felt that any statutory changes to the constitution should '(...) preserve the special constitutional and historical position of the High Court [of Justiciary] as the final court of criminal appeal in Scotland, an historical and constitutional fact that distinguishes it from the Court of Appeal in England and Wales or Northern Ireland'.¹⁴⁰ Yet, what is demonstrated is the extent to which human rights issues and the general criminal law are so tightly interwoven as to be virtually indistinguishable in many cases. Thus, where a human rights issue is allowed to proceed, the Supreme Court will indeed be Supreme. However, where the issue is deemed to be one resolved by the general criminal law, the High Court of Justiciary will have the last word. Cases such as *Fraser* show the extent to which this distinction is in contention. It is hard to see how this tension could be resolved where the same method of accessing the jurisdiction is employed. However, even if a system of certification was in place, it is perhaps unlikely that Scottish judges would generally be willing to grant the necessary certificate.¹⁴¹

The proposal for certification received a degree of criticism. For example, the Scottish Human Rights Commission stated that the Supreme Court was best placed

¹³⁶ *Holland v HM Advocate* 2005 SC (PC) 3; *Sinclair v HM Advocate* 2005 SC (PC) 28. The judgement of Lord Rodger of Earlsferry in *Holland*, particularly at [82] and [83], is cited by the Scottish Judiciary as demonstrative of the different test, arrived at without reference to the Scots line of authority on essentially the same matter.

¹³⁷ *ibid.*

¹³⁸ A O'Neill, 'The Curtailment of Criminal Appeals to London' (2011) *Edinburgh Law Review* 88.

¹³⁹ Walker (n 18) [3.4].

¹⁴⁰ McCluskey Review, *Final Report* (n 74) [41].

¹⁴¹ I Jamieson, 'Scottish criminal appeals and the Supreme Court: quis custodiet ipsos custodiet?' (2012) *Edinburgh Law Review* 77.

to determine what issues should come before it, while the Dean of the Faculty of Advocates stated that, in effect, it would fall to the High Court of Justiciary to certify whether the Supreme Court could determine the UK's international obligations in relation to Scotland.¹⁴² However, the McCluskey Group felt that the High Court of Justiciary must be trusted to develop and apply the key test that would be one of 'general public importance', and that the protection of rights is best served where there is '(...) optimal division of labour between courts, and the best procedures for ensuring that different courts carry out their functions as effectively as possible in a complimentary fashion'.¹⁴³ It would seem that the opposing positions consist of either: the Supreme Court having the final say on the UK's international obligations; or, of the High Court having control over what points of Scots law should be developed further by the higher court. On any constitutional view these positions are difficult to reconcile.

C. An Efficient Criminal Justice System

The 'delay and disruption' identified in the Bonomy Review has been cited frequently in criticism of the system of devolution issues. In their submission to the Calman Commission, the Scottish judiciary regarded that, given the presence of two jurisdictions capable of quashing a sentence, it was not justified that recourse to the Supreme Court could be invoked '(...) only if certain procedural steps have been timeously taken, which they may not have been, for whole arbitrary reasons'.¹⁴⁴ The McCluskey Review Group held the view that the system used in the Scottish courts for dealing with human rights issues in criminal cases was '(...) responsible for some slowing down of the court's processes and some lack of finality'.¹⁴⁵ They also highlighted the importance of mitigating delays and uncertainty as to avoid undermining public confidence and that the maxim 'justice delayed is justice denied' applied equally to victims.¹⁴⁶ However, the Expert Group observed that there was little empirical evidence that the present arrangements disrupted the Scottish courts and that any disruption was attributable to a general increase in arguments based on human rights being brought in criminal cases, a situation that would be unchanged by removing the jurisdiction of the Supreme Court.¹⁴⁷

There seems to be a logical flaw in playing down the question of delay and thereafter attributing any delay to the increased use of human rights arguments. It is predominantly through devolution issues that human rights arguments are advanced in Scots law and, therefore, any delay is indeed directly attributable to human rights. What is thoroughly confusing, however, is the Expert Group's subsequent acceptance of the arrangement '(...) as being clumsy, bureaucratic and productive of delay (...) creating a very serious problem for the Scottish court system

¹⁴² Scotland Bill Committee, *First Report: Report on the Scotland Bill – Vol 2 Main Report* (SP Paper 49, 2011) 90.

¹⁴³ McCluskey Review, *Final Report* (n 74) [46].

¹⁴⁴ *ibid* (n 132).

¹⁴⁵ McCluskey Review Group, *First Report* (n 108) [24].

¹⁴⁶ *ibid* [22].

¹⁴⁷ Advocate General's Expert Group (n 71) [3.5].

and the work of the Lord Advocate and Advocate General, as well as for victims and witnesses'.¹⁴⁸ This inconsistency in approach to the same matter is difficult to reconcile.

Furthermore, the Expert Group commented that '(...) insufficient consideration is given by those who argue in favour of retaining the present system to its effect on victims, witnesses and others, apart from the accused, that are caught up in the criminal process',¹⁴⁹ and that '(...) there is a public interest, as well as a legitimate interest of victims and witness, in determining criminal proceedings as speedily as is consistent with justice'.¹⁵⁰ Unfortunately, there was little further discussion of how the interests of victims and others were specifically affected. One is left assuming that, even with the lack of empirical evidence, the effect lies in both the delay and the lack of certainty arising from a further appeal. In *Fraser* for instance, where Lord Hope expressed regret at the delay and distress that would be caused to the family of Arlene,¹⁵¹ and *Cadder*,¹⁵² where over one thousand prosecutions were abandoned following the decision,¹⁵³ the problems for victims are apparent. However, it is no justification for the removal of a tier of appeal that problems stem from the fact that an appeal to the Supreme Court exists. When one considers that the constitutional basis for the jurisdiction is lacking, the issue of the severe problems for victims and the rest of the justice system is further compounded.

Although certainly not an argument against striving for less delay and disruption in the current system, it has been observed in defence of the current system, that there would be inexorably greater delay and disruption in having recourse only to the ECtHR. An autonomous Scottish court system, with all appeals to the Supreme Court ending, has been mooted, most vocally by the SNP. In light of the current constitutional arrangement of the UK, all three reviews, in fairly brief terms, ruled out removing the jurisdiction of the Supreme Court altogether. The position was summed up succinctly by the Advocate-General: '(...) it is a curious definition of 'simpler' to have a case sent to a court twice as far away, in France, where there is a backlog of 150,000 cases'.¹⁵⁴

D. Proposals for Reform

The current statutory regime of the Scotland Act 1998, combined with the interpretational gymnastics displayed by the JCPC/UKSC, has resulted in a human rights jurisdiction that is devoid of clear constitutional principle. While it may seem that much of the criticism of the system is also incoherent, the Advocate General's Expert Group and the McCluskey Review Group found agreement on two fronts: the inclusion of the Lord Advocate's 'retained functions' in the system of devolution

¹⁴⁸ *ibid* [4.19].

¹⁴⁹ *ibid* [4.4].

¹⁵⁰ *ibid* [4.31].

¹⁵¹ *Fraser* (n 3) [44] (Lord Hope).

¹⁵² *Cadder* (n 4).

¹⁵³ JLSS (n 86).

¹⁵⁴ BBC News, 'UK Supreme Court to retain role in Scots law' (*BBC News*, 14 September 2011) <www.bbc.co.uk/news/uk-scotland-scotland-politics-14923605> accessed 12 April 2012.

issues was a constitutional error resulting in practical problems; and that the Supreme Court should have a continued role in determining compatibility issues in criminal cases. However, the differing solutions proposed have sparked debate as to how best to reform the law in this area and the resolution of that debate has served to be an interesting illustration of the contemporary relationship between the Parliaments at Holyrood and Westminster.

The White Paper *Strengthening Scotland's Future*¹⁵⁵ contained the UK Government's commitment to alter the position of the Lord Advocate with regard to devolution issues through the new Scotland Bill, now Act.¹⁵⁶ Initially, the UK Government sought to act on the report's recommendations and tabled an amendment to the Scotland Bill that attempted to achieve two objectives. First, to remove from the list of devolution issues the question of whether an act of the Lord Advocate, acting in his capacity as head of criminal prosecutions in Scotland, was incompatible with EU law or Convention rights. Secondly, to create a new statutory right of appeal from the High Court of Justiciary to the Supreme Court where it was alleged that an act of the Lord Advocate, acting in his capacity as head of criminal prosecutions in Scotland, was similarly incompatible. Introducing the amendment, Secretary of State for Scotland, Michael Moore MP, claimed that the amendment would deal with the problems associated with the duality of the role of Lord Advocate and welcomed the wide support for the notion that '(...) people in all parts of the United Kingdom should enjoy the same rights under the courts'.¹⁵⁷ However, opposition came from both Labour and the SNP Members¹⁵⁸ stating that, following consideration of the McCluskey Review, the Government should revise the clause. Furthermore, following the introduction of the amendments to the Scotland Bill, the McCluskey group concluded that an anomaly existed in that a claim under Convention rights was only available in respect of an act of the Lord Advocate.¹⁵⁹ They also concluded that this was an anomaly perpetuated further by the fact that the proposed provision did not, it was felt, adequately distinguish between Convention rights and real *vires* devolution issues based on competence and failed to clearly define and limit the Supreme Court's jurisdiction.¹⁶⁰

The Bill in its original format merely sought to rearrange the wording of the Scotland Act 1998 in relation to the position of the Lord Advocate. While this would have achieved a marginal amount in addressing the interpretational gymnastics, it would have done nothing to resolve the more fundamental concerns of providing a proper constitutional basis for the Supreme Court's wide jurisdiction nor defined the competing positions of that court and the High Court of Justiciary. Faced with the criticisms of the scope of appeals and the powers of the Supreme Court, the

¹⁵⁵ Scotland Office, *Strengthening Scotland's Future* (White Paper, Cm 7973, 2010).

¹⁵⁶ *ibid* 67.

¹⁵⁷ HC Deb, 21 June 2011, vol 530, col 283.

¹⁵⁸ HC Deb, 21 June 2011, vol 530, col 291. Pete Wishart MP stated that '(...) the Bill contains unpalatable measures that are totally unacceptable to the Scottish Government, and will be totally unacceptable to the Scottish people too...When the last Scottish Parliament Bill Committee considered the Government's proposals, even that Unionist-led Committee did not see fit to pass them. I do not think that a new Scottish Parliament Bill Committee will be any better disposed towards them'.

¹⁵⁹ McCluskey Review Group, *First Report* (n 108) [28].

¹⁶⁰ *ibid*.

Advocate General, having responsibility for this aspect of the Bill, was swayed by the 'persuasive case' that had been made.¹⁶¹ With regard to the issue of certification, Lord Wallace was of the opinion, that the case for certification had not been made, but conceded that it had not been ruled out. He assured that there would be a '(...) proper consideration of the Bill when the committee stage at the House of Lords takes place'.¹⁶² It appears that, possibly due to constraints of time, no such debate took place.¹⁶³ This is regrettable for the denial of the benefit of further analysis and insight this would have afforded.

Ultimately, the Scottish Government received all the amendments to the Bill that it desired¹⁶⁴ in relation to the jurisdiction of the Supreme Court, with the exception of a certification requirement.¹⁶⁵ In sum, the purpose of the Legislative Consent Motion was to:¹⁶⁶

(...) ensure the role of the UK Supreme Court is properly defined; ensure that one procedure, with appropriate time limits, is available for human rights issues in criminal cases; retain the Lord Advocate and Advocate General's current powers of reference to the UK Supreme Court and allow for points of general public importance to be referred to the High Court [of Justiciary] and then Supreme Court for adjudication before trial; and to allow for a review in three years of the need for certification of cases by the High Court [of Justiciary] for Supreme Court consideration, to be chaired by the Lord President.

This would seem to be a vindication of the assertion that the political power lies in Westminster, the political will lies in Holyrood.¹⁶⁷ The Scotland Bill has now become the Scotland Act 2012 and sections 34-37 of the 2012 Act have implemented amendments to the system, as suggested by the abovementioned Legislative Consent Motion. These amendments represent a significant improvement and

¹⁶¹ Scotland Bill Committee, *Official Report* (1 November) cols 426 and 460.

¹⁶² *ibid.*

¹⁶³ 'Obviously we will come to discuss Clause 17 at the next sitting of the Committee, *if we get that far*, which in a number of important respects is a response to the review undertaken by the noble and learned Lord, Lord McCluskey, at the request of the Scottish Government': HL Deb, 26 Jan 2012, vol 539, col 1191 (Lord Wallace) (emphasis added).

¹⁶⁴ Scotland Bill Committee, *Report on the Scotland Bill – Vol 2 Main Report* (1st Report, 2011 Session 4, SP Paper 49) [414] (Kenny MacAskill MSP): 'The Scottish Government wishes to see a situation whereby the UK Supreme Court has a more focused jurisdiction and the High Court of Justiciary retains its place at the apex of the Scottish criminal justice system. We remain deeply concerned that the proposals of the Advocate General seek inappropriately to establish the UK Supreme Court as a court of appeal within the Scottish criminal justice system, rather than as a specialist court whose role is to define and interpret Convention Rights and then to remit cases back to the High Court for determination of the appropriate remedy.'

¹⁶⁵ Significant compromise was made on this point also. It is suggested that the fact that the Lord President, whose desire for a certification system has already been made known, will chair the review shows this is a serious compromise that goes beyond merely kicking the issue into the long grass: Lord President (n 57).

¹⁶⁶ Scottish Parliament, *Legislative Consent Memorandum- Scotland Bill* (LCM (S4) 8.1, 21 March 2012).

¹⁶⁷ Tony Kelly, 'The Supreme Court and the Scotland Bill' (*UKSC blog*, 26 January 2012) <<http://uksblog.com/the-supreme-court-and-the-scotland-bill>> accessed 12 June 2012.

certainly a serious attempt to tidy up the constitutional problems that dogged the previous system.

4. Conclusion

This paper has sought to provide analysis of the jurisdiction of the UK Supreme Court in relation to Scottish criminal cases. It has done so with reference to the manner in which the jurisdiction came about, its effect and the criticism that can be levelled against it. It has been argued that on the wording of the provisions in the Scotland Act 1998 relating to the *vires* control over decisions or acts of the members of the Scottish Executive, such a wide interpretation of the jurisdiction conveyed was neither inevitable nor foreseen. Furthermore, by virtue of the broad interpretation given to 'acts of the Lord Advocate' and the wide scope for basing an argument on an ECHR Article 6 point, the Supreme Court has exercised what effectively amounts to a general jurisdiction over all areas of Scots criminal procedure. In an activity lacking in constitutional justification, the Supreme Court has reviewed and overruled tests that have been developed and applied by the High Court of Justiciary in respect of miscarriages of justice.

The main theme that emerges from a consideration of the various criticisms of the arrangement is incoherence. Such illogicality is evident from the interpretative use of language by the JCPC/UKSC in developing the jurisdiction from acts of the Lord Advocate, to the constitutional grey area of which court is in fact the highest authority in Scottish criminal matters. It has been said that the whole issue amounts to a simple question: should parties in criminal proceedings emanating from Scotland be able to appeal to the Supreme Court.¹⁶⁸ The answer must be 'yes'. There must be a court at UK level ensuring compliance with the UK's international obligations. In many cases the decision on the ultimate issue, the protection of human rights in Scots trials, has been lauded.¹⁶⁹ However, the independent and defended position of the High Court of Justiciary as the apex court in criminal matters and the fact that the no clear and explicit case has been made for altering this position, render the question anything but simple. Despite the controversy that ensued following the decisions of *Cadder* and *Fraser*, the fact that the debate was reduced to a question of how best to uphold, with adequate regard to the 'prevailing constitutional position', the constitutional right of a Scottish person to access the Supreme Court for a determination of their Convention rights in criminal matters is indeed 'testament to the calming of fury'.¹⁷⁰

¹⁶⁸ O'Neill (n 138).

¹⁶⁹ Raitt and Fergusson (n 99).

¹⁷⁰ Kelly (n 167).

Scottish Limitations to Testamentary Freedom and Freedom of Religion under Article 9, ECHR

CATHERINE J. GUTHRIE*

Abstract

The writing of a Will may be regarded as an action in life carrying with it the reasonable expectation that its contents will be adhered to. Whilst, in general, anybody with the capacity to do so may leave a Will distributing the entire or part of his estate as a mortis causa trust on his death, testamentary freedom in Scotland is subject to certain limitations. Some manifestations of religious belief require specific observances on death which could be prevented by these limitations. Three such limitations to testamentary freedom, namely restrictions arising from the concept of legal rights, immoral Will conditions and the regulations surrounding the disposal of the corpse, have the capacity to affect directly the freedom to manifest religion which is protected under Art.9(1) of the ECHR. This paper will contend that whilst limits to testamentary freedom may interfere with the freedom to manifest religious belief, such restrictions are justifiable under Art.9(2) of the ECHR. It is, therefore, concluded that while interference may occur, the three limitations to testamentary freedom do not contravene Art.9 of the ECHR.

1. Introduction

Freedom of testamentary disposition is an established right within Scots law and, theoretically, anybody with the capacity to do so may leave a Will distributing the entire or part of his estate as a *mortis causa* trust on his death.¹ It is assumed that as part of the right of ownership, a person may dispose of his property as he sees fit.² The freedom of testation is, however, subject to certain limitations. As some manifestations of religious belief require specific observances on death, these limitations on testamentary freedom have the potential to conflict with freedom of religion, a right protected by Art.9(1) of the ECHR. This provides that a person has the right to believe in, and manifest their religion. For those with a strong religious belief, the laws of that religion are absolute, ranking even higher than those of the state in which they live. The freedom to manifest religion is not, however, absolute.

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¹ A person has no legal capacity until he reaches the age of 12 as per the Age of Legal Capacity (Scotland) Act 1991. Similarly, a Will made by a person without the capacity to understand the nature of the act, such as a person suffering from a psychiatric disorder or mental illness, will be void: see *Boyle v Boyle's Executor* 1999 SC 479 (OH). These are matters regarding the essential validity of the Will.

² D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance law' (2008) 12 *Edinburgh Law Review* 3 391.

This paper will contend that while limits to testamentary freedom may interfere with the freedom to manifest religious belief, such restrictions are justifiable under Art.9(2) of the ECHR. It will be argued that whilst interference may occur, limitations to testamentary freedom in Scotland do not contravene Art.9 of the ECHR.

This paper will be structured as follows. In Part II, limitations to testamentary freedom in Scotland will be examined and three limitations which relate specifically to the freedom of religion will be identified: (i) legal rights;³ (ii) immoral conditions contained in a Will; and (iii) Will conditions relating to the disposal of Mortal Remains. In Part III, the nature of the right protected by Art.9(1), ECHR will be examined and the class of justifiable restrictions on this right under Art.9(2) will be determined through examination of the case law of the European Court of Human Rights ('ECTHR'). In Parts IV, V and VI, the operation of each of the three limitations to testamentary freedom identified as affecting freedom of religion will be examined against specific religious practices and observances to determine: (i) whether they breach the Art.9(1) protection regarding the manifestation of religion; and (ii) whether the limitation to testamentary freedom falls within the class of justifiable exceptions to this freedom under Art.9(2).

2. Limitations to Testamentary Freedom

A. General Limitations

Scots law accepts that a testator is not free to distribute his estate in an unrestricted manner. Freedom of testamentary disposition is subject to certain limitations which arise through a variety of mechanisms and find their justification in numerous aspects of the law of property. A common class of restriction arises in connection with the fundamental nature of the property over which the testamentary disposition seeks to deal. An example of this is the right of servitude which provides that a person may make use of another's property for their own ends. This right can arise either through deed or passage of time and can be lost if it is not exercised. As the servitude is inseparably linked to the dominant tenement, the legacy of a servitude cannot be separated from that of the dominant tenement. This is due to the impossibility of separating the servitude from that to which it is attached. It, therefore, arises out of practicality, among other reasons. Additionally, further limitations to testamentary freedom arise due to the nature of croft property.⁴ A person cannot leave a bequest of his croft to more than one person. Additionally, where a bequest of a croft is made to someone who is not a member of the testator's family, the provision is null and void unless it is endorsed by the Crofters Commission.⁵ These limitations have arisen due to the desire to preserve the croft land and the crofting way of life.

³ As defined in the Succession (Scotland) Act 1964.

⁴ Crofting is a way of life unique to Scotland which finds its strongest continuation in remote areas of the West Coast.

⁵ Crofters (Scotland) Act 1993, s 10(1). The definition of 'family' is set out in s 61(2).

Many other limits to testamentary freedoms exist in Scotland, not least those dealing with entails,⁶ successive liferents⁷ or general accumulations of income.⁸ Even the drafting of the disposition can lead to the failure of the testator's wishes through uncertainty. This is an intrinsic constraint arising from the impossibility of deducing the intention of the testator. Such uncertainty can lead to a single clause or indeed the whole disposition being challenged. For example, if a deed seeks to appoint another person to determine the distribution of property such a clause will not stand. This is due to the fact that only the testator has the power to bequeath his property.⁹ Similarly, if a bequest is considered to be repugnant to ownership then the clause containing the repugnancy, or perhaps the entire deed, can be open to challenge. Repugnancy arises, for example, when a testator bequeaths property subject to a restriction, condition or contradiction which renders the term inconsistent with a right of full ownership.

B. Limitations of Religious Consequence

If a Will based upon religious belief fails on any of the grounds set out above then this has the potential to thwart a religious desire. However, none of the limitations mentioned previously directly impinge upon religious freedom; any restriction to religious freedom that may arise as a result of them is indirect. It is the case, however, that some limitations do arise in direct conflict with the rules of certain religions and, therefore, do have the potential to directly restrict religious freedom. Three such restrictions arise as a consequence of: (i) legal rights; (ii) public policy relating to immoral Will conditions; and (iii) laws dealing with the manner in which the corpse of the deceased may be disposed of. The direct nature of these limitations' restriction of religious freedom arises due to the fact that many religions have traditions or rules as to a person's property and corpse on death.¹⁰

The division of property on intestacy in Scotland is standardised¹¹ and does not discriminate between people of different religions. This means that, excepting where all potential beneficiaries are in agreement, there is no way for religious preferences to be incorporated into the rules of intestacy. Consequently, the only way of ensuring that such beliefs will be honoured following death is to make a Will. It is, therefore, understandable why testamentary limitations which may interfere with

⁶ The Entails (Scotland) Act 1914 prohibits the creation of new entails over land.

⁷ Successive liferents over moveables were restricted by the Trusts (Scotland) Act 1921, s 9. The modern law governing both land and moveables is found in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 18 which affects deeds executed after 25 November 1968. This limits the endurance of a liferent to a person who is *in utero* at the time of execution so that it does not extend past his 18th birthday. See *Stewart's Trs v Whitelaw* 1926 SC 701 (IH) 718 (Lord Sands).

⁸ Statutory restrictions are found in the Trusts (Scotland) Act 1961, s 5 and in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s 6. These provisions are retrospective.

⁹ *Wood v Wood's Executrix* 1995 SLT 563 (OH).

¹⁰ For example, Islamic Quranic legislation on inheritance stems from the pre-Islamic customary laws of tribal Arabia which preserved the patrimony by limiting inheritance to the male line: see DS Powers, 'The Islamic Inheritance System: a Socio-Historical Approach' (1993) 8 Arab Law Quarterly 1 13.

¹¹ Succession (Scotland) Act 1964.

the Will are likely to be challenged. With religious diversity comprising an important part of a multicultural society, it is important that it is protected. One of the methods for ensuring this protection is through the medium of Art.9, ECHR. In order to determine whether the three limitations to testamentary freedom which restrict religious activity contravene Art.9, they must be examined against its provisions. It is, however, important to first discern the scope of the protection offered by Art.9.

3. Freedom of Religion

A. Freedom under Art.9(1)

Article 9(1) of the ECHR states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

If read in isolation, the wording of Art.9(1) suggests that the freedom of thought, conscience or religion is not open to limitation. Art.9(1) also bestows the right to manifest religion through '(...) worship, teaching, practice and observance'. However, the right to manifestation is subject to limitations justifiable under the circumstances defined within Art.9(2). Accordingly, the meaning of manifestation must be determined. It would perhaps be assumed that acts purporting to represent a manifestation would be interpreted widely.

In deciding whether an action amounts to manifestation of a religion, two tests have arisen in the case law. The first, stemming from the need to consider whether the 'act gives expression to a religion or belief',¹² only appears in a small number of decisions. The second deals with whether the action is a necessary aspect in the adherence to that religion.¹³ The latter, being the one which the ECtHR appears to favour,¹⁴ for the purposes of determining manifestation, it will be the test used in this paper.

The necessity approach is one which the ECtHR will consider if the action is one that would otherwise fall within the class of justifiable restrictions. For example, in *X v Austria*,¹⁵ a prisoner converted to Buddhism while incarcerated. He contended that his freedom to manifest his religion was restricted as the prison authority would not let him grow a chin beard, perform yoga exercises, obtain a prayer chain or subscribe to a religious periodical. He also argued that their refusal to stock the prison library with relevant texts further obstructed his freedom to manifest his

¹² *X v Austria* App no 1753/63 (1965) 8 ECHR Yearbook 174, 184. It has been said that '(...) when the actions of individuals do not actually express the belief concerned they cannot be as such protected by Article 9(1), even when they are motivated or influenced by it': *Arrowsmith v UK* (1981) 3 EHRR 218 [71].

¹³ *X v Austria* (n 12)

¹⁴ *ibid* 184.

¹⁵ *ibid*.

religion. While the court rejected three of the submissions on the grounds that they fell into the class of justifiable restrictions, it rejected the fourth on the grounds that a prayer chain was not, '(...) an indispensable element in the proper exercise of the Buddhist religion.'¹⁶ This demonstrates that the importance of a certain thing or action within a religion is fundamental in deciding whether it represents a manifestation of that religion and, as such, whether it falls within the parameters of protection. It would seem, therefore, that the real difficulty in interpretation lies in the diversity of religions and the practices required by them. In order to be protected, an action must be proved, through the necessity test, to be a manifestation of a religion. Many people of the same religion will show different levels of commitment and adherence to their religious texts. While it is recognised that this causes a problem in determining the necessity of an action in more extreme cases, it will not be contested here. Rather, for present purposes, it will be accepted that the case law is permissive of the fact that some religious sects may be more liberal than others so that something one person may find essential may be a matter of preference to another.¹⁷ Similarly, rather than attempting to solve this inconsistency through a more rigid definition of religion, the ECtHR has taken the approach of applying Art.9(2). If something is protected under Art.9(1) due to the fact that it is a manifestation of a religious belief, rather than determining the legitimacy of that belief, the court can apply the justifiable limitations laid out in Art.9(2).¹⁸

B. The Class of Justifiable Restrictions

Prior to analysing the interpretation of Art.9's limitations, it should be noted that their use as regards testation has not been widely discussed due to the perceived unlikelihood of a person having human rights after death.¹⁹ Testation is, however, carried out during life; only its effects take place after death. Therefore, the act of writing a Will with religious implications is an attempt to exercise Art.9 rights during an individual's lifetime, meaning that it does fall within the ambit of the protection if the limitations do not apply. Article 9(2) of the ECHR provides:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The approach to limitation shown here is not exclusive to Art.9. Similar exceptions exist in relation to Arts 8, 10 and 11 as well as Art.2 of Protocol 1. Therefore, in

¹⁶ *ibid.*

¹⁷ See P Cumper and T Lewis, 'Last rites and human rights: funeral pyres and religious freedom in the United Kingdom' (2010) 12 Ecclesiastical Law Journal 131.

¹⁸ *X v Austria* (n 12) 184; *Arrowsmith v UK* (n 12).

¹⁹ Letter from the Equality and Human Rights Commission to Namaste Publishing (*WhatDoTheyKnow.com*, 11 August 2011).

<http://www.whatdotheyknow.com/request/do_deceased_people_have_human_ri> accessed 12 June 2012.

approach at least, these are comparable rights. The exceptions are justified by a balancing of individual and public rights within each contracting state. It is now accepted that the limitations to ECHR freedoms only exist in narrow circumstances and that there are two key principles of application.²⁰ The first principle directs that only the express limitations enumerated in the second paragraph of each article are allowed.²¹ This is not stated specifically but can be presupposed from the nature of the convention. The second principle is stated in Art.18: '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.'²²

In applying Arts.8-11, the courts have similarly adopted a narrow approach.²³ It is arguable that this is necessary in order that the protections fulfil their purpose: if it were possible to interpret the restrictions in the second paragraph broadly then the provisions would offer little or no protection. There has, however, been diversity in the treatment of cases dealing with limitations suggesting that individual findings are fact specific.²⁴ Indeed, decided cases would suggest that each set of circumstances is examined against a tripartite test: first, it must be determined whether the restriction is in accordance with the law; second, the purpose of the interference must be legitimate; and finally, the interference must be necessary within a democratic society.²⁵ It should be noted that in some limited cases it is not necessary to require proof of all three parts. For example the answer to the first part may be admitted and not require proof.²⁶ In attempting to determine whether a law breaches Convention rights it is important to understand fully the nature and application of these tests.

As regards the requirement that a restriction must be in accordance with the law, the ECtHR has developed a second tripartite test. Firstly, it must be demonstrated that the restriction has a basis in the law of the contracting State.²⁷ Secondly, the law must be readily available to anyone who wants to find it.²⁸ Thirdly, the law must be laid out in such a way that anyone choosing to access it can reasonably foresee the consequence of an action. This is known as the foreseeability test.²⁹ Additionally, the ECtHR can only disagree with the interpretation of national law by national courts if there is a very good reason to.³⁰ Moreover, it is not essential

²⁰ Robin White and Clare Ovey, *The European Convention on Human Rights* (5th edn, OUP 2010).

²¹ That the clearly expressed limitations were the only ones that could exist was not always accepted. It was previously suggested that some situations, especially relating to prisoners, could lead to wider limitations of rights: see James Fawcett, *The Application of the European Convention on Human Rights* (OUP 1987) 232-3. This idea was abandoned when the ECtHR failed to follow the Commission on this matter.

²² ECHR, Art 18.

²³ *Klass v Germany* (1979-80) 2 EHRR 214.

²⁴ A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671.

²⁵ *Otto-Perminger Institute v Austria* (1995) 19 EHRR 34

²⁶ An example of when only the third point was considered occurred in *Christian Democratic People's Party v Moldova* (2005) 40 EHRR 76.

²⁷ For example, the court could find no relevant law and, therefore, dismissed the case of *Djavit An v Turkey* (2005) 40 EHRR 1002.

²⁸ White and Ovey (n 20)

²⁹ See *S and Marper v United Kingdom* (2009) 48 EHRR 1169.

³⁰ See *Roche v United Kingdom* (2006) 42 EHRR 599. This was a case dealing with access to court under Art 6 ECHR, but the same principles must apply to Art 9.

that the law be contained in legislation; presence in the common law is perfectly acceptable.³¹ The second question that the court will consider in deciding whether an interference with a Convention right is justifiable is the need for specific legitimate aims.³² Case law shows that it is usually straightforward for a State to bring its action within a legitimate aim, as evidenced by the fact that this aspect is rarely contested by applicants.³³ Moreover, there is no case law in which the ECtHR has found a violation of an Art.8-11 right simply because a State has failed to satisfy the need for a legitimate aim. This is due to the fact that laws, whether from precedence or legislation, tend to arise due to a social need and as such are legitimate in their aim to meet this need.

As a final point in determining whether there has been a violation of a Convention right, the court must rule as to whether the limitation imposed is necessary in a democratic society. This involves a proportionality test in which the court weighs the severity of the restriction against whether it is in the public interest.³⁴ This is an area in which the State's margin of appreciation can influence the outcome – what may occur within the public interest in one State may be against the public interest in another due to extenuating factors such as social and cultural differences.³⁵ A State's margin of appreciation allows that State to give varying levels of protection to Convention rights in order that these differences are catered for. For example, in some cases contracting States may deal with a problem in very different ways with both approaches being deemed acceptable.³⁶ Moreover, the breadth of the margin can alter depending on the nature of the rights in question and the importance of the competing rights.³⁷ As such, a definition that will apply to all cases cannot be reached; the application of the concept will depend upon the circumstances. Certainly it appears that the ECtHR deems pluralism, tolerance, broadmindedness, liberty, equality and the encouragement of self-fulfilment to be

³¹ *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

³² See Peter Kempees, "Legitimate aims" in the case-law of the European Court of Human Rights' in Paul Mahoney, Franz Matscher, Herbert Petzold and Luzious Wildhaber (eds) *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Carl Hemanns, Köln 2000) 659.

³³ *Sunday Times v United Kingdom* (n 31); *Silver v United Kingdom* (1983) 5 EHRR 347.

³⁴ *Silver v United Kingdom* (n 33).

³⁵ See Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp 2002) and George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007).

³⁶ In contrast to England, Scotland does not currently accept the doctrine of adverse possession. Despite the fact that such a doctrine could be argued to interfere with property rights, the ECtHR deemed it permissible in *J.A. Pye (Oxford) Ltd v United Kingdom* App no 4430002/02 (ECtHR, 15 November 2005).

³⁷ See, for example, the discrepancy between *Von Hannover v Germany* [2005] 40 EHRR 1 and *Campbell v MGN Ltd.* [2004] UKHL 22, both dealing with breach of privacy and freedom of expression. *Von Hannover* found that due to the fact Princess Caroline was not fulfilling a public duty, the fact that she was in a public place did not mean the public had a legitimate interest in her whereabouts and that, therefore, publication of photographs of her in such a situation was a breach of her right to privacy. *Campbell*, however, found that to publish the details of Miss Campbell's drug treatment, as confidential information akin to medical records, would require specific justification which was not present. It was confirmed that the English courts recognised no tort of breach of privacy.

important qualities of a democratic society.³⁸ These are in addition to the rights explicitly protected by the Convention.

With an understanding of what constitutes a violation of Convention rights, it will now be determined whether the limits to testamentary freedoms in Scotland fall within the provisions of Art.9(2). The three limitations on testamentary disposition which could affect freedom of religion will now be separately examined so as to assess their effect under Art.9(1) and their permissibility under Art.9(2).

4. Legal Rights

A. Legal Rights as a Limit to Testamentary Freedom

Legal rights provide a surviving spouse and any children of the deceased, irrespective of legitimacy, with an automatic claim on part of the deceased's moveable estate.³⁹ They can be likened to a narrower kind of forced heirship as seen in many continental legal systems.⁴⁰ Unlike many Commonwealth jurisdictions, including England and Northern Ireland, however, an application to the court need not be made for these rights to be available.⁴¹ Legal rights cover two thirds of the deceased's moveable estate, provided he is survived by spouse and issue, and one half if only survived by one of these classes of people.⁴² While the exact origin of legal rights is unclear,⁴³ they cannot be defeated by a will.⁴⁴ Legal rights, therefore, operate as a limit to testamentary freedom in that the testator is, in actual fact, only free to make provision over the dead's part of the moveable estate comprising the remaining third, or half, of moveables.⁴⁵ Any provisions regarding the rest of the moveable property have the potential to be struck down or greatly reduced by someone claiming their legal rights, as legacies can be reduced in order that legal rights are fulfilled.⁴⁶

It should be noted, however, that as a limit to testamentary freedom, legal rights are not insurmountable. It is possible for a person to manage his estate in such a way as to ensure that legal rights cannot be claimed from it after his death. Indeed,

³⁸ John Merrills, *The Development of International Law by the European Court of Human Rights* (MUP 1993) 125-50 and *Rafah Partsi (the Welfare Party) v Turkey* (2003) 37 EHRR 1.

³⁹ Law Reform (Parent and Child) (Scotland) Act 1986.

⁴⁰ This comparison is made in Hilary Hiram, *The Scots Law of Succession* (2nd edn, Tottel Publishing 2007).

⁴¹ The Family Law (Scotland) Act 2006 permits application from cohabitants to inherit on the death of their partner.

⁴² Succession (Scotland) Act 1964 ss 3, 5 and 6 and the Civil Partnership Act 2004, s 131.

⁴³ MacDonald suggests that legal rights are a remainder of common property: Donald MacDonald, *Succession* (3rd edn, W Green, Edinburgh 2001) 37. Hiram points out that versions of legal rights arose variously in the *Regiam Magestatam* and the *Leges Burgorum*, Roman Law, English Law, French Law, Norman Law and the laws of the Germanic tribes: Hiram (n 40). Whilst, Gardner concludes that they date from the reign of David I: John Gardner, *The Origin and Nature of Legal Rights of Spouses and Children in the Scottish Law of Succession* (W Green, Edinburgh 1928).

⁴⁴ Bankton, *Institute*, 3.4.4.

⁴⁵ Succession (Scotland) Act 1964 (n 42) and Civil Partnership Act 2004 (n 42).

⁴⁶ *ibid* s 1(2).

it has been noted that as regards the legal rights of children, '(...) legitim is a right in succession which a father may lawfully and effectually defeat if he takes the right way of doing so'.⁴⁷ Despite the legislative changes to the law since this statement was made in 1916, this is still the case and means that a claim to legal rights can be prevented. Such is the situation due to the fact that legal rights are, by their nature, going to be limited since they apply only to moveables. In the main, the most valuable property a person may own will be heritable. Moreover, legal rights only apply to a proportion of the moveables meaning that their value may be very small. This value can, in theory, be reduced to nothing through the medium of *inter vivos* transactions disposing of moveable property. If there is no moveable estate on death, then legal rights cannot be claimed.⁴⁸ Similarly, the moveable estate from which legal rights fall due to be paid may be reduced by debt accumulated in the testator's lifetime. This is because legal rights are paid after ordinary debts but before other rights in succession. Despite this, it would be a very unusual situation in which a deceased left no moveable property at all. Therefore, legal rights operate, if only to a very limited extent in some cases, as a restriction on testamentary freedom and as such have ramifications regarding freedom of religion.

B. Legal Rights and Art.9(1)

Legal rights have the potential to conflict with any religious belief that rules on the division of a deceased's estate.⁴⁹ However, for the purposes of discerning if legal rights breach freedom of religion in Art.9(1), the focus will be on the Quranic law within the Islamic faith. According to the traditional Sunni law, on the death of a Muslim, the following four duties must be carried out: (i) the funeral expenses must be paid; (ii) any debts must be repaid; (iii) the deceased's Will must be executed; and (iv) the remaining estate must be distributed among relatives in accordance to Shari'a law.⁵⁰ This, *prima facie* seems to present little problem in relation to Scots law. However, conflicts do emerge. It should be noted that for Shari'a law to apply to the estate in the first place, a Will must be made stating as such. It will not occur automatically.⁵¹ Under Shari'a law, a testator is only permitted to bequeath one third of his total estate other than to those whom Shari'a law dictates as his beneficiaries.⁵² The remaining two thirds must be distributed as outlined by Islamic inheritance law. For Muslims, this is of great importance. Indeed, it is said that, '[i]t is not for a

⁴⁷ *Hutton's Trustees v Hutton's Trustees* 1916 SC 860 (IH) 881 (Lord Skerrington).

⁴⁸ *Agnew v Agnew* (1775) M 8210; *Hogg v Lashely* (1772) 2 ER 1278.

⁴⁹ For example, Judaism or to a lesser extent Christianity.

⁵⁰ Abid Hussain, 'Islamic Laws of Inheritance' (*Islam 101*)

<<http://www.islam101.com/sociology/inheritance.htm>> accessed 12 June 2012.

⁵¹ In any case where a person dies intestate the estate will be divided according to the rules on intestacy contained within the Succession (Scotland) Act 1964.

⁵² Ahmad Thomson, 'The Importance of Writing an Islamic Will' (*The Association of Muslim Lawyers*) <<http://www.muslimpersonallaw.co.za/importance%20of%20writning%20a%20Will.pdf>> accessed 12 June 2012.

believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any opinion in their decision.⁵³

The Quran has only three verses⁵⁴ dealing with inheritance law but, when taken together with the traditions of the Prophet Muhammed, Muslim jurists have succeeded in laying down specific instructions for the distribution of a deceased's estate.⁵⁵ The problem lies in the fact that a potential beneficiary can claim legal rights under Scots law rather than follow a Will. Such an occurrence will lead to property being disposed of other than in the way Shari'a law demands. In the context of inheritance law, the Quran states that: '(...) whosoever disobeys Allah and His Messenger, and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.'⁵⁶ Many Muslims, therefore, believe that there are serious consequences for a failure to follow this aspect of religion, meaning that its observance and practice are necessary manifestations of their religion. In Scots law, there is no method through which a testator may ensure that no legal rights may be claimed, short of obtaining signed documents from each potential beneficiary renouncing legal rights.⁵⁷ That a person may do this, especially if they do not hold the same religious laws in such high regard, is very unlikely. That religious Will provisions can be defeated by legal rights would, therefore, seem to be a breach of the freedom of religion, through limiting the manifestation of that religious belief, contained in Art.9(1).

C. Legal Rights and Art.9(2)

Whilst the freedom to hold a religious belief is unqualified, the freedom to manifest one's religious belief is limited under Art.9(2). Therefore, although it is established that legal rights have the potential to breach the freedom to manifest one's religion through testation and indeed do appear to do so in relation to Islamic inheritance law, if legal rights fall within the allowable exceptions to that freedom contained in Art.9(2), then no contravention can be said to have occurred. It has already been established that in dealing with the exceptions to Arts 8-11, the ECtHR has established a tripartite test. This test must, therefore, be applied to the case of legal rights.

The ECtHR's first test to determine whether a limitation of rights is justifiable is that there has to be a legal basis for the interference. As already shown, this is itself determined through a tripartite test. Firstly, it is unquestionable that legal rights have a basis in national law.⁵⁸ Secondly, the law must be accessible. If one is to type into an internet search engine⁵⁹ 'succession in Scotland', the first hit is a link to the Scottish Government site explaining rights on succession, including the operation of legal

⁵³ Quran 33:36.

⁵⁴ 4:11, 4:12 and 4:176.

⁵⁵ Joseph Schacht, "*Mirāth*" *Encyclopaedia of Islam* (2nd edn, Brill Academic Publishers 1991) 106-113.

⁵⁶ Quran 4:13-14.

⁵⁷ This was the case for five out of the six surviving children in *Hogg v Lashely* (n 48).

⁵⁸ Succession (Scotland) Act 1964, Part II.

⁵⁹ For these purposes, Google was used. Information was correct as at 8 June 2012.

rights.⁶⁰ The fifth hit is a link to the legislation itself. Therefore, it must be concluded that information as to the nature and operation of legal rights is readily accessible to anyone who wishes to know about it. Thirdly, the result of the limitation must be readily foreseeable. The Scottish Government's guidance under the heading 'Where the deceased left a valid Will' states that, '(...) the legal rights described in note 2 may be claimed by a surviving spouse or civil partner or a child.'⁶¹ This guidance as to the continued operation of legal rights where a valid will exists could not be much clearer. Therefore, the operation of legal rights has to be considered as foreseeable. On this evidence, it can be concluded that the concept of legal rights, as a limit to testamentary freedom, passes the first test in determining whether they are a justifiable restriction under Art.9(2).

To satisfy the second test to determine whether legal rights are a justifiable violation of Art.9(1), it must be proved that they have a legitimate aim. Legal rights '(...) have long been recognised in Scots law as a means of providing family protection for both the surviving spouse (...) and children'.⁶² They protect certain categories of people from disinheritance and have been held to be '(...) a very important check on capricious or unjust testaments.'⁶³ Consequently, they can be argued to fall within the definition of a justifiable restriction by 'protecting the rights and freedoms of others'.⁶⁴ It would seem likely that the ECtHR would be satisfied with the legitimacy of the aims of legal rights. It, therefore, seems that legal rights pass the second test in determining whether they are a justifiable limitation to freedom of religion.

The final point which the court will have regard to and which is itself a justification of limitation,⁶⁵ is whether the restriction is necessary in a democratic society. First, it should be noted that the term 'necessary' in these circumstances is not the same as 'indispensable'.⁶⁶ The severity of the restriction must be weighed against the social need for its existence. It is not enough to say that legal rights are similar to the doctrine of forced heirship that many other contracting Member States have. It is, however, true that the acceptance of the doctrine by the majority is suggestive. In the *Evans* case,⁶⁷ since the Grand Chamber found that there was no standard approach taken by the majority of contracting States to the issue in question, it deferred to the pre-legislation consultation that the United Kingdom undertook prior to passing the relevant legislation. This implies that if a uniform approach had been in existence, the Grand Chamber may have found it very persuasive. Thus, due to their similarity with forced heirship, legal rights may fall within the category of justifiable limitations. Additionally, it would appear from *Evans* that if consultation and monitoring has been carried out in respect of legislation, it is more likely to be considered to fall within the State's margin of

⁶⁰ Scottish Executive, *Rights of Succession: A brief guide to the Succession (Scotland) Act 1964* (2005) <<http://www.scotland.gov.uk/Publications/2005/12/05115128/51285>> accessed 12 June 2012.

⁶¹ *ibid.*

⁶² John Kerrigan, 'Testamentary freedom revisited - further erosion?' (2012) 6 SLT 29.

⁶³ *Hutton's Trustees* (n 47) 870 (Lord Salveson).

⁶⁴ ECHR, Art 9(2).

⁶⁵ *ibid.*

⁶⁶ *Silver v United Kingdom* (n 33).

⁶⁷ *Evans v United Kingdom* (2008) 46 EHRR 34.

appreciation.⁶⁸ This is significant as succession is an area of law which has been subject to rigorous examination by the Scottish Law Commission.⁶⁹ Moreover, in answering the question as to whether the restriction is proportionate to the legitimate aim previously established,⁷⁰ it could be argued that there is a social need for the protection offered by legal rights from disinheritance. In the case of legal rights, the protection of a whole class of people, over the right of one person to manifest his religion in one way should take priority, especially when considering the other arguments previously mentioned. This argument has added weight given that it is possible for a testator to defeat legal rights. As regards the third test, therefore, it would appear that the restriction on the manifestation of religion caused by legal rights is proportionate to the aim it is trying to achieve.

D. Conclusion on Legal Rights

Legal rights operate as a limit on testamentary freedom in that they can defeat any part of a Will that seeks to make provision over more than one third or one half of the testator's moveable estate. They can be construed as a restriction on a person's freedom to manifest his religion under Art.9(1) as wherever religion seeks to deal with inheritance laws, as is the case with Islam, legal rights have the potential to prevent full observance. Despite this, on application of the tripartite test for determining justifiable restrictions on Convention freedoms, legal rights fall within the category of the allowable contraventions within Art.9(2). Accordingly, legal rights, operating as a limit to testamentary freedom, do not contravene Art.9, ECHR.

5. Immoral Will Conditions

A. Immorality as a Limit to Testamentary Freedom

Immorality will usually act as a limit to testamentary freedom through the medium of an invalid potestative condition. This is a condition that is within the beneficiary's power to perform but whose requirement is immoral and is known as being *contra bonos more*. It has been said that:⁷¹

No person can lay himself under an obligation to (...) do any immoral or unlawful action, which is said to be legally impossible; because what is forbidden, either by rule of reason or by positive institution is, in the consideration of law, out of our power.

⁶⁸ *ibid* [63]-[69].

⁶⁹ See, for example, Scottish Law Commission, *Intestate Succession and Legal Rights* (Scot Law Com CP 69, 1986) and Scottish Law Commission, *Report on succession* (Scot Law Com No 215, 2009).

⁷⁰ *Silver v United Kingdom* (n 33).

⁷¹ Erskine, *Institute*, 3.3.84. For these purposes, the term 'impossible' will be interpreted as 'impossible within the law.'

It should be noted that any legacy which is coupled with an unlawful condition will still be effectual. The condition will simply be treated either as having been satisfied or as *pro non scripto*.⁷² While some conditions are impossible through illegality,⁷³ it is more often the case that conditions are considered as conflicting against morality as they represent an unacceptable abuse of the testator's power.⁷⁴ If this is the case, the condition will not be enforced.⁷⁵ This limits testamentary freedom as it acts to stop a condition of a legacy which was considered to be important by the testator. It may relate to the type of person the testator feels suitable to be rewarded by remembrance in a Will. Such conditions usually focus on an unreasonable attempt to restrain a beneficiary's freedom. For example, if a condition attempts to prohibit marriage altogether it will not be carried out on grounds of immorality. The condition will be considered illegal.⁷⁶ Many English cases exist on the prohibition of marriage.⁷⁷ Most concerned a condition which attempted to dictate the religion of a future spouse of the beneficiary. There is no Scots authority dealing directly with this issue although it has been argued that Scottish courts would give such conditions the same treatment as that given by their English counterparts.⁷⁸ Similar to cases of restriction of marriage are those dealing with conditions regarding residence with certain people.⁷⁹ The validity of such a condition will depend on the possibility of the condition, the nature of the condition and the degree of the relationship.⁸⁰ Thus considerations of morality act as a limit to testamentary freedom in that conditions attached to legacies may be considered unenforceable if the court deems the condition to be *contra bonos mores*. Such a limitation to testamentary freedom again has the potential to breach freedom of religion as protected by Art.9(1) of the ECHR.

B. Immorality and Art.9(1)

Immorality through legal impossibility will not be contested here. Instead, the focus will be on the borderline cases regarding something that a beneficiary could legally achieve. For example, the preservation of the institution of marriage is important in many religions. For the purposes of determining whether immorality as a limitation to testamentary freedom contravenes Art.9(1), the concept of marriage within the faith of Judaism will be examined.

⁷² John MacLaren, *The Law of Wills and Succession* (3rd edn 1894).

⁷³ As discussed for example in *Brown v Gregson* 1920 SC (HL) 87.

⁷⁴ *Hiram* (n 40).

⁷⁵ Bell, *Prin* § 1785.

⁷⁶ MacLaren (n 72) para 1096. See also *Ommanney v Bingham* (1796) 3 Pat 448; *Aird's Executors v Aird*, 1949 SC 154 (IH); *Young v Johnston and Wright* (1880) 7 R 760 (IH).

⁷⁷ See *Perrin v Lyon* (1807) 103 ER 538; *Re McKenna* [1947] IR 277; *Clayton v Ramsden* [1943] AC 320 (HL) and *Re Selby's Will Trusts* [1965] 3 All ER 386.

⁷⁸ WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, W Green 1995) 110.

⁷⁹ MacLaren points out that it can be difficult to determine the exact meaning of the term 'reside' within individual cases although cases dealing with residence will be allowable in many cases: (n 72) para 1095

⁸⁰ For example, in *Reid v Coates* 5 Mar 1813 FC, a condition which stated that the beneficiary must not reside with his mother was held to be valid. Whilst in *Fraser v Rose* (1849) 11 D 1467, a condition that the beneficiary could not live under the influence of his mother was held to be against morality.

In the first chapter of the Kedushah, the tractate of the Mishnah dealing with Holiness, the rules regarding interfaith marriage are prescribed. It is forbidden for Jews to have sexual relations with a person of a different faith as it is said, '[y]ou shall not intermarry with them; you shall not give your daughter to his son nor take his daughter for your son.'⁸¹ This prohibition was extended by Rabbinic law to include non-marital relations as well.⁸² This can be said to include cohabitations or more casual relationships.⁸³ Similarly, homosexuality, especially between women, is forbidden.⁸⁴ This demonstrates why it may be important to a testator that his property does not pass to either someone outside his faith or married to someone who he does not deem suitable. Jewish laws of inheritance regarding distribution of property on death are contained within the eighth and ninth chapters of the Baba Bathra, the section of the Mishnah that deals with the ownership of property.⁸⁵ The observation of such laws is a manifestation of religious belief through observance and practice. Preventing such manifestation through prescribing the means by which property could pass to the correct person⁸⁶ would, therefore, seem to be in breach of Art.9(1).

Whether the condition attaching to the legacy is for the protection of the property or to give incentive to the beneficiary to conform, will be irrelevant in the law.⁸⁷ It may, however, be relevant to the protections offered by Art.9(1). One of the manifestations of religion that is protected is the teaching of religious doctrines. The making of a legacy that is conditional on the observance of a specific aspect of religious law could be construed as a method of teaching that law. This is an argument contingent upon a technical interpretation. Less controversially, observance is a protected manifestation and in many cases a conditional legacy with religious connotations is seeking to ensure observance. This may be through the securing of a suitable marriage partner or through attempting to ensure that non-marital conjugal relations do not occur. These concepts fall within the required aspects of Judaism and, as such, someone of that faith would argue that it was immoral not to observe them. *Prima facie* it would seem, therefore, that the interpretation given to immorality as a limitation to testamentary freedom breaches Art.9(1) ECHR.

⁸¹ Deut 7:3.

⁸² Ishus 12:1-2.

⁸³ Lev 18:6, "No man shall come near to uncover nakedness."

⁸⁴ Lev 18:3.

⁸⁵ This gives an interpretation to Numbers 27:1-8 which excludes all female heirs excepting only daughters in the cases where no son is alive to claim.

⁸⁶ As property cannot pass out with the faith in the main.

⁸⁷ The decisions in *Fraser v Rose* (n 80) and *Young v Johnston and Wright* (n 76) demonstrate that it is the nature of the condition that renders it illegal. The intentions of the testator in writing it were not considered relevant.

C. Immorality and Art.9(2)

It falls to determine whether immorality, as a limitation to testamentary freedom in Scotland, can be accommodated within one of the restrictions contained in Art.9(2). The previously determined tripartite test will again be applied.

In considering whether there is a legal basis for the restriction on the manifestation of religion caused by the concept of immoral Will conditions, case law demonstrates that it does have a basis in national law. While there is no statutory provision relating to potestative conditions, the common law is accepted as satisfactory inclusion within national law.⁸⁸ This means that the numerous cases concerning immorality are sufficient to prove the first requirement for determining a legal basis for the restriction. However, in cases where rules stem from the common law, accessibility is harder to prove. Simply typing “immoral Will conditions, Scotland” into an internet search engine does not render anything helpful.⁸⁹ It should be remembered, however, that any practitioner in the field of private law should be aware of this limitation as knowledge of succession is compulsory to be admitted as a solicitor by the Law Society of Scotland.⁹⁰ Therefore, the common law is easily accessible to such a practitioner. Additionally, cases dealing with common law have not been seen to automatically fail on grounds of inaccessibility suggesting that access to legal experts, if not the primary source, is enough to prove accessibility.

Finally, in proving a legal basis, it must be determined whether the consequences of immorality are foreseeable. This question is problematic due to the narrow margin by which some cases are considered immoral while others are not. For example, as previously mentioned, a condition prohibiting marriage would be struck down by the courts. Conversely, when conferring a benefit on an unmarried child, if used descriptively i.e. the benefit is conferred on one of two daughters, one of which is married, or purposively i.e. the benefit is conferred if the daughter is still unmarried, then such a provision is allowed to stand.⁹¹ The difference between those which are allowed to stand and those which are struck down may appear to be marginal. Indeed acceptability may even be down to the quality of the drafting of the Will. This may be said to reduce the foreseeability of the consequences of immoral conditions in that what constitutes an immoral purpose is perhaps not altogether clear on cursory examination. What is made clear by the case law, however, is that immoral conditions will not be required to be carried out.⁹² It is, therefore, foreseeable that if immoral conditions are included in a Will provision, they will not stand. This indicates that the consequence of immorality, if not the immorality itself, is reasonably foreseeable. This is what the legal basis test demands. Immorality, therefore, passes the first test in determining whether it, as a limitation to

⁸⁸ *Sunday Times v United Kingdom* (n 31); *Barthold v Germany* (1985) 7 EHRR 383.

⁸⁹ For this test the search engine “Google” was used. The search results were correct as at 20 March 2012.

⁹⁰ Succession is one of the compulsory subjects for entry as a solicitor in Scotland:
<<http://www.lawscot.org.uk/becomingasolicitor/students/studying-the-llb/professional-subjects>>
last accessed 12 June 2012.

⁹¹ *Sturrock v Rankin's Trustees* (1875) 2 R 50 (IH).

⁹² *Fraser v Rose* (n 80).

testamentary freedom, falls within the justifiable restrictions over the manifestation of religious belief.

The need for a legitimate aim is an interesting problem when dealing with immorality. Many people would argue, especially those of a religious persuasion, that by imposing such a condition on a legacy within a Will they were protecting the morality of the beneficiary rather than themselves acting immorally. However, it should be remembered that each of the potential beneficiaries is awarded the same protection under Art.9 as the testator himself. They have the freedom to manifest their religion in just the same manner as he does. Therefore, in the case of immorality relating to religiously conditional legacies, the legitimate aim in limiting the testator's freedom is the 'protection of the rights and freedoms of others'.⁹³ This is a justifiable reason for the limitation of rights under Art.9(2) and, therefore, must, in these circumstances, be considered a legitimate objective of a restriction.

The necessity of a restriction in a democratic society on testamentary immorality again raises the issue of balancing an individual's rights and freedoms against those of a whole class of people; the testator's rights must be balanced against the beneficiaries' rights. It should be noted that this aspect is complicated by the fact that it is unclear whether the applicant must prove a restriction is unnecessary or whether it is for the State to prove that it is.⁹⁴ The legitimate aim in a limitation through immorality is the protection of the rights and freedoms of others. This, however, must be weighed against the severity of the restriction. In *Kokkinakis*,⁹⁵ which dealt with the proportionality of making proselytizing a criminal offence in Greece, when dealing with this very issue, it was said that, '(...) freedom of thought, conscience and religion is one of the foundations of a 'democratic society' (...) The pluralism indissociable from a democratic society (...) depends on it.'⁹⁶ The difficulty in assessing these competing rights was the foundation of a series of cases⁹⁷ which attempted to illuminate the issue through examination of the principle of respect for individuals.⁹⁸ It is recognised that whether a restriction is justified will depend extensively on the facts of the individual case.⁹⁹ However, the decision in *Kokkinakis* demonstrated that the ECtHR would allow a breach of Art.9(1) for the purpose of protecting the rights and freedoms of others.¹⁰⁰ While this decision has been criticised,¹⁰¹ the criticisms levelled would not hold in the case of immorality. The distinction here is the absence of a criminal offence.¹⁰² Without such a severe penalty,

⁹³ ECHR, Art 9(2).

⁹⁴ Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 589-592.

⁹⁵ *Kokkinakis v Greece* (1994) 17 EHRR 397.

⁹⁶ *ibid* [31].

⁹⁷ *Kokkinakis* (n 95); *Wingrove v UK* (1997) 240 EHRR 1.

⁹⁸ Malcolm Evans, *Religious Liberty and International Law in Europe* (CUP 1997).

⁹⁹ Carolyn Evans, *Freedom of Religion Under the European Convention of Human Rights* (OUP 2001).

¹⁰⁰ The court held that the creation of a criminal offence was not disproportionate. It should be noted that the court further ruled that Mr Kokkinakis's conviction was not necessary for the protection of the rights and freedoms of others. This, however, does not undermine the point.

¹⁰¹ Evans, *Freedom of Religion* (n 99).

¹⁰² In *Kokkinakis*, the State criminalised proselytism. This was held to be proportionate. The levying of much less severe repercussions for the same legitimate aim i.e. the protection of the rights and freedoms of others must also, therefore, be deemed proportionate.

the reasoning in *Kokkinakis* must stand. It can, therefore, be concluded that the restriction imposed on the freedom of religion, through the limitation of testamentary freedom on grounds of immorality, is proportionate to the legitimate aim of the restriction. If the need for such a restriction outweighs the severity of the restriction's imposition, it follows that for these purposes at least, it is necessary in a democratic society.

D. Conclusion on Immorality

Some conditions attaching to legacies will be considered immoral. This acts as a limitation to testamentary freedom as such immoral Will conditions need not be fulfilled. This has the potential to interfere with freedom of religion in two ways. First, religious laws often dictate who the beneficiaries of the deceased estate should be. This is accompanied by the requirement or assumption that the beneficiary will be of the same faith, as the property should not pass outside the faith. Therefore, in order that the beneficiary falls within both of these categories, the testator may feel that it is necessary for him to place a condition on the legacy. Secondly, a testator may feel that it is his moral duty to aid the spiritual growth and safety of a person by attempting to ensure that religious teachings are adhered to. However, public policy associated with immoral Will conditions has the potential to allow for any such conditions to be disregarded and not carried out. Therefore, the testator's wishes will not be given effect. Notwithstanding this, immorality falls within the category of justifiable restrictions upon application of the Court's tripartite test. Therefore, this limitation to testamentary freedom in Scotland does not contravene Art.9, ECHR.

6. Will Clauses Relating to Disposal of the Corpse

A. Disposal of the Corpse and Testamentary Limitation

The ceremonies and beliefs that surround the disposal of bodies is one of mankind's central characteristics.¹⁰³ Consequently, the method of disposal of their corpse is often so important to people that they wish to dictate how it is to be done in a specific condition in their Will. The growth of secularism in British society has altered attitude towards the disposal of the dead which has resulted in a marked departure from traditional Christian burial practices with cremation growing in popularity.¹⁰⁴ However, a person does not have complete testamentary freedom in deciding how they wish their corpse to be dealt with. For example, funeral expenses are a privileged debt charged to the estate.¹⁰⁵ However, the expenses have to have

¹⁰³ See Theya Molleson, 'The archaeology and anthropology of death: what bones tell us', in Sarah C Humphreys and Helen King (eds), *Mortality and Immortality: the anthropology and archaeology of death* (Academic Press 1981) 15.

¹⁰⁴ Peter C Jupp, *From dust to ashes: the replacement of burial by cremation in England 1840-1967* (Congregational Memorial Hall Trust, 1990).

¹⁰⁵ *Sheddan v Gibson* (1802) Mor 11855.

been reasonably incurred and extravagance is likely to be disallowed.¹⁰⁶ Similarly, there may be concerns relating to the environment¹⁰⁷ or public health when dealing especially with the burning or decomposition of human remains.¹⁰⁸ These concerns act as a limitation to testamentary freedom when it comes to dictating the method of disposal of the testator's corpse after death. For these purposes, the question of simple extravagance will not be contested but rather the focus will be on alternative methods of cremation.

B. Disposal of the Corpse and Art.9(1)

Many ancient beliefs or traditions require methods for the disposal of the deceased's remains that some in Western society would consider to be unsavoury.¹⁰⁹ For the purpose of examining whether the disposal of bodies, as a limitation to testamentary freedom, is in contravention of Art.9(1) of the ECHR, the faith of Hinduism will be examined.

In Hinduism, an important component of the *antyeshti* sacrament, or Hindu last rites, is the concept of open air cremation. These find their basis in *Rgveda*, an ancient Indian collection of Sanskrit hymns which forms the most holy books in the Hindu faith. Here, cremation is viewed as a form of sacrifice to sacred fire, known as *Agni*.¹¹⁰ The *Brahmanas* illustrate that sacrifice to *Agni* becomes a three part process whereby mortal remains are purified and thus made capable of integrating with the Divine Plane. The first step is purification whereby *Agni* is invoked to eat the unclean mortal flesh.¹¹¹ The second stage is that of transformation whereby the cremation is ritually demarcated to announce the arrival of *Agni* in the form of *jataveda*, or knower of all things.¹¹² Without the correct form of burning, the soul can never be led to its ancestors.¹¹³ Unlike the extreme heat of cremation chambers the pyre must not be allowed to become too hot. It may be cooled by adding water to the ashes.¹¹⁴ The third and final stage is the bestowal of energy. *Agni's* sacred energy can then be used to propel the spirit towards *pitriloka*.¹¹⁵ Traditional Hindus believe that the purpose of *Agni* is to protect the body from evil spirits who wish to disrupt the journey of the soul. Within traditional Hindu belief this is, therefore, a very necessary manifestation

¹⁰⁶ *Glass v Weir* (1821) 1 S 163. More recently see Bankruptcy (Scotland) Act 1985, s 51(1)(c).

¹⁰⁷ Environmental Protection Act 1990.

¹⁰⁸ There must be authorisation from the Scottish Environment Protection Agency if a corpse is to be buried anywhere other than a cemetery and strict procedure must followed with regards to the marking of the grave on Water Board maps etc.

¹⁰⁹ For example, the Zoroastrian tradition that considers a corpse to be a contaminate and, therefore, decrees that it must be placed upon a tall tower open to the sunlight and the birds of prey. Such is the only method to prevent contamination by the corpse demons.

¹¹⁰ Rajbali Pandey, 'Hindu Samskaras: Socio-Religious Study of the Hindu Sacraments' (Motilal Banarsidass 2006).

¹¹¹ Demonstrated through the lighting of the fire.

¹¹² *Taittiriya Samhita* I.1.1.7

¹¹³ *Rgveda* X.16.1-2

¹¹⁴ It must also be cooled through the use of ritualistic chants from *Rgveda* X.16.13-14, *Atharvaveda* 18.3.6, *Kausika-sutra* 82.26 and *Taittiriya-aranyaka* VI.4.1.

¹¹⁵ The Land of the Forefathers and Gods.

of the religion and accordingly, a cremation such as would occur in a British crematorium would not fulfil the purpose required of it by traditional Hindus. The site must be open to the midday sunshine, on fertile ground surrounded by trees and near to running water.¹¹⁶ Therefore, the requirements regarding the disposal of a corpse under the rules applying to Hindus are fairly clearly set out. However, this can be seen to come into conflict with national law.

Following problems associated with dealing with cremation under the common law in England,¹¹⁷ the Cremation Act 1902¹¹⁸ (the 'Cremation Act') was passed. The Cremation Act states that a crematorium is defined as '(...) any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto.'¹¹⁹ This definition has undergone close judicial scrutiny in the recent cases of *Ghai*.¹²⁰ At first instance it was held that the Cremation Act precluded the use of open air funeral pyres under any circumstance. This decision was overturned on appeal through a broad interpretation of the word 'building'. 'Building' was taken to mean any structure with four walls of such height that no part of the funeral pyre could be seen and that no elements of it could escape. Thus the pyre could be in the open air; there was no requirement for a roof.¹²¹ However, this does not fulfil all the requirements for *anthyesthi sanskara*. It can, therefore, be seen that the law relating to the disposal of bodies, acting as it does as a limitation to testamentary freedom in Scotland, can be said to limit the manifestation of religion, as protected freedom under Art.9(1), ECHR.

C. Disposal of the Corpse and Art.9(2)

Having established that the laws relating to the disposal of a corpse limit testamentary freedom and that they can restrict the manifestation of religion as protected under Art.9(1), it is now necessary to consider whether they fall within the category of allowable exceptions through the application of the tripartite test.

Regarding the legal basis for interference, as previously demonstrated, the restriction has a basis in national law through the medium of the Cremation Act. Whilst a decision of the English courts, *Ghai*¹²² demonstrates that the interpretation of the legislation, while broader than initially thought, does not allow for the full requirements of *anthyesthi sanskara*. As the Cremation Act applies to both Scotland and England, the English court's interpretation in *Ghai* is likely to be highly persuasive. This law is reasonably accessible to the general public without consultation of a lawyer due to the wide publicity the *Ghai* case has received. If 'open

¹¹⁶ *Satapata Brahmanam*, XIII.8.1 and *Asvalayana-Grihya-Sutra* IV.1.2.

¹¹⁷ *R v Price* (1883-84) LR 12 QBD 247.

¹¹⁸ Applying to Scotland as well as England and Wales.

¹¹⁹ Cremation Act 1902, s 2.

¹²⁰ *R (on the application of Ghai) v Newcastle City Council* [2009] EWHC 978 (Admin), rev'd [2010] EWCA Civ 59.

¹²¹ *R (Ghai) v Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2010] EWCA Civ 59 [35] (Lord Neuberger MR).

¹²² [2010] EWCA Civ 59.

air funeral pyre' is typed into an internet search engine¹²³ wide press coverage of the case is the result. In order to view the Cremation Act or the *Ghai* case report, however, it is necessary to know the exact title of the statute or case. Despite this, the accessibility of the law cannot be questioned as it is an area of law in which it is straightforward to obtain advice. Regarding the foreseeability of a consequence of an action in regards this law, the case of *Ghai* both in first instance and on appeal has made it clear that directions in contravention of the statutes will not be permitted. It can, therefore, be said that it is reasonably foreseeable that if a Will directs that a corpse be disposed of in a way inconsistent with domestic law then such a direction will not be carried out. Consequently, the limitation on testamentary freedom reflected by the law relating to the disposal of bodies passes the first test in determining whether it fits into the class of justifiable restrictions on the manifestation of a religion.

The second stage in this test is ascertaining that the restriction is based on legitimate aims. In the case of *Ghai*, it was originally argued that the legitimate aim of the interference was an environmental one. It was contended that there was a need to protect bystanders and the public generally from the toxins, dioxins, mercury deposits and polycyclic aromatic hydrocarbons that are released on the burning of a human corpse.¹²⁴ However, this was deemed not to be a legitimate aim due to the possibility of preventing these problems through regulation.¹²⁵ In *Ghai*, it was accepted that the legitimate aim was the need to protect the public morals and the rights of others as many might be offended by the burning of human remains in such a manner.¹²⁶ Therefore, the second part of the test to determine whether an interference with a Convention right falls within the category of justifiable restrictions has been passed by the limitation of testamentary freedom dealing with the disposal of the corpse.

Finally, in order to fall within the category of legitimate restrictions, the limitation must be proportionate to the legitimate aim of protecting public morals and the rights of others. Whether or not the restriction is proportionate to the legitimate aim in the case of open air funeral pyres has been criticised on the grounds that, '(...) it is questionable whether proscription of otherwise harmless conduct can ever be justified merely on the grounds that it may cause offence'.¹²⁷ Moreover, the proportionality of the restriction may seem questionable especially when it is accepted that arrangements could very easily be made to prevent any person who did not want to attend the cremation from ever seeing it. It seems, therefore, that the restriction exists not due to the possibility of a direct form of offence but rather secondary or hearsay offence. It, therefore, causes offence to those who become aware that such a thing is taking place through information imparted by others, but have no direct contact through the medium of their own senses with the thing that is causing them offence. This, *prima facie*, seems unjustifiable. However, the justifiability

¹²³ For these purposes Google was used. Search results were correct as at 24 March 2012.

¹²⁴ *R (on the application of Ghai) v Newcastle City Council* [2009] EWHC 978 (Admin) [61]-[70].

¹²⁵ *ibid.*

¹²⁶ *ibid* [103]-[104].

¹²⁷ Cumper and Lewis (n 17).

of the restriction can be upheld despite this. There are three arguments to support this.

First, in the case of the *Otto-Perminger Institute*,¹²⁸ it was held that the breach of Art.10 ECHR dealing with freedom of expression was proportionate to the legitimate aim of protecting the public from offence. The case involved the showing of a satirical religious film. The case is on point because despite the fact people could choose whether or not to watch the film, the ECtHR found that the ban on the film was a justifiable restriction due to the fact it was '(...) gratuitously offensive to others and thus an infringement of their rights.'¹²⁹ This demonstrates that secondary or hearsay offence would seem, therefore, to be sufficient.

Secondly, it could be argued that legislation is made, reviewed and updated as required by a democratically elected body and that interference with it by unelected courts is to intrude upon democracy and impinge upon the separation of powers. This is a matter dealing with the margin of appreciation enjoyed by contracting States to limit certain freedoms as they see necessary within the expectations of their citizens. Indeed, in the High Court it was stated in *Ghai* that,¹³⁰

(...) the present legislative framework is consistent with mainstream cultural expectations of persons living in this country and secures in a practical way the avoidance of likely offence and distress. That calculation is not one on which a judge can speak with any great expertise or authority. The resolution of the various competing interests on this difficult and delicate issue by elected representatives is not one a court should easily set aside.

This suggests that the decision not to allow funeral pyres outside a widely defined 'building' falls within the margin of appreciation.

Finally, when considering the issue of the proportionality of a restriction forming a criminal charge the *Kokkinakis* case must again be examined. While it was argued in *Kokkinakis* that the creation of a vague criminal offence was not proportionate to the aim of protecting a small number of vulnerable people,¹³¹ the majority holding did not follow this approach. It was found that proselytism was improper because it interfered with the rights and freedoms of others and, therefore, the State had the right to make it a criminal offence. This reasoning may be applied to open air funeral pyres. Following *Otto-Perminger Institute*, a secondary offence can constitute an interference with the rights of others. Moreover, it would appear from the reasoning in *Ghai* that the matter falls within the State's margin of appreciation. On this basis, the reasoning of the majority in *Kokkinakis* demonstrates that the state has the right to make the interference in the rights of others a criminal offence. It can, therefore, be concluded that the restriction placed on the making of open air funeral pyres is proportionate to the aim of protecting the rights of others. Therefore, the limitation upon testamentary freedom embodied by the law relating to disposal of the corpse, in this circumstance, passes the third test in determining whether it falls into the category of justifiable restrictions.

¹²⁸ *Otto-Perminger Institute v Austria* (1995) 19 EHRR 34.

¹²⁹ *ibid* [49].

¹³⁰ *Ghai* (n 121).

¹³¹ *Kokkinakis* (n 95).

D. Conclusion on the Disposal of the Corpse

The disposal of a deceased's corpse is an important ritual within any society. As a result, many people may be very particular as to what happens to their remains after death. This can lead to inclusion in a Will of a clause giving specific instructions as to the treatment of their remains. However, testamentary freedom is limited in this respect as there is legislation regulating the disposal of the deceased. This can have religious ramifications as evidenced by the problems an orthodox Hindu would have in trying to secure the right to an open air funeral pyre in order to fulfil the requirements of *anthyesthi sanskara*. The necessity of this rite in order to move on to the next stage is a deeply held belief among many orthodox Hindus. The restriction can, therefore, clearly be seen to interfere with the freedom to manifest religion as protected by Art.9(1). Despite this, the restriction is justifiable under Art.9(2) as it passes the tripartite test devised by the court for determining whether a limitation to a Convention freedom can be applied. Therefore, as regards the disposal of bodies after death, the limitation to testamentary freedom does not contravene Art.9, ECHR.

7. Conclusion

Whilst freedom of testamentary disposition and religion are both important concepts within Scots law, many limitations to testamentary freedom exist that could indirectly affect the freedom of religion. It has been determined in this paper that three limitations to testamentary freedom have the capacity to affect the freedom to manifest religion protected under Art.9(1). These limitations arise from: (i) the concept of legal rights; (ii) immoral Will conditions; and (iii) the regulations surrounding the disposal of the corpse. By demonstrating the way in which each concept acted as a limitation to testamentary freedom and then comparing the religious laws of Islam, Judaism and Hinduism respectively against the application of these limitations, it was shown that the limitation arose in direct conflict with the prescribed teachings of that particular religion.

However, on separate examination of each testamentary limitation it was found that when the tripartite test for determining justifiability was applied, each restriction was justified under the provisions of Art.9(2). This was because each limitation has a basis in prescribed law, a legitimate and protective aim, and deals with an area of law that required regulation in a democratic society. In each case it fell within the State's margin of appreciation to create law to regulate the area. It was found that for each circumstance, the limitation was not disproportionate to the mischief it sought to address. This is evidenced by reference to the legitimate aim and other contracting States' solutions to the same issue.

Accordingly, while these limitations to testamentary freedoms do restrict the manifestation of religious belief protected under Art.9(1), in each of these cases the restriction is justifiable under the terms of Art.9(2), ECHR. Consequently, it is the case that limitations to testamentary freedom in Scotland do not contravene Article 9 of the European Convention on Human Rights.

A Tale of Two Cities: Devolution, a Referendum and the Constitution

CAROLINE M. HOOD*

(...) no nation could be held irrevocably to a Union against its will and the way it works should be reassessed from time to time, so that it continues to work for the good of all of us. Too often in recent years there has seemed to be in Scotland a genuine, if sometimes unformed, anxiety that the Union is in some way less relevant to Scotland and her aspirations.¹

The disparity between London and Edinburgh² is more than political; it is also constitutional. The election success of the Labour Party in 1997 resulted in a commitment to devolution which altered the constitutional arrangements of the United Kingdom forever. In slightly over a decade, the process of devolution has propelled Scotland from Scottish Office, to Scottish Parliament, to an impending referendum on Scottish independence and secession from the United Kingdom. The architects of devolution, hypnotised by the politics of the debate, overlooked the constitutional consequences of devolution,³ an omission permitted by the flexibility of the United Kingdom's uncodified constitutional arrangements. The purpose of this paper is to provide a summary of the current status of devolution and to utilise the Scotland Act 1998 to provide a constitutional perspective on the referendum, focussing upon the rule of law and the manner in which authority for the referendum will be granted to Edinburgh by London.

1. Devolution

For Scotland, devolution was not a novel concept. The Kilbrandon Report⁴ and the Scotland Act 1978 which followed sought to achieve a level of political autonomy for the Scottish people but failed at the referendum stage.⁵ Nearly two decades later, on

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¹ Foreword by the Rt Hon John Major in Scottish Office, *Scotland in the Union: A Partnership for Good* (Cm 2225, 1993)

² For the purposes of this article "London" should be regarded as referring to Westminster and Whitehall, as the seat of the United Kingdom Parliament and government, whereas "Edinburgh" should be regarded as referring to the Parliament at Holyrood and associated locations of Government offices in Edinburgh.

³ A consultation of Hansard for the relevant debates will show a preoccupation with sovereignty, at most.

⁴ Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (Cmnd 5430, 1969-73).

⁵ 40% of the registered electorate had to vote in favour of devolution.

the 11th of September 1997, the Scottish electorate concluded John Smith's 'unfinished business', voting in favour of a Scottish Parliament complete with tax varying powers.⁶ The legal objective of devolution was to codify and to provide democratic representation for what was already within the administrative purview of the Scottish Office by adding to its existing remit and creating a statutory framework in the form of the Scotland Act 1998. The political objective of devolution was twofold: to 'bring government closer to the people';⁷ and, more importantly from London's perspective, to tame the beast of Scottish Nationalism. Indeed, the establishment of the Scottish Parliament presented the political opportunity longed for by politicians to 'kill nationalism stone dead'.⁸ Devolution's primary objective was a political one, despite representing a significant constitutional development for the United Kingdom by creating a legislative body with significant power outside of London.

Of course, even prior to devolution, Scotland has always been different. Depicted as '(...) a symbolic gesture to nationalistic grievances over the way the Union was handled in London',⁹ the origins of the Scottish Office in 1885¹⁰ were rooted in a desire to appease feelings in Scotland about direct governance from London. Greater representation in London of Scottish interests was granted a further incremental step in 1926 following the creation of the post of Secretary of State for Scotland.¹¹ Despite the initial 'symbolic gesture' of the position to placate the nationalists, the Scottish Office amassed a gradual increase in functions so that ultimately when circumstances mandated it, a distinctly Scottish policy perspective could be achieved.¹² The twentieth century oversaw an exponential increase in Scottish Office functions in keeping with the concept that '(...) in the absence of evidence to the contrary, the machinery of Government should be designed to dispose of Scottish business in Scotland'.¹³ This 'machinery' was ultimately constructed via five Scottish departments administering Scottish affairs from a base in St. Andrew's House in Edinburgh. The twenty-first century oversaw further change for the Scottish Office: following devolution, it ceased to exist, replaced by the 'Scotland Office'.¹⁴ Yet, despite the name change, the Scotland Office retained the historic quarters in Dover House, Whitehall and the status of a full ministerial department and presence in London.

⁶ Of the 60% of those eligible who voted in the Scottish referendum, 74% supported the creation of a Scottish Parliament and 63.5% agreed it should have tax raising powers. See: <<http://www.scottish.parliament.uk/vli/history/pathtodevolution.index.htm>> accessed 30 April 2011.

⁷ House of Commons Justice Committee, *Fifth Report: Devolution: A Decade On* (2008-09, HC 529) Summary.

⁸ Quote attributed to former Shadow Secretary of State for Scotland George Robertson, cited by Lord Mackay of Ardbrecknish in HL Deb, 24 July 1997, vol 581, col 1575.

⁹ P Cairney, 'Venue Shift Following Devolution: Where Reserved Meets Devolved in Scotland' (2006) 16 *Regional Studies* 4 429, 437.

¹⁰ Secretary for Scotland Act 1885: 'An Act for appointing a Secretary for Scotland and Vice-President of the Scotch Education Department.'

¹¹ Secretaries of State Act 1926.

¹² Cairney (n 9) 437.

¹³ Royal Commission on Scottish Affairs, *Report of the Royal Commission on Scottish Affairs* (Cmnd 9212, 1954) [12]

¹⁴ From 1st July 1999.

Subsequent to devolution, the Scotland Office appears to have struggled to define a constitutional role for itself. A current strategic objective of the Scotland Office is cited as advocating the '(...) best interests of Scotland within the United Kingdom'.¹⁵ Such a grand purpose is vague in its remit. However, the Scotland Office has been more focussed in recent months with the promotion of the constitutional role of the Advocate General. The post was created to fill the void in Scottish legal advice provided to London subsequent to the relocation of the Lord Advocate to the Scottish Executive as one of the collective Scottish Ministers.¹⁶ The Office of the Advocate General is emerging as an important factor in the early stages of the Unionist's campaign against Scottish Independence. London's ability to portray the legal aspects of the referendum as a distinct theme, excised from the political, has removed some of the more contentious elements from the debate and refocused minds on constitutional affairs.¹⁷

A synopsis of devolution would be incomplete without reference to the Scotland Act 2012 (the '2012 Act') which comprises the next stage in the process of devolution for Scotland. This Act was borne out of the Commission on Scottish Devolution (the 'Calman Commission') charged with the following task:¹⁸

To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.

The Calman Commission was convened in response to the SNP's *National Conversation*¹⁹ project and involved all the main political parties with the exception of the SNP. Following a final report,²⁰ the recommendations and findings of Calman were ultimately codified in the Scotland Bill and formed part of London's legislative programme.

The most significant powers devolved are financial in nature and will once again modify the relationship between the two cities and shape the next phase of devolution.²¹ Yet, the ultimate extent and applicability of the 2012 Act will be dictated by the success or failure of the referendum.²² The level of fiscal autonomy which the 2012 Act will grant Edinburgh when fully operational will see an unprecedented transfer of statutory authority from London to Edinburgh. The

¹⁵ Scotland Office, 'Scotland Office Business Plan 2010-2012' (December 2010) <<http://www.scotlandoffice.gov.uk/scotlandoffice/files/Scotland%20Office%20business%20plan%20-%202010-2012.pdf>> accessed 27 February 2012.

¹⁶ Scotland Act 1998, s 87.

¹⁷ The House of Lords Select Committee on the Constitution have observed the lack of legal detail in the Scottish Government's consultation paper into Scottish independence. See House of Lords Select Committee on the Constitution, *Twenty Fourth Report: Referendum on Scottish Independence* (HL 2010-12, 263) [20].

¹⁸ Commission on Scottish Devolution, *Final Report: Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (Edinburgh, 2009) 3.

¹⁹ Scottish Government, *Your Scotland, Your Voice: A National Conversation* (Edinburgh, 2009).

²⁰ Commission on Scottish Devolution (n 18).

²¹ See Part III of the Scotland Act 2012.

²² Due to the timetable under which the financial provisions are to be introduced.

purpose of the legislation is to decrease the financial worth of the block grant to Scotland from the Treasury in London and devolve specific taxes to Scotland to compensate for this financial deficit.²³ Under the new arrangements the Scottish Parliament will be responsible for raising approximately 35% of its revenue, with the remainder supplied by London.²⁴ The accountability of the Scottish Parliament to taxpayers will, therefore, evolve into a far more tangible connection between collection and expenditure.

The financial aspects of the 2012 Act and the Bill that preceded it, have dominated the headlines and the true constitutional significance of the Scotland Act 2012 has been underplayed. Within the confines of the Palace of Westminster, criticism of the disregard shown for the constitutional repercussions of the new legislation has emerged: 'In short, this is a major constitutional bill which has huge implications for the people in Scotland (...) and the rest of the United Kingdom.'²⁵ The 2012 Act and corresponding creation of a class of 'Scottish taxpayer'²⁶ will engineer hypothecation of tax receipts within the United Kingdom which has considerable potential to change the dynamic of the relationship between citizen and state.

Further, there are fundamental constitutional implications for the rule of law which stem from the devolution of substantial financial powers to the Scottish Parliament without a corresponding review of, (i) how that power is to be exercised; and (ii) how accountability for the exercise of that power is to be achieved. The exercise of power and accountability for that power's exercise cannot be separated from the political process. The current position of the SNP within the Scottish Parliament is unforeseen - the architects of devolution designed a voting system to prevent any one party obtaining an outright majority²⁷ - and the accountability mechanisms in Edinburgh reflect this. The results of the May 2011 election and subsequent SNP majority in the Scottish Parliament concentrates a significant amount of power in the hands of one party, for the First Minister, Alex Salmond, has:²⁸

(...) total control of a party with an absolute majority in a very small Parliament. There is no second chamber to check his conceits and caprices. The opposition parties are each in such a state of disarray that only my colleagues in the political media community (...) can impose the necessary scrutiny. This they must do.

²³ Part III of the Scotland Act 2012.

²⁴ Peter Jones, Hamish Macdonnell and Angus Macleod, 'Scotland Bill hands Holyrood sweeping new tax powers' *The Times* (London, 30 November 2010)

<<http://www.timesonline.co.uk/tto/news/uk/scotland/article2828126.ece>> accessed 5 July 2011.

²⁵ Lord Forsyth, 'Government criticised over handling of Scotland Bill' (*BBC News*, 21 March 2012)

<http://news.bbc.co.uk/democracylive/hi/house_of_lords/newsid_9707000/9707903.stm> accessed 12 June 2012.

²⁶ Scotland Act 2012, s 25.

²⁷ A combination of first-past-the-post and proportional representation.

²⁸ Kevin McKenna, 'Who will be the union's champion?' *The Observer* (London, 15 May 2011)

<<http://www.guardian.co.uk/commentisfree/2011/may/15/alex-salmond-scottish-independence-snp>> accessed 12 June 2012.

The accountability within Holyrood was, therefore, never designed to operate in the circumstances which the 2011 election has created or which the 2012 Act will produce when fully operational. The significance of this accountability gap cannot be overstated: the rule of law demands that relationships of power and accountability are inextricably linked and must be appropriately balanced. Edinburgh has the potential to operate in an environment where constitutional checks and balances provided by Parliament holding the Executive to account are strained, leaving the courts to fill the void.

As evidenced by the recent *Axa*²⁹ litigation,³⁰ the courts are still defining their role post-devolution. Although the Supreme Court held that Acts of the Scottish Parliament are only subject to judicial review on statutory grounds³¹ and not on the common law grounds of irrationality, unreasonableness or arbitrariness, their Lordships did not bind the court and allowed room for manoeuvre, as will be discussed below. Therefore, the role of both the Scottish courts and the Supreme Court after devolution is still to be fully determined, particularly in relation to the Supreme Court as a final court of appeal. Hence, the practical constitutional consequences of devolution are no longer confined to the academic. The proposed referendum on Scottish independence will entail examination of more than the politics of devolution, it will focus attention upon both the rule of law and the separation of powers as these fundamental constitutional tenets are tested by the limits of Edinburgh's authority and by the Scotland Act 1998 itself.

2. A Tale of Two Cities: the Referendum

A. The Constitution and Devolution

The Scottish Parliament is a statutory body – the source of all power and authority is a singular piece of legislation which prescribes the legislative competence of the Parliament.³² Section 29(1) of the 1998 Act states: 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament'. As a result, the nature and exercise of power is statutorily controlled and, therefore, open to judicial interpretation through the civil courts in a way that Westminster's acts and omissions are not. Naturally, there will be circumstances where the demarcation between reserved and devolved is not so clear: 'It has been recognised that the scheme of devolution means that it is not possible for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap will be inevitable (*Martin v HM Advocate* 2010 SLT 412: Lord Hope of Craighead at para 11)'.³³ Matters of statutory interpretation aside, the Scottish Parliament is not an equal; it is a subordinate operating under the

²⁹ *Axa General Insurance Ltd and Others v The Lord Advocate and Others* [2011] CSIH 31 (Inner House) and [2011] UKSC 46 (Supreme Court).

³⁰ This case will be considered further below.

³¹ As defined by the Scotland Act 1998.

³² Scotland Act 1998 now supplemented by the Scotland Act 2012.

³³ *Imperial Tobacco, Petitioner* [2010] CSOH 134, [11] (Lord Bracadale).

constraints of an Act of Parliament. Of particular relevance to this article is section 29(2)(b) which prohibits the Scottish Parliament from legislating on reserved matters and, therefore, according to the list of reserved matters in Schedule 5: 'The following aspects of the constitution are reserved matters, that is - (...) (b) the Union of the Kingdoms of Scotland and England'.³⁴ Therefore, according to the Scotland Act 1998, Edinburgh cannot cleave Scotland from the Union without London's assistance.

In constitutional terms, devolution has left sovereignty untainted. Critics may cite sovereignty as a solely English doctrine and that, notwithstanding Scotland's Union with England and Wales in 1707, the adoption of sovereignty as an indisputable fact is not an automatic and foregone conclusion.³⁵ Yet, this article would respectfully submit that the Treaty and Act of Union 1706-1707³⁶ abolished the two sovereign Parliaments and established a new sovereign Parliament at Westminster. The Scottish people became part of the sovereign nation of the United Kingdom and accordingly under the authority of Parliament who, through exercise of Crown powers, retained the sovereign right to legislate for the whole United Kingdom. Therefore, the traditional Diceyan³⁷ view of sovereignty retains its integrity:³⁸

The principle then of Parliamentary sovereignty may (...) be thus described: Any Act of Parliament which makes a new law or repeals or modifies an existing law, will be obeyed by the Courts (...) There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament.

Accepting Dicey's proposition, the Scottish Parliament may create problems for the *political* sovereignty of Westminster, in regard to the political capital that would require to be spent if Westminster was to legislate for Scotland over the wishes of the Scottish Parliament, but the *legal* sovereignty of Westminster remains untrammelled. Therefore, despite the devolution of further financial powers and greater fiscal accountability of the Scottish Parliament under the new Scotland Act 2012, sovereignty remains unchanged. It is the political circumstances within which devolution operates which have altered. However, it would be a mistaken belief to regard these political changes as having no effect upon constitutional law.

³⁴ Scotland Act 1998, Sch 5 para 1 subpara (b). This section will be explored in further detail below.

³⁵ See *MacCormick v The Lord Advocate* 1953 SC 396.

³⁶ Union with Scotland Act 1706 and Union with England Act 1707.

³⁷ The traditional Diceyan model has been criticised. For an alternative perspective see M Elliott, 'Parliamentary Sovereignty under Pressure' (2004) 2 IJCL 3 545.

³⁸ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, London 2005) 37-38.

B. The Referendum: “purpose” and “effect”

Both governments in Edinburgh and London have published consultation papers into the question of a referendum on Scottish independence³⁹ and, as the House of Lords Select Committee on the Constitution has observed, ‘[T]he two governments’ respective consultation papers raise a variety of constitutional and legal issues, which cluster around two main points: the power to hold a referendum on Scottish independence and the nature and design of the referendum question’.⁴⁰ This article will focus on the former aspect of the referendum question, using the Scotland Act 1998 as a basis for the analysis.

As already noted above, the Scottish Parliament and Government therein, is statutorily prohibited from legislating outside its competence.⁴¹ A referendum on Scottish independence would, therefore, likely conflict with the aforementioned provisions of the 1998 Act. The potential for an Act of the Scottish Parliament providing for a referendum on Scottish independence to be rendered *ultra vires* is further substantiated when section 29(3) is referred to:

For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

If the “purpose” and the “effect” of a piece of legislation providing for a referendum are considered, its purpose is to initiate the process of the deconstruction of the Union between Scotland and England and its effect is to provide the means for this procedure to begin. As already discussed, the Union between Scotland and England is a matter which is reserved to London and, therefore, strictly outside the Scottish Parliament’s powers. Consequently, this renders any such Act *ultra vires* and capable of review by the Supreme Court under the processes delineated in section 33 of the 1998 Act.

Referring back to the Scotland Act 1998 and specifically section 29(2)(b), the question ought to be raised as to whether it was ever London’s will to allow such a referendum to be within Edinburgh’s purview. According to the late Donald Dewar, ‘A referendum that purported to pave the way for something that was *ultra vires* is itself *ultra vires*. That is a view that I take, and one to which I will hold’.⁴² The purpose of any such referendum is clear: it represents a step on the road to independence, there is no other purpose. Indeed, it is suggested that any attempt to describe the referendum as “consultative” is misleading and constitutionally inept, particularly in view of the Inner House’s comments in *Imperial Tobacco, Petitioner*.⁴³

³⁹ Scotland Office, *Scotland’s Constitutional Future: A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom* (Cm 8203, 2012) and Scottish Government, ‘Your Scotland, Your Referendum’ (Scottish Government, Edinburgh 2012).

⁴⁰ House of Lords Select Committee on the Constitution, *Twenty Fourth Report: Referendum on Scottish Independence* (2010-12, HL 263) [3].

⁴¹ Scotland Act 1998, s 29(1) and specifically s 29(2)(b).

⁴² HC Deb, 12 May 1998, vol 312 col 257.

⁴³ *Imperial Tobacco, Petitioner* [2012] CSIH 9.

Per Lord Brodie: '(...) what section 29(3) makes determinative is the purpose of the provision in question. That has to do with the legislative objective as disclosed by the preparatory material'.⁴⁴ The purpose and effect of any legislation on a referendum on Scottish independence is undeniable, an alternative interpretation is illogical and hence draws the subject matter firmly into 'reserved' territory. Furthermore, the status of referenda in the United Kingdom are such that they only have an advisory status; a referendum result may be regarded as *politically* binding, it is not *legally* binding. Therefore, it is submitted that interpreting any Bill on a referendum as having a consultative effect and purpose is invalid and lacks credence as a legitimate and decisive point of debate.

Yet, this paper would be lacking if the alternative perspective were not considered and rebutted. An argument does exist which, its proponents suggest, could potentially provide Edinburgh with the requisite authority to hold a referendum without London's assistance:⁴⁵

If a question is carefully crafted, asking people whether or not their preference is for independence and making clear this would only be treated by the Scottish Government as a political mandate to enter negotiations, this would seem to fall within competence.

This approach is similar to that proposed by MacCormick in the early days of devolution, which went so far as to propose an appropriate question: 'Do you advise and consent to the Executive opening conversations with the United Kingdom government to agree terms of Scottish independence on the basis of the constitution envisaged, or on such other basis as the people, by then, choose to put in place?'⁴⁶ Tierney also proposes that should such an Act be regarded outside the Scottish Parliament's competence, that it would be possible to '(...) read legislation providing for a consultative rather than a binding referendum to be within competence using a liberal interpretation as invited by section 101'.⁴⁷ Although Tierney appears to suggest that a wide reading of section 101 should be preferred, it is unlikely the courts would be sympathetic to such a proposal. Indeed, such an approach has been expressly rejected by the Inner House.⁴⁸ In *Imperial Tobacco, Petitioner* his Lordship, Lord Reed, emphasised that:⁴⁹

(...) the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it.

⁴⁴ *ibid* [202] (Lord Brodie).

⁴⁵ Stephen Tierney, 'A constitutional conundrum' *The Herald* (Glasgow, 11 January 2012).

<<http://www.heraldscotland.com/politics/political-news/a-constitutional-conundrum.1326251061>> accessed 12 June 2012.

⁴⁶ N MacCormick, 'Is there a Constitutional Path to Scottish Independence?' (2000) 53 *Parliamentary Affairs* 4 721, 726.

⁴⁷ Tierney, 'A constitutional conundrum' (n 45).

⁴⁸ *Imperial Tobacco* (n 43).

⁴⁹ *ibid* [58] (Lord Reed).

Therefore, consequences of any decision about the validity of an Act of the Scottish Parliament will have constitutional implications in addition to the more immediate political ones. The rule of law must be respected and the courts are acutely aware of their role and responsibility as guardians of this fundamental constitutional tenet. Further, the judiciary must remain alert to the democratic mandate of the Scottish Parliament and the importance of the separation of powers. However, the politics of the referendum will not cloud the judiciary's view; Westminster remains sovereign and in the absence of amending legislation, the Scottish Parliament must act in accordance with the rule of law.

C. Section 30 Order

In an attempt to provide Edinburgh with the requisite authority to conduct the referendum, London has proposed the use of a section 30 order.⁵⁰ This provision of the 1998 Act specifies that, 'Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient'⁵¹. Orders in Council are a manifestation of the Royal Prerogative and are regarded as a form of primary legislation, although do not possess the full force of an Act of Parliament as they are subject to judicial review.⁵² Prerogative power exists as residue from the days of absolute monarchy and is a power which has gradually been claimed and refined by Parliament through a process that began with the Bill of Rights in 1689 and ended with the Reform Acts of the 19th century.⁵³ Today the prerogative is exercised by the Government in the absence of effective parliamentary oversight and, therefore, effective accountability and can hence be regarded as '(...) no longer appropriate in a modern democracy'.⁵⁴

In 2009, in an attempt to address this lacuna in the accountability of the Executive to Parliament, the then Labour Government launched a Green Paper entitled *The Governance of Britain* which noted:⁵⁵

The flow of power from the people to government should be balanced by the ability of Parliament to hold government to account. However, when the executive relies on the powers of the royal prerogative – powers where government acts upon the Monarch's authority – it is difficult for Parliament to scrutinise and challenge government's actions.

⁵⁰ Scotland Office, *Scotland's Constitutional Future* (n 39) 12.

⁵¹ Scotland Act 1998, s 30(2).

⁵² 'An Order in Council made under the Royal Prerogative is regarded as a form of primary legislation': Cabinet Office, *The Cabinet Manual: a guide to laws, conventions, and rules on the operation of government* (October 2011) [1.16]

<<http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-manual.pdf>> accessed 12 June 2012. For the reviewability of the exercise of the prerogative see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁵³ For a note on prerogative power see: UK Parliament, 'The Royal Prerogative' (Standard Note SN/PC/03861, 2009).

⁵⁴ Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) [14].

⁵⁵ *ibid* [15].

In the interests of democracy, therefore, the circumstances in which the prerogative should be used are limited. Granted, a section 30 order is required to be laid before and approved by both Houses of Parliament and the Scottish Parliament.⁵⁶ However, upon reading section 30, alongside the supplementary provisions in sections 112 to 116, it appears inappropriate that a procedure to enact legislation, via an Order in Council, should be used to grant power to the Scottish Parliament to conduct a referendum on Scotland's constitutional future.⁵⁷ Particularly so when the practical considerations of such an order are contained within Part VI, the 'Supplementary Provisions' section of the 1998 Act. These provisions were intended to ensure the practical operation of the Scotland Act. They cannot have been designed to effect constitutional reform or to initiate the secession of Scotland from the Union.

While London may regard the use of a section 30 order as 'necessary', when the constitutional consequences of permitting such an order are considered, it cannot be construed as expedient. Presumably such an order will be subject to the level of scrutiny normally accorded to subordinate legislation due to the pressures on parliamentary time. By enacting a piece of primary legislation, London would afford the referendum an appropriate level of political debate and corresponding scrutiny. In essence, democracy would be served. Furthermore, the potential for a legal challenge regarding such a referendum must not be discounted. By allowing the Scottish Parliament to pass a Bill under those circumstances, there exists scope for judicial consideration of the corresponding Act which would not be possible with an Act of the sovereign Parliament. Such a challenge would ultimately be decided in London by the Justices of the Supreme Court and would require sensitive handling, particularly following what some would regard as the SNP's actions in recent years to undermine the authority of the Justices.⁵⁸

Evident from the recent *Axa*⁵⁹ litigation is the courts' traditional deference to the separation of powers. The judiciary have an inherent and constitutionally appropriate distaste for intervening on specific matters of devolution due to the Parliament's legitimacy as a democratically elected body:⁶⁰

A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.

⁵⁶ 'Type A' procedure is to be followed: see Scotland Act 1998, Sch 7.

⁵⁷ Consideration of the issue during the Scotland Bill's stages certainly does not point to it being used for such a significant issue.

⁵⁸ See Owen Bowcott, 'Scotland independence referendum: role of UK supreme court' *The Guardian* (London, 12 January 2012) <<http://www.guardian.co.uk/law/2012/jan/12/scotland-independence-referendum-supreme-court>> accessed 12 June 2012.

⁵⁹ *Axa* (n 29).

⁶⁰ *Axa General Insurance Ltd and Others v The Lord Advocate and Others* [2011] UKSC 46, [49] (Lord Hope).

However, despite such respect for the separation of powers and with reference to these 'exceptional circumstances', there is a stronger force – the rule of law:⁶¹

We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.

Therefore, it is not inconceivable that should the rule of law come under pressure as a consequence of the actions of the Scottish Parliament and Government therein, the judiciary would, at least in theory, be prepared to intervene. Given the nature of the referendum proposed, MSPs must defer to the law and the statutory limitation of their powers. There is no other viable option.

3. Conclusion: The Constitution, Devolution and a Referendum

It is a fundamental principle of the constitution that, irrespective of any party's political mandate to form a Government, all governments must act in accordance with and subject to the rule of law. Likewise, the Scottish Parliament and may make law only within the limits of its competence.⁶²

Scotland could never be provided with a Parliament of the same status as that relinquished in 1707; the sovereignty of the United Kingdom Parliament proscribed it. However, devolution has achieved constitutional change on an unprecedented level, presiding over a transfer of powers from London to Edinburgh. The nature of this constitutional change engenders an exquisite fluidity to the arrangements – 'devolution is a process, not an event'.⁶³ The construction of devolution and the referendum as singularly political issues and not the concern of the constitutional is a false dichotomy. The constitutional significance of the nature and source of the devolved powers, hidden under the behemoth of political consequences which devolution entailed, has perpetuated the constitutional illiteracy which has plagued reform in the United Kingdom.⁶⁴ The British tradition of muddling along, of believing our uncodified constitutional arrangements can survive forever has created a false sense of security.

It is the law which, in the end, may ultimately resolve these questions. The rule of law cannot be circumvented. In focussing upon the constitutional issues at the

⁶¹ *ibid* [51] (Lord Hope).

⁶² House of Lords Select Committee on the Constitution (n 40) [13]-[14].

⁶³ Attributed to Ron Davies < <http://www.assemblywales.org/abthome/role-of-assembly-how-it-works/history-welsh-devolution.htm> > accessed 12 June 2012.

⁶⁴ The unforeseen consequences of the Human Rights Act 1998 being a case in point.

centre of this debate, which in turn respects both the rule of law and the determined will of the Scottish people, the most appropriate conclusion to the referendum debate can be reached. Furthermore, this article has served to illustrate that, despite the parliamentary time devoted to the recent Scotland Act 2012, London would elect to utilise an Order in Council to grant Edinburgh the authority it requires to call a referendum and in seeking recourse to section 30, chooses to exercise a provision of the 1998 Act which cannot have been intended to facilitate such an event. The anti-democratic nature of the prerogative combined with the ability of the courts to adjudicate upon the Scottish Parliament's acts and omissions demonstrate that it embodies an inappropriate exercise of such power. In the words of Lord Hope:⁶⁵

The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament (...) Sovereignty remains with the United Kingdom Parliament.

UK constitutional law is precariously constructed upon relationships of power and accountability. Unlike the sovereign Parliament at Westminster, the Scottish Parliament is accountable both to Westminster and to the courts. The importance of the rule of law in this debate cannot be neglected and our politicians must have regard to the words of Lord Hope; the success or failure of a referendum and the future of devolution may well depend upon it.

⁶⁵ *Axa* (n 60) [46] (Lord Hope).

Section 172 CA 2006: the ticket to stakeholder value or simply tokenism?

RACHEL C. TATE*

1. Introduction

Prior to the Companies Act 2006 (the 'Act'), there had been no definitive legislative statement establishing the core objective of the UK 'corporation'. A determination of the scope of company law and governance – i.e. in whose interests companies should be run – was, therefore, a critical aspect of the reform agenda.¹ The outcome was the concept of 'enlightened shareholder value' (ESV). Central to the advancement of this principle is the duty of directors to promote company success under s172 of the Act.² The aim of this paper is to determine whether the result has been a shift towards a stronger footing for non-member stakeholders in UK corporate governance. It begins by ascertaining whether s172 goes beyond a clarification of existing law. It then examines the new statutory derivative action and its ability to facilitate an enhanced position for stakeholders within the company matrix. Finally, the provision's indirect impact on corporate governance and the correlative area of corporate social responsibility (CSR) will be considered. It will be contended that, ultimately, s172 achieves very little in terms of strengthening the position of broader stakeholders.

2. s. 172: Something Old, Nothing New?

An exact equivalent of s172 was absent in the common law. Nonetheless, it is clearly linked to the pivotal loyalty duty to act in good faith in the interests of the company. Section 172 is, perhaps logically, thought to be the successor of that duty.³ The classic formulation of the duty was made by Lord Greene, who opined: '(...) they [directors] must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company (...)'⁴ In an analogous manner, s172(1) imposes upon directors the duty to act in the way '(...) he considers, in good faith, would be most likely to promote the success of the company for the benefit of its

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¹ Company Law Review Steering Group (CLRSG), *Modern Company Law for a Competitive Economy: The Strategic Framework* (February 1999) paras 5.1.4-5.1.33.

² Companies Act 2006, s 172(1).

³ A Keay, 'The duty to promote the success of the company: is it fit for purpose?' (2010) University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662411> accessed 12 June 2012.

⁴ *Re Smith and Fawcett Ltd* [1942] Ch 304 (CA) 306.

members as whole.⁵ This first component is, therefore, relatively uncontroversial, and appears to be almost a verbatim codification of the common law. It does, however, avoid use of the ambiguous phrase 'interests of the company' and finally settles that, as was already profoundly believed, companies are ultimately to be run for the benefit of their 'members' i.e. shareholders.⁶

It is the second element of s172(1) which is more novel. In discharging the above duty, directors are required to 'have regard' to a non-exhaustive list of factors. Among these factors are: long-term consequences; employee interests; the need to foster relationships with customers and suppliers; and any impact on the community or environment.⁷ This second limb innovatively seeks to '(...) capture cultural change in the way companies conduct their business.'⁸ It aspires to make decision-making more 'enlightened'⁹, advancing the aforementioned concept of ESV. ESV embodies the perception that the promotion of members' interests is unlikely to be achieved if management conduct business in absence of any regard to employees, suppliers and the community in which it is situated; and without fostering relationships with these constituencies. For the first time, UK company law has formally recognised the residual risk borne by these stakeholders and so requires attention to be paid thereto. Finally, the section encourages decision-making from a long-term perspective. It, therefore, steps beyond the common law's narrow focus on shareholder interests, which were frequently viewed in a short-term manner. In this way, it represents a development. Yet, as will become evident, it is one modest and subtle in nature.

The mandatory consideration of broader stakeholders may appear innovative. However, in terms of two of the constituencies, this is in fact a restatement of the common law. First, s172(1) makes no reference to creditors, albeit two potential categories – suppliers and employees – are listed. Subsection (3) does, however, provide that the overriding duty is subject to 'any enactment or rule of law' requiring directors to consider creditor interests in certain circumstances.¹⁰ This preserves existing statutory provisions affording creditor protection e.g. wrongful trading.¹¹ Simultaneously, it recognises the common law position which imposed on directors a duty towards creditors' in times of financial distress.¹² This part of s172, therefore, reaffirms the existing law. By contrast, the interests of employees are expressly included.¹³ This has been viewed, not as a restatement, but actually a weakening of employees' governance position.¹⁴ Directors were previously required to have regard to the interests of employees in the performance of their duties.¹⁵ This has been repealed and employee interests are now only to be considered to the extent that it would promote company success for members' benefit. At the same time, however,

⁵ Companies Act 2006, s 172(1).

⁶ P Davies and J Rickford, 'An Introduction to the New UK Companies Act' (2008) 5 ECFR 48, 65.

⁷ Companies Act 2006, s 172(1)(a)-(f).

⁸ Department for Trade and Industry, *Companies Act 2006: Duties of Company Directors* (Ministerial Statements, 2007) 2 <<http://www.berr.gov.uk/files/file40139.pdf>> accessed 12 June 2012.

⁹ Keay, 'The duty to promote the success of the company' (n 3) 11.

¹⁰ Companies Act 2006, s 172(3).

¹¹ Insolvency Act 1986, s 214.

¹² *Gwyer v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153.

¹³ Companies Act 2006, s 172(1)(b).

¹⁴ S Worthington, 'Reforming Directors' Duties' (2001) 64 MLR 439, 446.

¹⁵ Companies Act 1985, s 309.

the common law duty lacked any enforcement mechanism and was generally considered a 'lame duck'.¹⁶ Thus, the position of employees' is retained as it is neither improved nor diluted under s172.

As highlighted, s172(1) formally obliges directors to consider stakeholder interests during the decision-making process. Yet, it is crucial to note that shareholder interests remain paramount. The interests of non-shareholding groups are to be considered only insofar as it is desirable to '(...) promote the success of the company for the benefit of its members.'¹⁷ A director will not be required to consider these factors beyond the point at which to do so would conflict with the overarching duty to promote company success.¹⁸ Stakeholder interests have no independent value in the consideration of a particular course of action.¹⁹ In addition, no separate duty or accountability is owed to the stakeholders included in the section.²⁰ Thus, the duties of nurturing company success and having regard to the listed interests '(...) can be seen in a hierarchal way, with the former being regarded more highly than the latter.'²¹ Consequently, it would be wrong in principle to view s172 as requiring directors to 'balance' shareholders and stakeholder interests.²² These views are supported by industry guidance published on the effects of s172.²³

Finally, the Act itself states that the duties are 'based on' and 'have effect in place of' the respective common law rules and equitable principles.²⁴ The duties are also to be interpreted and applied in the same way as those rules.²⁵ Correspondingly, the few cases to date which address the section suggest that it simply codifies the existing law.²⁶ This paradox – advocating a new 'inclusive' concept, while endorsing the old shareholder-centric common law – further impedes any potential s172 has to fortify stakeholders' position. Section 172 can, therefore, ultimately be viewed as reiterating the prevailing shareholder-orientated approach to company law and governance.

¹⁶ A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 27 Syd LR 577, 593.

¹⁷ Paul Davies, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) 509.

¹⁸ *ibid.*

¹⁹ Davies and Rickford (n 6) 66.

²⁰ Keay, 'The duty to promote the success of the company' (n 3) 17.

²¹ *ibid* 19.

²² Davies (n 17) 509.

²³ ICSA International, *Guidance on Directors' General Duties* (2007) para 3.2

<<http://www.icsa.org.uk/assets/files/pdfs/080110%20Directors'%20General%20Duties.pdf>>

accessed 12 June 2012; GC100, *Companies Act 2006 – Directors Duties* (2007) 4

<<http://www.practicallaw.com/8-378-8813>> accessed 12 June 2012.

²⁴ Companies Act 2006, s 170(3).

²⁵ *ibid* s 170(4).

²⁶ *Re Southern Fresh Foods Ltd* [2008] EWHC 2810; *Re West Coast Capital (LIOS) Ltd* [2008] CSOH 72.

3. *The New Statutory Derivative Action: an ally or an obstruction to stakeholder participation?*

If s172 is to be advocated as advancing the position of stakeholders in any way, enforcement thereof becomes greatly significant. After all, '(...) a right without a remedy is worthless.'²⁷ A derivative claim may be brought in respect of breach of duty by a director and so, technically, s172 is potentially enforceable via this procedure.²⁸ But if a stakeholder believes that directors have breached s172, can they bring legal action to enforce this duty? Put simply, the answer is no.²⁹ This is for the plain reason that the duty under s172 is owed to the company.³⁰ Consequently, only shareholders, who are entitled to bring derivative proceedings on the company's behalf in certain circumstances, are capable of taking action.³¹

Stakeholders are, therefore, dependent on shareholders to challenge non-compliance. Any action is likely to turn on the existence of altruistic or activist members who are willing to represent and enforce stakeholder concerns. There are only a few perceived situations where a shareholder might do so. These include where a member: views their holding as a long-term investment and is concerned that directors are failing to promote business relations with suppliers/customers; is also an employee; lives in the same community and believes a proposed action – e.g. closure of a factory – will adversely affect constituents; has a particular community/environmental interest.³² The result is that, save where a member has a heightened social conscience, the only anticipated proceedings are those brought by shareholders '(...) whose self-interest in another capacity will be affected deleteriously in some way.'³³

The common law severely limited a shareholder's right to bring a derivative claim.³⁴ The procedure was developed as a tightly-drawn exception to the 'proper-claimant' rule in *Foss v Harbottle*.³⁵ The Law Commission viewed the procedure as unsatisfactory: based on 'complicated and unwieldy' rules, with an unclear criterion for granting leave.³⁶ Against this backdrop, the reform proposed to establish a new derivative claim '(...) with more modern, flexible and accessible criteria.'³⁷ The demanding standards of 'fraud on the minority' and 'wrongdoer control' have,

²⁷ See MW McDaniel, 'Bondholders and Stockholders' (1988) 13 J.Corp.L. 205, 309.

²⁸ Companies Act 2006, s 260(3).

²⁹ A Keay, 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' (2007) 28 Co Law 4 106, 109.

³⁰ Companies Act 2006, s 170(1).

³¹ *ibid* s 260(1).

³² Keay, 'Tackling the Issue of the Corporate Objective' (n 16) 609.

³³ *ibid*.

³⁴ P Beale, 'Directors Beware?' (2007) 157 NLJ 1033, 1034.

³⁵ *Foss v Harbottle* (1843) 67 All ER 189.

³⁶ Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) para 6.4

<http://www.justice.gov.uk/lawcommission/docs/lc246_Shareholder_Remedies.pdf> accessed 12 June 2012.

³⁷ *ibid* para 6.15.

therefore, been discarded in favour of general court discretion.³⁸ Fundamentally, there is also now a presumptive right to claim if the requisite conditions are met.

Nonetheless, a number of obstacles exist to potentially deter a shareholder from mounting proceedings and so from pursuing stakeholder interests. These include the length and complexity of the process itself. Claimants must first establish that there is a *prima facie* case.³⁹ If accepted, the claim proceeds to a full hearing for permission to take a derivative claim. Section 263(2) sets out circumstances in which the court must dismiss an application, with s263(3) listing six factors that the court is to consider when determining whether an application should succeed. The novelty is that it places the decision of whether commencing litigation is in the interests of the company with the court.⁴⁰ It is at this second stage that most claims will likely fail due to the breadth of this discretion.⁴¹ The latter can be allied with a general judicial reluctance to second-guess business judgements. The courts have made it clear that they will not use hindsight⁴² and litigants must still face the traditional suspicion of the courts towards these claims.⁴³ In addition, it will be hard to avoid the second stage turning into a mini-trial and so unduly lengthening preliminary proceedings. Finally, the claim is still framed in a manner which favours management, however permissive its terms might appear.⁴⁴ As was intended, derivative claims continue to be subject to 'tight judicial control'.⁴⁵ They remain a 'weapon of last resort'.⁴⁶

Cost is another practical hurdle facing shareholder litigants and acts as a major disincentive to those seeking to bring a claim.⁴⁷ Legal aid has never been available and any award will be made to the company. The general common law position on costs/fee rules also remains unchanged. The latter is an area that needs to be re-evaluated if any real change is to occur.⁴⁸ In light of the aforementioned complexities, there is nothing in the new procedure to incentivise members to embark on litigation. Instead, discontented shareholders will likely sell their holding and re-invest in a company more aligned with their values.

Even if a claim is permitted to proceed, it is anticipated that breach of s172 will be difficult to prove. This is because directors appear to have unfettered discretion in discharging this duty.⁴⁹ It is for directors, not the court, to determine what the

³⁸ J Sykes, 'The continuing paradox: a critique of minority shareholder and derivative claims under the Companies Act 2006' (2010) 29 CJQ 2 205, 215.

³⁹ Companies Act 2006, s 261(2).

⁴⁰ Davies (n 17) 614.

⁴¹ Alan Dignam and John Lowry, *Company Law* (5th edn, OUP 2009) 190.

⁴² *Re Welfab Engineers Ltd* [1990] BCC 600.

⁴³ A Reisberg, 'Shadows of the Past and Back to the Future: Part 11 of the UK Companies Act 2006 in action' (2009) 2 ECFR 3 219, 225.

⁴⁴ *ibid* 224.

⁴⁵ Law Commission (n 36) para. 6.13.

⁴⁶ D Gibbs, 'Has the statutory derivative claim fulfilled its objectives? The hypothetical director and CSR: Part 2' (2011) 32 Co Law 3 76, 82.

⁴⁷ Dignam and Lowry (n 41) 190-191.

⁴⁸ Reisberg (n 43) 239.

⁴⁹ D Fisher, 'The enlightened shareholder - leaving shareholders in the dark: will s172(1) of the Companies Act 2006 make directors consider the impact of their decisions on third parties?' (2009) 20 ICCLR 1 10, 15

interests of shareholders are,⁵⁰ as well as the extent to which it is appropriate to consider stakeholders in the promotion thereof.⁵¹ Exactly what will promote company success and, indeed, what constitutes 'success', are also matters for the director's own judgement.⁵² There is also no requirement to guarantee success. In response to any claim, directors will inevitably contend that they did have regard to the relevant constituencies and simply believed that the action taken promoted the company's success for its members' benefit.⁵³ If so, it will be strenuous to successfully assert otherwise. Interpretation and application of the section generally are also somewhat problematic given that core terms are not clearly defined. Again, the consensus appears to be that the operation of the individual components of s172 is to be left to directors and their good faith judgment.⁵⁴ Furthermore, s172 explicitly suggests a highly subjective compliance test – requiring a director to act in the way 'he regards' to be most likely to promote company success. As a consequence, there is no definite standard against which to judge any given action. Taken as a whole, it is difficult to anticipate situations in which directors will be held in breach of this obligation.⁵⁵

Finally, it may be asserted that since both present and future members can potentially instigate a derivative claim,⁵⁶ stakeholders could simply buy shares. Despite this possibility, the required consideration of whether the claimant is acting in good faith should filter out any vexatious claims.⁵⁷ The procedural requirements generally are a further restraint on activist groups purchasing shares and claiming their 'pet' interest has not been rightfully considered.⁵⁸ Fundamentally, it is also believed that members who have purchased shares purely to bring derivative claims will be met by a hostile judiciary.⁵⁹ It is, therefore, unlikely that the courts will allow derivative action to become a vehicle for activists. The aforementioned points illustrate that not only will proving non-compliance be a cumbersome threshold, but there may be no one able, or even willing, to commence actual proceedings. Thus, it is highly questionable whether the statutory derivative action will support s172 in directing a stronger position for broader stakeholders in corporate governance.

⁵⁰ A Keay, 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little?' (2011) 22 EBLR 1 1, 24.

⁵¹ Davies (n 17) 514.

⁵² Arad Reisberg, 'Derivative Claims, the UK Companies Act 2006 and Corporate Governance: a Roadmap to Nowhere?' in J. Jay Choi and Sandra Dow (eds), *Institutional Approach to Corporate Governance: Business Systems and Beyond* (International Finance Review, volume 9), (Emerald 2008) 337-84, 354.

⁵³ Keay, 'Tackling the Issue of the Corporate Objective' (n 16) 609.

⁵⁴ Keay, 'Moving Towards Stakeholderism?' (n 50) 30.

⁵⁵ S Kiarie, 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) 17 ICCLR 11 329, 340.

⁵⁶ Companies Act 2006, s 260(4).

⁵⁷ *ibid* s 263(3)(a).

⁵⁸ A Alcock, 'An accidental change to directors' duties?' (2009) 20 Co Law 12 362, 368.

⁵⁹ Reisberg, 'Derivative Claims' (n 52) 361.

4. CSR: the only viable route to stakeholder influence?

Notwithstanding these doubts, s172 may serve to indirectly strengthen the position of broader stakeholders. Keay asserts that the explicit inclusion of stakeholders in s172 may persuade boards to take into account their interests in a more conspicuous manner than was previously the case.⁶⁰ Others are of the opinion that it does not enshrine any radical change, given that large corporations were already taking into account broader stakeholder interests.⁶¹ Certainly, most large companies already disclosed adherence to CSR strategies and so s172 may be regarded as codifying existing commercial practices. Either way, what it does do is to statutorily recognise the importance of CSR. It emphasises that corporations do not operate in a vacuum; their activities impact and are impacted by a variety of stakeholders.⁶² To this extent, s172 may be viewed as a normative measure which, when combined with stakeholder/media pressure, will encourage more inclusive decision-making.⁶³

In a similar way, the obligation to produce an annual Business Review may to some extent compensate for the sections' lack of direct enforceability.⁶⁴ Its stated purpose is to inform members how directors have performed their duty under s172.⁶⁵ Crucially, it requires disclosure of information and policies on matters including the environment, community and company employees.⁶⁶ It, therefore, provides the information and transparency needed to underpin a more inclusive approach to governance and also establishes a 'mutually reinforcing' link between directors' duties and narrative reporting. It is unfortunate that it lacks the comprehensive guidance framework and reporting standards that featured in the originally proposed OFR. Nevertheless, requiring information on how a company is run may have its own value. Naturally, companies would not wish to have to make public that they do not respect or consider broader stakeholders. Reputation is, after all, vital to corporate success.

Fundamentally, however, stakeholders are not granted any rights under company law or included within the UK corporate governance model. In respect of any purported breach of duty, stakeholders will ultimately need to rely on protection afforded to them by specific employment, insolvency or environmental legislation. Indeed, this is where the CLRSG believed certain safeguards to lie.⁶⁷ A core governance concern is directorial accountability and consequently the appropriate allocation of rights to those affected by corporate activity. From this perspective, the *status quo ante* – significant discretion and power to the board, with correlative rights for shareholders – remains intact.

⁶⁰ Keay, 'Moving Towards Stakeholderism?' (n 50) 40.

⁶¹ Alcock (n 58) 368.

⁶² J Yap, 'Considering the enlightened shareholder value principle' (2010) 31 Co Law 2 35, 37.

⁶³ Fisher (n 49) 16.

⁶⁴ Companies Act 2006, s 417.

⁶⁵ *ibid* s 417(2).

⁶⁶ *ibid* s 417(5).

⁶⁷ CLRSG, *Modern Law for a Competitive Economy: Developing the Framework* (March 2000) para. 2.12.

5. Conclusion

Section 172 provides the first legislative mandate as to in whose interests' directors are to act. The underlying corporate objective of 'enlightened shareholder value' is intended to foster an inclusive approach to business relationships. Accordingly, s172 formally requires directors to have regard to broader stakeholders. It may at first blush appear to elevate stakeholders to a higher standing. But the 'devil is in the detail'. Any consideration must be such that it does not impinge on shareholder benefits.⁶⁸ The crux of the section is an overarching duty to promote company success for the benefit of its members. Such will be the determining question in any decision subsequently challenged. Moreover, and fatal to the hope of any stronger footing for broader stakeholders, is the absence of any enforcement mechanism. For non-member stakeholders, s172 is, therefore, a paradigmatic example of the realism that '(...) a duty is only as useful in law as it is enforceable'.⁶⁹ As suggested, it is highly unlikely that shareholders will undertake an uncertain, complex and costly derivative claim on their behalf. Hence, both the 'new' duty and derivative claim fall substantially short of strengthening stakeholders' position in corporate governance. Consequently, the economic agency relationship - directors as agents and shareholders as principals - continues to dominate UK corporate governance. In short, '(...) protection of the interests of stakeholders is left not to any specific rights (...) but wholly to the discretion of directors.'⁷⁰

⁶⁸ Keay, 'Moving Towards Stakeholderism?' (n 50) 28.

⁶⁹ Peter Loose, Michael Griffiths and David Impey, *The Company Director: Powers, Duties and Liabilities* (10th edn, Jordans 2008) 19.

⁷⁰ Keay, 'Moving Towards Stakeholderism?' (n 50) 35.

Souvenirs of Scotland

DOUGLAS BAIN# AND CATHERINE BURY*

1. Introduction

The Keeper of the Registers of Scotland has recently issued a warning to those with social aspirations that they may not get what they desire when they buy a small plot of land in Scotland in the expectation that ownership carries with it the right to use the title of laird, lord or lady.¹ This was a response to reports in the media regarding a number of companies who were offering for sale tiny pieces of land known as 'souvenir plots'. Statute currently defines a souvenir plot as being '(...) a piece of land which, being of inconsiderable size or no practical utility, is unlikely to be wanted in isolation except for the sake of mere ownership or for sentimental reasons or commemorative purposes.'² This article will consider some of the possible justifications for the Keeper's current practice of refusing the registration of such plots, the consequences of that practice and also how proposed statutory reform will impact upon the issue.

2. Background

A brief internet search reveals a number of websites offering souvenir plots of the type described above for sale. The websites may be new but attempts to sell souvenir plots and dubious titles were known at least as far back as the 1960s. The Keeper's article notes:³

The Keeper is required to reject an application for registration in the Land Register, if the land to which it relates meets the description of "souvenir plot". However, the fact that the Keeper is obliged to reject registration does not necessarily mean that "ownership" can be obtained by some other means.

In so stating, the Keeper is responding to statements such as the following 'question and answer' section which offers a good example of those contained on such websites:⁴

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¹ Registers of Scotland, 'Caution the souvenir hunters' (*Journal of the Law Society of Scotland*, 12 April 2012) <<http://www.journalonline.co.uk/Magazine/57-4/1011036.aspx>> accessed 12 June 2012.

² Land Registration (Scotland) Act 1979, s 4(1)(b).

³ Registers of Scotland (n 1).

⁴ See <http://www.monarchoftheben.co.uk/become_a_laird_or_lady.htm> accessed 12 June 2012.

Do I need to register my souvenir plot of land?

No. The Land Registration (Scotland) Act 1979 Section 4 (1)(b) specifically removes the requirement to register the land, because this is a souvenir plot. Unlike in England, Scotland has removed the need to register your purchase in order to be the owner of the land, thus permitting the transfer of title to take place under Contract Law. By removing the need to register the transfer, small plots of land can be sold without the expenses which would otherwise make this uneconomical.

Thus, the fact that a plot of land may not be registered in the Land Register is 'spun' into being a positive, liberating factor, opening up simpler and cheaper options whereby the aspiring laird or lady may become the owner of their own little piece of heaven in the Highlands. The sleight of hand used is the method of reframing the words 'cannot register' to 'do not need to register', the latter being a use of words in which Trading Standards and the Advertising Standards Agency might reasonably have an interest.⁵ It is not surprising that the Keeper felt the need to controvert such misleading claims.

3. Analysis

Every law student knows and the Keeper points out⁶ that real right of ownership of land in Scotland can only be acquired following delivery to the purchaser of a signed disposition followed by registration of that disposition in the Land Register or recording in the Sasine Register as appropriate. One of the websites is currently offering one foot square mini-estates in Lochaber for sale for £29.99. It is clear that any resulting transfer triggers the statutory requirement for registration under section 2 of the Land Registration (Scotland) Act 1979 (the '1979 Act'). This is true whether the transfer is of an interest in unregistered land for a valuable consideration thus triggering first registration in the Land Register, or a transfer of an already registered interest in land. In any event, the effect of registration of the disposition is to vest in the person entitled to the registered right in the land (i.e. the purchaser), the real right of ownership and all that flows on from that, *per* section 3(1)(a) of the 1979 Act. In contrast to a personal right, a real right is effective against challenge by any person.

But, while the Sasine Register is more tolerant of souvenir plots,⁷ the Land Register abhors them. As a real right is dependent upon registration, the best the aspirant laird can expect for his £29.99 is a personal right against the seller. In her article, the Keeper recruits to her cause the battalions of the Court of the Lord Lyon to comment on the correct usages of the terms 'laird', 'Lord' and 'Lady'. The Court reminds readers that only those people who have been bestowed with a peerage can correctly use the title 'Lord' or 'Lady'.⁸ Similarly, the word 'laird' is a historical term

⁵ For example, the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277.

⁶ Registers of Scotland (n 1).

⁷ Scottish Law Commission (SLC), *Report on Land Registration Volume One* (Scot Law Com No 222, 2010) 129.

⁸ Registers of Scotland (n 1).

often used by the people in a district to refer to the owner of a large Estate on which their ancestors are likely to have derived their livelihood.⁹ It is not a title and it is not possible to derive the right to be referred to as 'laird', 'Lord' and 'Lady' from the ownership of a souvenir plot.¹⁰

Certain companies do present themselves as intermediaries between the sellers and buyers of Barony titles which would allow the owner to utilise that title. Section 63(1) of the Abolition of Feudal Tenure (Scotland) Act 2000 makes the title separable from land where previously the ownership of the *caput baronium* (usually a castle or other piece of ground), allowed that owner to petition the Lord Lyon for an appropriate grant of arms. But this is heraldry, whereas the Keeper's warning (and this article) seeks to address the claims made on what is clearly a very different class of website.

The Scottish Law Commission has consulted on a suggestion that the provision in the 1979 Act regarding souvenir plots should be repealed, as had been done in England and Wales in 2002.¹¹ The proposal garnered some support, but was controversial, and was opposed by the Keeper and the Scottish Law Agents Society.¹² In its 2010 Report on Land Registration, the Scottish Law Commission concluded that the provisions in the 1979 Act should stand, subject to minor amendment to the definition of 'souvenir plot'.¹³

The proposed legislation currently before the Scottish Parliament intended to give effect to the Scottish Law Commission Report, the Land Registration etc. (Scotland) Bill (the 'Bill'), amends the 1979 Act by inserting into it:¹⁴

In subsection (1)(b), "souvenir plot" means a plot of land which –
(a) is of inconsiderable size and of no practical utility, and
(b) is neither –
(i) a registered plot, nor
(ii) a plot the ownership of which has, at any time, separately been constituted or transferred by a document recorded in the Register of Sasines.

Thus, existing souvenir plots are protected and the definition becomes subject to a double test of size *and* practical utility, as opposed to small *or* of no practical utility. Whilst the provisions in the Bill are an improvement, they nevertheless preserve the argument for further reform, for land use should never be stereotyped – what is a worthless corner of a field now might be at the very centre of a prestigious new shopping centre in ten years' time. Today's souvenir plot might easily be 2022's valuable ransom strip. True worth sometimes takes a few years to become apparent.

Registers of Scotland, the government body responsible for compiling and maintaining registers relating to property and other legal documents in Scotland, is intended to be self-financing. Registration fees cover the cost of registration activities

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Scottish Law Commission (SLC), *Discussion Paper on Land Registration: Registration, Rectification and Indemnity* (Scot Law Com No 128, 2005) 52-53.

¹² SLC Report No 222 (n 7) 129.

¹³ *ibid.*

¹⁴ Land Registration etc. (Scotland) Bill, s 22(2).

and can be seen to have increased over the years to cover the Registers' costs. The sellers of souvenir plots alluded to by the Keeper make a virtue of the fact that registration is not possible, allegedly facilitating bargain basement prices and all of the 'protection' of Scots contract law that is available to the holders of personal and not real rights in the ownership of land. The dangers of this situation were recognised by the Scottish Law Commission in 2005:¹⁵

If the original purchase was a bad bargain, it is made worse by paragraph...[4(1)(b) of the 1979 Act]. In the absence of registration, the purchaser is vulnerable to the insolvency of the souvenir plot provider, and to the possibility that the same plot is re-sold to someone else. The latter in particular seems an obvious risk, for without registration there is no practical check on the repeated sale of the same plot.

Of course, the purchasers of unregistrable souvenir plots in Scotland may point to their holding of a signed disposition delivered by the seller (allowing the spectre of *Sharp v Thomson*¹⁶ to rattle its chains, for what would the purchaser have if not a beneficial interest?), but the right of the beneficiary remains personal. It is only on registration of a signed disposition that the grantor is divested of land.

How, one asks, might an aggrieved plot-purchaser, denied registration, pursue the Keeper for remedy? There is, of course, the right of appeal to the Land Tribunal for Scotland, conferred under section 25 of the 1979 Act. The section deals with '(...) an appeal (...) on any question of fact or law arising from anything done or omitted to be done by the Keeper under this [the 1979] Act.' However, it is unclear how such an application might fare under this section as long as the Keeper abides by the existing terms of section 4(1) of the 1979 Act now and as amended in the future. As we have seen, the current law applies the 'two options' test of 'small or of no practical utility', and even under the new law the Keeper would surely continue to regard the matter as one of fundamental principle. At the very least, any such application could give the Lands Tribunal a considerable headache.

In a scenario in which company X disposes land – 9 sq ft – to person Y, who wishes to acquire it and (i) the plot can be identified on the Ordinance Survey map, and (ii) X very ostentatiously gives up possession of the plot to Y, who takes up possession *qua* 'owner', why then should the Keeper refuse registration, given that the persons having interests in the land agree that the transfer should take place and the cost of the process is covered in the fees?¹⁷ The true justification for the Keeper

¹⁵ SLC Report No 222 (n 7) 52-23.

¹⁶ 1997 SC (HL) 66. In *Sharp*, the House of Lords, giving rise to no small consternation, determined that the unregistered proprietors of heritable property falling within the scope of a floating charge had a beneficial interest in those subjects where the charge had crystallised and the receiver had been appointed. Some years later, in *Burnett's Trustee v Grainger* 2004 SC (HL) 19, the House of Lords decided that *Sharp* was confined to floating charges, i.e. made the case subject to a *cordon sanitaire*. Of course, in *Sharp*, the purchasers' title was registrable, whereas in souvenir plot cases statute allows the Keeper to reject applications for registration, but the point is that any such debate might involve the exhumation of *Sharp*, whereas the consensus surely favours leaving it in the box.

¹⁷ Indeed, s 9 of the 1979 Act allows the Keeper to rectify the register whether on being requested or not. In the scenario above, the Keeper might not wish to agree to a request from X and Y to rectify because from her perspective the result of such a rectification would be to create an 'orphan' piece of

refusing registration might well be rooted in public policy, for factors (i) and (ii) being present and the costs of registration being covered in the fees, mere administrative convenience cannot be a justification. The Scottish Law Commission's arguments for protecting the purchaser have already been mentioned. A public policy argument might be founded upon the proposition that it is not good policy to, for example, take a piece of land of 10,000 sq. ft. and break it into 400 x 25 sq. ft. parcels, destroying the long term economic value of the land and storing up all forms of dispute.¹⁸ But in reality, it may be a motive for the subdivision of land into tiny plots to preserve rather to render fractious a community; for example, from the construction of 'the world's greatest golf course' around a fragile though important and beloved sand dune environment.

Whatever the justification is for refusal, the effect is to introduce into the Land Register a *de minimus* rule in respect of the ownership of land in Scotland, the precise boundaries of which are subject to the discretion of the Keeper.

In common ownership, four hundred people may be common owners of a piece of land of 10,000 sq. ft. There is no limit to the number of co-owners in Scotland¹⁹ and as the land is held *pro indiviso*, the Keeper should not cavil against registration.²⁰ It is uncontroversial that in common property *in communionem vel societatem nemo compellitur invitus detineri* – '(...) where property in land or houses is held in common, and division is possible, it is a rule that no one is bound to remain in community, but may insist for a division.'²¹ It is only relatively recently that Scots law has, in the transition from the old *briefe of division* to the modern action for sale and division, shifted from physical division to the sale of a whole and the division of the proceeds. If the four hundred co-proprietors of a 10,000 sq. ft. plot of land owned *pro indiviso* are able, through a process of discussion and the drawing of lines on a map and, perhaps, the casting of lots, to identify their 25 sq. ft. plots and go to a court to seek division, a court would have to be particularly inventive in order to deny that division and instead decern the sale of the whole so as not to inconvenience the Keeper.

It may come to be that with the passage of time the 'owners' of a large number of 'souvenir plots' might form the desire to become the co-owners of a single united piece of ground; a form of ownership more palatable to the Keeper. Section 2(1)(b) of the 1979 Act would appear to allow for this possibility, but how can the Keeper join together what she has refused to put apart? However, these are admittedly *reductio ad absurdum* examples, and it is recognised that for practical purposes the amendments proposed in the Land Registration etc (Scotland) Bill should militate against them.

land – not owned by X and not registerable by Y, but an argument that "I cannot rectify because I cannot thereafter register" is surely a species of *post hoc ergo propter hoc*. Actual rectification, of course, leads on to a whole raft of new problems if the Keeper denudes X but refuses to register Y.

¹⁸ For example, an application of all of the dogma of common property, *communio est mater rixarum &c*, to sole ownership, albeit of a miniature plot.

¹⁹ See Kenneth Reid, *The Law of Property in Scotland* (LexisNexis UK 1996) para 28; *Menzies v Macdonald* (1854) 16 D 827.

²⁰ George Gretton and Kenneth Reid, *Conveyancing* (4th edn, W Green 2011) 7-12.

²¹ Bell, *Principles*, § 1079.

4. Conclusions

If there is to be any restriction on the purchase and sale of souvenir plots, the Bill must surely be an improvement on the Keeper's current position. However, if both purchaser and seller wish the transfer of the land and the plot is readily identifiable, how can the Keeper refuse to complete the transfer of the real right? It is very difficult for the Keeper to decide on the face of a transaction whether the ground should be transferred because it may be too small or has no apparent use. The issue of those persons offering the sale of souvenir plots in the face of the Keeper's refusal to deal with them are misleading potential purchasers and this is, it is submitted, an issue of consumer protection rather than conveyancing.

Finally, if a purchaser truly wants a title they can contact a Barony broker of the type referred to above, one of which, it is noted, is currently intimating for sale a good, marketable and legally valid right to be called Baron for a mere £65,000. Bargain basement 'titles' cannot compete.

Case Comment: *Aguirre Zarraga v Simone Pelz*

JAYNE HOLLIDAY*

1. Introduction

Mutual trust between Member States is a fundamental requirement for both the recognition and the enforcement of judgements across Member States. This common understanding between judicial authorities is central to the functioning of the European Union (EU) and exists between states when the '(...) respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union Level, in particular in the Charter of Fundamental Rights'.¹ However, it is arguable that this 'cornerstone of judicial co-operation'² has been put at risk following recent European jurisprudence in the case of *Aguirre Zarraga*.³ This article will demonstrate that in the absence of a power of review by the court of enforcement, a strict interpretation of Brussels IIbis Regulation⁴ risks eroding the trust between the courts of the Member States. In addition, it will consider that whereas the principle of mutual trust, in theory, offers a non-rebuttable presumption of equivalent human rights protection, the outcome of this case suggests otherwise.⁵

2. *Aguirre Zarraga*

A. The Facts

The couple at the centre of the case, Aguirre Zarraga and Simone Pelz, were married in Spain in 1998 and had a daughter, Andrea, in 2000. Following the couple's separation in 2007, the Spanish courts provisionally awarded custody to the father and the mother returned home to Germany. During the summer of 2008, Andrea

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¹ Case C- 491/10 *Joseba Andoni Aguirre Zarraga v Simone Pelz*, (CFI, 22 December 2010) para 70.

² European Council, 'Presidency Conclusions' (Tampere, October 1999) [33]-[34]

<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm> accessed 12 June 2012.

³ *Aguirre Zarraga* (n 1).

⁴ Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in parental responsibility (Brussels IIbis Regulation) [2003] OJ L338/1, repealing Regulation (EC) No 1347/2000.

⁵ Camille Dautricourt, 'A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law; Trends and Implications' (October 2010) Jean Monnet Working Paper <<http://centers.law.nyu.edu/jeanmonnet/papers/10/101001.pdf>> accessed 12 June 2012.

travelled to Germany to stay with her mother. However, when she was not returned to Spain, the father applied for her return under the Hague Convention on the Civil Aspects of International Child Abduction (the 'Abduction Convention'). This application was refused by the German courts on the basis of Article 13(b) of the Abduction Convention as Andrea was 'categorically opposed to return'.⁶ The decision was, in part, founded upon the opinion of an expert witness, who stated that Andrea's views should be taken into account in light of her age and maturity.⁷

The father sought to challenge the German court's judgement. During subsequent custody proceedings in Spain, the Spanish court attempted to obtain 'fresh expert opinion' and a date was set for Andrea's evidence to be heard there.⁸ However, following the imposition of a condition upon Andrea and her mother that they would not be free to leave Spain after the hearing, Andrea failed to attend court in Spain and was also denied permission to be heard via videoconference.⁹ In December 2009, the Spanish Court awarded sole custody to Aguirre Zarraga, requiring Andrea's return to Spain. Following the award of sole custody, a series of appeals were initiated. The first appeal was made by the mother, on the grounds that Andrea should have been heard by the Spanish court. The Spanish court then certified their December 2009 decision in accordance with Article 42 of the Brussels *Ibis* Regulation,¹⁰ leading the mother to request non-recognition of the judgement by the German courts, which was duly granted. The father, in turn, appealed this decision, which is where the difficulties began.

B. The Judgements

As a requirement of Brussels *Ibis*, courts have a duty to hear the child and in situations where a judgement is enforced by the issuing of an Article 42 certificate, it is reiterated that the child must be heard. Furthermore, paragraph 11 of the Article 42 certificate requires the court of origin¹¹ to expressly confirm that the child has been given this opportunity, unless it was considered inappropriate having regard to their age and maturity.¹² To confirm that the child has been heard, when they have not, represents a procedural breach. It would appear reasonable to suggest that a judgement, which contains a procedural breach such as this, cannot be enforceable. However, the European Court of Justice (ECJ) decided otherwise.

⁶ *Aguirre Zarraga* (n 1), Opinion of AG Bot, para 42.

⁷ *ibid.*

⁸ *ibid* para 44.

⁹ *ibid.*

¹⁰ Under Art 42 of the Brussels *Ibis* Regulation, an enforceable judgement for the return of a child given in a Member State is to be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgement has been certified in the court of origin in accordance with Art 42(2).

¹¹ Under Art 2(5) of the Brussels *Ibis* Regulation, the term "Member State of origin" means the Member State where the judgment to be enforced was issued. Whilst under Art 2(6), the term "Member State of enforcement" means the Member State where enforcement of the judgment is sought. For the purposes of this paper, the former will be referred to as the 'court of origin' whilst the latter will be referred to as the 'court of enforcement'.

¹² Brussels *Ibis* Regulation, Annex IV para 11. Both courts agreed that Andrea's views could be heard.

Aware that they had no power to review a certified judgement following the decisions found in *Povse*¹³ and *Rinau*,¹⁴ the German court referred *Aguirre Zarraga* to the ECJ believing they should have such a power in cases where there had been 'serious infringements of fundamental rights.'¹⁵ The German court asked two questions of the ECJ:

(1) Where the judgement to be enforced in the Member States of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Brussels IIbis Regulation] in conformity with the Charter of Fundamental Rights?

(2) Is the court of the Member State of enforcement obliged to enforce the judgement of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Brussels IIbis Regulation] contains a declaration which is manifestly inaccurate?

Surprisingly, the ECJ replied that the court of enforcement (i.e. the German court) had no power of review; the court of origin (i.e. the Spanish court) retained the sole power of review. Furthermore, the court of enforcement was obliged to enforce the judgement.¹⁶ The ECJ's ratio for this was that mutual trust between states was sufficient to protect fundamental rights and that Germany should trust the Spanish court to uphold the obligation to protect fundamental rights.¹⁷

From the perspective of the Spanish court, they had not breached the child's right to be heard, as they have provided the child with the *opportunity* to be heard.¹⁸ The fact that the mother had refused the child this opportunity, does not detract from the fact that it was offered. However, this in itself may be an argument for making a special effort to hear the child using other methods, as the child herself did not refuse; she had her rights denied by her mother.¹⁹ At this point, it should be remembered that the courts do not have a duty to hear the child if the child refuses to participate.²⁰ Therefore, it could be argued, as was held by the Advocate General, that Spain had satisfied the requirements of the Article 42 return order.²¹

¹³ Case C-211/10 *Povse v Alpagó* (ECJ, 1 July 2010); [2011] Fam. 199. The enforcement of a certified judgment which requires the return of the child may not be refused either on account of a judgment delivered subsequently by a court of enforcement or on account of a change of circumstances after its delivery.

¹⁴ Case C-195/08 *Rinau v Rinau* [2008] ECR I-5271. An application for non-recognition of a judicial decision is not permitted if an Art 42 certificate has been issued.

¹⁵ *Aguirre Zarraga* (n 1), Opinion of AG Bot, para 52.

¹⁶ *ibid* para 128.

¹⁷ *ibid*.

¹⁸ *ibid* para 44.

¹⁹ Giacomo Biagioni, 'The Aguirre Zarraga case: the freedom of circulation of judgements goes one step further' (Conference on International Law, University of Madrid, July 2011) section 3.

²⁰ Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (OUP 1999) 179.

²¹ Biagioni (n 19) section 5.

From Germany's perspective, Spain's actions fell short of the requirements for mutual trust; Spain failed to provide an effective and equivalent protection of fundamental rights. Germany's procedural rules provide a high standard of protection for the right of the child to be heard, indeed, it is '(...) standard practice for the child to be interviewed by the judge.'²² In the view of the German court, by failing to hear Andrea, the Spanish court breached the requirements of Article 42. Furthermore, it has been suggested that hearing the child is an integral part of the right to a fair trial and by not hearing the child, Spain has possibly breached this right.²³ If, as other authors have suggested, the case of *Aguirre Zarraga* could proceed to the European Courts of Human Rights (ECtHR), it is likely that the court would find in Andrea's favour.²⁴

Is it really necessary that all children have the opportunity to be heard in abduction cases? If we are to satisfy the standards expressed in the United Nations Convention on the Rights of the Child, then the answer is yes. If we take an emotive stance, then it is argued that giving the child the opportunity to be heard can avoid subjecting vulnerable people to extreme distress. In the English case of *Re M*, it was decided that it was in the best interest of two boys, aged 11 and 10 years, to return from England to their father in Australia.²⁵ The judge did not hear the boys and the mother consented to accompany them on their return. However, prior to the return flight '(...) the boys, who embarked alone (...) were very upset and the elder one created a scene so violent that the captain of the aircraft refused to take off with them on board.'²⁶ Despite the intervening circumstances of the mother's absence at the time the boys boarded the flight,²⁷ the strength of the children's objection to being returned can neither be refuted nor ignored.

The Brussels *Ibis* Regulation is clear that children in abduction cases have the right to be heard. It also states that a certificate enforcing a judgement under Article 42 cannot be submitted unless the child has been given an opportunity to be heard. In *Aguirre Zarraga*, the fact that Spain did not hear Andrea was undisputed. Yet for the German court, this represented a procedural breach of fundamental rights. Even so, the Advocate General held that Andrea had been heard - in Germany. So the underlying question centred upon whether the hearing that took place in Germany was sufficient to satisfy the obligation to hear the child under Article 42(2).²⁸

The German Government, European Commission, Greece, France and Latvia all submitted views that the hearing in the court of enforcement failed to satisfy the requirements prescribed by Article 42 to hear the child.²⁹ The reason given was that it would mean that the state of origin would be 'discharged from their obligation to

²² Anne-Marie Hutchinson, 'CAFCASS' (Reunite International Conference, 10 May 2007) para 22 <<http://www.reunite.org/edit/files/Library%20-%20Conference%20Papers/CAFCASS%20Paper%2008.05.07.pdf>> accessed 12 June 2012.

²³ L Walker and P Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approach of the European Court of Human Rights and the European Court of Justice' (2011) 17 *Journal of Private International Law* 2 231, 243.

²⁴ *ibid.*

²⁵ *Re M (A Minor) (Child Abduction)*[1994] 1 FLR 390.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *Aguirre Zarraga* (n 1), Opinion of AG Bot, para 63.

²⁹ *ibid* para 65.

hear the child' if it was acceptable to only consider the evidence from the court of enforcement.³⁰ They also argued that the two states would have differing reasons for the hearing; the hearing before the court of enforcement related to the return of the child whereas the hearing for the purpose of Article 42(2)(a) was intended to enable a final ruling to be given on rights of custody in respect of the child and, therefore, had a much wider scope. With these differing objectives, the information gathered in the state of enforcement would have little value to the state of origin.³¹ It was also contended that the evidence was outdated due to the fact that nine months had elapsed between the time when Andrea had been heard in Germany and when the Spanish judgement for enforcement took place.³² However, the Advocate General did not share this view. It was decided that the hearing held in Germany was sufficient to satisfy the requirements for the child to be heard under Article 42. Even if it did not and Andrea had not been heard, a Member State could not oppose a certified judgement. In the Advocate General's opinion, the hearing in Germany had to be given an interpretation which would be understood by all Member States.³³ Moreover, the Advocate General held that Spain had given Andrea the opportunity to be heard and that a child's opinion was not binding on the court.³⁴ Recognition was also given to the fact that Spain had considered the evidence from the German hearing.³⁵

The reasoning expressed above by the German Government unwittingly supports genuine mutual trust. It is a valid point that the state of origin should not be able to discharge their obligations when the protection of fundamental rights is the issue. This was, unfortunately, not followed in the final ruling from the ECJ in *Aguirre Zarraga*, whereby the court of enforcement is unable to oppose a certified judgement even if there is a fundamental procedural breach. Moreover, the court of origin has exclusive jurisdiction to assess any breach, creating an imbalance of power between the Member States. In order for it to be acceptable to Member States, the principle of mutual trust is usually tempered by the ability to refuse cooperation based on their human rights obligations found within Article 23(b) of the Brussels IIbis.³⁶ It states that a ground for the non-recognition of the judgement is '(...) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought.' Yet Article 42 is an exception to this rule as where there is a violation of the principle of procedure of the Member State in which recognition is sought, there is no possibility of opposing the recognition of the judgement.

The principle of mutual trust has great value in the functioning of the Abduction Convention and the European judicial system. It should not, therefore, be undermined. If Spain had made arrangements to hear Andrea, arrangements that were available to the Spanish courts at the time, then the argument by Germany for

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ *ibid* para 78.

³⁴ *ibid* para 78.

³⁵ *ibid* para 103.

³⁶ Dautricourt (n 5) 13.

non-return based on the procedural breach of the right of the child to be heard would not have stood. However, it should be remembered that if this were solely an Abduction Convention case, as opposed to one which falls under Brussels IIbis Regulation, Germany's non-return order would have been final.³⁷ Under the Abduction Convention, Article 13(b) provides grounds for non-return by the court of enforcement in order to protect the child in exceptional circumstances. Brussels IIbis, therefore, seriously undermines the Abduction Convention by introducing the Article 42 certificate which overrules these exceptions. The argument in support of the Article 42 certificate is that Member States should trust one another to ensure genuine protection of rights. Yet it could be argued that trust should exist between Member States not to take advantage of these exceptions.

C. The Consequences of the Judgement

The ECJ's decision leaves Member States with a judgement which undermines the Abduction Convention, mutual trust and fundamental rights. It also fails to clarify whether Germany must wait until after the appeal in the Spanish court in order to enforce the judgement or whether they have to enforce it irrespective of the appeal.³⁸ The first option causes additional delay which is not in the child's best interests, but creates the possibility that the breach may be amended by the Spanish court asking that the child be heard. However, it is likely that Spain could argue that having given the child the opportunity to be heard, which was turned down, they have satisfied their legal requirement.³⁹ The second option results in the enforcement of a judgement which Germany considers to be in violation of fundamental principles of their procedural rules, which would also constitute a breach of Article 6, ECHR.⁴⁰ Furthermore, Germany would also be held liable for the breach of the procedural rules. Both options are unsatisfactory with regard to the child's best interest.

Therefore, the ECJ may be seen to have failed to consider the practical application of the judgement. Following the introduction of the Abduction Convention and the subsequent evolution of children's rights, it is questionable whether child abduction cases can continue to be held without granting respect to the right of all children to be heard. Despite this, the current jurisprudence from the ECJ remains unsupportive of this position. The margin of appreciation inherent in interpretation of procedural rules and of legislation by Member States erodes the possibility of a genuine mutual trust, thereby reducing the protection of fundamental rights for some European children. Furthermore, the recent suggestion that Europe must clarify whether mutual trust should prevail over human rights failed to take into account the contribution that mutual trust can make to the overall protection of

³⁷ Walker and Beaumont (n 23) 247.

³⁸ *ibid* 243.

³⁹ *ibid*.

⁴⁰ *ibid* 244.

these rights.⁴¹ In sum, the ECJ has interpreted this principle to the detriment of fundamental rights, a situation that demands urgent review.

3. *The Approach Elsewhere*

A. The Approach of the European Court of Human Rights

The ECtHR has confounded the balance between mutual trust and fundamental rights, erring in favour of fundamental rights. Recent jurisprudence from the ECtHR appears to support the idea that Article 8 of the European Convention on Human Rights ‘trumped’ the Abduction Convention, indicating that there needed to be ‘a full best interests’ test in child abduction cases.⁴² This approach potentially undermined the functioning of the Abduction Convention, not to mention the principle of mutual trust, enforced or otherwise.⁴³ Indeed, the rulings from *Neulinger*⁴⁴ and *Rabin*⁴⁵ caused great consternation amongst family lawyers and academics alike, prompting the Hague Conference to highlight the lack of harmony and consistency created by the ECtHR rulings against the purpose of the Abduction Convention. As Van Loon pointed out in his address to the Legal Advisers of the Council of Europe in March 2011, it is ‘(...) not the function of a court dealing with a return application under the 1980 [Abduction] Convention to conduct an in-depth examination into the entire family situation i.e. a full ‘best interests’ test.’⁴⁶ Extrajudicially, the President of the ECtHR, Jean Paul Costa, made a point of emphasizing that the jurisprudence from the ECtHR in no way undermined the Abduction Convention,⁴⁷ asserting that the need for a full welfare assessment in *Neulinger* was due to the ‘crucial factor of time’ and arguing that delay in the court proceedings necessitated a fresh look at the circumstances.⁴⁸

As observed, if the mother in *Aguirre Zarraga* decided to take the case to the ECtHR, it is highly likely that the ECtHR would rule in favour of the child staying in Germany due to the fact that she is now settled there.⁴⁹ Walker and Beaumont

⁴¹ Gilles Cuniberti and Isabelle Rueda, ‘Abolition of the Exequatur, Addressing the Commissions’ Concerns’ (2010) University of Luxembourg Working Paper No. 2010-03 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691001> accessed 12 June 2012.

⁴² P McEleavy, ‘Brussels II Bis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition’ [2004] 53 ICLQ 503, 510.

⁴³ *ibid.*

⁴⁴ *Neulinger and Sharuk v Switzerland* App no 41615/07 (ECtHR, 6 July 2010).

⁴⁵ *Raban v Romania* App no 25437/08 (ECtHR, 26 October 2010).

⁴⁶ Hans Van Loon ‘Interaction between recent case-law of the European Court of Human Rights and the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction’ (41st Meeting of the Committee of Legal Advisers on Public International Law, Strasbourg, 17 March 2011) para 15 <<http://www.hcch.net/upload/coe2011.pdf>> accessed 12 June 2012.

⁴⁷ Jean-Paul Costa, ‘The Best Interests of the Child in Recent Case-Law of the European Court of Human Rights’ (Franco-British-Irish Colloque on Family Law, Dublin, 14 May 2011) <http://www.echr.coe.int/NR/rdonlyres/E6F5D437-C49A-47C5-9772-578F54FB5C86/0/20110514_COLLOQUE_Dublin_FR.pdf> accessed 12 June 2012.

⁴⁸ *ibid.*

⁴⁹ Walker and Beaumont (n 23) 247.

suggest that the ECtHR is no longer ruling on a true child abduction case but rather a breach of the child's right to a family life, which has been detrimentally affected by the delays in the court proceedings that relate to child abduction.⁵⁰ The reason for the delay needs to be reviewed but this is outside the scope of this article. Many of the delays would appear to be avoidable if measures were put in place to support genuine trust and fundamental rights, thus avoiding the need to go to the ECtHR at all.

B. The Approach of the UK Courts

The decision of the Supreme Court in *Re E*⁵¹ demonstrates a balanced approach to mutual trust and indicates the support given by the UK courts to the ECtHR President's extrajudicial interpretation of the jurisprudence in *Neulinger*. *Re E* concerned the removal by their mother of two girls, aged seven and four and their elder stepsister, aged seventeen, from Norway to the UK. The father applied for the return of the children but the mother argued that an exception to the return under Article 13(b) applied, due to alleged serious psychological abuse the family had experienced at the hands of the father. The Supreme Court dismissed the mother's appeal and ordered the return of the children to Norway. The Supreme Court urged:⁵²

(...) the Hague Conference to consider whether machinery can be put into place, whereby, when the courts of the requested state identify protective measures as necessary if the Article 13(b) exception is to be rejected, those measures can become enforceable in the requesting state.

This request supports the earlier premise that by creating mechanisms such as those proposed by the Supreme Court, it encourages genuine trust between Member States, while the aims of the Abduction Convention are respected. Such changes would require legislative reform in order to be effective.

C. Legislation Reform

There is no simple solution to the problems created by enforced trust and overridden fundamental rights. On a practical level, the role that mediation and negotiation can play in avoiding these problems from the very start should be fully explored, for with sensitive handling, encouraging parents to discuss the welfare of their child can produce results in some instances.⁵³ This could increase the possibility that the court case could be avoided altogether, which has to be in the child's best interests, not to mention the interests of the family.

⁵⁰ *ibid.*

⁵¹ [2011] 2 WLR 1326.

⁵² *ibid* [37].

⁵³ C Paul and J Walker, 'Family Mediation in International Child Custody Conflicts: The Role of Consulting Attorneys' (2008) 22 *The American Journal of Family Law* 1 45.

Another relevant factor in preventing breaches of the child's right to be heard is to remove obstacles to the return of the child.⁵⁴ In *Aguirre Zarraga*, the child was given the opportunity to be heard within Spain, however, she was not able to take this opportunity, not because she was unwilling to express her view but because Spain refused to grant the mother the freedom to leave Spain after the hearing. Removing the threat of criminal prosecution of the abducting parent would eliminate one of the barriers for non-return, thereby increasing the chances of the child returning to the state of origin where the court would have the opportunity to hear the child.⁵⁵

However, under the current European legislation,⁵⁶ it is not essential to return the child to the state of origin in order to take their evidence. The Taking of Evidence Regulation grants Spain the ability to hear Andrea in Germany and, therefore, meet the requirement of the right of the child to be heard. However, it could be argued that the state of origin may see this as potentially delaying the return of the child. Providing the child with the opportunity to be heard and in an appropriate manner is in the child's best interests. In the UK, it is standard procedure for a CAFCASS⁵⁷ officer to interview the child.⁵⁸ Having trained professionals appointed by the court to interview the child in a manner sympathetic to their age and maturity is in the child's best interests. These working methods have allowed evidence to be presented in abduction cases from children as young as six years – evidence which is now coming to be accepted.⁵⁹

Confusion over differing procedural rules within Europe is a harder problem to address. The doctrine of the margin of appreciation allows European Courts to consider the fact that a member state may interpret a human right differently due to cultural, historic or philosophical reasons.⁶⁰ However, although a Member State could not refute the existence of the child's right to be heard, it is possible that the procedural rules of a Member State could limit the opportunities to be heard.⁶¹ Indeed, the difference seen in *Aguirre Zarraga*, where Germany will always hear the child, compared to Spain's belief that the fact that they had given Andrea an opportunity to be heard satisfied this requirement, highlights the differing standards in this area. Granting the court of enforcement the power to stay the recognition of a

⁵⁴ Phillippe Lortie, 'Theme II - Development of Regional and International Networks - Their scope and object, appointment process, information about members and functions of members (Draft Principles Nos 1 to 5)' (2009) XI The Judges Newsletter on International Child Protection <http://www.hcch.net/index_en.php?act=text.display&tid=60> accessed 12 June 2012.

⁵⁵ *ibid.*

⁵⁶ Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (Taking of Evidence Regulation) [2001] OJ L174/1.

⁵⁷ Children and Family Court Advisory and Support Service.

⁵⁸ Hutchinson (n 22) para 22.

⁵⁹ McEleavy advocates that it is possible to satisfy the obligation of the Hague Abduction Convention and the right of the child to be heard by ascertaining the child's views at the beginning of the proceedings. In this way it should not cause a detrimental delay: P McEleavy 'Evaluating the views of abducted children: trends in appellate case-law' [2008] Comparative Family Law Quarterly 230.

⁶⁰ A Daly, 'The Right of Children to be heard in Civil Proceedings and the emerging law of the European Court of Human Rights' (2010) 15 The International Journal of Human Rights 3 441, 444.

⁶¹ *ibid.*

summary judgement until procedural breaches have been amended would help to uphold consistency and support the fundamental rights of the child to be heard. However, if a genuine judicial area is argued for and Europe has identified the child's right to be heard as being a fundamental procedural right, it is difficult to comprehend why Member States can have such differing values which can lead to a child's rights being breached in one Member State and upheld in another. If genuine trust were established through a requirement for both Member States to uphold certain fundamental rights, this would go some way to avoid the conflict found within *Aguirre Zarraga*. Finally, the most complex issue is the reinterpretation of the principle of mutual trust itself. It could be argued that the current principle of mutual trust has more in common with blind faith than with genuine trust. Mutual trust is fundamental to the functioning of the Abduction Convention which when genuine, will actively contribute to the support of fundamental rights. The ECJ needs to review their approach to mutual trust.

4. Conclusion

The relationship between child abduction, the principle of mutual trust and fundamental rights is complex. Society's view of the child has changed significantly in the last thirty years since the drafting of the Abduction Convention. The rights that the child has been afforded since then should be reflected in current legislation and, to a certain extent, this has been the case. However, legislation can be weakened by a lack of clarity such as that found in the Brussels IIbis Regulation. The ambiguity in the law surrounding whether the opportunity to be heard in the court of enforcement can satisfy the obligation to be heard in the court of origin, requires urgent evaluation as Member States are not yet ready for unconditional trust.

This analysis of *Aguirre Zarraga* highlights the disparity between the professed understanding of the principle of mutual trust and the reality of its application. If mechanisms could be established which encourage genuine trust, such as readdressing the balance of power between states so that one court is not given the sole power of enforcement, especially given a breach of fundamental procedural rights, or the proposals put forward by the Supreme Court in *Re E*, then this will be one step further towards the goal of the genuine judicial area.

The ECJ cannot remain complacent about the imbalance between the principle of mutual trust and fundamental rights. A genuine judicial area would be beneficial to the functioning of Europe. However, it ought not to be a case of choosing between one principle and another; the encouragement of genuine trust between Member States would protect fundamental rights. Any revision of the principle of mutual trust needs to be considered carefully; it cannot be rushed but should form part of the evolution of the fledgling European legal order.

Book Review

***Oil and Gas Law - Current Practice and Emerging Trends
(2nd Edition) Greg Gordon, John Paterson and Emre Üşenmez (eds)
(Dundee University Press, Dundee 2011, ISBN: 9781845861018)***

The oil and gas industry is the foundation upon which modern society has developed in the course of the past fifty years. Hydrocarbons underpin transportation, production and commerce throughout a global environment. Demand continues to remain high. Yet in the United Kingdom Continental Shelf (UKCS) the production profile has changed over the past decade, from that of buoyancy to maturity. It is within this context that difficulties arise – developments become uneconomic, infrastructure ages, decommissioning approaches and security of supply becomes a concern. The importance of a sound framework for legal regulation is all the more apparent in a mature province. It is fitting, therefore, to see a new edition of the bestselling text ‘Oil and Gas Law – Current Practice and Emerging Trends’ directly on this legal regime. In the four years following the first publication, much development has been seen in both law and industry. The second edition has been eagerly awaited by both students and practitioners alike.

The new text incorporates the substance of the previous edition, with the benefit of updated chapters and additional topics. The extent of this is apparent even at first glance, with some 150 pages having been added to this new book. It is helpfully divided into three main sections, providing a balance between the areas of contextual foundations (Chapters 1-3), substantive legal regulation (Chapters 4-11) and commercial concerns (Chapters 12-18). Written by a combination of academics and practising lawyers, the book combines issues of law and practice in a comprehensive manner. It provides the academic background necessary for any reader without knowledge of the industry, yet contributes well to the current debates for those involved in study or practice. The accessibility of the book has been fundamental to its success. In this regard, the editors note that their intentions were to provide ‘a clear, reasonably concise and affordable account of contemporary oil and gas practice in the UKCS’. This they have undoubtedly achieved.

The new additions to this book include chapters on energy security (Chapter 3), the fiscal regime (Chapter 6), environmental regulation (Chapter 9) and technology in the oilfield (Chapter 15). Of these, the contribution on the taxation arrangement is extremely welcome. To date, there has been a lack of academic commentary on the legal aspects of the oil and gas taxation regime. It is an area that is generally excluded from most substantive revenue law related texts. Similarly, it is rarely dealt with in detailed contemporary energy law publications. This could be explained, perhaps, by the evolving nature of the area – the fiscal budget from the government each year often brings something of a change to the current outlook. Yet there are clearly principles in the regime which remain constant and which deserve a detailed review. Üşenmez does so in Chapter 6 by providing an overview of petroleum-specific taxation, focusing on Petroleum Revenue Tax, Ring Fence

Corporation Tax and Supplementary Charge. He allows the reader to gain an understanding of the practical application of these charges by providing example calculations, thereby removing the difficulty often found in considering fiscal laws in the abstract. The chapter is also extremely useful in charting the comprehensive and somewhat complex system of allowances and reliefs in relation to each charge. The interaction of a number of different pieces of legislation makes this an area which can be difficult to follow, but Üşenmez's coherent and logical structure makes this simple for a reader to digest. Unfortunately, the date of publication meant that little consideration could be given to the controversial rise in the rate of Supplementary Charge from 20% to 32% in the 2011 Budget (mention given at footnote 83), which is, of course, inherent in the nature of any commentary on this ever-changing area. This does not, however, detract from the value of this chapter to any extent.

Chapter 6 sits well alongside the book's earlier chapter on 'Evolving Economic Issues' by Kemp (Chapter 2), which benefits from a short postscript consideration of the effects of this budget change (p. 32). Kemp's chapter considers the economics of the industry to a much wider degree and thus the two chapters complement one another. In this first edition, Kemp's chapter sat somewhat isolated from much of the rest of the book, in that it was the only dedication to purely fiscal matters. Some of the terminology and technical language in this chapter may, therefore, have been difficult for a reader with no previous knowledge of the regime to grasp. This new edition, which allows for detailed consideration of the legal aspects of the fiscal regime alongside this contextual outlook from an economist's perspective, results in a much improved text in this regard.

In the context of recent events in the industry, the importance of the new material on environmental regulation also becomes clear. Following the Gulf of Mexico disaster in 2010, the focus on the need for appropriate environmental safeguards became much more apparent. It is useful, therefore, that an overview of the current UK and European environmental regulation be included in this second edition. The chapter, written by Havermann, follows neatly on from Paterson's chapter on health and safety (Chapters 8 and 9) - highlighting the combined importance of an operator's overall responsibility in the safeguarding of life and of the marine environment throughout operations. Much of the concerns regarding occupational safety in the mature province - such as financial and time-based pressures, and the concern of ageing assets - equally result in environmental concerns and a proper assessment of this area of safety regulation would not be complete without a full acknowledgment of the environmental point. Chapter 9 is, therefore, another welcome addition to the text which contributes to the book's relevance following the impact of the largest oil spill in recent years.

In addition to the new material in this volume, the remaining chapters have been substantively updated in light of legislative and contextual changes. In particular, these include updates following the Energy Act 2008 in relation to access to infrastructure (Chapter 7) and decommissioning (Chapter 10), and the new Model Clauses found in the Schedule to the 2008 Petroleum Licensing Regulations, as further amended in 2009 (Chapter 4). An interesting point of note from the new edition is the removal of some of the first edition material. Chapters on public procurement rules and on employment law issues in the oil and gas context do not

feature in the updated text. This is unfortunate, particularly given the nature and structure of employment within the industry, with much work being undertaken by agency or contractor personnel. Readers will, of course, still be able to benefit from the material written on these points, but simply must revert to the first edition to do so.

Overall, the value of this comprehensive and detailed overview of the current legal position in the oil and gas industry cannot be overstated. In the opening chapter of this book, the authors note that there are many lessons that arise from the accumulation of experience gained in a mature province such as the UKCS. This is undoubtedly true and it is clear from this book that there is much that can be learnt. It is a fantastic starting point for any student, academic or practitioner in this area and should be acquired without hesitation. I am sure that the second edition of this book will prove to be equally as successful as the first.

Leanne M. Bain

April 2012

Guidelines for Contributors

Submissions are welcomed from students and graduates of the University of Aberdeen.

Several types of articles will be considered:

- Case Notes (500 to 1,500 words on a recent judicial development)
- Book Reviews (500 to 1,500 words on a recent publication)
- Essays and Short Articles (1,500 to 4,000 words)
- Long Articles (4,000 to 10,000 words)

The limits specified are for general guidance only and will not be strictly upheld.

Every piece of work is reviewed anonymously by the student Editorial Board, before being sent for Peer Review. Submissions may be accepted outright, accepted subject to modification, or rejected. Constructive comments will be sent to the author.

Published articles will be compiled in an annual issue which will be available online and in law libraries throughout the country.

All submissions must conform to House Style and to the Oxford Standard for Citation of Legal Authorities.

Articles must provide a critical analysis of a particular area of law, publication or judicial decision. Comment should be original, relevant and aim to make an interesting contribution to the academic debate.

For further information on submitting an article, subscribing to the journal or becoming involved in a supportive capacity, please contact us via the details on our website: www.abdn.ac.uk/law/aslr.

We would be delighted to hear from you.

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