Aberdeen Student Law Review

Volume 10

2020

This Tenth Anniversary Volume
is Kindly Sponsored by

EDITORIAL BOARD
VOLUME 10

FOREWORD BY THE RT HON LORD WOOLMAN SENATOR OF THE COLLEGE OF JUSTICE AND PRESIDENT OF THE SCOTTISH TRIBUNALS

A ten-year anniversary is a time for reflection. Looking back at the first decade of the *Review*, certain features stand out. Each issue displays a breadth of interest, an intellectual curiosity and a commitment to good writing. These are the hallmarks of a valuable journal. The abstracts for Volume 10 suggest that the pattern continues. I congratulate the authors and the editors on a fascinating set of articles. It's clear that they result from deep thought and hard work. That, in a nutshell, is the life of the law.

Rt Hon Stephen Woolman
Edinburgh, September 2020

ANNIVERSARY NOTE BY PROFESSOR GREG GORDON HEAD OF SCHOOL OF LAW

It is a great pleasure to write a foreword to this, the tenth volume of the *Aberdeen Student Law Review*. The *Aberdeen Student Law Review* has become such a feature of life in the Law School that it is almost surprising to be reminded that it was established only ten years ago.

New student-led initiatives sometimes wither away quite quickly after their originator's graduation. It is perhaps human nature to be more interested in setting up something new of one's own than to maintain and nurture the brain-child of someone else. The initiatives that manage to assume an element of permanence generally need to have at least a couple of things going for them. They need to be 'of course we should' ideas – ideas that are, in retrospect, so obvious and appealing that when they are finally pitched it comes as a bit of a surprise that no-one had thought of them before. They also need to be established in such a way as to build in sustainability. So there needs, among other things, to be appropriate support for the person in charge, a succession plan, and an understanding of what the venture is likely to cost and how those expenses are going to be recovered.

The *Aberdeen Student Law Review* is a great 'of course we should' idea. Being published continues to be one of the real pleasures of academic life, even long into one's career. But – at least for the academically-minded – seeing one's name in print for the first time is both a joy and a rite of passage. An accessible (but still academically-

rigorous[1]) forum is of huge value to the student. So, it is no surprise that the *Review* has succeeded in attracting a steady through-put of contributions, many – but by no means all – of which will have started off life as an LLB or LLM thesis, or extended piece of coursework. As to sustainability, the *Review* was fortunate to have been established by an editorial team that was both dynamic and blessed with considerable foresight. It was impressive to see issues like sponsorship and the importance of being included in major electronic databases had occurred to the founders before there was any need to prompt in this regard. Sustainability has probably also been assisted by the fact that the composition of the editorial team has over time moved from the undergraduate to the postgraduate community, a shift that has allowed for greater continuity.[2] Looking back over the list of past editors, it is striking to see how many are now members of academic staff, both at Aberdeen and elsewhere.

As I often say when introducing new students or to legal study, law is everywhere. Sometimes in the foreground, sometimes lurking in the shadows of crucial but apparently obscure regulations, it determines family relations, commercial relationships, and the relationships between the individual and the state and between states and can be analysed from a range of perspectives including the

[1] The ASLR is home, for instance, to the best case comment that I have encountered on the leading British oil and gas licensing case, *Bocardo SA v Star Energy UK Onshore Ltd and another* [2010] UKSC 3 (C Stacey, *Case Comment,* 2 (2011) ASLR 124), and the clearest exposition of the NESS causation test of which I am aware (E West, *The Utility of the NESS Test of Factual Causation in Scots Law*, 4 (2013) ASLR 1).
[2] This shift occurred as early as the third volume and has with some exceptions generally continued since.

historical, theoretical, international, comparative, doctrinal and sociological. One of the strengths of the curriculum at the University of Aberdeen is that it embraces that diversity and does not elevate any one area or perspective above any other. It is therefore a matter of great satisfaction for me, in reviewing the contents of this particular Volume, to see the great breadth of its subject matter. From a historical treatment of the Scots corroboration requirement to the international law of nuclear non-proliferation, the articles published here are unified only by the quality and rigour of their analysis. They are a credit to their authors and to the University of Aberdeen, and I am thankful, looking back over the last decade, for the hard work and initiative shown by Dominic Scullion and the rest of the original editorial team, and all of their successors, in keeping this fine enterprise going.

Professor Greg Gordon
Aberdeen, September 2020

ANNIVERSARY NOTE BY PROFESSOR MARGARET ROSS HEAD OF SCHOOL OF LAW IN 2010

One of the pleasures of occupying the role of Head of School is to be able to respond positively to good ideas. When approached by Dominic Scullion in the early part of 2010 with a question about whether it would be possible to set up a student-led academic journal there was no need to pause before saying yes. Indeed, as Professor Greg Gordon has said in his Foreword, it was an 'of course we should' idea, one 'in retrospect so obvious and appealing that it makes us question why it hadn't been thought of before'. But that is not to undermine the significance of the idea. The point is that for us it had not been thought about before, and I was both delighted and humbled by the idea brought forward by students of foresight, ambition and commitment. It was only when I read the Editorial to the inaugural volume that I realised that the idea had been spawned in a pub on Union Street, but it was none the worse (possibly better) for that.

Student law reviews are an integral part of the educational experience in law schools in North America, bearing course credits and great kudos for the students involved. However, they sit in the comfort of that long history and continuity of support for each year of activity. There was no doubt in my mind that the senior undergraduate students at the helm for this inaugural volume would deliver on the establishment and publication of the *Review* but it was also essential that it be a student-led initiative that would survive beyond the tenure of those students at Aberdeen Law School. They

did not need to be reminded of this, and they went on to nurture their successors to the same high standard.

The groundwork done in preparation for this being a serious academic journal with an ISSN number and access to key libraries around the world was time-consuming but essential to its credibility. The founding editorial team received advice from Dr Adelyn Wilson who had been instrumental as a postgraduate in setting up a student law journal in another university. They established a web presence within the Law School site with the assistance of Dr Angus Campbell, which added exposure and durability. Indeed, the Review was ahead of the times in terms of open access publishing.

Student-led initiatives enhance the experience and the employability of the students involved, as well as the reputation of the Law School and University. Over the past decade we have seen a huge interest from students of the school at undergraduate and postgraduate level in new activities ancillary to their studies. The opportunities such initiatives present are beyond value and certainly beyond the powers of staff because their value is in the self-discipline and self-management *by students* of activity of high quality. The inaugural volume carried an item of news about the Aberdeen Law Project, a student-led initiative also brought to me for approval in my time as Head of School. The *Review* and the Project have both offered complementary opportunities for the Law School's students over the past decade and are firmly embedded in the history of the School. However, one must never underestimate the power of both the

original idea and the commitment of the founders and their successors to create opportunities built to last.

The editors would update me as Head of School on progress from time to time and some practical support was on hand from school staff as well as the promise of funding for production and launch. However, essentially this was student-led in its entirety in the few months from idea to production and launch in July 2010. Attracting sponsorship from Stronachs hinged upon the clear evidence of attention to detail and quality of Volume 1. As the founding editors noted, they sought to include articles on a broad range of subjects, and that approach has continued to be taken to great effect in the intervening years. The range is as interesting this year as it was in the inaugural and intervening volumes, to the credit of successive committed editorial teams. The submissions are the subject of selection and review processes as robust as any academic journal, and the production values are very high, underpinned by clear submission guidelines. Having a formal launch of each volume, to which authors and guests, editors, supporters and sponsors have been invited also establishes the Review in the Law School calendar and exposes the breadth and depth of what is studied at Aberdeen Law School.

The opening article of the inaugural volume related to civil justice, an area of my own research. It was penned by senior honours student Ben Christman. In an article soon to be published I was delighted to be able to cite a very recent piece from the *Edinburgh Law*

Review by the same author co-written with a former member of Aberdeen Law School staff, who had also contributed to the *Review*. Being published in the *Aberdeen Student Law Review*, a journal of high quality, at an early stage has provided the impetus for many authors to publish again and again. That can only be to the good for the wider understanding of our laws and their development for the future.

As I write I have by me Volume 1 in hard copy bearing a handwritten note from the Editor acknowledging the School's support and saying 'please keep in touch'. I am delighted that we have kept in touch and that within the academic and professional communities working in law, not just in Scotland, we can take great pride in the achievements of editors and authors alike. To the founding editorial team of Dominic Scullion, assisted by Leanne Bain and Calum Stacey, and editors Terri Costello, Corey Duff, Guy Grant, Julia Harris and Natasha Mortazavi I renew my thanks a decade on, for bringing to fruition that 'of course we should' idea of the *Aberdeen Student Law Review*.

Professor Margaret Ross
Aberdeen, September 2020

ANNIVERSARY NOTE BY DOMINIC SCULLION MANAGING EDITOR OF VOLUME 1

It is a particular pleasure to have been asked to write a note for Volume 10 of the *Aberdeen Student Law Review*. Whilst I am, of course, honoured to have been asked, it is due to the efforts of those who followed us on the original Editorial Board that the ASLR continues to publish to this day. As the Head of School observes in his foreword, it is 'human nature to be more interested in setting up something new of one's own than to maintain and nurture the brain-child of someone else'. So, my profound thanks are owed to the 2011-2020 generation of ASLR editors for continuing where we left off, fixing what we got wrong, and exercising sound judgment in matters such as sponsorship which have ensured that the ASLR continues.

From a scan of the contents of this Volume, I am heartened by the breadth of subject matters explored, and I am reminded of the words of the Rt Hon Lord Woolman in his foreword to the inaugural edition: '*An understanding of one area of law can be enhanced by looking at another area. It is surprising how often there is scope for cross-pollination of ideas and principles.*' The contributors and editors of this Volume 10 are to be congratulated. In the inaugural edition, the Editorial Board noted that:

> *Writing about the law is as important as reading about it or discussing it. It forces us to research more extensively and, it is hoped, to broaden our legal minds. It encourages us to think about the other sides to an argument and to pursue our own case armed with increased knowledge. It is what lawyers from*

> *this university have been doing since 1495 and it is what we hope the next generation of lawyers will continue to do.*

Re-reading that a decade on, I suspect that we stand by it now more than ever. Those who engage in writing about the law (whether as students, practitioners, or academics) help to develop it in ways perhaps not immediately appreciable. Journal articles and legal textbooks are read by solicitors and advocates in advance of advising clients or making submissions to judges. They are frequently cited in court (whether or not that is evident from the eventual judgment!). They can inspire students and inform the public. They are, in short, essential; not just for student lawyers at university hoping to achieve better grades or for academic lawyers hoping to advance, but for the development of the jurisprudence.

What is more, in the COVID-19 world in which we all unfortunately must live, the days of lawyers turning up at court and making oral submissions alone are probably over. Written submissions, which were, in any event, becoming more prevalent 'BC' (Before COVID), are now ordered by courts as a matter of routine, whether to supplement or to replace oral submissions. It is thus more important than ever that the next generation of lawyers is well-versed in the art of written advocacy. And if student law reviews assist in nurturing that skill, then that is all to the good.

Thanks have been given by Professors Gordon and Ross in their contributions to this Volume, and so it is my turn to do the same. I remain indebted to the School of Law at Aberdeen (particularly to

Angus Campbell, Sarah Duncan, Adelyn Wilson, and, of course, Margaret Ross) for supporting and encouraging what was at the time a half-baked idea; to my fellow editors of the inaugural Editorial Board for the work put in and the fun had (naive as we might have been in assessing the work to fun ratio - but I'm happy to report that at least some of them continue to speak to me); and to the original contributors for being willing to submit the fruit of their intellectual labour to their peers for review. I know I speak for all of us back in 2010 in saying that it is enormously encouraging to see this adventure from our days as students in the silver city with the golden sands continue to flourish.

I hope that the current editors don't mind if I dedicate this Volume, to the extent that it is for me to do such a thing at all, to the late Professor David Lessels, a teacher and mentor to generations of students at Aberdeen, a supporter of the *Aberdeen Student Law Review* in its embryonic stages, and a friend of mine.

I wish the ASLR every continued success in the decades to come.

Dominic Scullion
Advocates Library, Parliament House
Edinburgh, October 2020

EDITORIAL FOREWORD

It has been an eventful journey to hit the ten-year milestone. Being saddled with the responsibility of overseeing a special Ten-Year Anniversary Edition of the *Aberdeen Student Law Review*, little did we know that 2020 was going to hit us with a major disruption in the form of the COVID-19 virus. It is fair to say this past academic term has not been at all what any of us expected. When we first gathered at the Taylor Building in Old Aberdeen last autumn for our mutual introduction and to discuss our preliminary plans for Volume 10 of the *Review*, none of us foresaw COVID-19, or at least the Scottish Government's response to it, emerging to demolish what had promised to be a grand year. When the Law School, University libraries, and other academic buildings around Aberdeen were all closed this past March, it quickly became somewhat difficult to work on the *Review*.

Still, thanks largely to modern technology, it has been possible for us to push forward with the preparation of the present volume. The interchange of ideas among the present editors over the Internet—be it on the various submissions to be selected for publication, the review process for those submissions, or the editing and proof-reading of the articles themselves—has been both enjoyable and stimulating. While it might have been much more enjoyable to work together in person, it has still been a worthwhile endeavour for us all, isolated from one another and working remotely though we were. The articles selected for publication in this volume discuss an

interesting array of topics, which we hope will prove to be both interesting and useful for academics and practising lawyers alike. While we decided to print a volume with a distinctly Scottish flavour, by including a number of articles on topics specific to the law of Scotland, we included articles on other subjects as well.

As always, we wish to acknowledge our debts to the Right Honourable Lord Woolman, Senator of the College of Justice, who, despite his tight schedule, has provided forewords for ten consecutive editions; to Stronachs LLP, and in particular to Mr James Downie, partner in the energy law group at Stronachs' Aberdeen office; and to the University of Aberdeen School of Law, for their support in preparing this edition for publication. We wish to acknowledge Dominic Scullion, who first conceived of the *Review*, and his team, for kickstarting it in 2010. Last, though certainly not least, we wish to acknowledge the contributions of Professor Margaret Ross, who as Head of School of Law at the time, facilitated the establishment of the *Review*. Our hope is that this journal will withstand the test of time, providing quality legal research papers for years to come. Just as the University of Aberdeen recently celebrated its 525-year anniversary, we hope someone, someday, will find the time to read Volume 525 of the *Aberdeen Student Law Review*.

Azubuike Ozah
Stephen J Foland
Aberdeen, September 2020

TABLE OF CONTENTS

Cohabitation in Scots Succession Law: A Critical Examination of Section 29 of the Family Law (Scotland) Act 2006

ALISON C HETHERINGTON*

Abstract

The law surrounding the provision of rights in succession to cohabitants in Scotland has created much debate since their introduction under Section 29 of the Family Law (Scotland) Act 2006. Although the debate continues to grow, substantial reform in this area has been lacking. By examining changing societal attitudes and on-going proposals for reform, this article aims to answer what changes to the law are likely to be included in the future reform of Section 29. The introduction of a registration system for cohabitants and cohabitation agreements is examined as a possible solution to increasing protection for cohabitants whilst maintaining freedom of testation. This article concludes by discussing the relevancy of irregular marriage to inform the modern debate on succession rights for cohabitants.

Keywords: Cohabitation, irregular marriage, law reform, Scots family law, succession

Introduction

The position of cohabitants within Scots family law is now firmly established. Societal acceptance of cohabitation as a lifestyle choice and the modernisation of certain attitudes towards marriage have led to a substantial shift in family structure throughout Scotland. The increased incidence of cohabitation has led to a higher demand for legal recognition and legal protection for this type of domestic partnership. This eventually resulted in the introduction of limited inheritance provisions for cohabitants under the Family Law (Scotland) Act 2006 (2006 Act).[1]

* LLB, University of Aberdeen; DPLP, University of Edinburgh. Alison spent one year as a research assistant at the Scottish Law Commission and will be entering

Section 29 of the 2006 Act has received heavy criticism for its lack of judicial guidance and arbitrary time-limits.[2] With a lack of case law since its introduction, suggestions for reform have been numerous however implementation of reform has been lacking. This article will evaluate the current issues and examine to what extent this area of law is in need of reform.

The Scottish Law Commission (SLC) has made extensive recommendations, which include repealing Section 29 of the 2006 Act and introducing a completely new system of inheritance provisions for cohabitants.[3] This proposed system will be evaluated for the adequacy of the SLC's proposed remedies and whether these effectively resolve the problems faced by cohabitants in relation to succession.

The inequality faced by cohabitants will be established through looking at the differing standards of treatment between cohabitation agreements and pre-nuptial agreements.[4] An international overview of the law, relating to cohabitants in France and Australia, will be used to suggest wider reform for the structure and functionality of the Scottish system for cohabitation.

Finally, the origins of cohabitation as developing from irregular marriage will be explored. A case will be made for the unique position of marriage by cohabitation with habit and repute through the high level of protection which it previously provided for a minority of cohabitants, and whether irregular marriage could still be relevant in modern Scots Law.

---

into a legal training contract in 2021. She would like to thank the ASLR for the opportunity to have this article published.

[1] Family Law (Scotland) Act 2006 s 29.

[2] Jack Kerrigan, 'Time Limits and the Family Law (Scotland) Act 2006' (2013) 17 SLT 125; Scottish Law Commission, *Report on Succession* (2009) (Scot Law Com 215) 1.21, 1.23 n 30, 4.3-4.7, 4.31; Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, *Cohabitation* (2nd edn, W Green 2011) 62.

[3] Scottish Law Commission, *Report on Succession* (n 2) 4.9.

[4] Family Law (Scotland) Act 1985 s 16.

Changes in Cohabitation and Marriage

The twenty-first century has seen a notable increase in the legal recognition of cohabitants in Scotland. Their position has been put firmly into legislation with a variety of rights and claims in family law and succession, some not unlike those found in marriage and divorce. Although Scots law of succession has seen numerous minor changes over the last fifty years, the most significant change in policy has been the recognition of 'partners in intimate domestic relationships'.[5] There has been a great increase in the number of people choosing to cohabit rather than marry, with statistics showing that this has been a steady trend over the last fifty years.[6] This move away from the nuclear family model, described by Barlow and others as the departure from 'virtual' to 'real' families,[7] reflects certain changes in societal values.[8] Cohabitation is no longer regarded as an immoral lifestyle, but is now a widely-accepted choice, whether as a precursor to marriage or as a permanent family structure.[9]

Societal Opinion Change and Statistics

The reasons for such change are numerous. First, regarding cohabitation, the movement towards a more liberal, secular society has seen many of the traditional views on propriety and stigma washed away.[10] Sexual relationships and cohabitation out of wedlock no longer result in the scandal that would have occurred at the start of the twentieth century.[11] There is greater acceptance that people are free to choose their own lifestyle, and many people now openly reject marriage due to their objections over its patriarchal form, religious

---

[5] Hilary Hiram, 'New Developments in UK Succession Law', *Electronic Journal of Comparative Law 10.3* (December 2006) available at <http://www.ejcl.org/103/art103-7.pdf> accessed 22 August 2020.
[6] General Register Office for Scotland, National Statistics 2003, 2001 Census, 2001 Reference Volume, Theme Table 'CAST05', 'All People', 'Scotland'.
[7] Anne Barlow and others, *Cohabitation, Marriage and the Law* (Hart 2005) 75.
[8] Hiram (n 5) 10.3.
[9] Barlow and others (n 7) 65.
[10] Fiona Gavin and Sheena Inness, *Cohabitation* (W Green 2005) 2.
[11] Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 ICLQ 480.

aspects,[12] or state intervention in the most private aspects of their lives.[13] Some cohabitants make an informed choice to live in long-term committed relationships and to raise families in this structure, or rather, lack of structure.[14] In 2008, for the first time, the number of children born to unmarried parents was higher than the number of children born to married parents, and this trend has continued ever since, showing the growing regularity of cohabiting families.[15] Others do not choose anything at all but have simply 'drifted into' cohabitation, through lack of taking any positive action regarding their relationship status.[16] An increasingly harsh economic climate means that many cohabitants simply seek to exploit the convenience of short-term cohabitation by saving money and sharing resources.[17]

The change to a secular society has also seen the sacramental aspect of marriage stripped away, with its focus now on marriage as a contract and a set of rights.[18] Furthermore, the stigma of divorce also has been largely stripped away, as evidenced by the availability of 'fast-track' divorce and increased protections during the breakdown of marriage and subsequent divorce.[19] However, cohabitation and marriage should not be regarded as mutually exclusive. National statistics show that cohabitation lasts on average two years, before ending in either marriage or breakdown of the cohabitation.[20] Such a 'trial period' is now accepted as quite a sensible exercise before proceeding to marriage.[21]

---

[12] David Hughes and Martin Davis, '"Come Live with Me and Be My Love": A Consideration of the 2007 Law Commission Proposals on Cohabitation Breakdown' (2008) *Conveyancer and Property Lawyer* 223.
[13] Ruth Gaffney-Rhys, 'Same-Sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 be Extended to Opposite-Sex Couples?' (2014) 26 CFLQ 173.
[14] Claire Clarke, 'The Lives We Live', *New Law Journal* (14 March 2014), available at <https://www.newlawjournal.co.uk/content/lives-we-live> accessed 22 August 2020.
[15] Elaine Sutherland, 'From 'Bidie-In' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise' (2013) 27 IJLPF 143-75.
[16] Jane Lewis, *The End of Marriage? Individualism and Intimate Relations* (Edward Elgar 2000) 135.
[17] Gaffney-Rhys (n 13) 173.
[18] Deech (n 11) 481.
[19] Divorce (Scotland) Act 1976 s 1(2)(d).
[20] Deech (n 11) 496.
[21] Scottish Social Attitudes Survey 2000, available at <http://doi.org/10.5255/UKDA-SN-4503-1> accessed 20 August 2020.

The 2011 Census results found that 11% of the total population were cohabiting.[22] Further examination of this information shows that 90% of couples between the ages of 16 and 19, and 40% of couples between the ages of 20 and 34, were cohabiting, compared with the older population of 50 to 59-year-olds, where only 5% of couples were cohabiting.[23] This reveals a trend of greater frequency and acceptance within younger age groups and less acceptance in older generations.[24] In a study of American cohabitation trends, the authors found that the rate of cohabitation is likely to continue increasing for the foreseeable future, due to the cohort replacement of the older generations who are less accepting, by younger generations who have a higher acceptance and frequency of cohabitation.[25] As the Scottish statistics are currently following the same pattern as those in the American study, it seems that their findings could give some insight into future cohabitation trends in Scotland. Some correlation may already be evident, as the recent Scottish Government's *Consultation on Succession* has found that the rates of cohabitation in Scotland have most likely continued to increase since the 2011 Census.[26] Alongside the growing popularity of cohabitation, marriage rates are steadily decreasing, and so cohabitants will form an increasingly large portion of the population.

Acceptance of Legal Recognition

Such acceptance is reflected not only in the increasing frequency of cohabitation, but that the public is now largely of the opinion that cohabitants should be entitled to some legal protection in succession.[27] The change in opinion is not only that cohabitation is acceptable within people's private lives, but that such a lifestyle deserves legal recognition and protection. Long before the 2006 Act was being drafted, there was a high level of support for allowing cohabitants to

[22] General Register Office for Scotland (n 6) 10.
[23] ibid.
[24] ibid.
[25] Susan L Brown and Matthew R Wright, 'Older Adults' Attitudes Toward Cohabitation: Two Decades of Change' (2016) 71 *Journal of Gerontology* 755–64.
[26] *Scottish Government Consultation on the Law of Succession* (February 2020) 3.1-3.3.
[27] Fran Wasoff and Claudia Martin, 'Scottish Social Attitudes Survey 2004 Family Module Report' (2005) 7 Scottish Executive Social Research, available at <https://www.webarchive.org.uk/wayback/archive/20170113113449/http://www.gov.scot/Publications/2005/08/02131208/12181> accessed 20 August 2020.

inherit. The 1981 public opinion survey by the Office of Population Censuses and Surveys recorded 56% of the respondents preferring a surviving cohabitant to inherit the entire estate on intestacy, with no share at all for the wider family of the deceased.[28]

As far back as 1986, the SLC showed support for the legal recognition of cohabitants through the introduction of discretionary provisions for surviving cohabitants, based on their research findings for the Consultative Memorandum 69.[29] The work of the SLC in this area continues through their current project on 'Aspects of Family Law',[30] which again examines in detail the legal status of cohabitants in Scotland.[31] In the Scottish Executive Survey of 2005, public support had increased, with 80% of the respondents agreeing that a surviving cohabitant should be entitled to some claim on their deceased partner's estate, even if they died testate and there was also a surviving spouse.[32] The question remains that with a significant portion of the population now cohabiting, and with these numbers only likely to increase, and with the public consultations showing a high level of support for increased rights in succession for cohabitants, is the current law providing an adequate level of legal recognition and protection for cohabitants?

Arguments for and Against Legal Recognition of Cohabitants

Baroness Deech has written, 'I would argue that cohabitation law retards the emancipation of women, degrades the relationship, takes away choice, is too expensive and would extend an already unsatisfactory maintenance law for married couples to another large category'.[33]

---

[28] AJ Manners and Irene Rauta, *Family Property in Scotland: An Enquiry Carried Out on Behalf of the Scottish Law Commission by the Social Survey Division of the Office of Population Censuses and Surveys in 1979* (UK Office of Population Censuses and Surveys Social Survey Division 1981) table 4.7.

[29] Scottish Law Commission, *Intestate Succession and Legal Rights* (1986) (Scot Law Com 69).

[30] Scottish Law Commission, *Tenth Programme of Law Reform* (2018) (Scot Law Com 250).

[31] Scottish Law Commission, *Discussion Paper on Cohabitation* (2020) (Scot Law Com Discussion Paper 170).

[32] Wasoff and Martin (n 27) 13–14.

[33] Deech, 'The Case Against Legal Recognition of Cohabitation' (n 11) 482.

Some of the arguments against legal recognition of cohabitants are that it undermines autonomy and personal freedom. Hilary Hiram writes, '[E]xtending rights in succession to a wider range of partners in marital-type relationships has…reduced the scope of the principle of testamentary freedom'.[34] Importance should be placed on the cohabitant's reasons for not marrying. As previously discussed, some make an informed choice not to marry;[35] for others, cohabitation is an unsuccessful 'trial period' before marriage.[36] It seems inappropriate to impose a marital-style framework upon couples who are seeking to avoid such a framework.[37] The law in such cases may harm those who are trying to protect themselves from unwanted legal ramifications. The counter-argument is that autonomy is protected by the ability to 'opt out' of this system by creating a cohabitation agreement.[38]

Although the intention of the 2006 Act was to 'create legal safeguards for the protection of cohabitants in long-standing relationships',[39] the broad definition given under Section 25 also allows for less-committed, short-term cohabitants to apply.[40] This results in the majority of cohabitants now facing the potential 'blackmail' of legal action on breakdown and in inheritance cases, and this threat falls on the family of the deceased during a time of bereavement.[41] Further objections arise around the negative impact which such protections may have on society through encouraging the idea that women need to be maintained, inhibiting the development of social equality.[42]

---

[34] Hiram (n 5) 10.3.
[35] Hughes and Davis (n 12) 211.
[36] Scottish Social Attitudes Survey 2000 (n 21).
[37] Deech, 'The Case Against Legal Recognition of Cohabitation' (n 11) 480.
[38] Scottish Law Commission, *Report on Succession* (n 2) 4.23.
[39] E Gary Spitko, 'Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for US Law Reform from the Scottish Experience' (2018) 103 Iowa L Rev 2175, 2188.
[40] *Savage v Purches* [2009] SLT (Sh Ct) 36, 38. Following this decision, the Court would likely take a harsh approach to such a claim.
[41] Ruth L Deech, 'Cohabitation' (2010) 39 Family Law 4.
[42] ibid.

Marriage benefits society in the stability and security that it provides[43] with many groups expressing concern that marriage is degraded by the legal recognition of other forms of domestic partnership,[44] especially when in competition with a surviving spouse.[45] However, a recent study which looked at the introduction of rights for cohabitants in Australia examines the potential impact which this new legislation may have on marriage rates.[46] The results clearly indicate that marriage rates continued to decrease at the same steady rate as previously recorded, and that the introduction of financial rights for cohabitants had no impact on declining marriage rates, and certainly did not further the declining marriage rates as feared.[47]

With the increasing complexity of relationships, it is necessary for the law to step in to 'introduce greater certainty, fairness and clarity' for cohabitants.[48] With many commentators arguing that cohabitation is often 'functionally identical to marriage',[49] it would be harsh to deny all statutory protection whatsoever for unmarried families. This seems especially true as limited rights have already been introduced and so the 2006 Act is following the natural progression of law.[50] Even Baroness Deech is less critical about some provision for inheritance, as 'at least the relationship lasted till death', and the parties are no longer able to organise their own affairs.[51]

The need to protect the vulnerable or legally ignorant outweighs the arguments in opposition to legal protection.[52] The steady increase in the incidence of cohabitation[53] along with the common lack of

[43] Baroness Murphy, 'Cohabitation Bill' (2009) *Lords of the Blog: Life and Work in the House of Lords*, available at <http://lordsoftheblog.net/2012/01/26/against-my-will/> accessed 20 August 2020.
[44] Wasoff and Martin (n 32) 7.
[45] Spitko (n 39) 2190–95.
[46] Murphy (n 43).
[47] ibid.
[48] Tom Guthrie and Hilary Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006' (2007) 11 ELR 212, 212.
[49] ibid 212.
[50] ibid 228.
[51] Deech, 'Cohabitation' (n 41) 39.
[52] Hughes and Davis (n 12) 201.
[53] General Register Office for Scotland (n 24) 10.

awareness of legal status and rights,[54] combined with the higher rates of intestacy for unmarried couples[55] have justified legal intervention rather than leaving this group to fend for themselves. What remains unclear is why there is such an imbalance in the protections created under Sections 28 and 29 of the 2006 Act. With less protection being given in the more vulnerable situation of the death of one of the cohabitants and the difficulties of judicial application, the inheritance of cohabitants has become a target for extensive reform.

Cohabitants and Current Succession Law

This section will discuss whether current legal protections for cohabitants in succession are adequate. The bulk of legal protections for cohabitants are found in the 2006 Act, with Section 29 focusing on surviving cohabitants inheritance provisions. It is important to note that giving cohabitants legal rights, sometimes very similar to spouses or civil partners, is not a new development in Scots law; the Matrimonial Homes (Family Protection) (Scotland) Act 1981 gave cohabitants occupancy rights,[56] and the right to inherit both public and private sector tenancies has been common practice for several decades,[57] as well as for social security,[58] damages claims for personal injury,[59] and the long-standing recognition of the succession rights of crofting cohabitants.[60]

The provisions on cohabitation introduced by the 2006 Act saw a definitive shift in policy towards wider protections, and a more extensive legal framework was imposed on cohabitation than is present in any previous statutes. The introduction of Section 29 has been described as 'revolutionary in Scots Law, inasmuch as it confers a very wide discretion upon a court to interfere with the usually fairly rigid rules of intestate succession in the interests of a party with no

[54] Deech, 'Cohabitation' (n 41) 39.
[55] Baroness Deech, 'Against My Will' (2012) *Lords of the Blog: Life and Work in the House of Lords* available at <http://lordsoftheblog.net/2012/01/26/against-my-will/> accessed 20 August 2020.
[56] Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 18.
[57] Rent (Scotland) Act 1984 s 3; Housing (Scotland) Act 1988, Schedule 1.
[58] Social Security Act 1986 s 20.
[59] Damages (Scotland) Act 1976, Schedule 1.
[60] Succession (Scotland) Act 1964.

other claim under these rules'.[61] Currently, cohabitants have no automatic right to inherit from the estate of their deceased partner. Section 29 does not allow a surviving cohabitant to automatically inherit from their deceased partner, but it allows a surviving cohabitant to apply for a discretionary provision on intestacy. In *Kerr v Mangan*,[62] it was submitted to the court that a Section 29 application did not amount to a right in succession, to which Lady Smith responded that Section 29 is now 'part of the Scots Law of Succession' is inescapable.[63]

Section 29 of the Family Law (Scotland) Act 2006

Section 29 of the 2006 Act establishes that if a cohabitant dies intestate, the surviving cohabitant may apply to the court for payment of a capital sum out of the deceased's estate, a property transfer, or the court may make some other form of interim order which it deems appropriate.[64] There are a number of pre-conditions to be met before a claim can be made; the couple must pass the threshold requirements set out in Section 25 defining a cohabiting couple,[65] the deceased must be domiciled in Scotland and cohabiting with the claimant immediately before death,[66] and the claim must be brought within six months from the date of death.[67] A cohabitant's claim will rank below any existing spouse or civil partner but above that of children and other relatives.[68]

The directions given to the court in assessing what order to make are that consideration should be given to the size and nature of the deceased's estate;[69] any other benefits which have or will be received by the surviving cohabitant, including those outside of the deceased's net intestate estate;[70] any other competing claims on the deceased's

[61] Hector L MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 2' (2019) 161 Fam LB 4.
[62] *Kerr v Mangan* [2015] SC 17, 27.
[63] John Kerrigan, 'Legal Rights and the Future' [2016] 6 SLT 23.
[64] Family Law (Scotland) Act 2006 s 29(2).
[65] ibid s 25.
[66] ibid s 29(1).
[67] ibid s 29(6).
[68] ibid s 29(10)(c).
[69] ibid s 29(3)(a).
[70] ibid s 29(3)(b).

estate;[71] and any other matter which the court considers appropriate.[72] The court is limited as any order made in favour of the surviving cohabitant should not exceed the amount that an equivalent surviving spouse or civil partner would be entitled to.[73]

On paper, this seems like a reasonably robust system for allowing the introduction of inheritance claims for cohabitants, giving flexibility to the court to assess the appropriate order in both form and amount, along with the ability to balance this against other competing claims. However, criticism quickly followed the introduction of Section 29,[74] and over a decade after its introduction, it is generally accepted that this provision is 'unsatisfactory' following the serious issues arising from its application.[75] But a dearth of case law[76] and lack of political motivation to tackle such a controversial area of law[77] has resulted in any reform of Section 29 being continuously delayed.[78] Even the most recent Scottish Government Response to *Consultation on the Law of Succession*[79] has proven largely inconclusive as to what form future reform of Section 29 and cohabitants rights in succession should take.[80] The main conclusion drawn is that 'further research and evidence gathering is required', and that the matter of cohabitants rights in succession may be referred back again to the SLC once their current project on 'Aspects of Family Law' [81], which includes consultation on reform of other rights relating to cohabitants,[82] has been completed.[83] As the current SLC project on 'Aspects of Family Law' was announced in 2018 and is expected to take five years to complete,[84] it seems likely that reform will once again be delayed for the foreseeable future.

---

[71] Family Law (Scotland) Act 2006 s 29(3)(c).
[72] ibid s 29(3)(d).
[73] ibid s 29(4).
[74] Scottish Law Commission, *Report on Succession* (n 2) 4.7.
[75] Kerrigan (n 2) 127; Malcolm, Kendall and Kellas (n 2) 62.
[76] Scottish Law Commission, *Report on Succession* (n 2) 4.5.
[77] Elizabeth Sparks, 'Changes to the Laws of Succession: The Importance for Family Lawyers' (2017) 145 Fam LB 2.
[78] Guthrie and Hiram (n 48) 224.
[79] *Scottish Government Consultation on the Law of Succession* (n 26).
[80] *Scottish Government Response to Consultation on the Law of Succession* (May 2020) 4.
[81] Scottish Law Commission, *Tenth Programme of Law Reform* (n 30) 19.
[82] Scottish Law Commission, *Discussion Paper on Cohabitation* (n 31) xvi.
[83] *Scottish Government Response to Consultation on the Law of Succession* (n 80) 4.
[84] Scottish Law Commission, *Discussion Paper on Cohabitation* (n 31) xvi.

The following section will focus on two of the main areas of concern regarding Section 29 applications: the lack of judicial guidance and strict time limits.

Lack of Judicial Guidance

The uncertainty surrounding Section 29 applications has been attributed to the lack of judicial guidance for making such an order.[85] There is a no mention of a goal to be achieved or what matters of the cohabitation to focus on when making an order under Section 29 and so judges are forced to create their own solutions.[86] This discomfort is apparent for both Section 28 and Section 29 claims, confirmed by the great inconsistency in the amounts awarded in such cases[87] and the inclination of judges not to release any lengthy judgments alongside their decisions.[88] No mention is made in the legislation of any stated purpose for granting an order in favour of the applicant, and this omission means that there is no guidance for what weight the court should give each element of criteria considered.[89] The criteria mentioned in the legislation to be considered,[90] which have been described above, are so broad that they make the outcomes of such cases practically impossible to predict.[91] Although Section 29(3)(a)-(c) lists certain aspects of the cohabitation which the court should consider, Section 29(3)(d) then states that the court can also consider 'any other matter the court considers appropriate'. In *Savage v Purches*, Sheriff Arthurson tried to source further guidance from within the legislation by confirming that 'any other matter' does allow the court to include the criteria in Section 25(2) when considering a Section 29 application.[92]

---

[85] *Whigham v Owen* [2013] SLT 483, 486.
[86] Lord Walker, 'How Far Should Judges Develop the Common Law?' (2014) 3 CJICL 124, 124.
[87] Judith Bray, 'Gow v Grant Leads the Way Towards Financial Rights for Cohabitants' (2012) 42 Fam Law 1505, 1505.
[88] Scottish Parliament, Sixth Report, Session 4: Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006 (2016) s 24.
[89] Guthrie and Hiram (n 48) 219.
[90] Family Law (Scotland) Act 2006 ss 29(3)(a)-(d).
[91] *Kerr v Mangan* [2015] SC 17, 27.
[92] *Savage v Purches* [2009] SLT (Sh Ct) 36, 38.

Legal academics concur that Section 29 leaves too much to judicial discretion and that 'judges have been rightly hesitant to lay down guidelines in an area which it may be felt should have been addressed by the legislature'.[93] Scottish Sheriffs seem to have taken heed of Lord Lowry's warning from south of the border, that 'disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems'.[94] During their research into Section 29 claims, the SLC reported that their only findings were two Sheriff Court decisions: *Savage v Purches*,[95] in which no order was made, and *Chebotareva v Khandro*,[96] in which the claim failed on jurisdictional grounds.[97] The subsequent case of *Windram (Applicant)* created no further guidance as the nature of the cohabitation was virtually identical to marriage.[98]

Strict Time Limit

The other main area of criticism is the strict time limit of six months in which a claim must be brought forward, with no ability for the courts to exercise discretion or flexibility regarding this time limit, even in cases of exceptional circumstance. This requirement under Section 29 has led to several unexpected and clearly unintended consequences in the case law following its introduction.

The Court of Session in *Simpson v Downie*[99] dealt with the issue of time limits and their interpretation. This case saw a counterclaim for financial provision under a Section 28 application which was made over twelve months after the separation. The Sheriff originally allowed the counterclaim stating that only the initial action had to be brought within twelve months and that the counterclaim was part of the off-setting action provided for in Sections 28(2), 28(5), and 28(6). The decision was appealed all the way up to the Inner House of the Court of Session, which gave a final verdict that the time limit was essential in validating an application under Section 28, and that

[93] Judith Bray, 'The Financial Rights of Cohabiting Couples' (2009) 39 Fam Law 1152, 1152.
[94] *C (A Minor) v DPP* [1996] AC 1, 28.
[95] *Savage v Purches* [2009] SLT (Sh Ct) 36, 38.
[96] *Chebotareva v Khandro (King's Executrix)* [2008] Fam LR 66, 66.
[97] Scottish Law Commission, *Report on Succession* (n 2) 1.21.
[98] *Windram (Applicant)* [2009] 157 Fam LR 3.
[99] *Simpson v Downie* [2013] SLT 178, 178.

Section 28(2) cannot be operated as a stand-alone provision.[100] As the sections regarding time limits are drafted almost identically,[101] it is accepted that this reasoning is equally applicable to any application under Section 29 as Parliament did not give any provision granting the court power to make any extension in this section either and so strict adherence to the time limits is required for the validity of an application under either Section 28 or Section 29.[102] The combined short and strict nature of Section 29 also prevents rather than encourages settlements out of court, with six months being too short a period to conduct adequate negotiations before the application would have to be made.[103] An extension of these time limits is permitted for cases involving cross-border mediation as detailed in Section 29A, but this does not benefit the majority of claimants.[104]

Jack Kerrigan, reviewing further consequences of the time limits under Section 29, discusses a case in which the outcome was undoubtedly not foreseen by Parliament during drafting.[105] The case involves a surviving cohabitant who was the main beneficiary under their deceased partner's will. The other family members of the deceased challenged the validity of the will and the court found in their favour, with the reduction of the will meaning almost the entire estate fell into intestacy.[106] By the time the court proceedings were concluded, the strict six-month limit had been passed and so through no fault of their own, the cohabitant was time-barred from making an application under Section 29.[107] Kerrigan also reports on the abuse of the strict time limits through the ability of families to exclude a cohabitant's claim by deliberately delaying the appointment of an executor dative,[108] a concerning issue which has been further examined in the SLC's Report on Succession.[109] He concludes that immediate reform is required as 'the right of the surviving cohabitant in Scotland to claim under Section 29 (and have that claim properly

[100] ibid.
[101] Compare Family Law (Scotland) Act 2006 ss 28(8) and 29(6).
[102] Kerrigan (n 2) 124.
[103] Malcolm, Kendall and Kellas (n 2) 62.
[104] Family Law (Scotland) Act 2006 s 29A.
[105] Kerrigan (n 2) 126.
[106] ibid 128.
[107] ibid 126.
[108] ibid 128.
[109] Scottish Law Commission, *Report on Succession* (n 2).

considered and adjudicated upon by the court) should not be predicated upon, or prejudiced by, the likes or dislikes of the deceased cohabitant's family – surely that was not part of our Parliament's intention'.[110]

Time Limit: Additional Common Law Concerns

At first, it may seem like these issues could be resolved by straightforward reform extending the time limit, but even with a one-year time limit equal to Section 28, if it remains a strict time bar then many claims will still automatically fail through no fault of the cohabitant.[111] In the situation described in the previously mentioned case where a will was challenged, any subsequent appeal would inevitably take much longer than one year. This is of further concern due to the decisions in *Jenkins v Gillespie* (unreported) [112] and *Courtney's Executor v Campbell*.[113] The following discussion will not focus on the details of the doctrine of recompense or the law of unjustified enrichment, but on how these interact with Section 29 claims.

Although some academics are doubtful about the status of the doctrine of subsidiarity within the law of unjustified enrichment,[114] in Scots law it has long been established that the subsidiarity rule applies to an action for recompense[115] as explained by Lord Hodge: 'the redefinition of the law of unjustified enrichment has not superseded the old rules relating to the law of recompense'.[116] *Courtney's Executor v Campbell* saw the application of the subsidiarity rule enforced in a claim of unjustified enrichment by a cohabitant who was time-barred from applying under Section 28 of the 2006 Act, meaning that the cohabitant was barred from seeking a remedy under the common law principle of unjustified enrichment until all other legal options had

[110] Kerrigan (n 2) 126.
[111] Gillian Black and Daniel J Carr, 'Cohabitants Rights in Conflict: The Family Law (Scotland) Act 2006 vs Unjustified Enrichment in Courtney's Executors v Campbell' (2017) 21 ELR 294, 294.
[112] *Jenkins v Gillespie* (Alloa Sheriff Court, 8 September 2015).
[113] *Courtney's Executors v Campbell* [2016] CSOH 136, 136.
[114] Robin Evans-Jones, *Unjustified Enrichment: Volume 1* (W Green 2003) 1.97.
[115] *Varney (Scotland) Ltd v Lanark Town Council* [1974] SC 245, 245.
[116] *Transco Plc v Glasgow City Council* [2005] SLT 958.

first been exhausted.[117] Although the time limit had expired it had not been exhausted, and so by being unable to exhaust the statutory route this precludes the availability of any remedy in unjustified enrichment.[118]

Although the decision was based on Section 28, again this principle would apply equally to the time limits in Section 29.[119] The decision in *Courtney's Executor v Campbell*[120] reaffirmed that if the strict time limit was missed for such a claim, a cohabitant applying under Section 29 would also be left without this common law remedy.[121] The topic of unjustified enrichment in relation to cohabitation has been discussed in detail by Hector MacQueen, [122] who expresses the concern of potential future injustices if the decision in *Courtney's Executor v Campbell* is not soon revisited.[123] Further examination by the courts and reform of Section 29 is necessary, or else 'legislation intended to improve the legal position of cohabitants was left having the formal effect of cutting off rights that they might otherwise have'.[124] The further implications of this are that if the surviving cohabitant is left genuinely economically disadvantaged by the relationship, to the enrichment of their deceased partner, they would likely be successful in raising a claim of unjustified enrichment and yet they are now in a worse position than before the 2006 Act was introduced.[125]

---

[117] Kirsty Malcolm, 'The Family Law (Scotland) Act 2006 S.28 and Unjustified Enrichment: The "Subsidiarity Rule"' (2017) 159 Fam LB 5.
[118] Michael Hughes, 'The Subsidiarity Exclusion: Cohabitation and Unjustified Enrichment' (2016) SLT 7.
[119] Malcolm (n 117) 6.
[120] *Courtney's Executors v Campbell* [2016] CSOH 136.
[121] ibid.
[122] Hector MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 1' (2019) Fam LB 160; MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 2' (n 61) 4.
[123] MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 2' (n 61) 5.
[124] MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 1' (n 122) 160; MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 2' (n 61) 5.
[125] Black and Carr (n 111) 296; MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 2' (n 61) 5; MacQueen, 'Cohabitants, Unjustified Enrichment and Law Reform: Part 1' (n 122) 6.

Taking all of these issues into consideration, it would seem that it is necessary to both extend the time limit for cohabitants claims under Section 29 to at least one year and to change from a strict time limit to one which would allow discretion for applications beyond this in exceptional circumstances. It is important for these reforms to introduce a degree of flexibility, as reinforced by the outcome of *Courtney's Executor v Campbell*.[126]

Evaluating the SLC and Scottish Government Proposals for Reform

What was introduced under Section 29 was a system which resulted in the most crucial component of a cohabitant's claim being the speed at which they must seek legal advice and apply to the court.[127] The unexpected lack of caselaw has unfortunately meant less information to work with when recommending reform.[128] Changes were anticipated with the long-awaited Succession (Scotland) Act 2016,[129] which was expected to reform a variety of aspects of Scots succession law.[130] However, the more controversial elements have been left out for a later piece of legislation with the 2016 Act introducing only technical and more straightforward uncontroversial reform.[131]

One of the main bodies of research for legal reform is work of the SLC. This institution has released various Reports and Discussion Papers over the last fifty years which have included reform recommendations of the law in relation to cohabitants.[132] As previously mentioned, although the SLC is currently consulting on cohabitation rights in Scotland, the current consultation does not include an examination of potential reform of succession rights for cohabitants and specifically excludes Section 29 of the 2006 Act from its remit.[133] The SLC Report 215 'Report on Succession', is the most

[126] *Courtney's Executors v Campbell* [2016] CSOH 136.
[127] Black and Carr (n 111) 299.
[128] Spitko (n 39) 2190–95.
[129] Succession (Scotland) Act 2016.
[130] Sparks (n 77) 3.
[131] ibid.
[132] Scottish Law Commission, *Report on Succession* (n 2); Scottish Law Commission, *Report on Family Law* (1992) (Scot Law Com 135); Scottish Law Commission, *Discussion Paper on Succession* (2007) (Scot Law Com Discussion Paper 136); Scottish Law Commission, *Consultative Memorandum No. 69* (n 29); Scottish Law Commission, *Discussion Paper on Cohabitation* (n 31).
[133] Scottish Law Commission, *Discussion Paper on Cohabitation* (n 31) 1.8.

recent paper by the SLC which examines the reform of succession rights of cohabitants in detail. The recommendations in the SLC Report 215 are that Section 29 should be repealed and a new system altogether should be introduced.[134] This next section will give an overview of this proposed new system, the recent Scottish Government 'Consultation on the Law of Succession',[135] and whether these will adequately resolve the problems examined in the previous chapter.

Lack of Judicial Guidance

The position reached by the SLC in relation to their recommendations for reform can be summarised as follows:

> Where, however, the relationship giving rise to the claim is of a less certain character and where, accordingly, the choice may have to be between a system of discretionary provision and no provision at all, we think that the disadvantages of a discretionary system are tolerable. We have therefore concluded that we should now recommend the introduction of a system of discretionary provision for a surviving cohabitant out of the estate of the deceased cohabitant.[136]

Of course, the disadvantages of the discretionary provisions were not so 'tolerable', due to the lack of judicial guidance provided when Section 29 was introduced.[137] The SLC's Report 135 from 1992 included more extensive guidance than what was finally enacted in the 2006 Act, with a limited list of factors that the court should consider, specifically including a provision for offsetting any contributions creating economic advantages or disadvantages,[138] and which did not include anything remotely similar to the problematic

[134] Scottish Law Commission, *Report on Succession* (n 2) 4.9.
[135] As the Scottish Government's *Consultation on the Law of Succession* does not examine the issues surrounding reform for the succession rights of cohabitants in Scotland in as much detail as the SLC Report 215, and in some places builds upon their recommendations, this article will focus on the SLC Report 215.
[136] Scottish Law Commission, *Report on Family Law* (n 132) 16.29.
[137] Scottish Law Commission, *Report on Succession* (n 2) 4.7.
[138] Scottish Law Commission, *Report on Family Law* (n 132) 16.33.

Section 29(3)(d).[139] Even with clearer judicial guidance in their recommendations, the SLC already contemplated that the courts may find a discretionary system difficult to apply,[140] with this method being quite 'out of step' with the tradition of fixed shares in Scottish succession.[141]

In the new system, a claim by a surviving cohabitant would be calculated as a percentage of what would be awarded had the surviving cohabitant been the spouse or civil partner of the deceased.[142] The assessment is based purely on the quality of the cohabitants' relationship, with the court awarding a percentage which reflects to 'what extent the surviving cohabitant deserves to be treated as the deceased's spouse or civil partner for the purposes of the rules of succession'.[143] The purpose of this limit is to ensure that the proposed system would not undermine marriage[144] and would provide greater guidance for applications where there is both a surviving spouse and a surviving cohabitant.[145]

The new proposals contain three central aspects of cohabiting relationships: length, interdependence, and contributions,[146] which benefits the court by limiting judicial discretion.[147] The criteria are still very broad, so this may continue to result in a high level of judicial discretion where the outcomes of cases may still greatly vary, not necessarily providing the level of certainty that the SLC were hoping to achieve.[148] This discretion could also result in trends towards 'inequitable inferences', such as cohabitation being more readily established for those with children or higher awards being given to those with children.[149]

The exclusion of all other factors, including other benefits or other claims by the deceased's family on the estate, is intended to

[139] Family Law (Scotland) Act 2006 s 29(3)(d).
[140] Scottish Law Commission, *Report on Family Law* (n 132) 16.29.
[141] Spitko (n 39) 2190–95.
[142] Scottish Law Commission, *Report on Succession* (n 2) 4.21.
[143] ibid 4.19.
[144] ibid 4.18
[145] ibid 4.30.
[146] ibid 4.21.
[147] Spitko (n 39) 2190–95.
[148] Scottish Law Commission, *Report on Succession* (n 2) 4.7, 4.19.
[149] 'Succession Reform Consultation' (2015) 53 *Scottish Private Client Law Review* 8.

create a 'veil of ignorance' during the court's assessment.[150] So now, not only does the new system improve upon Section 29 by providing the court with a clearer purpose and limited factors to consider, it also restricts judicial discretion by excluding other factors from consideration. After establishing cohabitation and assessing what percentage is appropriate, there is no further involvement by the court as the percentage will be awarded in the form of a decree which can be given to the executor dative who can apply this when distributing the deceased's estate.[151] This will benefit a surviving cohabitant by speeding up the judicial process and reducing legal fees. The new system also provides that if the deceased dies testate and there are provisions in favour of the surviving cohabitant, unless expressly stated by the deceased, the cohabitant must elect between the percentage claim or any other rights in succession.[152]

Overall, the new system proposed by the SLC would resolve most of the problems currently found surrounding the lack of judicial guidance found in Section 29. The mostly minor concerns could likely be resolved in subsequent caselaw without need for additional legal reform. With a stated purpose and more limited judicial discretion, it is unlikely that the new system would face the same problems as the lack of case law following the introduction of Section 29.

Time Limits

With this being a much less complicated issue in need of reform, naturally it does not require as complex a solution. In the original SLC recommendations, the court was to have the discretion to extend this time limit in exceptional circumstances, such as when 'a later will is discovered after the expiry of the limit which revokes an earlier will in favour of the cohabitant, or if the executor or relatives have led the cohabitant to believe that a reasonable provision would be made and then refuse any payment after the time limit has expired'.[153] With no such discretion provided for the courts in Section 29, these avoidable issues have become a harsh reality.[154] The reasoning behind the introduction of a shorter time limit of six months from the date of

[150] Scottish Law Commission, *Report on Succession* (n 2) 4.19.
[151] Scottish Law Commission, *Report on Succession* (n 2) 4.20.
[152] ibid 4.30.
[153] Scottish Law Commission, *Report on Family Law* (n 132) 16.35.
[154] Kerrigan (n 2) 128.

death of the deceased was to ensure that the inheritance process was not slowed down by the addition of a further potential claimant.[155] Once again, the SLC recommends reforming the 2006 Act to extend the time limit for an application under Section 29 to one year from the date of death of the cohabitant, and to allow the court discretion to accept an application made after the expiry of this date on cause shown.[156] The increase of the strict time limit for applications from six months to one year from the date of death has been raised again in the 2019 Scottish Government's *Consultation on the Law of Succession*.[157]

With the suggested reform increasing judicial guidance and creating greater certainty for the outcomes of claims by surviving cohabitants, this will help them to reach a settlement without resorting to litigation.[158] A balance is needed to facilitate negotiations and not unduly slow the succession process. Such a balance is reached by extending the time limit for applications to one year and allowing the court to consider claims out with this time limit on cause shown.[159]

Wider Reform

Rather than only allowing a claim on intestacy, the new system would give a cohabitant a claim against both the testate and intestate estate of the deceased.[160] This recommendation is not surprising given the initial proposals presented by the SLC.[161]

There are concerns over extending the cohabitant's claim to the testate estate as this would put the cohabitant in further competition with any surviving spouse or children.[162] Concerns over such an extension were echoed once again in the findings of the recent

[155] Scottish Law Commission, *Report on Family Law* (n 132) 16.35.
[156] Scottish Law Commission, *Report on Succession* (n 2) 4.32.
[157] *Scottish Government Consultation on the Law of Succession* (n 26) 3.1–3.3.
[158] Scottish Law Commission, *Report on Succession* (n 2) 4.7.
[159] Malcolm, Kendall and Kellas (n 2) 62.
[160] Scottish Law Commission, *Report on Succession* (n 2) 4.9.
[161] Scottish Law Commission, *Report on Family Law* (n 132) 16.36.
[162] Fiona Burns, 'Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future' (2013) 33 *Legal Studies* 85, available at <https://www.cambridge.org/core/journals/legal-studies/article/surviving-spouses-surviving-children-and-the-reform-of-total-intestacy-law-in-england-and-scotland-past-present-and-future/0D55068C0BA47EA37A470434B0328CE6> accessed 22 August 2020.

consultation by the Scottish Government's *Consultation on the Law of Succession*.[163] The complaints centre on the principle that a cohabitant has no obligation to maintain their partner, compared with the existence of such an obligation to a child or spouse and yet the law now creates such an obligation on death.[164] Such complaints are not unfounded as the 2006 Act already contains an implicit bias, favouring the partner of the deceased over any children of the deceased,[165] highlighting that succession is now developing from a 'dynastic to spousal-focused scheme'.[166]

The further benefits of the SLC's suggestions are that this system of calculating a percentage of what an equivalent spouse or civil partner would be entitled to is much more robust. Regardless of whether future changes are introduced to the entitlement of a spouse or civil partner (another area being examined by the SLC),[167] the suggested wording of the cohabitation calculation is such that it will not have to be reformed, or face only minor technical reform, to accommodate these changes.[168] There will not necessarily be any issues of judicial application as the purpose behind the cohabitant's application will remain the same and the factors listed to limit judicial guidance when finding the appropriate percentage remain equally relevant. The further benefit is that this will simplify the administration of the estate compared with Section 29. In the new system, the executor will be able to use one system for both spouse and/or cohabitant, with a cohabitant requiring a minor additional step to calculate the final sum through the application of the percentage calculated by the court.[169] Creating a system for the cohabitant's calculation which builds upon the spouse and civil partner's calculation would improve the speed and ease of distribution of the estate,[170] achieving the goal of increased simplicity[171] and preventing any undue delay.[172]

---

[163] *Scottish Government Consultation on the Law of Succession* (n 26) 1.1.
[164] 'Succession Reform Consultation' (2015) 53 *Scottish Private Client Law Review* 8.
[165] Guthrie and Hiram (n 48) 229.
[166] Burns (n 162) 85.
[167] Scottish Law Commission, *Report on Succession* (n 2) 2.3.
[168] ibid 4.21.
[169] ibid 4.20.
[170] Burns (n 162) 118.
[171] 'Succession Reform Consultation' (n 164) 7.
[172] Scottish Law Commission, *Report on Family Law* (n 132) 16.35.

Scottish Government Consultation on the Law of Succession

In February 2019 the Scottish Government launched its most recent consultation into the law of succession, which focused on intestacy, with Chapter 3 focusing specifically on cohabitants' rights.[173] From their findings, the Scottish Government estimate that the number of cohabiting couples in Scotland is continuing to increase.[174] The consultation paper discusses that intestacy does not necessarily reflect any intention to prevent a cohabitant from inheriting[175] and that the law of intestacy should deliver 'fair outcomes reflecting the way they [cohabitants] have arranged their affairs in life',[176] however the limitations of 'individual expectations' as a guide for future reform was noted by respondents.[177]

The consultation paper discusses the recommendations for reform put forward by the SLC as discussed in the previous section, and then builds upon these proposals by suggesting that a somewhat simplified version of the two-part test of the SLC for establishing cohabitation could be created, as part of the proposals consulted on for future reform: 'a) they as a couple appeared to others to be

---

[173] *Scottish Government Consultation on the Law of Succession* (n 26) 1.11.
[174] ibid 3.3.
[175] ibid 3.6.
[176] ibid 3.3; Centre for Scots Law, University of Aberdeen, *Response to the Scottish Government Consultation on the Law of Succession* (February 2020) available at <https://consult.gov.scot/ justice/law-of-succession2019/#consultation/view_respondent?uuId=741496373> accessed 3 September 2020; Alan R Barr, *Response to the Scottish Government Consultation on the Law of Succession* (February 2020), available at <https://consult.gov.scot/justice/law-of-succession-2019/consultation/view_respondent?uuId=839731206> accessed 3 September 2020; Law Society of Scotland, *Response to the Scottish Government Consultation on the Law of Succession* (February 2020), available at <https://consult.gov.scot/justice/law-of-succession-2019/consultation/view_respondent?uuId=1048972627> accessed 3 September 2020.
[177] *Scottish Government Response to Consultation on the Law of Succession* (n 80) 3; George L Gretton, *Response to the Scottish Government Consultation on the Law of Succession* (February 2020) available at <https://consult.gov.scot/justice/law-of-succession-2019/consultation/view_respondent?uuId=176385953> accessed 3 September 2020; Faculty of Advocates, *Response to the Scottish Government Consultation on the Law of Succession* (February 2020), available at <https://consult.gov.scot/justice/law-of-succession-2019/consultation/view_respondent?uuId=1033988822> accessed 3 September 2020.

married, in a civil partnership, or cohabitants of each other; and b) they had a financially interdependent relationship to which they both contributed'.[178]

One of the suggested outcomes of meeting this test would be to award a qualifying cohabitant the equivalent rights of a spouse or civil partner.[179] The consultation also asked a series of questions in relation to the treatment of a cohabitant in situations where the deceased is also survived by either a spouse or civil partner.[180] The general consensus from respondents was that in the law of intestate succession, cohabitants should be allowed to inherit even when there is a surviving spouse or civil partner, but it should remain that marriage and civil partnership are afforded greater recognition in such situations than cohabitation.[181]

The Scottish Government reports receiving very mixed responses and the somewhat inconclusive results of this consultation require further examination before any substantive reform of Section 29 and the law relating to cohabitants' succession rights can be put forward.[182] However, one firm commitment for reform was made as part of this consultation, that the strict time limit of six months from the date of death of a cohabitant for any application is to be extended to one year.[183] This commitment, although small, is a positive step towards remedying the harsh outcomes discussed previously which are caused by the previously both short and strict time limit of six months.[184]

Cohabitation Agreements and Registration

As examined earlier, a central argument against the extension of legal recognition for cohabitants is that this creates an infringement on the

---

[178] *Scottish Government Consultation on the Law of Succession* (n 26) 3.17.
[179] ibid 3.18.
[180] ibid 28, 29.
[181] *Scottish Government Response to Consultation on the Law of Succession* (n 80) 3; Law Society of Scotland (n 176); Faculty of Advocates (n 176); Barr (n 176); Centre for Scots Law, University of Aberdeen (n 176).
[182] *Scottish Government Response to Consultation on the Law of Succession* (n 80) 3-4.
[183] *Scottish Government Consultation on the Law of Succession* (n 26) 3.35.
[184] Kerrigan (n 2) 127; Law Society of Scotland (n 181); Centre for Scots Law, University of Aberdeen (n 176).

freedom to govern one's own personal relationships without legal intervention.[185] 'There should be a corner of freedom where couples may escape family law with all its difficulties.'[186]

As part of the justification for introducing provisions for cohabitants, it was acknowledged that cohabiting couples should be able to 'opt-out' of this new statutory framework.[187] This could be done at any time before or during the relationship by creating an agreement which the couple can use to disapply the automatic system or to create their own personalised system of rights. Such agreements can cover various aspects of the relationship such as property rights, breakdown, financial provisions (including insurance and pensions), childcare, personal possessions, and death.[188]

Agreements v Statutory Provisions

As domestic agreements have always been available, why was it regarded as necessary to introduce a statutory system? The existence of a legal remedy does not guarantee that it will be used by the majority of the population. As previously mentioned, the majority 'drift into' cohabitation through inaction and not deliberate choice[189] and with public understanding of the law surrounding cohabitation being largely misinformed and confused,[190] it is too much to presume that a voluntary system of agreements would be used any more frequently than other similar and more familiar systems, such as wills or pre-nuptial agreements. Certain academics have been critical of the current legislation: 'The policy reflected in the [2006] Act as passed reflects only confusion about where boundaries between personal choice, public policy and the role of the courts are to be placed and how conflicts between them are to be reconciled.'[191]

---

[185] Deech, 'The Case Against Legal Recognition of Cohabitation' (n 11) 497.
[186] Deech, 'Cohabitation' (n 41) 39.
[187] Scottish Law Commission, *Report on Succession* (n 2) 4.23.
[188] Kenneth Norrie, 'Marital Agreements and Private Autonomy in Scotland' in Jens Sherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012) 289.
[189] Lewis (n 16) 135.
[190] Guthrie and Hiram (n 48) 212.
[191] ibid 227.

The recent proposal of the Scottish Government to run a campaign to raise public awareness of the how the current intestacy regime operates, including the position of cohabitants, will hopefully go some way to remedying the current level of confusion and may encourage more individuals to consider writing a will or cohabitation agreement to organise their affairs.[192] Before Section 29 was introduced, inheritance could be established by creating a trust, agreement, survivorship clause, or writing a will.[193] The positive action required meant that these remedies were inadequate, with most cohabitants omitting to independently organise their estate after death.[194]

Current statistics put an estimate for those who leave a will at around 30% of the population, with further examination showing that around 50% of those who are married had left a will, compared with only 17% of those who cohabit.[195] This trend towards intestacy will be likely to continue, with a minority of cohabitants creating agreements. To encourage the use of such agreements the SLC recommended that the legality of these contracts be made explicitly clear by creating a provision on cohabitation agreements in the 2006 Act,[196] however, this suggestion was not implemented.[197] It is clear from these statistics that a large portion of the Scottish population relies on the statutory system of intestacy, especially the unmarried population.[198] The benefits of cohabitation agreements make them deserving of legislative recognition, however, the current infrequency of their use by the minority of cohabitants does not eliminate the need for an automatic statutory system to protect the majority of cohabitants.

Agreements Functionality

Cohabitation agreements generally follow the same format as pre-nuptial agreements, which have long been recognised as legally

---

[192] *Scottish Government Response to Consultation on the Law of Succession* (n 80) 4.
[193] George Gretton and Andrew Steven, *Property, Succession, and Trusts* (3rd edn, Bloomsbury Professional 2017) 23–30.
[194] S O'Neill, 'Wills and Awareness of Inheritance Rights' (2006) *Scottish Consumer Council* 5.
[195] ibid.
[196] Scottish Law Commission, *Report on Succession* (n 2) 4.23.
[197] Guthrie and Hiram (n 48) 227.
[198] O'Neill (n 194) 5.

binding contracts in Scotland.[199] Although generally focused on divorce rather than death, there are often terms relating to succession. During the breakdown of a marriage before divorce, there is usually some form of separation agreement made in which both spouses renounce any inheritance claims.[200] It has always been part of Scots law that either before[201] or after the death,[202] any party with an automatic claim on the estate of the deceased is free to renounce their entitlement, an act which is legally binding.

However, there are certain differences between cohabitation agreements and pre-nuptial agreements, as examined by Professor Kenneth Norrie, which are crucial when challenging such agreements.[203] Pre-nuptial agreements are given statutory footing under the Family Law (Scotland) Act 1985, which lays out the principles which apply to domestic agreements and which cannot be set aside by the terms of the contract.[204] Some of the case law[205] behind Section 16 of this Act has concluded that if it can be proven that the pre-nuptial agreement was unfair or unreasonable when it was created, then the courts will not hesitate to vary the terms or set the agreement aside.[206] As cohabitation agreements have not been given any statutory footing, they are treated as regular commercial contracts without the additional statutory protections which are available for other domestic contracts.[207] Therefore, a cohabitation agreement can only be challenged under the normal rules of contract law: on grounds of error, misrepresentation, fraud, undue influence, or material breach.[208] This illustrates the inequality between cohabitants and spouses, with preference shown for spouses through giving them a higher level of legal protection than is provided for cohabitants.[209]

Some academics argue against the bending of the normal principles of contract law for domestic agreements, objecting to the

[199] Family Law (Scotland) Act 1985 s 16; Norrie (n 188) 204-14.
[200] Norrie (n 188) 295.
[201] *Rebecca Hog v Thomas Hog* (1795) Mor 4628.
[202] *Kerr, Ptr* 1968 SLT (Sh Ct) 61.
[203] Norrie (n 188) 295.
[204] Family Law (Scotland) Act 1985 s 16(4).
[205] *Edgar v Lord Advocate* (1965) SC 67.
[206] Family Law (Scotland) Act 1985 s 16(1)(b).
[207] Norrie (n 188) 310.
[208] Gillian Black (ed), *Woolman on Contract* (5th edn, W Green 2014) 36–43.
[209] Norrie (n 188) 301.

idea that factors such as gender become relevant to the contractual validity of pre-marital or civil partnership agreements.[210] Retaining this disparity in the protection given to cohabitants and spouses or civil partners is not an adequate solution and until these wider issues are resolved, it is unjustifiable to refuse to extend equal protection to cohabitants.[211] The possibility of the unequal treatment of cohabitants in comparison to spouses or civil partners as a human rights issue has been examined, with the European Court of Human Rights ultimately accepting that affording a privileged status to marriage is a legitimate aim under Article 8 of the European Convention on Human Rights.[212] This issue has been discussed by Elaine Sutherland, who states that there appears to be 'little rational relationship between the current legal approach and promoting marriage', and that it would be preferable and more proportionate to treat marriage and cohabitation as having the same legal consequences and to permit parties the freedom to contract out of these consequences.[213]

Other academics argue that the law relating to all types of relationships should be more focused on the contractual element to reflect what is gradually becoming the reality of registering intimate domestic partnerships.[214] The number of types of relationships which are legally recognised is only likely to increase, and so creating a robust contractually focused system now would allow future reforms to be made with less controversy or complication.

Benefits of Registration

A current flaw is that the only way to have a cohabitation legally recognised is through obtaining a court declarator on breakdown or death, situations which only occur at the end of a cohabitation. As the number of cohabitants increases, it will become desirable to introduce a system allowing legal recognition at the beginning or during the relationship without resorting to litigation. This flaw lies in the

---

[210] Deech, 'The Case Against Legal Recognition of Cohabitation' (n 11) 480.
[211] Norrie (n 188) 301.
[212] *Shackell v United Kingdom* (45851/99) unreported 27 April 2000 European Court of Human Rights; *Re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, 36; Elaine E Sutherland, 'Scots Child and Family Law: Liberty, Equality and Protection Revisited' (2019) 1 Jur Rev 39.
[213] Sutherland (n 212) 39.
[214] Deech, 'The Case Against Legal Recognition of Cohabitation' (n 11) 480.

inequality between cohabitants and spouses or civil partners in Scots family law, as spouses and civil partners can register their relationship and gain certain automatic inheritance rights whereas cohabitants cannot.[215]

The process of reforming the law to create greater equality will eventually require the development of a similar register for cohabiting relationships. This could be modelled on the system used for marriage and civil partnerships and also form part of the National Records of Scotland. When registering a marriage or civil partnership, the certificate is presented by one of the spouses at the Registrar's Office and the date is recorded on a centralised system.[216] The same will happen when the Registrar is presented with the court declarator for divorce or dissolution.[217] Currently, any application by a cohabitant under the 2006 Act will include a decision by the court as to whether the relationship qualifies under Section 25 and a decision establishing the dates of when the cohabitation began and ended.[218] The ability to register the relationship would achieve the goal of saving time and money during the litigation process as these facts would already be established and recorded.[219] This could be introduced alongside the statutory system, so the majority of cohabitants who do not register will not lose any legal protections but would create benefits for those who do register. This would also strike the balance of giving greater protection whilst ensuring the cohabitation remains distinct from marriage/civil partnerships, reducing the likelihood of any objections on the grounds of the encroachment of cohabitation on marriage/civil partnership. As explored in the next subsection, a system to officially establish cohabitation during the relationship would give greater security to the cohabiting couple by guaranteeing that their relationship will be legally recognised and would benefit cohabiting families by reducing the costs and risks of litigation for cases of both death and breakdown.

---

[215] Marriage and Civil Partnership (Scotland) Act 2014.
[216] National Records of Scotland, 'Statutory Register of Births, Deaths and Marriages' (2018) available at <https://www.nrscotland.gov.uk/research/guides/birth-death-and-marriage-records/statutory-registers-of-births-deaths-and-marriages> accessed 20 August 2020.
[217] ibid.
[218] Family Law (Scotland) Act 2006 s 25.
[219] Spitko (n 39) 2175-95.

International Comparison: France

A system of registration for cohabitants in Scotland could be based on the system which has developed in France. A study of the French system reveals several attributes that would be beneficial if adopted in Scotland.[220] This approach creates a tiered system for registering domestic relationships which are all recorded within a centralised system. [221] The French system has three levels of recognised relationship which each offer different packages of legal rights. The *contrat de marriage* is at the top of this tier and gives the strongest entitlements,[222] followed by the *pacte civil de solidarite* (PACs), which is the French equivalent of a civil partnership but gives fewer rights than a UK civil partnership. [223] Beneath this is the *l'union libre ou concubinage*, which has no real legal value, but serves to formally recognise the couple.[224] The PACs system was originally introduced for the benefit of same-sex couples, but was also made available to opposite-sex couples.[225] The popularity of PACs is increasing as it becomes more socially accepted and the rate of dissolution of PACs sits at 28%.[226] This can be compared to the divorce rate in France, which sits at 45% of all marriages,[227] slightly higher than in the UK.[228] The 2015 statistics from the Institut National D'Etudes Demographiques (INED) show that only around 4% of the total number of PACs were created by same-sex couples, with an average of 169,000 being signed each year for the last five years.[229] The same

[220] Gaffney-Rhys (n 13) 182.
[221] Hughes and Davis (n 12) 220.
[222] Notaires de France, 'Marriage' (13 January 2017) available at <https://www.notaires.fr/fr/lunion-libre-ou-concubinage> accessed 20 August 2020.
[223] Notaires de France, 'Civil Partnership' (11 January 2017) available at <https://www.notaires.fr/fr/lunion-libre-ou-concubinage> accessed 20 August 2020.
[224] ibid.
[225] Gaffney-Rhys (n 13) 194.
[226] Institut National D'Etudes Demographiques, 'Civil Unions (PACS)' (2016) available at <https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/pacs/> accessed 20 August 2020.
[227] Institut National D'Etudes Demographiques, 'Divorces' (2016) available at <https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/divorces/> accessed 20 August 2020.
[228] Hughes and Davis (n 12) 220.
[229] Institut National D'Etudes Demographiques, 'Civil Unions (PACS)' (n 226).

average for marriages has just under 230,000 registered each year.[230] These statistics show that since the introduction of the system of PACs in 1999, it has been accepted within society, and is now widely used. The introduction of a system of central registration has clearly been instrumental in the French system for clarity within domestic relationships.

This format could be followed for the introduction of a similar system of registration for cohabitants in Scotland. This system gives differing levels of rights for the different types of domestic relationship and the special status and additional benefits of marriage would not be undermined. This would allow security through guaranteed recognition of cohabitation and a centrally- organised system of records.

International Comparison: Australia

The Australian protections for cohabitation also follows an 'opt-out' approach, the same approach which is found in Scotland.[231] Not all territories have a register for 'de facto relationships'[232] and so the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 was created to introduce a more uniform approach to cohabitation across Australia.[233] In Australia, unlike in Scotland, cohabitation is recognised by this Act as being virtually the equivalent to marriage.[234] The Act sets out standard criteria for establishing cohabitation and awarding financial provision, but if the

[230] Institut National D'Etudes Demographiques, 'First Marriages and Remarriages' (2016) available at <https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/remarriages/> accessed 20 August 2020.
[231] Anne Barlow, 'Cohabitants and Their Rights in the United Kingdom' (2015) 3 *University of Exeter* available at <http://www.nonmarital.org/Documents/Workshop_IV/Anne_Barlow.pdf> accessed 22 August 2020.
[232] ibid.
[233] Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 No 115 (Australia).
[234] Lyn Turney, 'The Denial of Paternity: Pregnancy as a Risk to the "Pure Relationship"' (2011) *SAGE Journals (Sociology)* 1-16, available at <http:// citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.847.1697&rep=rep1&type=pd> accessed 22 August 2020.

couple have been able to register their cohabitation, they are exempt for these qualifiers in any application.[235]

The Australian law also gives wider protection to the entire cohabiting family and does not focus only on creating rights for the cohabiting couple. This is done through extending the rebuttable presumption of parentage for a child born during marriage[236] to cohabiting relationships. If a child is born to a woman, and at any time during the period beginning not earlier than forty-four weeks and ending not less than twenty weeks before the birth, the woman cohabited with a man to whom she was not married; the child is presumed to be a child of the man.[237]

The benefits of this presumption are that the children of cohabiting couples are protected through the law actively stepping in to establish both parents regardless of the legal status of their relationship. Although not a perfect system, the benefits are that any child born within a cohabiting family is legally recognised as the child of both parents, giving them increased security in both financial support and succession. These children are disadvantaged by pot luck depending on the type of relationship which their parents have chosen or have 'drifted into'.[238] Of course, with more than one presumption for parentage, this may create conflicts and so additional straightforward provisions have been created to deal with these situations.[239] The future security is more stable for children who have the right to be maintained by two parents and when such rights vest in the child directly and by implementing a legal presumption there is no legal burden to be proven by the child or on behalf on the child, and so the law is proactive in protecting the most vulnerable party. Here a more equitable balance is struck between autonomy of lifestyle choice for the cohabiting couple and better protection for the most vulnerable: the children of cohabiting families.

---

[235] Max Meyer and Louise Carter, 'Family Law in Australia: Overview' *Thomson Reuters Practical Law* (1 October 2017) available at <https://uk.practicallaw.thomsonreuters.com/8-579 5585? transitionType= Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 22 August 2020.
[236] Family Act 1975 No 53 s 69P (Australia).
[237] Family Act 1975 No 53 s 69Q (Australia).
[238] Lewis (n 16) 135.
[239] Family Act 1975 No 53 s 69U(2)(b) (Australia).

In this regard, the law of Scotland is inadequate and there still seems to remain an inequality between what were previously defined as 'legitimate' and 'illegitimate' children.[240] In Scotland, there is only a presumption of parentage for couples who are married.[241] In all other cases, both parents must be individually registered at the birth of the child or where this has not occurred to have a second parent subsequently registered the unmarried couple face the significant hurdle of obtaining a court declarator of parentage.[242] The number of births where an unmarried mother is the only parent initially registered has increased in correlation with the increased frequency of cohabitation.[243] This inequality in Scotland through the lack of presumption of parentage during cohabitation is only likely to increase in severity as the complexity of the modern family and number of cohabitants continues to grow. A legal presumption of parentage, such as found in the Australian model would help remove this remaining injustice and take the legal burden from the children of cohabiting families and place it on cohabiting parents.

Irregular Marriage by Cohabitation with Habit and Repute

Before the 2006 Act, it was possible for a surviving cohabitant to obtain the rights of a spouse by establishing an irregular marriage by cohabitation with habit and repute (MCHR).[244] Irregular marriage is not commonly discussed and in the short time since its abolition, it seems to have been largely forgotten.[245] The law has since developed automatic and accessible legal protections for cohabitants under the 2006 Act, however many of the criticised characteristics of irregular marriage have remained in the new provisions for cohabitation. By examining these connections to the current law of cohabitation it will be established that a modernised version of MCHR would have a relevant place in modern Scots law in filling a gap created by the 2006 Act.

---

[240] Family Law (Scotland) Act 2006 s 21.
[241] Law Reform (Parent and Child) (Scotland) Act 1986 s 5.
[242] ibid s 7.
[243] National Records of Scotland, 'Statistics and Data: Births Time Series Data' (29 September 2017), available at <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/births/births-time-series-data> accessed 22 August 2020.
[244] Marriage Act 1939 s 5.
[245] Family Law (Scotland) Act 2006 s 3.

MCHR before Abolition

The last remaining form of irregular marriage, MCHR, was retained by the Marriages Act 1939 which introduced civil marriage and abolished the other forms of irregular marriage, marriage *per verba de praesenti* and marriage *per verba de future subsequente copula.* [246] Irregular marriage was once widely accepted, and at one point in Scottish history, accounted for a third of all marriages.[247] By the mid-nineteenth century, irregular marriage began to be abused as a legitimate method of establishing a marriage and became largely misunderstood due to its increased misuse. [248] MCHR was not originally a traditional form of irregular marriage under common law, but rather a method of proving other forms of irregular marriage and it only became a separate form of irregular marriage when these were put into statutory form.[249]

MCHR was abolished by the 2006 Act,[250] with this decision being largely influenced by the SLC who described MCHR as 'inadequate and statistically insignificant',[251] with an average of fewer than ten decrees of declarator establishing MCHR being granted each year.[252] Irregular marriage was regarded by many academics as outdated, complex, uncertain, and along with unjustified enrichment claims, inadequate for protecting cohabitants in modern society.[253] One of the major criticisms of MCHR specifically was that it was regarded as a system which often rewarded deception.[254] There are other criticisms that the policy adopted by Parliament in relation to the on-going reform of succession has changed in the objectives being prioritised, by moving away from a focus on best achieving testamentary freedom and intention and placing other objectives such as simplicity in

[246] Marriage Act 1939 s 5.
[247] Francis Lyall, *ICLARS Series on Law and Religion: Church and State in Scotland, Developing Law* (Routledge 2016) 171.
[248] ibid.
[249] 'An Advocate', *Marriage, Regular and Irregular* (William Hodge & Co 1893) 1.
[250] Section 3 of the Family Law (Scotland) Act 2006 abolishes, but Section 3(4) still allows a narrow exception for, a declarator of irregular marriage, relating to complications arising from marriages contracted abroad.
[251] Scottish Law Commission, *Report on Family Law* (n 2) 7.5.
[252] ibid 7.2.
[253] ibid 7.5.
[254] Sutherland (n 212) 39.

competition with these.[255] This creates a level of conflict between the objectives being pursued and it can be reflected that overall objectives such as simplicity are not necessarily suitable to guide the development of succession which is a technical and complex area of law. The pursuit of simplicity may be partly to blame for the unnecessary abolition of MCHR.

It seems that the SLC were too hasty in their 'tidy up' and failed to recognise the unique position of MCHR in Scots law. Their objective is to include cohabitants who would have previously qualified for MCHR within the new protections:

> In determining whether they were living together in this way we think that it would be useful to direct the court to the most important relevant factors. These are…whether the parties appear to family, friends and members of the public to be a married couple, civil partners or cohabitants. This will cover two situations. First, when a couple pretend to be married or in a civil partnership but are not, and secondly, couples who state openly that they are not married or have not registered a civil partnership[,] but nevertheless live together.[256]

The use of the word 'pretending' gives the impression that the SLC were only considering those who are *knowingly* unmarried. Irregular marriage was in some cases a remedy for couples who on death or breakdown discovered that their marriage was void.[257] Although the draft wording in Section 4.13 would be broad enough to cover those who were unaware, the SLC's reasoning seems to omit this group from their considerations.[258] Such an oversight again shows that in certain exceptional cases an exceptional remedy may be necessary, which MCHR previously provided.[259]

---

[255] Burns (n 162) 118; Scottish Law Commission, *Report on Succession* (n 2) 4.2 n 5.
[256] Scottish Law Commission, *Report on Succession* (n 2) 4.11.
[257] Scottish Law Commission, *Report on Family Law* (n 132) 7.12.
[258] Scottish Law Commission, *Report on Succession* (n 2) 4.13.
[259] MCHR is still available under Section 3 of the Family Law (Scotland) Act 2006, but under an exception only applicable to marriages contracted outwith the UK, and not to marriages contracted within Scotland.

Unlike the provisions introduced by the 2006 Act, by establishing MCHR a cohabitant could gain full spousal rights in life and death against their partner,[260] with this level of protection being much higher than what is currently available to cohabitants under Section 29. The situation would be improved by the future reform to allow claims from both the intestate and testate estate[261] and that following reform of judicial guidance would likely give a high weight to marital equivalent cohabitation.[262] However, this does not remove the fact that some cohabitants are now in a more legally disadvantaged and vulnerable position than they were before the 2006 Act came into force. Compared to the application for a discretionary award under Section 29, MCHR offered cohabitants the enforceable succession rights of a spouse on the net intestate estate of their deceased partner.[263] It was a logical system in that such a high level of protection required a higher threshold to be passed in order to establish MCHR and thus attain marital status.

Case for the Modernisation of MCHR

The nature of irregular marriage is similar to cohabitation in that its existence does not rely on formal registration or court decree, making it impossible to accurately ascertain the real frequency of use.[264] Unless a dispute arose surrounding the existence of such a marriage, there was no need to have it formally recognised.[265] The 2006 Act saw no introduction of any equivalent level of protection in inheritance for cohabitants. Although MCHR was only available to a minority of cohabitants, it did not make these claims any less worthy of legal recognition. The judiciary had already begun to modernise the harshest qualifying threshold, with the courts taking an increasingly lighter approach when establishing repute and consequently increasing the availability of MCHR to a larger number of cohabitants.[266]

---

[260] Lyall (n 247) 173.
[261] Scottish Law Commission, *Report on Succession* (n 2) 4.9.
[262] ibid 4.21.
[263] Brian Dempsey, 'Farewell then Common Law Marriage' (2005) 50 JLSS 12, available at <http://www.journalonline.co.uk/Magazine/50-12/1002528.aspx> accessed 22 August 2020.
[264] 'An Advocate' (n 249).
[265] Lyall (n 247) 172.
[266] *Donnelly v Donnelly's Exr* [1992] SLT 13.

Rather than abolition, further modernisation could have been achieved by extending its availability to same-sex couples, rectifying the inequality of its availability being exclusive to heterosexual couples.[267] The Marriage and Civil Partnership (Scotland) Act 2014 introduced same-sex marriage to Scotland[268] and could have also been used to modernise the application of MCHR by extending its application to same-sex couples, had MCHR not been abolished by the 2006 Act. This expansion happening less than a decade after the 2006 Act once again indicates that the abolition of MCHR in Scots law was done too hastily and without adequate consideration for modernisation rather than abolition.

Similarities between MCHR and Cohabitation

The idea that repute was the most central aspect of MCHR is a misrepresentation of the original tradition of irregular marriage. As previously mentioned the focus was originally on the intention and consent of the parties to regard each other as married and to bestow on one another the legal rights of a spouse, and this agreement was held to be a legally binding contract of marriage.[269] Irregular marriage could be achieved in secret with no one being aware of the marriage at all and with the couple being held by society to be unmarried individuals.[270] This was often in cases when the family disapproved and so the couple wished to protect themselves from disinheritance.[271] Irregular marriage was able to be established by a private agreement between the couple to regard each other as spouses without any requirement of repute. [272] This bears striking similarities to the ongoing encouragement for cohabitants to create private cohabitation contracts to establish their rights.[273]

[267] Marriages Act 1939. The words of the Act refer only to 'man and wife'.
[268] Marriage and Civil Partnership (Scotland) Act 2014 s 1.
[269] Dempsey (n 263) 50-12.
[270] Leah Leneman, *Promises, Promises: Marriage Litigation in Scotland 1698-1830* (NMS Enterprises 2003) 1.
[271] 'An Advocate' (n 263).
[272] Lyall (n 247) 173.
[273] Scottish Law Commission, *Report on Succession* (n 2) 4.23.

MCHR cases have frequently debated the duration necessary to establish this type of irregular marriage.[274] The belief was that establishing an arbitrary fixed time period was unnecessary and instead a flexible approach was developed. This was criticised due to the uncertainty of such a rule and yet there was little difficulty in judicial application.[275] It follows that the 2006 Act also rejected an arbitrary time-limit for cohabitants claims and focused on the behaviour and intention of the couple, adopting the same system as irregular marriage.[276] These elements of the current cohabitation law which are based on MCHR are the least problematic, proving that perhaps MCHR was not such an outdated or unworkable system after all.

The aims of reform were to achieve greater legal protection and certainty for cohabitants. Under Section 29 of the 2006 Act the court must establish whether the cohabitation qualifies under Section 25, the type of order, the amount to award, and simultaneously balance these factors against other benefits or claims on the deceased's estate,[277] with a declarator recognising MCHR seeming much less complex by comparison. In addition, MCHR was not available if either of the parties was already married or believed themselves to be already married, removing the problem of competing claims.[278] The new system suggested by the SLC (as discussed in the previous sections of this article) assesses the quality of cohabitation based on the degree to which it mirrors marriage by looking at three key factors.[279] Although recognition is given to the fact that some cohabiting relationships are virtually identical to marriage,[280] cohabitants are still denied the extension of the full status of marriage and a somewhat superficial separation is preserved. This further illustrates that MCHR is an adequate system of protection for modern cohabitants.

When looking at the functionality of the current laws governing cohabitation including the intention of the parties, the flexibility of

---

[274] *Wallace v Fife Coal Co* 1909 SC 682; *Low v Gorman* 1970 SLT 356; *Shaw v Henderson* 1982 SLT 211.
[275] Scottish Law Commission, *Report on Family Law* (n 132) 7.8.
[276] ibid 16.4.
[277] Family Law (Scotland) Act 2006 ss 29(a)-(d).
[278] *Lapsley v Grierson* (1845) 8 D 34, 1 HLC 498.
[279] Scottish Law Commission, *Report on Succession* (n 2) 4.21.
[280] Guthrie and Hiram (n 48) 223.

duration, and the importance of private agreements, this is extremely similar to the functionality of irregular marriage. The principles of providing certainty and protection for cohabiting relationships, especially those which are virtually identical to marriage, means that the level of protection is gradually increasing, bringing the available outcome of a claim ever closer to what was previously achieved through establishing MCHR. A slightly modernised version of MCHR should be placed alongside the 2006 Act, as its abolition has left a currently unfilled gap in the law, denying unique protection to a small group of deserving cohabitants.

Conclusion

The purpose of this article was to give a critical overview of the development of cohabitants rights in Scottish succession and the likely future developments within this area of law. The recent statistics examined establish that family law has changed in a permanent way, not only in structure but in societal attitudes towards the different types of domestic partnership. The increased incidence of cohabitation throughout Scotland demonstrates the necessity for the protections introduced through the 2006 Act.

By critiquing the functionality of the Section 29 inheritance provisions, it has been established that the strict time-limits and lack of judicial guidance have rendered these protections inadequate in fulfilling their original goal. The recommendations of the SLC for repealing Section 29 and replacing it with an entirely new system will help provide the desired outcome of greater security and certainty for cohabitants. However, this article has sought to establish that these recommendations for reform do not go far enough.

There are several issues of inequality between spouses and cohabitants which are in need of reform. The unequal protection for cohabitation agreements should be remedied through giving such agreements a statutory footing equal to the current system for pre-nuptial agreements. Through examination of other international jurisdictions, a case has been made for the benefits of introducing a centralised register for cohabitation based on the French PACs system to give greater security for cohabitants' inheritance claims. This article also suggests that this system could benefit the children of cohabiting families through the extension of the marital presumption of

parentage to registered cohabitants. Such wider reforms would help achieve the primary goal of protecting the vulnerable.

Finally, a case is made for the modernisation and reintroduction of MCHR beyond the extremely narrow scope within which it remains after its general abolition by the 2006 Act. The history of acceptance within Scots Law and society of what is commonly mistakenly labelled as 'common law marriage' and the high level of protection which it provided to qualifying cohabitants has resulted in some issues after its abolition. With no equal level of protection provided by Section 29 or the SLC's recommendations for reform, this article has sought to establish that MCHR still has a place in modern Scots law.

A Window into the Past: Is Corroboration Still True to its Historical Roots?

DEREK W GARDINER*

Abstract

The requirement of corroboration has been present in the Scots law of evidence for centuries. The institutional writers articulated the current rules in the eighteenth and nineteenth centuries, which have been used by the courts throughout the twentieth and early twenty-first centuries. The rules did not become clear until the late eighteenth century, and were based on medieval canon law, a fact that has been used to brand the requirement 'archaic'. The purpose of this article is to assess how the current rules came about and whether the rules articulated by the institutional writers remain the rules governing the requirement today or whether the requirement has been changed to go beyond the intent of the institutional writers. It will conclude that the requirement today remains largely the same as what the institutional writers intended.

Keywords: Canon law, corroboration, evidence, Moorov doctrine, Roman law

Introduction

The requirement of corroboration in Scots law is that there must be at least two credible independent sources of evidence available to the court to establish each of the *facta probanda*, or essential facts, of a criminal case.[1] The jury must be satisfied based on the evidence presented and beyond reasonable doubt that the conduct complained of constitutes a crime known to the law of Scotland and that the accused can be positively identified as the perpetrator of that crime.[2] Courts will not consider evidence to be corroborated if the evidence

* LLB (Hons), DPLP, University of Aberdeen. Derek is primarily interested in criminal law, human rights law and public law.

[1] Robert Wemyss Renton and Henry Hilton Brown, *Criminal Procedure According to the Law of Scotland* (Gerald H Gordon and Christopher HW Gane eds, 6th edn, W Green & Son 1996) para 24-69.

[2] ibid.

conflicts. [3] This has remained a staple of Scottish evidentiary procedure for centuries.

The requirement is perhaps best summarised by Lord Justice Clerk Ross in *Smith v Lees*[4] as being either two direct eyewitnesses to the fact, one direct eyewitness supported by circumstantial evidence spoken of by one witness to the evidence, or at least two sources of circumstantial evidence each spoken to by a witness.[5] All of these are sufficient to establish corroboration. *Fox v HM Advocate*[6] established that for evidence to be corroborative, it must 'confirm or support' other sources of evidence. Therefore, the general test is to identify the strongest source of evidence (a direct eyewitness testimony or stronger source of circumstantial evidence) and assess whether the weaker source of evidence 'confirms or supports' it.[7]

The rule has its origins in medieval canon law, which had a 'two witness' rule requiring two direct eyewitness testimonies.[8] Over time a series of cases made reference to by the institutional writers differs from the Romano- Canonical understanding of it to include circumstantial evidence and different acts of the same crime to be corroborated by a single witness.[9]

The modern debate surrounding corroboration in Scotland is dominated by the Carloway Review.[10] The final analysis of the report recommends the complete abolition of the requirement in all criminal law cases.[11] Despite much opposition from the judiciary, the Scottish government adopted the abolition of corroboration as policy and included it in early drafts of the Criminal Justice (Scotland) Bill; however, this became law in 2016 [12] with all provisions for the

[3] Derek P Auchie, *Evidence* (4th edn, W Green & Son 2014) para 2-34.
[4] 1997 JC 73.
[5] ibid 94.
[6] 1998 JC 94.
[7] Auchie (n 3) para 2-34.
[8] James A Brundage, *Medieval Canon Law* (Longman Group 1995) 142.
[9] David Hume, *Commentaries on the Law of Scotland Respecting Crimes* vol 2 (Bell & Bradfute 1844) 383-86.
[10] Carloway Review, *Report and Recommendations* (2011).
[11] ibid para 7.2.55.
[12] Criminal Justice (Scotland) Act 2016.

abolition of corroboration removed, on the basis that the government needed more time to consider the implications.[13]

One of the main objections to corroboration advanced by Lord Carloway is that it is an 'archaic doctrine' derived from 'medieval jurisprudence'. [14] In his report he outlines a brief history of corroboration arguing that historical context is needed to shed light on the modern utility of the requirement.[15] Carloway claims in his analysis that the corroboration requirement remains something unique to Scots law and was largely abandoned by the rest of Europe in favour of more subjective criteria. [16] This Article will address Carloway's criticism that the requirement has been stretched to the point where it is no longer true to its historical roots.

Variants of the requirement, including the *Moorov* doctrine,[17] special knowledge confessions and corroboration by distress will be assessed, as will the proposition that these represent relaxations of the requirement. It will conclude that the requirement of corroboration remains almost the same today as it was articulated by the institutional writers in the eighteenth century and that the institutional writers did not base their writings on a strict medieval requirement of two direct eyewitnesses to the facts, but instead on the case law contemporary to them.[18] The rules of corroboration that are followed today were already well established by the time of the institutional writers; it was an assessment of reliability rather than a purely quantitative one. The institutional writers did not cover every particular and the courts have built upon their writings as foundations for their rulings.[19]

---

[13] 'Plans to Abolish Corroboration in Scottish Cases Dropped' (*BBC News*, April 2015) available at <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-32398065> accessed 17 December 2018.
[14] Carloway (n 10) para 7.1.21.
[15] ibid para 7.1.4.
[16] ibid para 7.1.15.
[17] 1930 JC 68.
[18] Hume (n 9) 383-86.
[19] 1930 JC 68, 71.

Corroboration in Scotland

This section will explore the historical background of corroboration in the law of Scotland, from its origins in medieval canon law and the influence it had in Scotland prior to the time of the institutional writers. It will then explore the requirements set out by the institutional writers and how they came to the conclusions that they did.

Romano-Canonical Origins

The origins of corroboration can be found in evidentiary procedures outlined in the Old and New Testaments. One relevant text in the Old Testament reads, 'At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.[20] Another text in the New Testament reads, 'In the mouth of two or three witnesses shall every word be established'.[21] The Biblical story of Susannah and the elders illustrates the requirement. Susannah was charged with adultery and the evidence against her was the testimony of two eyewitness. However, upon cross examination, several inconsistencies were found in their accounts, and Susannah was acquitted.[22]

Sir Gerald Gordon suggests that the Old Testament requirements were also more practical. In a system where both the pursuer and the defender were required to give evidence, it would tip the balance in favour of one party.[23] Philo Judaeus wrote in the first century AD that the Old Testament requirement was a 'splendid rule' and that '[i]t is best, it would seem, to suspend judgement when neither side lacks or excels at anything'.[24]

---

[20] Deuteronomy 19:15.
[21] 2 Corinthians 13:1.
[22] Daniel 13:1-64. The Catholic and Orthodox Churches include this story as part of the Old Testament Deuterocanonical books. It is considered to be apocryphal in most Protestant circles.
[23] Gerald H Gordon, 'At the Mouth of Two Witnesses: Some Comments on Corroboration' in Robert F Hunter ed, *Justice and Crime: Essays in Honour of The Right Honourable Lord Emslie* (T&T Clark 1993) 34.
[24] ibid.

These words can be interpreted in several ways. While the former certainly provides some form of legal codification by making reference to the death penalty, the latter can be interpreted in a more religious sense. Jesus says at various points in the Gospel of St Matthew that where two or three of his disciples are gathered, he will be there with them.[25] In St Paul's Second Letter to the Corinthians, where he quotes this sentence, it is not within the context of criminal litigation.[26]

After the adoption of Christianity by the Roman Empire, the Bible became more influential as a source of law and was interpreted in the *Codex* of Justinian as setting a minimum standard of proof in litigation. The *Codex* established, 'It is certain that no force attaches to the sole statement that has been brought forward but without its case confirmed by other lawful evidence' and 'We have ordained also that no judge readily allow the testimony of one person in any case whatsoever. Now We plainly ordain that the response of a single witness should not be heard even if he is resplendent with the office of the illustrious city council'.[27]

In ancient Rome, the courts of the Roman Republic had adhered to a more subjective standard.[28] However, by the time of the *Codex*, distrust both of jurors and judges was widespread.[29] Judges were therefore required to follow a strict objective standard where written evidence was preferred to oral evidence and the evidence of a single witness afforded no credibility at all.[30]

Romano-Canonical law had influence in Scotland since before the time of *Regiam Majestatem* in the early twelfth century.[31] It was at the time referred to as *jus civile* or *jus imperiale*, and was far more commonly used in ecclesiastical courts than in the other types of

[25] Lord Hope of Craighead, 'Corroboration and Distress: Some Crumbs From under the Master's Table' in James Chalmers and others (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 5.
[26] 2 Corinthians 13:1.
[27] *Codex* 20.4, 20.9.
[28] HF Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge University Press 1972) 462.
[29] ibid.
[30] ibid.
[31] DM Walker, *A Legal History of Scotland* vol 2 *The Late Medieval Period* (W Green 1990) 255.

courts that existed, which may well have had different standards of proof. However, the Church had extensive jurisdiction at this time, and any such laws would have been the Romano-Canonical laws followed by the Church in the rest of Europe.[32]

Anything resembling modern criminal procedure in Scotland did not emerge until the early thirteenth century. Before that, the most commonly used methods of proof were trials by fire, water and combat, collectively known as 'trial by ordeal'.[33] However, even at this early stage, there remained alternative methods of proof, including the testimony of two eyewitnesses or 'good men under oath'.[34] Generally, these 'good men under oath' were required to swear the innocence rather than the guilt of the accused and must number either six or twelve in order to prove that an inferior court failed to do justice.[35] In an early case of an inquiry into a death, thirteen men gave testimony that the death was not a homicide but caused by a person acting in self-defence.[36]

In 1230, King Alexander II gathered senior clergymen and nobles to reform legal procedure into something resembling the modern understanding of it.[37] The reformers themselves were largely influenced by the Fourth Lateran Council and Bishop Melveisin, who had been present at the council. There a ruling was given by Pope Innocent III that no clergymen could participate in a trial by ordeal. Due to the Church's extensive influence on European jurisprudence, this required legal reform throughout Europe's kingdoms.[38]

The accusation procedure remained widespread in medieval Europe and required the victim of the crime to initiate proceedings, rather than the state against citizen, to use modern terminology. It was done on the basis of citizen against citizen. The methods of proof expected by canon law were extremely high; they must be 'clearer

[32] Ibid (n 31).
[33] Andrew RC Simpson and Adelyn LM Wilson, *Scottish Legal History* vol 1 *1000–1707* (Edinburgh University Press 2017) 72.
[34] ibid.
[35] DM Walker, *A Legal History of Scotland* vol 1 *The Beginnings–1286* (W Green 1988) 274.
[36] ibid.
[37] Simpson and Wilson (n 33) 74.
[38] ibid 74-76.

than the mid-day light'.[39] This usually required two credible eyewitness testimonies, or else a confession made by the accused person which alone would have made full proof. This meant that the crime would have had to have taken place in the mid-day light if the evidence had any chance of succeeding. The two witnesses must testify under oath that they personally witnessed the criminal acts complained of.[40] This, to use modern terminology, would require two sources of direct evidence. This was based on a distrust of circumstantial evidence by canonical jurists, as it was seen as leaving too much discretion to the judges. If God was not in the judgement seat, the matter could not be left to a human judge; he could only convict based on a set standard of objective criteria.[41] At this time, circumstantial evidence could only be grounds for deciding whether or not to torture the accused.[42] The Biblical two-eyewitness requirement remained central to the causational procedure, and the accuser risked punishment if he failed to sustain the accusation.[43] Trial by ordeal remained a substitute, and was a preferred method of resolution if the two eyewitness failed to materialise.[44]

In the early thirteenth century, Pope Innocent III sought to reform the system to reduce the evidentiary hurdles. He authorised courts to convict on the testimony of one witness supported by circumstantial evidence, but this remained only a 'partial proof'.[45] The papal reforms introduced what is today regarded as the inquisitorial system, whereby the judge would act as the prosecutor, rather than the victim of a crime having to initiate proceedings and potentially facing punishment if there was insufficient proof. The reforms also cemented the position that circumstantial evidence could be used rather than the testimony of two eyewitnesses.[46] Representing an early relaxation of the strict two-witness requirement, this was a response to clerical concubinage, which was extremely difficult to

[39] Brundage (n 8) 142-43.
[40] ibid.
[41] John H Langbien, *Torture and the Law of Proof* (University of Chicago Press 1977) 6-7.
[42] ibid 8.
[43] Simpson and Wilson (n 33) 73.
[44] ibid 75.
[45] Brundage (n 8) 145.
[46] ibid.

prove under the Church's own rules, and therefore required some relaxation.[47]

In response, King Alexander abolished trial by fire and water but retained trial by combat, and jury trial was introduced. At this point in time, there was no distinction between criminal and civil procedure, so the victim of a crime would have to initiate procedure as in civil cases and still faced punishment if they lacked sufficient evidence to support their accusations. In cases where the victim was considered to be within a vulnerable class, the Crown would make the accusation on their behalf, as is the case in criminal procedure today.[48]

Sixteenth to Eighteenth Centuries

In the 1520s, Archbishop Gavin Dunbar established the College of Justice, comprised of 'literate men of knowledge and experience'.[49] Such men would be trained in universities across the Continent and would be able to read and interpret Latin, in which the Roman legal texts were written. They were heavily influenced by the *Codex* of Justinian. Roman law became more standardized throughout Scotland, superseding most of the local customs that had existed previously.[50] In 1560, the Papal Jurisdiction Act[51] declared that the Bishop of Rome had no authority in Scotland, and the jurisdiction of ecclesiastical courts was transferred to temporal courts. However, the rule that a single witness was insufficient remained in place.[52]

There remains some dispute among historians regarding how widespread the requirement was in this time period. Walker argued that the principle of corroboration did not apply in the seventeenth century, despite it being referenced by Stair.[53] In the seventeenth and eighteenth centuries, a middle way was adopted which would, in capital crimes, allow the judge to impose a lesser sentence than death where there was insufficient proof under the Romano-Canonical

[47] Simpson and Wilson (n 33) 76.
[48] ibid 76.
[49] ibid 131.
[50] ibid.
[51] 1560 c 2.
[52] DM Walker, *A Legal History of Scotland* vol 3 *The Sixteenth Century* (T&T Clark 1995) 435.
[53] Stair *Institutes* I, 43, 143.

rules. This was known as *Poena Extraordinaria*. In cases such as these, a more subjective standard was imposed, and judges who were convinced on a single source of circumstantial evidence could impose a lesser sentence on the accused.[54] The writings of Hume show this custom was adopted in Scotland.[55]

By the end of the eighteenth century, juries were only allowed to convict based on the evidence presented at court, and not any other knowledge they may have had of the case. The objective standards remained firmly in place. Juries could only convict if the evidence met the criteria.[56]

Early Institutional Writers

The test of corroboration used in Scotland's courts today was established by Baron Hume in the late eighteenth century.[57] However, the requirement was referred to by earlier institutional writers. Bisset wrote, 'The witness proves sufficient gives two at least' and Balfour wrote, 'one witness is not sufficient of the law'.[58] There is some dispute as to whether the requirement was strictly enforced in all cases, and indeed if such a requirement only came into existence in the seventeenth century, despite its having existed previously in the ecclesiastical courts of the Catholic Church.

Stair's *Institutes* interprets the requirement in its strict Biblical sense. He wrote, 'One witness cannot make sufficient probation, whatever be the quality or veracity of that witness', and went further than Hume in writing, 'Hence it is also consequent that the probation of some points requires but two witnesses, and others require three which must be matters of very great importance.'[59] Stair based his statements mostly on Roman authorities, though he did not elaborate on what matters constituted 'matters of very great importance'.

---

[54] Langbien (n 41) 50.
[55] Hume (n 9) 383.
[56] DM Walker, *A Legal History of Scotland* vol 5 *The Eighteenth Century* (T&T Clark 1998) 555.
[57] Hume (n 9) 383.
[58] DM Walker, 'Evidence' in *Introduction to Scottish Legal History* (The Stair Society 1958) 309.
[59] Stair *Institutes* I, 43, 143. 1-3.

Hume

Hume, writing a century later, made no reference to prior institutional writers, but instead based his thesis on a series of cases contemporary to him over most of the eighteenth century, and not on any religious justifications, but rather on a need for reliability.[60] He saw the need for corroboration as an alternative to unanimity of the jury, which Scottish juries lack.[61] Lord Hope opined that the universal acceptance of the rule was by the time of Hume 'a comparatively recent development'.[62] Professor Walker argued that despite the writings of the institutional writers at the time, the requirement of corroboration fell into disuse in the seventeenth century[63] with cases such as *Gylour*[64] showing that the essential *facta probanda* could be established by a single witness, including the identity of the accused. Some scholars view the writings of Hume as a revival of the requirement that had been in use in medieval courts, while others view it as continuing the Romano-Canonical corroboration requirement.[65] By the time of Hume, ecclesiastical courts were a distant memory in the Scottish legal system.

Hume's oft-quoted passage encompasses both the requirements for the corroboration test to be met, as well as the rationale behind it. It reads, 'No matter how trivial the offence and how high so ever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape'.[66]

Sir Gerald Gordon argues that this is a form of 'rule utilitarianism' in that in order to ensure no innocent person is

---

[60] Hope (n 25) 6.
[61] David Hume, *Commentaries on the Law of Scotland Respecting Crimes* vol 1 (Bell & Bradfute 1844) 6.
[62] Hope (n 25) 7.
[63] DM Walker, *A Legal History of Scotland* vol 4 *The Seventeenth Century* (T&T Clark 1996) 548.
[64] J Irvine Smith, *Selected Justiciary Cases 1624–1650* (The Stair Society 1974) 518-20.
[65] Hope (n 25) 6.
[66] Hume (n 9) 383.

wrongfully convicted, it is better to allow the guilty to escape.[67] However, Jeremy Bentham was critical of the requirement, writing, 'The innocents who ought to have presented themselves by millions [*ie* the victims of crimes unproved for lack of corroboration] are overlooked and left out of the account'.[68]

Hume was also clear that indirect circumstantial evidence pointing to the guilt of the accused was sufficient to corroborate the testimony of one witness, writing:

> It would not however be a reasonable thing[,] nor is it our law[,] that the want of a second witness to the fact cannot be provided by the other circumstances of the case. If one man swear he saw the accused stab the deceased and others confirm his testimony with circumstances such as the panel's sudden flight from the scene, the blood on his clothes, the bloodied instrument found in his possession, his confession on being taken and the like, these are as good, nay better than even a second testimony to the act of stabbing.[69]

Hume wrote there was no need for two witnesses to establish all the relevant facts of the case, each witness could testify as to different facts of the same case. And in some cases, such as that of Thomas Souter and James Hogg, different facts of the same case were established by the testimony of a single witness.[70] It was lawful to convict on circumstantial evidence alone, provided there were two independent sources of circumstantial evidence, as in the case of Stewart, wherein the presence of a hat in a tavern where the accused last met with the deceased was used to corroborate other circumstances.[71] Hume's assessment differs from the original Romano-Canonical rule, which should perhaps be regarded as a 'two witness' rule, while the current formulation of the requirement advanced by the institutional writers is based on the principle of reliability.[72]

---

[67] Gordon (n 23) 35.
[68] ibid.
[69] Hume (n 9) 384.
[70] ibid 385.
[71] ibid.
[72] Gordon (n 23) 36.

Hume's assessment of the requirement of corroboration remains the most authoritative source to this day, alongside Alison, Dickson and Burnett.[73] Hume's test of corroboration was endorsed by a bench of seven judges in the case of *Morton v HM Advocate*.[74] However, there is evidence to show that some doubts over Hume's authority remained into the nineteenth century. Lord Hope makes reference to an annotated copy of Hume's *Commentaries* that he inherited from his ancestor, Lord Justice Clerk Hope, in which he wrote beneath Hume's statement that the evidence of a single witness can never be accepted, 'Wrong. It is merely a question of how far the single witness is in the opinion of the jury to be believed'.[75] Lord Hope believed he was drawing inferences from the law of England; Hume, however, always viewed the law of Scotland, especially in relation to evidence, as distinct from that of England.[76] Lord Coulsfield has said that while there may have been some confusion in earlier times, the rules articulated by Hume remain the *locus classicus*.[77]

Later Institutional Writers

Alison made a similar assessment of the law as Hume.[78] He also added that in cases where there is a chain of circumstances such as theft, one witness is not required to each link in the chain.[79]

Burnett followed the writings of Hume. Unlike Hume, however, Burnett acknowledged the Biblical and Roman origins of the rule, writing that it had 'prevailed since the earliest of times…and is founded on both reason and humanity.'[80] He cites the original Romano-Canonical understanding of the requirement of two direct eyewitnesses swearing to the facts as 'perfect and complete',

---

[73] Archibald Alison, *Practice of the Criminal Law of Scotland* vol 2 (W Blackwood 1833) 551; WG Dickson, *A Treatise on the Law of Evidence in Scotland* vol 2 (T&T Clark 1887) para 1808; John Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (A Constable 1811) 518.
[74] 1938 SLT 27.
[75] Hope (n 25) 7.
[76] ibid.
[77] 1998 JC 94, 117.
[78] Alison (n 73) 551.
[79] Archibald Alison, *Principles of the Criminal Law of Scotland* vol 1 (W Blackwood 1832) 323. The chain approach was later discredited. 1957 JC 31.
[80] Burnett (n 73) 518.

concurring with Hume that direct and circumstantial evidence are sufficient.[81]

By 1887, WG Dickson largely concurred with Hume's assessment. He gives specific examples of cases where two eyewitness testimonies are very difficult to produce, such as in rape cases where corroboration can be established by circumstantial evidence or the admission of guilt by the accused can corroborate the woman's testimony.[82]

Dickson wrote that it is possible to convict of one crime where there is insufficient proof, if it is part of a string of offenses, the example he gives is a series of burglaries committed at the same time and there was evidence to prove that the accused perpetrated them all in a way which created 'unity of character'. Then evidence of one burglary would be sufficient to convict the accused of the others as it is part of a 'thieving expedition', this would seem to be what would today be regarded as the *Moorov* doctrine.[83]

Dickson also opined that circumstantial evidence could be more reliable than two eyewitness testimonies as it was far more difficult to fabricate circumstantial evidence than to find two eyewitnesses to give a concurring false testimony. This is perhaps due to a change in societal attitudes towards swearing under oath. In medieval times, a false oath would lead to eternal damnation, however by the time of Dickson, society was more secular rational, and it would be more likely that a false testimony would be given under oath, therefore increased trust was being placed on circumstantial evidence. It was a well-established practice by the time of Dickson that unless statute directed otherwise, corroboration was required in all cases criminal or civil.[84] It can be drawn that it took some time for the treatise writers to develop a coherent set of rules in relation to the rule. Requirements had changed from a mere quantitative assessment to one of reliability.[85]

---

[81] Burnett (n 73) 518.
[82] WG Dickson, *A Treatise on the Law of Evidence in Scotland* vol 2 (T&T Clark 1887) para 1808.
[83] ibid.
[84] DM Walker, *A Legal History of Scotland* vol 6 *The Nineteenth Century* (LexisNexis 2001) 506.
[85] Gordon (n 23) 36.

Case Law

Some cases involving the requirement of corroboration can be traced back as far as the sixteenth century. It is useful to trace the case law of this period, as the institutional writers would have based their understanding of the rules on the cases contemporary to them.

A requirement for more than one source of evidence was taken into account at the trial of Agnes Sampson for witchcraft. King James VI took a personal interest in hunting down witches, presiding over pre-trial proceedings himself. Due to only one source of 'evidence' being available at this stage namely the word of the complainer. The King ordered the torture of the accused prior to the trial. The accused confessed under torture, and that gave sufficient evidence to proceed to trial.[86]

The 1598 case of *Hay*[87] related to then-criminal offence of adultery. The case made reference to the requirement of two witnesses and it was submitted that the evidence presented by a doctor should not be rejected on the basis that he was a single witness, as it was a special case. The 1642 case of *Gylor*[88] relates to the rape of a ten-year-old girl. In this case, the panel would have been identified solely by the victim thus there was no corroboration as to the identity of the accused, one of the two essential *facta probanda* to be established. The case was criticized by Hume for lack of reliable evidence. This case would seem to be an anomaly. Walker has inferred from this that there was a brief period of time in which corroboration was not required, however evidence from other cases shows the requirement remained in place throughout the seventeenth century, although it may not have been adhered to universally.[89] And the 1667 case of *Lady Milton v Laird of Milton*[90] represented an early relaxation of the requirement allowing the evidence of a single witness to connected acts of the same kind.[91]

However, a custom once existed where inferior punishments could be levied in the event that only 'half-proofs' were available to

[86] Simpson and Wilson (n 33) 352.
[87] 1598 Pitcairn 65.
[88] 1642 2 JC 518.
[89] Smith (n 57) 518-20.
[90] M 120101.
[91] Walker (n 58) 309.

the court.[92] In the 1705 case of Gabriel Clarke,[93] who was charged with making and vending false coins, with the testimony of only one witness, the aforementioned custom concerning inferior punishment where there were inferior methods of proof. The accused was therefore sentenced to penal transportation rather than death. In the 1722 murder trial of John Troublecock,[94] there was only one witness to the accused fleeing from the crime scene, however the presence of a bloody bayonet and different witnesses proving the other facts of the case resulted in the panel receiving the full sentence of death.[95] Hume's writings show that the rules of corroboration as understood today remain largely the same as they were during the time period in which he wrote.

Nineteenth-century cases show that the requirement of corroboration was by that time well established. In the theft case of *Brown*[96] the trial judge directed the jury that the testimony of one person also accused of the same crime was insufficient and there had to be either circumstantial evidence or a concurring testimony of an unsuspected person.

Modern Approach to Corroboration

This section will aim to assess how corroboration has changed since the time of the institutional writers. Has there been any real substantive change? It will start by examining the landmark case of *Fox v HM Advocate*[97] in which the current rules of corroboration were laid down. It will then examine to what extent the landmark cases of *Moorov v HM Advocate*[98] and *Smith v Lees*,[99] often cited as representing revolutionary change in the requirement of corroboration actually represent such change. This section will end by assessing Lord Carloway's historical analysis and address many of the criticisms he makes of the current rule in a historical context.

---

[92] Hume (n 9) 383.
[93] ibid.
[94] ibid.
[95] ibid 383-85.
[96] 2 Irv 232.
[97] 1998 JC 94.
[98] 1930 JC 68.
[99] 1997 JC 73.

Fox v HM Advocate

The current rules regarding the modern requirement of corroboration were established in the landmark case of *Fox v HM Advocate*.[100] In this case, the complainer consented to sexual intercourse with the accused based on the mistaken belief that he was another individual. The court held that if there was circumstantial evidence which was consistent with the complainer's direct evidence, then it did not have to be more consistent with the complainer's evidence than with any other evidence for the jury to accept it. The evidence needed to 'confirm or support' any direct evidence provided. The case overruled an earlier case, which held that circumstantial evidence equally consistent with the direct evidence provided by both sides was at best neutral.[101]

In this case, the court took the opportunity to examine the historical roots of the requirement and reflect on some of the changes that had been made. The Lord Justice General was of the opinion that 'in essence the picture has not changed' since the time when the institutional writers set out the rules of the requirement and that is, that a single source of direct evidence must be supported by another independent source of direct evidence or circumstantial evidence.[102] He gives an imaginary case in which the accused kills the husband of a woman who gives evidence in court, this evidence is supported by fingerprints belonging to the accused being lifted from the body of the husband and the blood of the husband being found on the accused's clothing. This would constitute direct and circumstantial evidence. If the accused gave an alternative account then the jury could accept that, however, they may convict if they believed that the direct evidence advanced by the crown more closely aligned with other facts of the case.[103]

Lord Coulsfield's expands on what Hume might have regarded as circumstantial evidence. Certainly, the examples he gives in his passage of the panel's sudden flight from the scene or the bloodied instrument found in his possession are authoritative, provided that the witnesses to these circumstances are independent of the direct

[100] 1998 JC 94.
[101] ibid.
[102] ibid.
[103] 1998 JC 94, 103-04.

evidence provided. Lord Coulsfield's interpretation of Hume is that the evidence of the circumstances must 'point to' the guilt of the accused and the jury must be satisfied that the evidence from the different sources they are relying upon are independent of each other. Lord Coulsfield concludes by saying that the passages of Hume should be understood as requiring something other than the testimony of a single witness or source of evidence.[104]

Moorov v HM Advocate

The earlier case of *Moorov v HM Advocate*[105] gave birth to what modern scholars describe as the *Moorov* doctrine, that in circumstances where corroboration is lacking for one crime, evidence of a similar crime of which the accused is also charged on the same indictment will be enough to establish a *factum probandum*. Lord Carloway describes this case as an example where the requirement has become 'stretched'.[106] This is certainly not the case, and the following analysis will aim to demonstrate why it is not.

Samuel Moorov was a business owner who was charged with several counts of assault and indecent assault against women in his employ. He was charged with seven simple assaults against seven people over a period of seven years, and with nine indecent assaults against five people over a period of three years. The simple assaults were dismissed as trivial.[107] However, in relation to the indecent assaults, the only evidence put forward was the testimony of the female victims against whom each assault was perpetrated. The court held that corroboration could be found in cases where 'there was sufficient interrelation in time, place, and circumstances between the assaults to allow the evidence of one woman with regard to her experience to corroborate the evidence of another with regard to hers'.[108]

The individual judgements of the high court show that none of their lordships saw this as a deviation from the writings of the institutional writers nor did they see this as creating the revolutionary

[104] 1998 JC 94, 117.
[105] 1930 JC 68.
[106] Carloway (n 10) para 7.2.46.
[107] 1930 JC 68, 75.
[108] 1930 JC 68.

change it has been portrayed as creating.[109] The lead judgement was provided by Lord Clyde who said that 'It is beyond any doubt in the law of Scotland that corroboration can be established in this way'.[110] However, the circumstances are limited. Hume said that there need not be corroboration of all the individual acts of the same crime and this was relied upon in Lord Clyde's judgement to the effect that despite the fact that there were separate charges, they were separate acts in a sequence which represents a 'unity of intent, project, campaign or adventure'.[111]

The judgement of Lord Alness is perhaps the most helpful in explaining the principles of the court relied on in coming to this decision. Lord Alness relied on the passage by WG Dickson referenced above.[112] He gave the example of a series of robberies conducted on the same night by the same person so as to represent a 'thieving expedition'.[113] Lord Alness offers two interpretations of this passage. A negative one is where the separate acts have no connection to each other, and it is not competent to that one witness to an act should corroborate a witness to the other act. A positive interpretation is one where the different criminal acts form different parts of the 'same criminal conduct' then the evidence of one witness to one act a will be enough to corroborate one piece of evidence to another.[114] Alison also made reference to this saying:

> In the third place, where a number of instances of the same crime are charged under one general denomination, and connected together and forming part of one and the same criminal conduct, as subornation, adultery...each separate act may be competently established by the evidence of a single witness, as each act is in truth nothing but the link by which the guilt upon the whole is established.[115]

Another key aspect addressed in the Lord Alness judgement is the question of time. The institutional writers spoke of a connection in

[109] ibid 73.
[110] ibid 100.
[111] ibid.
[112] Dickson (n 73) para 1810.
[113] ibid para 1814.
[114] 1930 JC 68.
[115] 1930 JC 79; Alison (n 73) 552.

time. He specifically declined to define exactly how much time should pass between the separate acts but instead argued that it should be dependent on the circumstances of the particular case. He justified this on the basis that there was no authority that ran contrary to his judgement on the matter. While the passage cited from Dickson does make reference to a 'thieving expedition' taking place on the same night.[116] Lord Carloway said, 'The application of the principle in *Moorov* is yet another example of where the law has become stretched. It becomes highly artificial where the events are years apart'.[117]

However, it can be inferred from the judgement of Lord Alness that this has been interpreted as analogy rather than law. Indeed, this is merely an example and Dickson does not at any point say that the time between the acts has to be merely hours or days as counsel for the appellant submitted in this case.[118] The indecent assaults complained of in this case took place over a period of three years and it is worth noting that the first of the simple assaults, which took place in 1923 four years before the first of the indecent assaults complained of, was dismissed on the basis that it was a remote incident.[119] This suggests some form of time limit, although this was not clearly defined in this case.

The dissenting judgement of Lord Sands was not based on a belief that the *Moorov* doctrine ran contrary to the principles of corroboration as articulated by the institutional writers. Indeed, Lord Sands did not rule out the use of evidence in support of a separate charge being used as supporting evidence. Instead he dissented on the basis that in principle the use of evidence in support of another charge would prejudicial to the principles of fair and impartial inquiry.[120]

Therefore, it can be inferred from the judgements cited above that there was not a debate as to whether allowing evidence for a separate charge or conviction was competent but rather whether in the facts of this particular case it should be applied. Indeed, there is evidence from cases pre-dating *Moorov*, such as that of *HM Advocate v*

[116] Dickson (n 73) para 1810.
[117] Carloway (n 10) para 7.2.46.
[118] 1930 JC 68, 82.
[119] ibid 81.
[120] 1930 JC 85.

McDonald.[121] In this case, the accused had sexually assaulted his two daughters, each of which could only testify to the assault upon themselves and not upon the other. In this case Lord Blackburn noted that crimes of a private sexual nature were not as common in the time of the institutional writers as they are in modern times,[122] but he did not significantly depart from their writings on the subject. The idea that *Moorov* represents a new doctrine which was unavailable before the case was decided is not an accurate representation of the law. Nothing decided in *Moorov* was in any way inconsistent with the writings of the institutional writers.

Corroboration by Distress

Another landmark case that has attracted the attention of scholars is *Smith v Lees.*[123] In this case, the panel was charged with sexually assaulting a thirteen-year-old girl on a camping trip while she was asleep. The girl left the tent in the morning and was visually distressed and began to cry. The trial court held that the evidence of the complainer's distress was enough to corroborate her account. The panel appealed and the crown relied on the evidence of her distress in its submissions. The appeal court observed that evidence of distress could corroborate a lack of consent on a charge of rape. The jury must be satisfied that the distress arose spontaneously from the incident and that it was genuine and not being faked.[124] This was justified by the Crown on the basis that sexual intercourse was a pleasurable experience and distress occurring as a result of it would prove that it was not consensual.[125] However, in this particular case they were not satisfied that the panel's conduct complained of had caused the distress but only that something distressing had occurred.[126]

It is now necessary to turn to the question of whether corroboration by distress is in line with the requirements laid down by the institutional writers. Lord Carloway said that it is 'an attempt to fit an archaic requirement into today's reality'.[127] To discover the

[121] 1928 JC 42, 44.
[122] ibid.
[123] 1997 JC 73.
[124] ibid (n 123).
[125] ibid 79.
[126] 1997 JC 73.
[127] Carloway (n 10) 7.2.45.

truth of this statement it is necessary to look at previous authorities that could be regarded as contrary. In the case of *Morton v HM Advocate*[128] the facts were very similar to that of *Smith v Less*. The panel was charged with assault of the female complainer. There were no other witnesses to the assault who could identify the accused other than the complainer herself. Later, on the same day as the alleged assault she met with her brother and recounted the events to him in a distressed state. This was held by the court to be a statement *de recenti* (a statement that could add credibility to a source of evidence but did not constitute an independent source of evidence itself)[129] and thus was insufficient in law to corroborate the testimony of the complainer as it was classed as hearsay evidence unless it could be brought within the *res gestae*[130] (things said which form part of the alleged incident or are 'intimately connected' with what was done).[131] It would seem from this case that distress could only ever constitute part of a *de recenti* statement. However, this case is unlikely to have been decided differently under the test set out in *Smith v Lees*, as the panel was charged with assault, and not rape.

The leading judgement of *Smith v Lees* was provided by Lord Justice General Rodger. He makes reference to the writings of Hume and Alison's statements in relation to circumstantial evidence and notes that Burnett says that what constitutes circumstantial evidence cannot be determined by any rule.[132] He seems to base his thesis on an ambiguity rather than any concrete foundations. The Lord Justice General later cited Burnett as saying that the supporting evidence must be independent of the evidence provided by the witness.[133] He then referred to further authority and bases his judgement on the merits of the individual case.[134] The main submission on behalf of the appellant in this case was that the distress displayed by the victim was not independent of the testimony as it came from the same source. There is merit to this argument. Lord Justice Clerk Ross made reference to more institutional authority in his judgement. His

[128] 1938 JC 50.
[129] Stair *Institutes* I, 43, 143.
[130] 1938 JC 50, 53.
[131] Renton and Brown (n 1) 24-135.
[132] 1997 JC 73, 79.
[133] 1997 JC 78.
[134] ibid.

judgement conveys scepticism of the idea of corroboration by distress.[135] A statement by Burnett, to the effect that

> [n]o other evidence which goes merely to support the credibility of the witness in the account he has given of the fact to be proved, as by establishing that he had recently after communicated what he had witnessed to another person shall be held to as sufficient to supply the want of another witness to the fact.[136]

This would appear to run contrary to the idea that distress could ever be sufficient proof in Scots law. The court did, however, take a conservative approach in this case and did not go as far as some earlier cases had.

Lord Hope's Analysis

Lord Hope provided additional analysis in a lecture in honour of Sir Gerald Gordon, in which he posed the question of whether distress can corroborate the account of a witness and if this constituted 'circumstantial evidence' as understood by Hume.[137] He echoes the criticisms made by the judges in *Smith v Lees* that the institutional writers were very vague on this point. Hume said that the evidence must 'confirm his testimony.' While he gave some examples, these are not necessarily exhaustive, and Lord Hope opined that some of the tests were satisfied in *Smith v Lees*. However, Lord Hope's comments are also interesting, in that he seems to suggest that the law is moving away from Hume. He cites Professor Victor Tadros, who opined that the continuing authoritative influence of Hume showed a lack of modern academic scholarship in the area. [138] As previously mentioned, the institutional writers make little reference to crimes of a sexual nature committed in private; they do, however, make reference to highway robberies, which often took place in isolated locations and away from public view. It was in cases such as these that circumstantial evidence would be used more often than in cases that took place in public. *Smith v Lees* overruled the earlier case of *Stobo v*

[135] ibid 93.
[136] 1997 JC 73, 95; Burnett (n 73) 519.
[137] Hope (n 25) 1.
[138] ibid 9.

HM Advocate,[139] in which the court had attempted to establish a more qualitive assessment to corroboration by distress. Lord Hope believed that overruling this case restored the 'purity of the law'.[140]

Sir Gerald Gordon commented on the case of *Cannon v HM Advocate*[141] in which the crown relied on evidence of the complainer's distress and this was accepted as corroboration due to a small-time interval in which little else could have occurred. He said: 'Perhaps, however we should treat the concept of distress as corroboration as a relaxation of the rules of corroboration required in order to take account of the fact that rape is normally committed clandestinely.'[142]

This author concurs with this analysis. It seems doubtful that the institutional writers would have viewed corroboration by distress as sufficient, indeed Burnett seems to have opposed such a conclusion on the basis that the evidence was not independent as it came from the same source, although spoken to by a separate witness, as the account provided by the witness. This relaxation can be justified due to the difficulties of establishing corroboration in cases where the facts are of a sexual nature.

Lord Carloway's Review

It is not the purpose of this article to make a case for or against the abolition of corroboration, but rather to explore the modern approach to it. This section will focus on Lord Carloway's Review.[143]

Carloway's Criticisms

Lord Carloway's main criticisms included the proposition that the objective standards of proof were outdated, and that Europe had moved towards a more subjective standard after the abolition of torture.[144] His second criticism was that the high standards of proof led to those who were guilty escaping justice.

---

[139] 1994 JC 78.
[140] Hope (n 25) 11.
[141] 1992 SCCR 505.
[142] ibid 512.
[143] Carloway (n 10) 7.2.
[144] ibid 7.1.13-15.

Carloway contends that the requirement is based on a distrust of circumstantial evidence. However, the position by the eighteenth century, as quoted above by Hume, was that the testimony of a single eyewitness could be substantiated by any other source of evidence, either a direct eyewitness testimony or an independent source of circumstantial evidence spoken to by another witness.[145] Dickson took a far more cynical view of eyewitness testimonies by the time he wrote in the 1880s. The same level of religious fervour was not present in society, and witnesses were more likely to lie under oath; this put an increased trust in circumstantial evidence, which was considered by Dickson to be more reliable than two perjured testimonies.[146]

It is clear from Carloway's analysis that he rejects Hume's 'rule utilitarian' statement that some guilty people should be allowed to escape justice to ensure that no innocent person was convicted without supporting evidence.[147] He also submits that the requirement has been stretched over time and a number of exceptions made to the rule so as to render it incomprehensible to a lay jurist. He says that the process of bending the requirement meant that certain cases had succeeded which would have failed had the medieval rules been applied, despite the current *locus classicus* being Hume's assessment and not the medieval requirement.[148]

Carloway uses the Romano-Canonical requirement or 'two witness' rule, as described by Sir Gerald Gordon, and the requirement articulated by Hume, interchangeably. That is not the case for reasons outlined above. Hume's understanding of corroboration is based on a series of cases litigated in the eighteenth century. He makes no reference to the Bible or to medieval canon law in his writings.

Gillespie v MacMillan

A case that Carloway cites as showing that the requirement is no longer true to its historical roots is that of *Gillespie v MacMillan*.[149] He argues that the judges were 'altering or bending' the requirement, and

[145] Hume (n 9) 384.
[146] Dickson (n 73) para 1811.
[147] Carloway (n 10) para 7.2.30.
[148] 1998 JC 94, 117.
[149] 1957 JC 31.

that they knew this.[150] This is a case of a speeding offence in which one police officer started a stopwatch when the appellant passed him, a second police officer stated his stopwatch at the second point, and a third police officer stopped the car. Counsel for the appellant submitted that two police officers were required to corroborate each part of the crime. However, this position was dismissed as extreme by Lord Justice General Clyde.[151] Hume certainly would have agreed with this assessment; he said that if there was one witness to each separate act in a chain of circumstances each pointing to the guilt of the accused, there was no need for there to be two witnesses to each link in the chain.[152] Lord Thomson describes this as a common sense approach rather than a strictly logical approach.[153]

This case should however be viewed with scepticism. The main criticism of this case is that the essential facts of the case were not proved by more than one source. Criticisms in the *Scots Law Times* read, 'The court in reaching its decision departed from the principles laid down by Hume.'[154] The *Gillespie* decision was further criticised for extending Alison's chain analogy to include cases where the only evidence available was a chain of circumstances implicating the accused and thus went against the law as stated by Hume.[155]

The case came under further criticism from Sir Gerald Gordon, as an abolition of the corroboration requirement in any meaningful sense.[156] This is because it abandoned the reliability principle; it was not possible for one witness to support the testimony of the other as both witnessed different acts of the crime.[157] The case could, however, be considered an anomaly. Despite being decided by a bench of five judges, it has not had much influence ever since.[158] In any event, corroboration for this type of road traffic offence has since been

[150] Hope (n 25) 6.
[151] ibid 36.
[152] Hume (n 9) 384.
[153] 1957 JC 31, 40.
[154] 1958 SLT 138.
[155] ibid 139.
[156] Gordon (n 23) 47.
[157] 1958 SLT 138.
[158] Gordon (n 23) 48.

abolished, and has been much criticised in later cases, including Lord McCluskey's judgement in *Smith v Lees*.[159]

Possible Reforms

This is not an article on the abolition of corroboration. However, some closing remarks will comment on possible reforms, which would be consistent with the institutional writings. It was generally accepted by the nineteenth century that the requirement would remain in place unless statute directed otherwise.[160] Statute has already intervened to reduce the evidentiary requirements in relation to road traffic offences.[161] Lord Hope suggested that legislation may be used to remedy any difficulties with the requirement in some way.[162] This has also been echoed by Lord McCluskey in *Smith v Lees*.[163] Any proposals for reform in this way should be based an understanding of the rule and its ability to adapt in the face of adversity. The changes to the requirement should not be viewed as 'dilutions' but more as adaptions of the requirement to maintain the reliability principle.

It is possible that due to concerns raised by members of the judiciary a more conservative approach could be adopted to corroboration. However, even cases cited as representing a very liberal approach to the requirement can find justification in the authority of the institutional writers.

Conclusion

The rules of corroboration are derived from the Romano-Canonical 'two-witness rule' of proof, born of a distrust of circumstantial evidence.[164] The Romano-Canonical requirements formed the basis of this requirement, which was always present in the Scottish judicial system in one form or another. The early institutional writers based their assessments on Roman and canon law.[165] By the time of Hume, the requirement had evolved into the modern understanding of it and

[159] ibid 102.
[160] Dickson (n 74) para 1813.
[161] Road Traffic Offenders Act 1988 s 21.
[162] Hope (n 25) 12.
[163] ibid 102.
[164] Langbien (n 41) 6.
[165] Walker (n 52) 309.

this was the foundation upon which later institutional writers such as Alison, Dickson and Burnett would base their own authorities. By the time the rules were universally accepted and firmly in place there was room for much flexibility. Circumstantial evidence was always sufficient under these rules, and was considered by some writers to have an even more reliable quality to it than direct evidence.[166] The understanding of corroboration of the institutional writers was that corroboration could be satisfied if there was a second source of reliable evidence. It was more a belief that no one should be convicted on the testimony of a single source of evidence than a strict medieval two witness rule.

Some cases presented as revolutionary change to the requirement, such as *Moorov*, do in fact have foundations in the works of the institutional writers. However, others, such as *Smith v Lees* and *Gillespie v Macmillan*, have attracted more criticism for being inconsistent with the institutional writers, in particular the more conservative approach adopted by Burnett, which required the sources to be independent of each other. Corroboration by distress could be seen as an innovation. However, *Smith v Lees* adopted a more conservative approach to the concept, restoring the 'purity of the law'.

In *Smith v Lees*, Lord Justice General Clyde said, '[T]here is an infinite variety of possible situations in which the question of sufficiency of evidence can arise, and no single test of sufficiency which will solve every such situation has ever been or indeed can be laid down'.[167] Burnett also says that it was not possible to foresee every situation that could arise. The requirement moved in a more liberal direction in the latter half of the twentieth century, but it has not departed from the tests of reliability established by the institutional writers.

It seems possible that a more conservative approach to corroboration could be adopted in the future, despite calls for its abolition, particularly due to concerns raised by Lord Hope and others in the judiciary concerning corroboration by distress. Perhaps a statutory approach will be adopted for the more difficult cases.

---

[166] Dickson (n 73) para 1811.
[167] 1957 JC 31, 36.

When applied to today's rules, the corroboration requirement remains substantially the same. It is that no one can be convicted on the testimony of a single witness or on a single source of evidence. This was the guiding principle in the time of the institutional writers and remains so today. It can be interpreted in a variety of ways and at the present time the courts have taken a more liberal approach to remedy situations where corroboration can be very difficult to establish.

The Future of Choice of Court and Arbitration Agreements under the New York Convention, the Hague Choice of Court Convention, and the Draft Hague Judgments Convention

ROUZANA KASEM*

Abstract

In the absence of a global framework for the recognition and enforcement of foreign judgments resulting from choice of court agreements, the dominance of arbitration agreements for the resolution of international commercial disputes has been attributed to the global acceptance of the New York Convention. Operating in tandem with the 2005 Hague Choice of Court Convention, the forthcoming adoption of the Draft Hague Judgments Convention will, however, enhance the position of choice of court agreements in international commercial dispute resolution. This article argues that upon the equal global ratification of the three conventions, commercial parties will be granted more certainty and predictability through a choice of court agreement than through an arbitration agreement. This argument will be demonstrated through a comparison of certain issues in the jurisdiction, recognition, and enforcement provisions of the three conventions. The article will then illustrate the scope for abuse available under each convention for a party seeking to derogate from an agreement, followed by an analysis of contracts with conflicting forum selection agreements. Lastly, on the basis of this article's findings, an exclusive choice of court agreement will be recommended for granting the most certainty and predictability.

Keywords: Allocation; arbitration agreements; commercial contracts; enforcement; foreign judgments; international arbitration; jurisdiction clauses; New York Convention; parallel proceedings; recognition of judgments; The Hague Convention

Introduction

With the support of the widely-ratified New York Convention (NYC),[1] arbitration agreements[2] have been favoured by commercial parties for the resolution of international commercial disputes.[3] In contrast, cross-border litigation of commercial disputes through choice of court agreements has been absent of an international framework for the recognition and enforcement of foreign judgments.[4] Although the adoption of the 2005 Hague Convention on Choice of Court Agreements (COCC) has enabled such a framework in relation to judgments resulting from exclusive choice of court agreements,[5] the restricted scope and limited global ratification of the convention have so far inhibited its effectiveness and its ambition of replicating the success of the NYC.[6] The forthcoming adoption of the Hague

---

* LLB (Hons) (First Class) (Options in Business Management), DPLP, University of Aberdeen. Rouzana is a trainee solicitor specialising in corporate and commercial matters. The views expressed in this article are her own.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 4739 UNTS 330.

[2] 'Agreement' in this article refers solely to a forum selection agreement, *ie*, in an arbitration agreement or a choice of court agreement. This article does not differentiate between an agreement clause within a commercial contract and a separate agreement concluded by the parties. Both forms constitute an 'agreement' as discussed within this article.

[3] G Born, *International Commercial Arbitration* vol 1 (2nd edn, Kluwer Law International 2014) 78-79.

[4] V Black, 'The Hague Choice of Court Convention and the Common Law' (2007) Annual Proceedings of the Uniform Law Conference of Canada, Charlottetown 4, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116549> accessed 20 January 2019; Born, *International Commercial Arbitration* vol 1 (n 3) 78.

[5] Hague Convention on Choice of Court Agreements (adopted 30 June 2005, entered into force 1 October 2015).

[6] T Hartley and M Dogauchi, 'Explanatory Report on the 2005 Hague Choice of Court Agreements Convention' (2013) Hague Conference on Private International Law 31, available at <https://assets.hcch.net/upload/expl37final.pdf > accessed 20 October 2018; Black (n 4) 2, 4; L Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 American Journal of Comparative Law 543, 548; Z S Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) 253-54; N Newing and L Webster, 'Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post-Brexit: And What Would This Mean for International Arbitration' (2016) 10 Dispute Resolution International 105, 114; DI Tan,

Judgments Convention (HJC) by the Hague Conference on Private International Law (HCCH) will, however, enable an effective system for the recognition and enforcement of foreign judgments resulting from choice of court agreements as the HJC and the COCC will operate in tandem.[7] It is therefore argued that the COCC and the HJC will place choice of court agreements for the resolution of international commercial disputes in a more favourable position than that of arbitration agreements. This deduction is made on the basis of greater certainty and predictability which is granted to the commercial parties by the two Instruments,[8] regardless of the viability of arbitration and litigation as methods of dispute resolution.

This article seeks to indirectly compare certain provisions of the NYC, the COCC, and the May 2018 draft text of the HJC (DHJC). However, considering that the wide global ratification of the NYC contributed to the effectiveness of arbitration agreements, such a comparison will only be of value if the COCC and the HJC are also widely ratified. This article will, therefore, proceed on a possible future scenario whereby the three Instruments are equally ratified.

'"Enforcing" National Court Judgments as Awards Under the New York Convention' (2018) 34 Arbitration International 415, 420.

[7] Special Commission on the Recognition and Enforcement of Foreign Judgments, '2018 Draft Convention' (2018) Hague Conference on Private International Law, available at <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf> accessed 20 December 2018 (Draft of the Hague Judgments Convention); F Garcimartín and G Saumier, 'Judgments Convention: Revised Explanatory Report' (Preliminary Document no 1 of December, Hague Conference on Private International Law 2018) paras 14, 220-23, available at <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 20 December 2018; P Beaumont, 'Respecting Reverse Subsidiarity as an Excellent Strategy for the European Union at The Hague Conference on Private International Law: Reflections in the Context of the Judgments Project?' (2016) Aberdeen Centre for Private International Law Working Paper 2016/03, 6, available at <https://www.abdn.ac.uk/law/documents/CPIL_Working_paper_ 2016_3_revised.pdf> accessed 15 October 2018.

[8] The focus is on certainty and predictability as commercial parties conclude a forum selection agreement for reasons of party autonomy and efficiency in international commerce, it is therefore expected that this agreement is respected; Teitz, 'The Hague Choice of Court Convention' (n 6) 546; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 1.

The article will commence with an introductory overview of the three Instruments' aims, scope and status, as well as a justification for a future scenario analysis. Then compares certain issues in the jurisdiction provisions of the NYC and the COCC.[9] It highlights the benefits of the COCC's autonomous choice of law rule,[10] how the ambiguity of the term 'null and void' is better reconciled under the COCC, as well as the difficulties raised by the NYC's arbitrability requirements.[11] It also justifies key differences between the provisions of the COCC and the NYC. It goes further to explore certain issues in the refusal of recognition and enforcement across the three Instruments. [12] Another part of this article, demonstrates the agreement validity and arbitrability difficulties encountered under the NYC, that the uncertainty of the three Instruments' public policy exception is minimised under the COCC,[13] and that the explicitness of the COCC and DHJC's fraud ground provides predictability for parties.[14] It also establishes that more value can be derived from the DHJC's autonomy-based refusal grounds than those of the NYC.[15]

Since commercial parties conclude a forum [16] selection agreement [17] for reasons of party autonomy and efficiency in international commerce,[18] this part of the article demonstrates the scope for abuse and thus derogation from the agreement which is available under the three Instruments, highlighting its significance under the NYC. This is followed by an analysis of ill-drafted

[9] New York Convention art II; Choice of Court Convention arts 5-6.
[10] Choice of law matters will only be considered in this article where they significantly impact the effectiveness of the three conventions' rules.
[11] New York Convention art II; Choice of Court Convention arts 5(1), 6(a).
[12] New York Convention art V; Choice of Court Convention art 9; Draft of the Hague Judgments Convention art 7.
[13] New York Convention art V(2)(b); Choice of Court Convention art 9(e); Draft of the Hague Judgments Convention art 1(c).
[14] Choice of Court Convention art 9(d); Draft of the Hague Judgments Convention art 1(b).
[15] New York Convention arts V(1)(c)-(d); Draft of the Hague Judgments Convention art 7(1)(d).
[16] 'Forum' in this article encompasses both judicial courts and arbitral tribunals.
[17] 'Forum selection agreement' in this article encompasses both arbitration agreements and choice of court agreements.
[18] D Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (3rd edn, Sweet & Maxwell 2015) 3; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 1.

commercial contracts which include conflicting forum selection agreements. It also demonstrates that the conflict will be considered more neutrally by national courts upon the ratification of the COCC and DHJC with the potential of a 'pro-enforcement' approach in favour of choice of court agreements. Based purely on the findings of this article, the final section recommends the use of an exclusive choice of court agreement in commercial contracts, due to the greater certainty and predictability granted by the COCC.

Underlying this analysis, it becomes apparent that the high detail of the COCC and the DHJC's provisions which has been criticised for creating complexity,[19] is in effect expressing matters which are covered implicitly by the NYC's provisions. The detail, and thus explicitness, is what enhances certainty and predictability for the parties under the COCC and DHJC.[20] The analysis also partly reveals that in contrast to the autonomy-based nature of arbitration, party autonomy through a choice of court agreement is more constrained by the varying domestic rules of private international law in litigation. These rules can only be harmonised to the extent that negotiating states of diverging common law and civil law traditions are accepting to compromise.[21]

An Overview of the Three Conventions

New York Convention

The NYC, which seeks to 'provide common legislative standards for the recognition and enforcement of foreign arbitral awards', was adopted in 1958 with the aim that 'foreign and non-domestic arbitral awards will not be discriminated against'.[22] The NYC obliges contracting states to enforce an agreement to arbitrate, to recognise foreign arbitral awards as binding, and to enforce them.[23] Upon the parties' request, a court seised is required to refer the parties to

[19] Teitz (n 6) 549; Newing and Webster (n 6) 113.
[20] Hartley and Dogauchi (n 6) 61.
[21] Teitz (n 6) 546; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.
[22] New York Convention intr.
[23] ibid arts II-III.

arbitration unless the agreement is found to be void.[24] By virtue of Article II(1), the dispute in question must be arbitrable, and recognition and enforcement of an award is subject to the requirements of Article V.[25] The convention's application is limited to foreign arbitral awards and awards 'not considered… domestic' in the requested [26] court. [27] The NYC has been received as the 'most important Convention in the field of international commercial arbitration'.[28] In the words of Judge Schwebel, and as reiterated by Born: 'it works'.[29] The convention's significance has been attributed to its ratification by 159 contracting states which include the world's largest trading nations.[30]

Choice of Court Convention

The COCC aims to make exclusive choice of court agreements 'as effective as possible' with the desire to '…promote international trade and investment through enhanced judicial co-operation'. [31] The convention is both a jurisdiction and judgments convention, requiring the chosen court to 'hear the case when proceedings are brought before it'[32] and the non-chosen court to decline jurisdiction, subject to

---

[24] New York Convention intr art II.
[25] ibid art V(2)(a).
[26] A 'requested' court or state in the context of this article refers to the court or state where recognition or enforcement is sought by a party.
[27] New York Convention art I(1). The application of the New York Convention may be limited further by a state declaration under Article I(3) to the effect that it will only apply in respect of awards made 'in the territory of another Contracting State', or that it will only apply to legal relationships considered 'commercial' under its domestic law.
[28] N Blackaby, C Partasides, A Redfern, and M Hunter (eds), *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 73.
[29] Born, *International Commercial Arbitration* vol 1 (n 3) 103; S M Schwebel, 'A Celebration of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1996) 12 Arbitration International 83, 85.
[30] United Nations Commission on International Trade Law, 'Status; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 16 December 2018; Schwebel (n 29) 85. These nations are China, Germany, Japan, the United Kingdom, and the United States.
[31] Choice of Court Convention pmbl; Hartley and Dogauchi (n 6) 31.
[32] Choice of Court Convention art 5; Hartley and Dogauchi (n 6) 31.

the exceptions of Article 6.[33] Article 8 requires that the judgment of the chosen court be recognised and enforced, subject to the refusal grounds of Article 9.[34] The scope of the convention is limited to exclusive choice of court agreements [35] in international cases, concerning civil or commercial matters.[36] Further exclusions under Article 2 include Intellectual Property ('IP') and competition matters.[37] To date, [38] the COCC has been ratified by Mexico, Singapore, Montenegro, Denmark, and the member states of the European Union.[39]

The Hague Judgments Convention

Having concluded the COCC in 2005, the HJC is the Judgment Project's latest development at the HCCH and is currently awaiting a diplomatic session in June 2019.[40] Similar to the COCC, the Special Commission's objective with the HJC is to 'promote access to justice globally through enhanced judicial cooperation',[41] thus facilitating 'international trade, investment and mobility' through a minimum harmonisation Instrument.[42] By virtue of Article 4, the DHJC requires the requested contracting state to recognise and enforce judgments

[33] Choice of Court Convention arts 5-6.
[34] ibid arts 8-9.
[35] The Choice of Court Convention provides: ' "[E]xclusive choice of court agreement" means an agreement concluded by two or more parties… [which] designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts'. Choice of Court Convention art 3.
[36] Choice of Court Convention art 1.
[37] ibid art 2. The scope can be limited further by a state declaration to that effect under Article 21, in contrast to an Article 22 declaration, which can extend the convention's scope to non-exclusive choice of court agreements.
[38] March 2019.
[39] Hague Conference on Private International Law, 'Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements', available at <www.hcch.net/en/ instruments/ conventions/status-table/?cid=98> accessed 23 December 2018.
[40] Draft of the Hague Judgments Convention; Hague Conference on Private International Law, 'Overview of the Judgments Project' 1, available at <https:// assets.hcch.net/docs/ 905df382-c6e0-427b-a5e9-b8cfc471b575.pdf> accessed 22 December 2018; Garcimartín and Saumier (n 7) para 5.
[41] Garcimartín and Saumier (n 7) para 6.
[42] ibid paras 6, 367; Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 5.

from other contracting states,[43] subject to accepting jurisdiction through the indirect jurisdictional bases of Article 5(1),[44] and the refusal grounds of Article 7.[45] The DHJC is intended to complement the COCC by extending its benefits 'to a broader range of cases' as asymmetric and quasi-exclusive agreements are also granted protection.[46] With the exception of the DHJC not being limited to choice of court agreements,[47] the subject-matter scope of the COCC and DHJC is largely similar.[48] The DHJC applies to civil and commercial matters, with exclusions from scope under Article 2.[49] Meetings of the Special Commission indicate that the exclusion of IP 'and analogous matters' remains the subject of further discussion.[50]

Exclusion of Arbitration

Notably, 'arbitration and related proceedings' are excluded from the subject-matter scope of the COCC and DHJC.[51] The justification for the exclusion by both Instruments is identical: the intention to not 'disturb' the existing regime for international arbitration, particularly

[43] Draft of the Hague Judgments Convention art 4.
[44] Draft of the Hague Judgments Convention art 5(1). The bases are those that a 'court of a requested State will accept as legitimate grounds for the purpose of the recognition and enforcement', the bases are indirect as they are not used by the courts of the State of origin. Garcimartín and Saumier (n 7) para 144.
[45] Draft of the Hague Judgments Convention art 7.
[46] Draft of the Hague Judgments Convention arts 5(1)(m) and 7(1)(d); Garcimartín and Saumier (n 7) paras 14, 220-23; Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 6. The inclusion of asymmetric agreements within the scope of the Draft Hague Judgments Convention is of great significance due to their frequent usage in cross-border finance transactions. R Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 50, 97.
[47] Draft of the Hague Judgments Convention art 5.
[48] Choice of Court Convention art 2; Garcimartín and Saumier (n 7) paras 14, 34; Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 4. In contrast to the Choice of Court Convention, the scope of the Draft Hague Judgments Convention includes matters such as employment and consumer contracts, rights in rem, and tenancies over immovable property. Draft of the Hague Judgments Convention art 2.
[49] Choice of Court Convention art 2.
[50] Draft of the Hague Judgments Convention art 2(1)(m); Garcimartín and Saumier (n 7) para 56.
[51] Choice of Court Convention art 2(4); Draft of the Hague Judgments Convention art 2(3).

the operation of the NYC.[52] The explanatory reports of both Instruments therefore highlight that the arbitration exclusion should be interpreted broadly.[53]

Future Scenario Analysis

While it is clear that there is demand for a litigation counterpart to the NYC,[54] the absence of COCC ratification by the United States,[55] a significant trading nation and negotiator of the convention,[56] has undoubtedly demotivated wide global ratification of the COCC.[57] Considering the fact that this is due to incompatibility between the various domestic American state laws,[58] it would be justified to conclude that the adoption of the HJC will provide a motivation both for the United States and other nations to ratify the COCC and the HJC together as a foreign judgments package, as such ratification will consume less parliamentary time and appears more worthwhile for domestic legislators. It would, therefore, be reasonable to base the following analysis on a future scenario whereby the three Instruments are equally ratified.

---

[52] Hartley and Dogauchi (n 6) 47; P Nygh and F Pocar, 'Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: Report of the Special Commission' (Preliminary Document 11 of August, Hague Conference on Private International Law 2000) 36, available at <https://assets.hcch.net/upload/wop/ jdgmpd11.pdf> accessed 2 January 2019; Garcimartín and Saumier (n 7) para 66; RA Brand and PM Herrup, *The 2005 Convention on Choice of Court Agreements: Commentary and Documents* (CUP 2008) 73.

[53] Hartley and Dogauchi (n 6) 47; Garcimartín and Saumier (n 7) para 66.

[54] L Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation' (2004) 10 Roger Williams L Rev 1, 47; W J Woodward Jr, 'Saving the Hague Choice of Court Convention' (2008) 29 U of Pa J Int'l L 657, 659-60; R Garnett, 'The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?' (2009) 5 J Private Int'l L 161, 169-70; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 254-55; Y Zeynalova, 'The Law on Recognition and Enforcement of Foreign judgments: Is It Broken and How Do We Fix It' (2013) 31 Berkeley J Int'l Law 150, 169-82.

[55] The United States has only signed the Choice of Court Convention. Hague Conference on Private International Law (n 39).

[56] Teitz, 'The Hague Choice of Court Convention' (n 6) 544.

[57] Woodward (n 54) 657.

[58] ibid 678-79.

Jurisdictional Issues under the Conventions

Choice of Law Governing the Agreement's Validity

Although both Instruments provide for the severability of the forum selection agreement,[59] the absence of a choice of law rule for the validity of an arbitration agreement under the NYC creates uncertainty.[60] The prevailing view suggests that Article V(1)(a)'s 'two-prong' choice of law rule should be applied analogously to Article II(3).[61] The rule points to the law chosen by the parties, or in the absence thereof, to the law of the country 'where the award was made'.[62] However, a prevailing view is not a hard line rule. This is emphasised by the literature, where van den Berg has noted that the application by analogy rule can be '*deemed* to constitute uniform rules of conflict of laws which prevail over any other conflict rules…'.[63] Furthermore, some case law demonstrates variation in the application of this rule. Authorities in the United States have applied the law of the forum.[64] Meanwhile, French courts have applied the parties' 'common intentions',[65] and the Swiss courts have applied a combination of several laws in accordance with their own federal rules.[66] Even if the prevailing rule was uniformly applied by the

[59] Choice of Court Convention art 3(d); A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International 1981) 146; Blackaby and others (n 28) 138; D Solomon, 'International Commercial Arbitration: The New York Convention' in S Balthasar (ed), *International Commercial Arbitration Handbook* (CH Beck Hart Nomos 2016) 78; Guide on the New York Convention 71.

[60] The New York Convention provides: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'. New York Convention art II(3).

[61] New York Convention arts II(3), V(1)(a); van den Berg (n 59) 126; Born, *International Commercial Arbitration* vol 1 (n 3) 494; Blackaby and others (n 28) 158-59; Solomon (n 59) 85.

[62] New York Convention art V(1)(a).

[63] van den Berg (n 59) 126 (emphasis added).

[64] *Becker Autoradio USA Inc v Becker Autoradiowerk GmbH* 585 F2d 39 (3d Cir 1978); van den Berg (n 59) 128; Blackaby and others (n 28) 162-63.

[65] Blackaby and others (n 28) 164.

[66] Swiss Federal Statute of Private International Law s 178(2).

contracting states, a gap would remain in the convention's rules at the pre-award stage where the parties have not designated a place for arbitration. [67] Consequently, a number of commentators have concluded that an autonomous choice of law rule would be a 'preferable' solution.[68]

On the other hand, an improvement from the NYC is visible in Articles 5(1) and 6(a) of the COCC which designate the law of the chosen state for decisions concerning the validity of the choice of court agreement.[69] Not only does this provide predictability for parties, but as highlighted by Hartley and Dogauchi, it ensures consistency in judgments concerning agreement validity,[70] thus avoiding double standards.[71] The effectiveness of the autonomous choice of law rule has been disputed by Brand and Herrup for oppressing weaker parties as stronger parties may choose a forum with favourable validity rules.[72] The same is suggested by Woodward, who refers to the rule as a 'bootstrap approach'. [73] Brand and Herrup further indicate that the application of a foreign law by a non-chosen court is a function which is often not performed 'well'.[74] Although there is merit in these arguments, the difficulties and unpredictability that the absence of an autonomous choice of law rule under the NYC have

[67] van den Berg (n 59) 127; Born, *International Commercial Arbitration* vol 1 (n 3) 496; Solomon (n 59) 85.
[68] Solomon(n 59) 85; L Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' (2009) 38 Georgia J Int'l and Comp L 25, 45.
[69] The Choice of Court Convention provides: 'The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State'. It also provides: 'A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless… the agreement is null and void under the law of the State of the chosen court'. Choice of Court Convention arts 5(1), 6(a); Hartley and Dogauchi (n 6) 61.
[70] Hartley and Dogauchi (n 6) 61; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 253.
[71] A Schulz, 'The 2005 Hague Convention on Choice of Court Clauses' (2006) 12 ILSA J Int'l and Comp L 433, 438.
[72] Brand and Herrup (n 52) 81.
[73] Woodward (n 54) 693.
[74] Brand and Herrup (n 52) 81.

raised render the presence of such a rule more favourable than its absence. Indeed, while Schulz supports this view on the ground that it would avoid parallel proceedings,[75] Beaumont further highlights that the '*quid pro quo* in the negotiations' was the presence of Article 6(c),[76] which provides flexibility to the court seised by enabling it to apply its own public policy rules. Beaumont's conclusion effectively recognises that while there are difficulties with an autonomous choice of law rule, the presence of the rule and the provision of flexibility through Article 6(c) is nonetheless the optimal way of providing parties with predictability, an aspect which as noted by Schulz, 'the Convention is intended to enhance'.[77]

'Null and Void, Inoperative or Incapable of Being Performed'

As with the validity of an arbitration agreement under the NYC,[78] the COCC requires that a choice of court agreement be enforced unless it is 'null and void'.[79] Although the COCC reproduces the wording of the NYC in the hope of replicating its success,[80] the use of a concept which is undefined in both the NYC and the COCC itself arguably curtails clarity. The absence of a definition for the 'null and void' concept in both Instruments is justified by the need for flexibility in catering for the diverging legal traditions of the contracting states.[81] Unlike the NYC, the explanatory report of the COCC clarifies that the concept 'applies only to substantive (not formal) grounds of invalidity' and provides examples of 'generally recognised grounds'.[82] Hartley and Dogauchi also note that case law under the

---

[75] Schulz, 'The 2005 Hague Convention' (n 71) 438.

[76] The Choice of Court Convention provides: 'A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless… giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised'. Choice of Court Convention art 6(c); P Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status' (2009) 5 J Private Int'l L 125, 139-40.

[77] Schulz, 'The 2005 Hague Convention' (n 71) 437.

[78] New York Convention art II(3).

[79] Choice of Court Convention arts 5(1), 6(a).

[80] Hartley and Dogauchi (n 6) 31, 61.

[81] van den Berg (n 59) 155; Teitz, 'The Hague Choice of Court Convention' (n 6) 549.

[82] Hartley and Dogauchi (n 6) 55.

NYC could provide a valuable interpretational tool.[83] Brand and Herrup, however, question the utility of the NYC's case law in this context on the basis that the concept of 'null and void' is not necessarily directly transferable to choice of court agreements.[84] Nevertheless, it is argued that this conclusion stems from the diverging interpretations of 'null and void' established by the authors themselves,[85] some of which carry no support in neither the text of the convention, the explanatory report, nor the negotiations.[86] Considering explanatory reports have proven authoritative in the past,[87] the clarification made therein should not be deviated from by the literature; as in this manner, no confusion regarding 'null and void' would occur. On the other hand, there is value in Brand and Herrup's concern regarding the effectiveness of the NYC's case law on 'null and void' if such a concern is alternatively interpreted to refer to the 'pro-enforcement bias' of the NYC.[88] This 'bias' which has been adopted by the authorities of the contracting states has enabled 'null and void' under the NYC to be read narrowly and operate with minimal difficulties despite the concept's ambiguity.[89] However, whether a 'pro-enforcement bias' will be applied to choice of court agreements depends on the approach of the courts of the COCC's contracting states.[90] Although it could be argued that concerns regarding the 'pro-enforcement bias' are also applicable to paragraphs (d) and (e) of the COCC's Article 6, which aim to replicate another of the NYC's ambiguous and undefined concepts, 'inoperative or

[83] ibid 61.
[84] Brand and Herrup (n 52) 79-80.
[85] ibid 80.
[86] One of Brand and Herrup's interpretations enables a court to decline enforcement of agreements in 'certain kinds of contracts', despite this being the effect of an Article 21 declaration. This opinion is also adopted by Beaumont. Beaumont, 'Hague Choice of Court Agreements Convention' (n 76) 144-45.
[87] P Beaumont and L Walker, 'Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Brussels I Recast and Some Lessons From It and the Recent Hague Conventions for the Hague Judgments Project' (2015) 11 J Private Int'l L 31, 56.
[88] van den Berg (n 59) 155; Brand and Herrup (n 52) 79-80.
[89] van den Berg (n 59) 155; Born, *International Commercial Arbitration* vol 1 (n 3) 642; Blackaby and others (n 28) 138.
[90] text to n 330.

incapable of being performed',[91] such concerns are counteracted by the more elaborate text of the COCC and the clarifications in the COCC's explanatory report. Hartley and Dogauchi's emphasis on the word-choice of 'exceptional' in paragraph (d)—wording which is not present in the NYC—and indication of the paragraph's operation as the doctrine of frustration highlights the narrow scope of the paragraph.[92] This narrow reading is also proffered by Brand and Herrup, who agree that the wording of the paragraph 'underscores' its limited scope as an exception to enforcement.[93] As such, enforcement of the parties' choice of court agreement under the COCC is clearer than that of an arbitration agreement under the NYC.

Arbitrability

The NYC's objective arbitrability requirement under Article II(1) creates unpredictability for the parties as the subject of the dispute must be capable of resolution by arbitration under national law, regardless of the validity of the arbitration agreement.[94] Inconsistency

---

[91] The Choice of Court Convention provides: 'A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless… for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed'. It further provides: 'A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless… the chosen court has decided not to hear the case'. Choice of Court Convention arts 6(d)–(e); Hartley and Dogauchi (n 6) 61.

[92] Hartley and Dogauchi (n 6) 61-62.

[93] Brand and Herrup (n 52) 94.

[94] The New York Convention provides: 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'. New York Convention art II(1); Born, *International Commercial Arbitration* vol 1 (n 3) 944; Tang *Jurisdiction and Arbitration Agreements* (n 6) 247; United Nations Commission on International Trade Law, 'UNICTRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' (2016) 49, available at <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_ Convention.pdf> accessed 10 December 2018. Non-arbitrability concerns under national law, for example, typically arise in relation to matters of anti-trust (competition), insolvency, intellectual property, and trade

is present with regard to the choice of law to be applied under Article II(1).[95] This has exacerbated unpredictability as non-arbitrability not only overrides party autonomy, but also differs amongst states and evolves over time.[96] In contrast, such difficulties are inapplicable to agreements under the COCC. While it could be argued that the subject-matter scope of the COCC provides a comparable limitation on party autonomy,[97] unlike the NYC, the subject matter scope of the COCC is made explicit by Article 2, thus eradicating unpredictability for the parties.[98]

Further Choice of Court Convention Issues

With the numerous detailed exceptions in Article 6, it could be argued that the COCC is more complex and provides more limitations on party autonomy than the NYC by providing more opportunities for the non-chosen court to refuse to decline jurisdiction.[99] The COCC's provisions, however, present an improvement from those of the NYC, as the Article 6 exceptions are merely explicit in comparison to the similar implicit and thus ambiguous grounds of the NYC's Article II.[100] Hartley and Dogauchi accept this conclusion and highlight that Article 6's detailed wording and addition of paragraph (c) were measures aimed at enhancing the 'clarity and precision' of the 'rather skeletal' provisions of the NYC.[101] The complexity of the provisions of

---

sanctions. Born, *International Commercial Arbitration* vol 1 (n 3) 973-1039; Blackaby and others (n 28) 112-19.

[95] UNICTRAL (n 94) 49-50.

[96] Born, *International Commercial Arbitration* vol 1 (n 3) 957; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 247; Blackaby and others (n 28) 111-12.

[97] Garnett, 'The Hague Choice of Court Convention' (n 54) 171; Tang , *Jurisdiction and Arbitration Agreements* (n 6) 246-47.

[98] Choice of Court Convention art 2.

[99] Choice of Court Convention art 6; R A Brand, 'Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Exclusive Choice of Court Agreements' (2009) 2009 Annals of the Faculty of Law in Belgrade International Edition 23, 32; Garnett, 'The Hague Choice of Court Convention' (n 54) 171; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 253.

[100] New York Convention art II.

[101] Hartley and Dogauchi note that Article 6, paragraphs (a) and (b), are intended to directly respond to 'null and void' under Article II(3) of the New York Convention, and paragraph (d) and (e) respond to 'inoperative or incapable of being performed' in the same Article. Hartley and Dogauchi (n 6) 61.

the COCC as a whole can also be attributed to the need for compromise amongst the negotiating states which possess diverse legal traditions.[102] As suggested by Teitz, the simplicity of the NYC 'may be impossible in a world where law has become more fragmented…'. [103] Variations in the drafting of the COCC were, therefore, necessary to cater for diverse legal traditions in the context of litigation and improve upon the simplicity of the NYC.

Incapacity

Article 6 enables the non-chosen court to continue proceedings on a finding that the parties lacked capacity under its own law through paragraph (b) or the law of the state chosen through paragraph (a), as 'null and void' encompasses capacity. [104] Although this enables a double test on capacity under the two different laws at the jurisdiction stage,[105] the explicitness of this approach renders it more predictable for the parties than that of the NYC, which only mentions capacity of the parties at the recognition and enforcement stage through Article V.[106] Commentators however conclude that a positive interpretation of Article V(1)(a) requires the parties to the agreement to have legal capacity in order for the agreement to be valid, [107] thus enabling capacity to be challenged at the beginning of the arbitral proceedings. [108] Van den Berg further highlights that capacity is included in the 'null and void' test under the NYC's Article II(3).[109] Although this clarification should provide sufficient predictability, questions of choice of law arise as Article V(1)(a) refers to 'the law

[102] Teitz, 'The Hague Choice of Court Convention' (n 6) 546, 556; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.
[103] Teitz, 'The Hague Choice of Court Convention' (n 6) 549.
[104] Choice of Court Convention art 6(a). It also provides: 'A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless… a party lacked the capacity to conclude the agreement under the law of the State of the court seised'. Choice of Court Convention art 6(b); Hartley and Dogauchi (n 6) 61.
[105] Brand and Herrup (n 52) 90-91.
[106] New York Convention art V(1)(a).
[107] van den Berg (n 59) 276; Blackaby and others (n 28) 75; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 247-48; Solomon (n 59) 87-88.
[108] Blackaby and others (n 28) 81.
[109] van den Berg (n 59) 156.

applicable to them' without indication of how this law is to be determined,[110] thus leaving it to the differing conflict of laws rules of each state.[111] Furthermore, the inclusion of capacity by 'null and void' brings about the choice of law difficulties considered above. [112] Overall, the assessment of party capacity is clearer, and not wider, in the COCC than in the NYC.

Manifest Injustice and Public Policy

Article 6(c) of the COCC has also been the subject of criticism despite it being the best outcome going forward. The provision, which enables the non-chosen court to continue proceedings on grounds of 'manifest injustice' or 'public policy' of its own law,[113] is not reflected in the provisions of the NYC.[114] Although this has composed part of the criticism towards the provision,[115] the focus of the literature has been on the uncertainty it generates.[116] Not only is it unobjectionable that the 'manifest injustice' concept will be interpreted varyingly across contracting states,[117] the text of the provision also does not indicate whether both concepts refer to procedural or substantive grounds.[118]

The explanatory report clarifies that procedural grounds are covered by paragraph (c).[119] While Brand and Herrup highlight that application to substantive grounds is unclear and should be exercised by the courts with 'due care', [120] Tang suggests that the provision does

[110] New York Convention art V(1)(a).
[111] van den Berg (n 59) 276.
[112] text to n 60.
[113] The Choice of Court Convention provides: '…[G]iving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised'. Choice of Court Convention art 6(c).
[114] Choice of Court Convention art 6(c); J Talpis and N Krnjevic, 'The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant That Gave Birth to a Mouse' (2006) 13 Southwestern J L & Trade in the Americas 1, 23.
[115] Talpis and Krnjevic (n 114) 23.
[116] ibid 23-24; Black (n 4) 17; Woodward (n 54) 698; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.
[117] Talpis and Krnjevic (n 114) 24; Brand and Herrup (n 52) 92.
[118] Choice of Court Convention art 6(c); Brand and Herrup (n 52) 93.
[119] Hartley and Dogauchi (n 6) 61.
[120] Brand and Herrup (n 52) 93.

cover substantive grounds.[121] Both views prompt unpredictability. The provision's limited 'case-by-case' application has also raised concerns regarding its utility in support of weaker parties—particularly small businesses—in typically unnegotiable 'mass market' contracts.[122] Garnett's conclusion that such contracts should be excluded through an Article 21 declaration is most appropriate and largely eradicates these concerns.[123] Although the provision can be further criticised for its excessive wording,[124] the absence of uniformity across states in the content of the two concepts necessitates greater detail.[125] The above difficulties were also acknowledged in the preparatory work leading up to the convention, as the need for this 'escape clause' were balanced with the need for 'legal certainty and foreseeability',[126] and some delegates attempted to restrict the scope of the provision.[127] Despite the various concerns raised by the literature, and in consideration of the delegates' 'fruitless' attempts as well as the necessity for compromise due to the diverse legal traditions of the negotiating states,[128] the preliminary negotiations could not have reached a more optimal solution than paragraph (c). The provision is also strengthened by the narrow interpretation proffered by the literature and the explanatory report, which

[121] Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.
[122] Woodward (n 54) 707; A Kerns, 'The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match' (2006) 20 Temple Int'l & Comp L J 509, 509; K Bruce, 'The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?' (2007) 32 Brooklyn J Int'l L 1103, 1106-07; Garnett, 'The Hague Choice of Court Convention' (n 54) 178. This is of particular concern to the United States. Woodward (n 54) 657.
[123] Garnett, 'The Hague Choice of Court Convention' (n 54) 178.
[124] Teitz refers to Article 6(c) with '… the language cobbled together to create the public policy exception'. Teitz, 'The Hague Choice of Court Convention' (n 6) 556.
[125] Hartley and Dogauchi (n 6) 61; Brand and Herrup (n 52) 91-92.
[126] text to n 76; A Schulz, 'Report on the First Meeting of the Informal Working Group on the Judgments Project' (Preliminary Document 20 November, Hague Conference on Private International Law 2002) 8, available at <https://assets.hcch.net/upload/wop/jdgm_pd20e. pdf> accessed 1 February 2019; Brand and Herrup (n 52) 91.
[127] Talpis and Krnjevic (n 114) 24-25.
[128] Teitz, 'The Hague Choice of Court Convention' (n 6) 546, 556; Talpis and Krnjevic (n 114) 24-25; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.

emphasises the 'high threshold' for both concepts.[129] As such, problems conferred by the provisions of the COCC must be considered in light of the fact that no global instrument for the recognition and enforcement of foreign judgments has been capable of achieving the COCC's level of compromise amongst negotiating states, its provisions should therefore be welcomed in comparison to a stark absence of a global framework.

Issues in Refusal of Recognition and Enforcement

Validity of Forum Selection Agreement and Arbitrability

In comparison to the NYC, the COCC offers more predictability for the parties regarding the validity of the agreement at the recognition and enforcement stage.[130] The autonomous choice of law rule in Articles 5(1) and 6(1) of the COCC is carried to the recognition and enforcement stage.[131] Despite limiting party autonomy by preventing the parties from designating a law to govern the substantive validity of their agreement,[132] application of the law of the chosen state at both the jurisdiction and recognition and enforcement stages maximises predictability as it prevents irreconcilable decisions regarding the validity of the agreement.[133] Alternatively, the validity ground under

---

[129] Nygh and Pocar (n 52) 114; Hartley and Dogauchi (n 6) 61; Brand and Herrup (n 52) 92-93; Beaumont, 'Hague Choice of Court Agreements Convention' (n 76) 146.

[130] The New York Convention provides: 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, …the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made …'. New York Convention art V(1)(a). The Choice of Court Convention provides: 'Recognition and enforcement may be refused if – …the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid'. Choice of Court Convention art 9(a). Agreement invalidity is not a refusal ground under the draft Hague Judgments Convention due to the ground's pure relevance to forum selection agreements. Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 6.

[131] Choice of Court Convention arts 5(1), 6(a), 9(a).

[132] Tang , *Jurisdiction and Arbitration Agreements* (n 6) 247-48.

[133] P A Nielsen, 'The Hague Judgments Convention' (2011) 80 Nordic J Int'l Law 95, 111.

Article V(1)(a) of the NYC mentions the 'agreement referred to in article II' and thus brings back the choice of law difficulties encountered under Article II(3).[134] Considering the arbitral tribunal's choice of law finding established under Article II may differ from that required by Article V(1)(a), [135] the court at the recognition and enforcement stage may reach a different conclusion regarding the substantive validity of the arbitration agreement by applying a different law. [136] This creates uncertainty. [137] Under the COCC, however, the validity of the parties' agreement is precluded from review by the court addressed if validity has been upheld by the chosen court (under its own law).[138] Although as noted by Brand and Herrup this may initiate a 'difficult and delicate inquiry' as to whether the court of origin had made an 'implicit' validity determination;[139] the application of the law of the chosen state by the requested court will most likely provide the same conclusion. This is attributed to the fact that the requested court's determination will only differ upon a finding of party incapacity under its own law through Article 9(b), or an incompatibility with its public policy or procedural fairness through Article 9(e), both of which possess a high threshold.[140]

In addition, concerns regarding the unpredictability of the arbitrability requirement under Article II(1) of the NYC are also present at the recognition and enforcement stage through its Article V(2)(a).[141] Article V(2)(a) therefore enables states to apply provisions of national law to preclude the enforcement of an otherwise valid

---

[134] text to n 60.

[135] text to nn 64-66. The arbitral tribunal may not apply the choice of law rules of Article V(1)(a) by analogy.

[136] G Born, *International Commercial Arbitration* vol 3 (2nd edn, Kluwer Law International 2014) 3469.

[137] Born, *International Commercial Arbitration* vol 1 (n 3) 494.

[138] Choice of Court Convention art 9(a); Brand and Herrup (n 52) 111.

[139] Brand and Herrup (n 52) 111.

[140] Choice of Court Convention arts 9(b), 9(e); Hartley and Dogauchi (n 6) 69-70.

[141] New York Convention art II(1). The New York Convention provides: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … The subject matter of the difference is not capable of settlement by arbitration under the law of that country…'. New York Convention art V(2)(a); text to n 96.

award.[142] Although rarely applied,[143] the exception nonetheless provides uncertainty to parties and has no relevance to agreements under the COCC and the DHJC.[144]

Public Policy

A public policy exception is well established as an unpredictable yet necessary 'escape device'.[145] In comparison to the NYC's public policy exception, the formulation of the exception under the COCC and DHJC provides an improvement to the uncertainty[146] associated with such an exception.[147] Article 9(e) of the COCC includes incompatibility 'with the fundamental principles of procedural fairness of that State';[148] whereas authorities applying the NYC have inconsistently accepted both procedural and substantive grounds of public policy under Article V(2)(b), despite procedural aspects being

---

[142] New York Convention art V(2)(a); Born, *International Commercial Arbitration* vol 1 (n 3) 836-37.
[143] Born, *International Commercial Arbitration* vol 1 (n 3) 836.
[144] UNICTRAL (n 94) 229.
[145] D Otto and O Elwan, 'Article V(2)' in H Kronke, P Nacimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 365; Born, *International Commercial Arbitration* vol 3 (n 136) 3647, 3654; Beaumont and Walker (n 87) 47; Solomon (n 59) 143.
[146] van den Berg (n 59) 376; Born, *International Commercial Arbitration* vol 3 (n 136) 3654; Beaumont and Walker (n 87) 52.
[147] The New York Convention provides: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … the recognition or enforcement of the award would be contrary to the public policy of that country'. New York Convention art V(2)(b). The Choice of Court Convention provides: 'Recognition and enforcement may be refused if … recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State'. Choice of Court Convention art 9(e). The Draft of the Hague Judgments Convention provides: 'Recognition and enforcement may be refused if … recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State'. Draft of the Hague Judgments Convention art 7(1)(c).
[148] Choice of Court Convention art 9(e).

covered by paragraphs (1)(b) and (1)(d) of the same article.[149] The overlap between public policy and other refusal grounds under Article V of the NYC is also visible in Article 9 of the COCC, as paragraphs (c),(d) and (e) have relevance to 'procedural fairness'.[150] Hartley and Dogauchi acknowledge this overlap and justify the express reference to 'procedural fairness' by the constitutional role it retains in some legal systems.[151] Brand and Herrup's reference to 'the bedrock principles of procedural justice' in relation to 'procedural fairness' also demonstrates its limited nature.[152] Although there is uncertainty as to whether the COCC's public policy exception encompasses both procedural and substantive grounds,[153] the explanatory report notes that '…public policy as understood in the Convention is not limited to procedural matters'.[154] Brand and Herrup fail to acknowledge this statement but imply that both substantive and procedural grounds are covered by the exception.[155] Uncertainty regarding procedural and substantive scope is also inherent in the DHJC's public policy exception. Considering its explanatory report states that the public policy exception therein 'replicates the formulation' of the COCC, it is concluded that both substantive and procedural public policy are also encompassed by the DHJC's exception.[156] Although the exception's formulation under the DHJC is arguably wider in scope than that of the COCC as it additionally covers 'infringements of security or sovereignty of that State',[157] such infringements are encapsulated by public policy in practice.[158] Indeed, Garcimartín and Saumier highlight that the scope of the exception is

[149] New York Convention arts V(1)(b), V(1)(d), V(2)(b); Born, *International Commercial Arbitration* vol 3 (n 136) 3683; *Judgment of 8 February 1978, Chrome Res Sa v Léopold Lazarus Ltd*, XI Year Book of Commercial Arbitration 538 (Swiss Federal Tribunal) (1986); *Judgment of 26 May 1994*, XXIII Year Book of Commercial Arbitration 754 (Affoltern am Albis Bezirksgericht) (1998); *Judgment of 27 August 2002*, XXVIII Year Book of Commercial Arbitration 814 (Amsterdam Rechtbank) (2003).

[150] New York Convention art V; Choice of Court Convention arts 9(c)-(e).

[151] Hartley and Dogauchi (n 6) 71.

[152] Brand and Herrup (n 52) 118.

[153] ibid 118-19.

[154] Hartley and Dogauchi (n 6) 71.

[155] Brand and Herrup (n 52) 119.

[156] Garcimartín and Saumier (n 7) para 288.

[157] Draft of the Hague Judgments Convention art 7(1)(c).

[158] Garcimartín and Saumier (n 7) para 294.

identical to that of the COCC.[159] Furthermore, the express reference is necessary for providing clarity with the 'greater potential' of these infringements arising under the wide scope of the DHJC.[160]

On the contrary, the absence of express indication as to what is encompassed by the public policy exception under the NYC has exacerbated the uncertainty therein.[161] As noted by Born, there is 'widespread acceptance' that the NYC's public policy exception operates in relation to 'international' as opposed to 'domestic' public policy.[162] Authorities have however adopted various interpretations of what comprises 'international' public policy.[163] Although the 'universally accepted' high threshold of the exception as well as the 'pro-enforcement bias' of the NYC operate to limit its parochial use as a bar from recognition and enforcement,[164] this has not prevented the courts of contracting states, such as Russia and Turkey,[165] from interpreting the exception widely.[166] Concerns are consequently raised in the context of the DHJC, the explanatory report of which mentions that the public policy exception therein 'relates to "international public policy" and not to domestic public policy', in a bid to limit the exception's scope.[167] While both the NYC and DHJC can be condemned for the inherent ambiguity of their public policy exception,[168] parties are provided with more clarity under the DHJC due to its elaboration on the meaning of 'international public policy'

[159] Garcimartín and Saumier (n 7) para 294.
[160] ibid.
[161] New York Convention art V(2)(b).
[162] Born, *International Commercial Arbitration* vol 3 (n 136) 3339. The distinction is also referred to as *ordre public international* and *ordre public interne*. van den Berg (n 59) 360-61; Solomon (n 59) 144.
[163] Born, *International Commercial Arbitration* vol 3 (n 136) 3657-58; Solomon (n 59) 144-45.
[164] van den Berg (n 59) 368; Otto and Elwan (n 145) 367; Blackaby and others (n 28) 642; Solomon (n 59) 145; *Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F2d 969 (2nd Cir 1974) 973.
[165] M Kerr, 'Concord and Conflict in International Arbitration' (1997) 13 Arbitration Int'l 121, 140-41; Blackaby and others (n 28) 646.
[166] Blackaby and others (n 28) 644.
[167] Garcimartín and Saumier (n 7) para 293.
[168] New York Convention art V(2)(b); Draft of the Hague Judgments Convention art 7(1)(c).

in the explanatory report,[169] a document which has proven authoritative on previous occasions.[170]

Fraud

In contrast to the NYC, fraud constitutes an express ground for refusal of recognition and enforcement under both the COCC and DHJC.[171] Although commentators endorse the implicit application of fraud under the NYC's Article V(2)(b) public policy exception,[172] this application is uncertain. For instance, Born differentiates between intrinsic and extrinsic fraud in the context of arbitral proceedings but does not specify whether both forms of fraud may be accepted by the courts.[173] Apart from precluding the litigation of a fraud matter that has been presented to the arbitrators,[174] it appears that both intrinsic and extrinsic fraud may be accepted under Article V(2)(b) as a national court has previously noted that refusal may be granted if the award itself was 'procured by fraud'.[175] Nonetheless, fraud has not been accepted under public policy in some courts.[176] Although the Guide on the NYC identifies that fraud is frequently reviewed by courts under public policy;[177] Born's hesitancy towards this being the courts' practice demonstrates the uncertainty surrounding the fraud ground.[178] Should fraud be accepted as constituting a public policy ground however, the threshold has been sufficiently high to render

[169] Garcimartín and Saumier (n 7) para 293.
[170] Beaumont and Walker (n 87) 56.
[171] Choice of Court Convention art 9(d); Draft of the Hague Judgments Convention art 7(1)(b).
[172] Otto and Elwan (n 145) 374; Born, *International Commercial Arbitration* vol 3 (n 136) 3704-05.
[173] Born, *International Commercial Arbitration* vol 3 (n 136) 3339.
[174] ibid 3704-05.
[175] *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F3d 274 (5th Cir 2004) 306-07.
[176] *Judgment of 3 April 1987*, XVII Year Book of Commercial Arbitration 529 (Italian Corte di Cassazione) (1992); *Judgment of 26 January 2005*, XXX Year Book of Commercial Arbitration 421 (Austrian Oberster Gerichtshof) (2005).
[177] UNICTRAL (n 94) 252.
[178] 'It is not clear whether fraud is a defense to enforcement under the New York Convention'. G Born, *International Commercial Arbitration: Commentary and Materials* vol 3 (2nd edn, Kluwer Law International 2001) 880.

most allegations unsuccessful,[179] which provides a degree of predictability for enforcement-seeking parties.[180]

On the contrary, the COCC's express refusal ground on procedural fraud is clearly limited to extrinsic fraud by Brand and Herrup.[181] Beaumont and Walker have previously criticised the provision on the basis that fraud should be subsumed within the public policy exception in order to simplify the recognition and enforcement procedure, and that this should be highlighted in the convention's explanatory report.[182] However, the independence of fraud from the public policy exception is justified on the basis that some states don't recognise fraud as a ground of public policy.[183] Since the presence of fraud in either the explanatory report or the text of the convention ultimately maintains fraud as a ground for refusal and hence does not necessarily simplify the procedure, more clarity and thus certainty would be granted to parties if the text of the convention expressly referred to fraud as well as to whether it compasses procedural or substantive fraud, or both. This would avoid the complications encountered by the fraud ground under Article V(2)(b) of the NYC, where uncertainty also lies regarding the substantive and procedural public policy distinction. Nonetheless, Beaumont recognises the Special Commission's focus on certainty in the context of the DHJC's fraud ground.[184] Unlike the COCC, the DHJC's refusal ground encompasses substantive fraud.[185] Although the explanatory report of the DHJC justifies the granting of wider defences to judgment-debtors with the wider scope of the DHJC in comparison to

[179] Otto and Elwan (n 145) 374; Born, *International Commercial Arbitration* vol 3 (n 136) 3706; UNICTRAL (n 94) 259.
[180] 'Enforcement-seeking party' refers to a party seeking enforcement of a given judgment, regardless of whether said judgment is that of a chosen or non-chosen forum.
[181] The Choice of Court Convention provides: 'Recognition and enforcement may be refused if …the judgment was obtained by fraud in connection with a matter of procedure'. Brand and Herrup (n 52) 116; Choice of Court Convention art 9(d).
[182] Beaumont and Walker (n 87) 54-56.
[183] Hartley and Dogauchi (n 6) 70; Beaumont and Walker (n 87) 55.
[184] Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 6.
[185] The Draft of the Hague Judgments Convention provides: 'Recognition and enforcement may be refused if …the judgment was obtained by fraud'. Draft of the Hague Judgments Convention art 7(1)(b).

that of the COCC,[186] the inclusion of substantive fraud reduces predictability for enforcement-seeking parties. This is exacerbated by the fact that Article 4(2) enables review on the merits of the judgment in the requested state if it is 'necessary for the application of the Convention',[187] which the explanatory report indicates covers the refusal grounds of Article 7.[188] In comparison to the NYC's implicit fraud ground under article V(2)(b), the DHJC nonetheless provides more clarity and thus predictability for parties through the text of the convention.

Draft Hague Judgments Convention Article 7(1)(d)

A significant enhancement to the recognition and enforcement of foreign judgments in the context of choice of court agreements is visible in Article 7(1)(d) of the DHJC.[189] The provision enables a requested court to refuse recognition or enforcement on the ground that 'proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument' which designated a court other than the court of origin for determining the dispute.[190] In contrast to other refusal grounds under Article 7 and those under the COCC's Article 9,[191] the provision encompasses a wide scope as it aims to protect party autonomy by upholding the parties' agreement.[192] As such, provided that a judgment is covered by an Article 5 jurisdictional base, Garcimartín and Saumier highlight that the provision covers any agreement which 'validly excluded the jurisdiction of the court of origin' regardless of its exclusivity.[193]

The DHJC hence goes beyond the scope of the COCC by also protecting asymmetric and quasi-exclusive agreements. Although the inclusion of exclusive choice of court agreements under the provision may appear incompatible with the COCC, the fact that a party seeking

[186] Garcimartín and Saumier (n 7) para 286.
[187] Draft of the Hague Judgments Convention art 4(2).
[188] Garcimartín and Saumier (n 7) para 101.
[189] Draft of the Hague Judgments Convention art 7(1)(d).
[190] ibid.
[191] Choice of Court Convention art 9; Draft of the Hague Judgments Convention art 7.
[192] Garcimartín and Saumier (n 7) para 297.
[193] ibid paras 297, 299.

recognition or enforcement is capable of relying on the more favourable Instrument demonstrates a prioritisation of the parties' agreement.[194] This is because the invocation of the DHJC's Article 7(1)(d) entails that only a judgment resulting from a designated court can be enforced under both conventions.[195] The parties' capability of relying on either instrument for enforcement additionally makes the differences between the refusal grounds of the COCC's Article 9 and those of the DHJC's Article 7 of higher significance.[196] This is demonstrated by the fact that if a judgment is rendered by the chosen court by virtue of an exclusive choice of court agreement, and both Instruments apply,[197] the party avoiding enforcement in the requested court may rely on the DHJC's Article 7(1)(b) refusal ground of substantive fraud, which is not present in the COCC.[198] However, the enforcement-seeking party may alternatively rely on the COCC and consequently enforce the judgment.[199] This is made possible by the discretionary nature of both conventions' refusal grounds.[200] Although invoking Article 7(1)(d) requires that the same party contested jurisdiction at the court of origin before arguing on the merits,[201] and did not submit to the court of origin's jurisdiction;[202] the wide scope of the provision is maintained by the fact that it is not

[194] Garcimartín and Saumier (n 7) paras 421-22.

[195] Consequently, where a judgment is rendered by a chosen court under an exclusive choice of court agreement, and another is rendered by virtue of an Article 5 base under the Draft Hague Judgments Convention, the judgment of the chosen court will be given priority through Article 7(1)(d) in the requested state. Garcimartín and Saumier (n 7) para 423; Choice of Court Convention art 8(1).

[196] Choice of Court Convention art 9; Draft of the Hague Judgments Convention art 7.

[197] The Draft Hague Judgments Convention would apply if an Article 5(1) base is engaged.

[198] Choice of Court Convention art 9(d); Draft of the Hague Judgments Convention art 7(1)(b).

[199] Garcimartín and Saumier (n 7) paras 421-22.

[200] The Choice of Court Convention provides: 'Recognition or enforcement *may* be refused…'. Choice of Court Convention art 9 (emphasis added). The Draft of the Hague Judgments Convention provides: 'Recognition or enforcement *may* be refused…'. Draft of the Hague Judgments Convention art 7 (emphasis added); Garcimartín and Saumier (n 7) paras 421.

[201] Draft of the Hague Judgments Convention art 7(1)(d); Garcimartín and Saumier (n 7) para 298.

[202] Submission by this party 'may be considered as an implicit derogation of the choice of court agreement…'. Garcimartín and Saumier (n 7) para 298.

necessary for the court designated in the parties' agreement to be that of a contracting state.[203] This particularly widens the protection afforded to exclusive choice of court agreements, as the COCC requires the court designation to be that of a contracting state.[204]

Although Article 7(1)(d) suffers from minor downfalls, it nonetheless achieves a new level of protection for party autonomy in choice of court agreements. To demonstrate, in order for the provision to apply, the court of the requested state must necessarily ensure that the agreement is valid; the fact that this test must be conducted under the law of the requested state (including its private international law rules) creates uncertainty for the parties.[205] Not only is this choice of law rule not noted in the text of the DHJC itself,[206] it also contrasts with the COCC which applies the law of the chosen state.[207] From the perspective of a party seeking to rely on Article 7(1)(d), it is not certain that the requested court will render the agreement valid under its own law.

Furthermore, if the court of origin decided on the validity of the agreement in dismissing the defence,[208] and hence rendered it invalid, it is not clear whether this party would be precluded from invoking Article 7(1)(d) at the requested court by virtue of issue estoppel,[209] considering the provision requires the agreement to be rendered valid in the requested court. On the other hand, a party seeking to enforce the judgment of a non-chosen court will be proceeding on the basis that when jurisdiction was contested by the other party at the court of origin, the defence was dismissed. The uncertainty for the

---

[203] Garcimartín and Saumier (n 7) para 299.
[204] Choice of Court Convention art 3(a).
[205] Draft of the Hague Judgments Convention art 7(1)(d); Garcimartín and Saumier (n 7) para 299.
[206] It is alternatively noted in the explanatory report. Garcimartín and Saumier (n 7) para 299.
[207] Choice of Court Convention arts 5(1), 6(a), 9(a).
[208] Other reasons for dismissing the defence include the agreement no longer being binding, or the dispute in question being out-with the scope of the agreement. A S Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP 2003) 283-84.
[209] *Res judicata* in relation to collateral issues (such as the effect of a choice of court agreement) is a matter for national law and thus varies from state to state. Fentiman (n 46) 476-77.

enforcement-seeking party would, therefore, be that contrary to the court of origin's decision, as the agreement is valid under the law of the requested state. This makes the enforcement-seeking party's choice of requested state critical for the successful recognition and enforcement of a judgment contrary to a choice of court agreement.

Despite this uncertainty, the choice of law rule is the best outcome that can be achieved under the scope of the DHJC which excludes rules of direct jurisdiction.[210] Although a rule requiring the agreement to be valid under the law of the state chosen would be more desirable,[211] it would require immense compromise on the part of the contracting states,[212] especially considering the state chosen may not be a party to the HJC.[213] This renders such a rule unachievable under the DHJC. The refusal ground of Article 7(1)(d) should, therefore, be considered a step forward in the protection of choice of court agreements and hence party autonomy.[214]

Since it is necessary for the requested court to have established jurisdiction under an Article 5(1) base before a party may invoke Article 7(1)(d), it is also argued that the presence of a clear list of jurisdictional bases creates certainty and predictability for parties.[215] Brand, however, rejects this conclusion and asserts that despite Article 21's 'uniform interpretation' obligation, Article 5's bases may be the subject of 'homeward trend',[216] a phenomenon of non-uniform interpretation by domestic courts which has been attributed to the text

[210] Draft of the Hague Judgments Convention art 5; Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 5; Garcimartín and Saumier (n 7) paras 144, 309.
[211] This is the position under the Choice of Court Convention. Choice of Court Convention arts 5(1), 6(a), 9(a); text to n 69.
[212] Teitz, 'The Hague Choice of Court Convention' (n 6) 546, 549; Tang, *Jurisdiction and Arbitration Agreements* (n 6) 249.
[213] Garcimartín and Saumier (n 7) para 299.
[214] Draft of the Hague Judgments Convention art 7(1)(d).
[215] Draft of the Hague Judgments Convention arts 5(1), 7(1)(d).
[216] The Draft of the Hague Judgments Convention provides: 'In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application'. Draft of the Hague Judgments Convention art 21; RA Brand, 'The Circulation of Judgments Under the Draft Hague Judgments Convention' (2019) University of Pittsburgh Legal Studies Research Paper 2019/02, 20, available at <http://ssrn.com/abstract=3334647> accessed 1 March 2019.

of the Vienna Convention despite its 'uniform interpretation' provision.[217] Such an argument is however undermined by the guidance of the HJC's explanatory report, which the Vienna Convention lacks. Although Article 5 may also be criticised for 'locking' an exhaustive list of jurisdictional bases in the dynamic area of international trade,[218] not only is this a price worth paying for certainty and predictability in commercial transactions, but the opportunity for states to apply more liberal national laws through Article 16 provides sufficient flexibility for catering to any modern developments in jurisdiction.[219]

New York Convention Articles V(1)(c) and (d)

In accordance with the autonomous nature of arbitration, the NYC also contains grounds for refusal of recognition and enforcement of an award under Article V(1)(c) and (1)(d).[220] In contrast to the wide scope of the DHJC's Article 7(1)(d), the NYC's comparable grounds have been narrowly construed,[221] accommodating the NYC's 'pro-

[217] Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (Vienna Convention) art 7; F Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' (2009) 3 Int'l Business L J 333.

[218] Draft of the Hague Judgments Convention art 5; Brand, 'The Circulation of Judgments' (n 216) 19-20.

[219] The Draft of the Hague Judgments Convention provides: 'Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law'. Draft of the Hague Judgments Convention art 16.

[220] New York Convention arts V(1)(c)-(d).

[221] The New York Convention provides: 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that: … The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced…'. New York Convention art V(1)(c). The New York Convention further provides: 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that: … The composition of the arbitral authority or the arbitral procedure was not in accordance with the

enforcement bias'.[222] Despite the need to prevent frivolous actions, it is argued that in principle, such a narrow construction operates against the parties' agreement as it would enforce an award despite it not being 'within the terms of submission to arbitration', or where the 'composition of the arbitral authority' or procedure were not in accordance with the parties' agreement.[223]

Although with regard to Article V(1)(c), Born notes this is in accordance with the understanding that 'commercial parties desire "one-stop shopping" in resolving their international disputes', such an approach defeats the autonomy-preserving purpose of the provision.[224] Further limits are placed on the autonomy of the parties under Article V(1)(d) by virtue of the general principles of the NYC,[225] as well as subject-matter arbitrability,[226] public policy of the requested state,[227] and due process.[228] These weaknesses are in addition to the inherent inconsistency between the NYC's Article V(1)(d) and (1)(e), where if the parties had agreed to an arbitral procedure that could raise a defence under paragraph (1)(d), such a procedure may be contrary to the mandatory law of the arbitral tribunal, giving rise to annulment and hence a defence under paragraph (1)(e).[229] While Born suggests that the prevailing view prioritises the parties' agreement,[230] some commentators seem more hesitant,[231] and there are authorities

agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place…'. New York Convention art V(1)(d); Draft of the Hague Judgments Convention art 7(1)(d).

[222] Born, *International Commercial Arbitration* vol 3 (n 136) 3543, 3548-49, 3561; *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Sys Inc* 29 F Supp 2d 1168 (SD Cal 1998) 1171.

[223] New York Convention arts V(1)(c)-(d).

[224] Born, *International Commercial Arbitration* vol 3 (n 136) 3548.

[225] Solomon (n 59) 125.

[226] New York Convention art V(2)(a); P Nacimiento, 'Article V(1)(d)' in H Kronke, P Nacimiento, D Otto and N C Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 284.

[227] New York Convention art V(2)(b); Nacimiento (n 226) 284; Solomon in Balthasar (n 59) 125.

[228] New York Convention art V(1)(b); Nacimiento (n 226) 284.

[229] New York Convention arts V(1)(d)-(e).

[230] Born, *International Commercial Arbitration* vol 3 (n 136) 3574.

[231] Nacimiento (n 226) 285-86; Solomon (n 59) 125.

which have prioritised the law of the state.[232] Although it has been noted that a difference between the parties' agreed procedure and the mandatory law of the arbitral tribunal is not likely to occur frequently,[233] the fact that matters relating to the composition of the arbitral tribunal are frequently invoked creates uncertainty for the parties.[234] As such, the effectiveness of the NYC's Article V(1)(c) and (1)(d) as autonomy-preserving tools is questionable; this reiterates the significance of the DHJC's Article 7(1)(d) in enhancing the protection of party autonomy in the context of choice of court agreements.

Scope for Abuse

A party wishing to derogate from the arbitration or choice of court agreement ('agreement-derogating party') without the consent of the other party is given significant scope to do so under the NYC, COCC and the DHJC. The core of this problem rests on the absence of a negative *competence-competence* being granted to the chosen forum by neither of the Instruments nor national law. This enables the preliminary issue to be decided in multiple fora. Each forum may therefore not only be proceeding concurrently with another forum, but may also make contradictory decisions regarding the validity of the parties' agreement and hence render irreconcilable judgments.

Parallel Proceedings

Under the COCC, no rule regulates parallel proceedings as such a general jurisdictional rule would be outside the ambit of the convention.[235] Although Article 5(2) prevents the chosen court from declining jurisdiction by relying on the doctrines of *forum non*

[232] *Judgment of 24 February 1994, Ministry of Public Works v Société Bec Frères,* XXII Year Book of Commercial Arbitration 682 (Paris Cour d'appel) (1997) para 688; *Judgment of 1 July 1991*, DFT 117 II 346 (Swiss Federal Tribunal) para 348.
[233] Solomon (n 59) 125.
[234] Born, *International Commercial Arbitration* vol 3 (n 136) 3571.
[235] T Hartley, *Choice-of-Court Agreements under the European and International Instruments* (OUP 2013) 231.

conveniens[236] and *lis pendens,*[237] it has been argued that a state declaration under Article 19, which enables the state's courts to refuse to enforce an exclusive choice of court agreement in the absence of a 'connection between that state and the parties or the dispute', limits the application of Article 5(2) and operates for the benefit of the agreement-derogating party.[238] However, no state has made an Article 19 declaration,[239] and the availability of the declaration is justified by the need to attract state ratification by proffering flexible rules.[240] With regard to *lis pendens*, despite the optimism demonstrated by commentators such as Hartley and Teitz,[241] the risks associated with the infamous European Court of Justice decision in *Gasser*,[242] whereby the agreement-derogating party initiated pre-emptive proceedings in a non-chosen court, have not been fully eradicated under the COCC.[243]

A party may challenge an exclusive choice of court agreement in a non-chosen court; if this court fails to meet an Article 6 ground and there are parallel proceedings on the preliminary issue in the chosen

---

[236] The doctrine enables a court to decline jurisdiction on the ground that another court would be more appropriate for the action. Hartley and Dogauchi (n 6) 57.
[237] The doctrine enables a court to decline jurisdiction on the ground that another court was seised first of the action. Hartley and Dogauchi (n 6) 57.
[238] Choice of Court Convention arts 5(2), 19; B Khatri, 'The Effectiveness of the Hague Convention on Choice of Court Agreements in Making International Commercial Cross-Border Litigation Easier: A Critical Analysis' (2016) Victoria U Wellington Legal Research Paper 48/2016, 16-17, available at <https:// papers.ssrn.com/sol3/papers.cfm?abstract_ id=2817597> accessed 20 February 2019.
[239] Hague Conference on Private International Law (n 39) tbl.
[240] A state ratifying the Choice of Court Convention and making an Article 19 declaration, which limits the effectiveness of the Convention, is nonetheless more beneficial for parties (to an exclusive choice of court agreement) than not having that state as a contracting state at all. As with the state's ratification, parties can at least avail themselves of some of the benefits conferred by the convention.
[241] Teitz, 'The Hague Choice of Court Convention' (n 6) 554; Hartley (n 235) 231.
[242] Case C-116/02 *Erich Gasser Gmbh v MISAT Srl* [2003] ECR I-14693.
[243] Fentiman (n 46) 97; M Ahmed and P Beaumont, 'Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and its Relationship with the Brussels I Recast Especially Anti-suit Injunctions, Concurrent Proceedings and the Implications of BREXIT' (2017) 13 J Private Int'l L 386, 394-95.

court,[244] the non-chosen court is not even required to dismiss the proceedings, and can merely suspend them.[245] Furthermore, in assessing the applicability of the Article 6 grounds, the non-chosen court is not restricted by a *prima facie* standard of review.[246] This is of concern for the agreement-enforcing party as a full review by a non-chosen forum better enables the forum to find a ground for derogating from the parties' agreement and rendering a judgment on the merits.[247] This concern is however also applicable to the NYC, where Article II(3) does not prescribe a reduced standard of review for (non-chosen) courts in deciding the preliminary jurisdictional issue.[248] This has led to divergence amongst states,[249] with some courts carrying out a full review,[250] and others only a *prima facie* review.[251] A party seeking to derogate from either an exclusive choice of court agreement or an arbitration agreement can thus aim to challenge the agreement in a forum which is more likely to undertake a comprehensive review.

The scope for abuse granted to agreement-derogating parties is even more significant under the NYC.[252] This is further complexified by the addition of arbitral tribunals as well as the autonomy-based nature of arbitration, which in principle provides a party with the autonomy to abuse the process under the NYC. The degree of *competence-competence* granted to arbitral tribunals which varies amongst contracting states affects the extent to which courts can be

---

[244] Brand and Herrup (n 52) 88.
[245] M Weller, 'Choice of Court Agreements Under Brussels Ia and Under the Hague Convention: Coherences and Clashes' (2017) 13 J Private Int'l L 91, 111.
[246] Weller (n 245) 111-12.
[247] ibid 120.
[248] New York Convention art II(3); Born, *International Commercial Arbitration* vol 1 (n 3) 1054-55; UNICTRAL (n 94) 62. The preliminary issue here concerns whether the dispute falls within the agreement, and whether the agreement is 'null and void, inoperative or incapable of being performed'.
[249] D Schramm, E Geisinger and P Pinsolle, 'Article II' in H Kronke, P Nacimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 109.
[250] *Judgment of 29 April 1996, Found M v Banque X* 14 ASA Bulletin 527 (Swiss Federal Tribunal) (1996).
[251] Born, *International Commercial Arbitration* vol 1 (n 3) 1054.
[252] Z S Tang, 'Parallel Proceedings and Anti-Arbitration Injunction' (2012) 7 J Business L 589, 589.

involved in the parties' underlying dispute.[253] As such, while an arbitration agreement is intended to be exclusive in nature,[254] the NYC does not preclude a party from raising the preliminary issue with supervisory courts at the seat of arbitration, nor with non-supervisory courts in a foreign state.[255] This undermines the arbitration agreement by the mere access to judicial and hence non-arbitral settlement. Since the NYC is silent on the matter of parallel proceedings,[256] such proceedings could also be brought by an agreement-derogating party prior or following the time in which an arbitral tribunal is reviewing the preliminary issue.[257]

The risks associated with parallel proceedings at the preliminary stage are however lower for the agreement-enforcing party under the COCC. It is argued that the COCC's autonomous choice of law rule for reviewing the validity of an exclusive choice of court agreement operates to justify the absence of a negative *competence-competence* rule.[258] This is owing to the fact that different fora will most likely render uniform decisions on the preliminary issue.[259] In addition to providing less scope for agreement-derogating parties, the COCC's approach provides uniformity while attracting state ratifications due to the exclusion of a radical negative *competence-competence* rule.[260] This contrasts with the NYC's inconsistency in choice of law application under Article II(3) as previously discussed.[261] Different fora are hence more likely to reach different decisions on the preliminary issue and continue to render irreconcilable decisions on

---

[253] Born, *International Commercial Arbitration* vol 1 (n 3) 1048.
[254] ibid 1275. The exclusivity of an arbitration agreement is the negative obligation excluding the jurisdiction of the courts in resolving the dispute.
[255] B Cremades and I Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 Arbitration International 507, 508; Born, *International Commercial Arbitration* vol 1 (n 3) 1053.
[256] Born, *International Commercial Arbitration* vol 3 (n 136) 3796.
[257] Born, *International Commercial Arbitration: Commentary and Materials* vol 1 (n 178) 75.
[258] Choice of Court Convention arts 5(1), 6(a), 9(a).
[259] Choice of Court Convention arts 5(a) and 6(a); Nielsen (n 133) 107. Party capacity and public policy, however, are to be decided under the law of the court seised. Choice of Court Convention arts 6(b)-(c); Schulz, 'The 2005 Hague Convention' (n 71) 438.
[260] Tang, *Jurisdiction and Arbitration Agreements* (n 6) 77.
[261] text to nn 64-66.

the merits.[262] The NYC therefore not only enables parallel proceedings but also in effect renders such proceedings attractive for an agreement-derogating party, especially if no law is chosen by the parties to govern the validity of the arbitration agreement. This exacerbates reverse forum shopping whereby the agreement-derogating party seeks a more favourable forum to challenge the agreement;[263] indeed, it has been noted that parallel proceedings at the preliminary stage in international commercial arbitration are widespread.[264]

Irreconcilable Judgments and Injunctive Relief

There is a high risk of irreconcilable decisions under both the NYC and the COCC. The COCC deals with inconsistent decisions by the Article 9(f) and (g) grounds for refusal of recognition or enforcement.[265] These grounds are almost identically reflected in Article 7(1)(e) and (1)(f) of the DHJC.[266] Although both grounds are

---

[262] Cremades and Madalena (n 255) 511.

[263] F De Ly, 'Forum Shopping and the Determination of the Place of Arbitration' in F Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (Sellier 2013) 59.

[264] N Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer Law International 2014) 3.

[265] The Choice of Court Convention provides: 'Recognition and enforcement may be refused if … the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties…'. Choice of Court Convention art 9(f). It also provides: 'Recognition and enforcement may be refused if … the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State'. Choice of Court Convention art 9(g).

[266] The Draft of the Hague Judgments Convention provides: 'Recognition and enforcement may be refused if … the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties…'. Draft of the Hague Judgments Convention art 7(1)(e). It further provides: 'Recognition and enforcement may be refused if … the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same *subject matter*, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State…'. Draft of the Hague Judgments Convention art 7(1)(f) (emphasis added). Garcimartín and Saumier note that 'subject matter' is equivalent to the Choice of Court Convention's 'cause of action' but easier to apply in different states. Garcimartín and Saumier (n 7) para 302.

necessary for the proper administration of justice in the absence of general direct rules on jurisdiction,[267] they are capable of providing further scope for the agreement-derogating party. The COCC's Article 9(f) and DHJC's Article 7(1)(e) enable this party to commence proceedings in a non-chosen court; [268] if the court renders the agreement invalid,[269] finds that the parties lacked capacity under its own law,[270] or that giving effect to the agreement would be contrary to its public policy,[271] it may render a judgment on the merits.[272] Following, if the agreement-enforcing party seeks to enforce an inconsistent judgment of the chosen court in the state where the agreement-derogating party received his or her judgment, the agreement-derogating party's judgment will be prioritised if it is rendered prior to the institution of the recognition and enforcement proceedings of the chosen court's judgment.[273] It could therefore be argued that the refusal ground motivates a 'race to recognition and enforcement'.

The COCC's Article 9(g) and DHJC's Article 7(1)(f) present similar difficulties in the context of inconsistent decisions from foreign courts concerning the same dispute, however, a 'race to judgment' is more appropriate under this ground as the non-chosen court's judgment must be first in time.[274] In contrast, the NYC is silent on the issue of inconsistent awards or judgments.[275] Although it has been noted that refusal of recognition and enforcement of an inconsistent

[267] Beaumont and Walker (n 87) 56-57.
[268] Choice of Court Convention art 9(f); Draft of the Hague Judgments Convention art 7(1)(e); Brand and Herrup (n 52) 120.
[269] Choice of Court Convention art 6(a). This is impliedly accepted under the Hague Choice of Court Convention's Article 9(f) by Brand and Herrup, as they note the non-chosen court's judgment need not be 'properly' given. Brand and Herrup (n 52) 121.
[270] Choice of Court Convention, art 6(b); Brand and Herrup (n 52) 121.
[271] Choice of Court Convention, art 6(c); Brand and Herrup (n 52) 121.
[272] Hartley and Dogauchi (n 6) 71; Brand and Herrup (n 52) 120-21; Garcimartín and Saumier (n 7) para 301.
[273] Hartley and Dogauchi (n 6) 71; Brand and Herrup (n 52) 120-21; Garcimartín and Saumier (n 7) para 301.
[274] Choice of Court Convention art 9(g); Draft of the Hague Judgments Convention art 7(1)(f); Hartley and Dogauchi (n 6) 71; Brand and Herrup (n 52) 121-22; Garcimartín and Saumier (n 7) para 302.
[275] Tang, *Jurisdiction and Arbitration Agreements* (n 6) 252.

award may be considered a matter of public policy under Article V(2)(b),[276] this is uncertain and further undermined by the limited application of the public policy exception under the NYC.[277] As such, no consolation is provided for an agreement-enforcing party should an inconsistent judgment or award be rendered contrary to an arbitration agreement.

Whether a party is capable of exercising injunctive relief under the NYC to prevent the risk of inconsistent decisions is a controversial, uncertain and expansive issue.[278] The NYC is silent with regard to injunctive relief.[279] Nonetheless, it can be concluded that while an anti-suit injunction directed at foreign proceedings in violation of an arbitration agreement in a non-supervisory court may be granted by common law courts as it is not inconsistent with the NYC,[280] it is unlikely that civil law courts will grant such a remedy.[281] Although granted by some countries,[282] anti-arbitration injunctions sought by the agreement-derogating party against the arbitration proceedings pose even further difficulty due to their inconsistency with the NYC and considerations of comity.[283] Should an agreement-derogating party be exceptionally successful in attainting an anti-arbitration injunction from a supervisory or non-supervisory court,[284] an arbitral tribunal in practice may not be required to enforce the injunction and has the authority to determine its own jurisdiction and continue proceedings.[285] Although this operates for the benefit of the

[276] F Emanuele and M Molfa, *Selected Issues in International Arbitration: The Italian Perspective* (Thomson Reuters 2014) 152.
[277] Emanuele and Molfa (n 276) 152; Born, *International Commercial Arbitration* vol 3 (n 136) 3651.
[278] Born, *International Commercial Arbitration* vol 1 (n 3) 1304. An extensive assessment of the area of injunctive relief and other remedies lies outside the scope of this article.
[279] Born, *International Commercial Arbitration* vol 1 (n 3) 1312.
[280] A Layton, 'Anti-Arbitration Injunctions and Anti-Suit Injunctions: An Anglo-European Perspective' in F Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (Sellier 2013) 140; Born, *International Commercial Arbitration* vol 1 (n 3) 1291.
[281] Born, *International Commercial Arbitration* vol 1 (n 3) 1297.
[282] Tang, *Jurisdiction and Arbitration Agreements* (n 6) 87.
[283] Layton (n 280) 144; Born, *International Commercial Arbitration* vol 1 (n 3) 1312.
[284] Born, *International Commercial Arbitration* vol 1 (n 3) 1314.
[285] ibid 1315-16.

agreement-enforcing party, the parties may be left with inconsistent decisions from both fora. The anti-arbitration injunction may also be of relevance for the tribunal if the parties will be seeking enforcement of the award in the state where this injunction was issued, as recognition and enforcement will likely be refused on a finding that the agreement was invalid.[286] The agreement-derogating party's inconsistent court judgment will however also be subject to the recognition and enforcement procedures of the requested state; where it may be denied recognition and enforcement through the COCC and DHJC due to their arbitration exclusion.[287] As such, minimal restrictions are placed on the agreement-derogating party in preventing inconsistent decisions.

On the contrary, the COCC's control mechanism for inconsistent judgments lies at the recognition and enforcement stage by only permitting recognition and enforcement of the chosen court's judgment.[288] A court is however not precluded from rendering a judgment outside the convention.[289] Although this undermines the parties' agreement, a rule preventing the recognition and enforcement of a non-chosen court's judgment outside the convention was deemed 'an intrusion into national law'.[290] The agreement-derogating party is still limited by the non-chosen court's obligation to exercise jurisdiction consistently with the 'fundamental object and purpose' of the COCC, which is noted in the preamble as ensuring the 'effectiveness of exclusive choice of court agreements between parties…'.[291] This benefits the agreement-enforcing party as the non-chosen court will also be less likely to exercise an anti-suit injunction against proceedings of the chosen court. Further, the literature suggests that the chosen court is not precluded from exercising an anti-suit injunction towards the proceedings of the non-chosen

[286] Tang, *Jurisdiction and Arbitration Agreements* (n 6) 89.
[287] Choice of Court Convention art 2(4); Draft of the Hague Judgments Convention art 2(3); Hartley and Dogauchi (n 6) 47; Garcimartín and Saumier (n 7) para 68.
[288] Choice of Court Convention art 8(1).
[289] Teitz, 'The Hague Choice of Court Convention' (n 6) 554.
[290] Talpis and Krnjevic (n 114) 28.
[291] Choice of Court Convention pmbl; Brand and Herrup (n 52) 120; Beaumont, 'Hague Choice of Court Agreements Convention' (n 76) 153. This presumes the non-chosen court is a contracting state to the Choice of Court Convention.

court,[292] though this is also subject to the common law and civil law differences noted in relation to injunctions under the NYC.[293] Nonetheless, the presence of an autonomous choice of law rule will operate to minimise the risk of parallel proceedings on the merits and the need for such remedies.[294]

Draft Hague Judgments Convention

Comparable to the NYC, the DHJC provides significant scope for agreement-derogating parties. This is attributed to the absence of direct jurisdictional rules under the convention,[295] which leaves jurisdiction matters to the varying national laws of the contracting states.[296] Although this prevents the inclusion of a rule on *lis pendens*,[297] the exclusion operates for the benefit of an agreement-enforcing party as it prevents the chosen court from declining jurisdiction where the agreement-derogating party has commenced pre-emptive proceedings in a non-chosen court. On the other hand, the absence of direct rules on jurisdiction necessarily implies that a court designated by an agreement cannot be given priority in jurisdiction, and parallel proceedings will be a likely consequence.[298] Indeed, an agreement-derogating party may seek recognition and enforcement of a judgment from a non-chosen court through the DHJC by relying on an Article 5(1) base other than base (1)(m).[299] Although the agreement-enforcing party can rely on Article 7(1)(d) to refuse recognition and enforcement of this judgment, the Article 7(1)(e) and (1)(f) refusal grounds for inconsistent decisions, discussed above,[300] provide significant scope for the agreement-derogating party to refuse recognition and enforcement of the chosen court's

[292] Choice of Court Convention art 7; Joseph (n 18) 423; Ahmed and Beaumont (n 243) 388, 396-97.
[293] text to nn 280-81.
[294] Choice of Court Convention arts 5(1), 6(a), 9(a); Teitz, 'Both Sides of the Coin' (n 54) 68; Schulz, 'The 2005 Hague Convention' (n 71) 438.
[295] Garcimartín and Saumier (n 7) para 103.
[296] ibid para 1.
[297] ibid para 309.
[298] ibid.
[299] Draft of the Hague Judgments Convention art 5(1)(m).
[300] text to n 267.

judgment.[301] In fact, both judgments may be refused recognition and enforcement, as the discretionary nature of Article 7 does not compel contracting states to enforce either of the judgments.[302]

Since the refusal of enforcement of both the chosen and non-chosen courts' judgments would amount to a loss for both parties due to the additional delay and expenses in resolution, it may be preferable for an agreement-enforcing party to not invoke Article 7(1)(d) in certain occasions of parallel proceedings.[303] For instance, the agreement-enforcing party may have contested jurisdiction at the non-chosen court but the defence was dismissed, following which, the non-chosen court renders a judgment on the merits prior to the chosen court, thus enabling the agreement-derogating party to refuse recognition and enforcement of the potential inconsistent judgment from the chosen court under Article 7(1)(e) or (1)(f).[304] In such circumstances, having weighed the consequential costs of refusing enforcement, the non-chosen court's decision may only be slightly sub-optimal for the agreement-enforcing party. In another scenario, it may also be optimal for the agreement-enforcing party to not contest[305] jurisdiction where the agreement-derogating party seises a non-chosen court prior to the agreement-enforcing party seising the chosen court, and the non-chosen court seised is that of the state to be requested for recognition and enforcement. This is due to the agreement-derogating party's capability of refusing enforcement of the judgment under Article 7(2);[306] indeed, the *lis pendens* rule of Article 7(2) arguably also enables a party to initiate pre-emptive proceedings in breach of a choice of court agreement by seising a court of the requested state. Although the manoeuvres by the agreement-enforcing party can provide near optimal resolution to the parties' dispute, they also demonstrate the extensive scope left under the DHJC for derogating from the parties' agreement.

---

[301] Draft of the Hague Judgments Convention arts 7(1)(d)-(f).
[302] Draft of the Hague Judgments Convention art 7(1); Garcimartín and Saumier (n 7) para 423.
[303] Draft of the Hague Judgments Convention art 7(1)(d).
[304] ibid 7(1)(e)-(f).
[305] Garcimartín and Saumier (n 7) para 174.
[306] Draft of the Hague Judgments Convention art 7(2).

Nonetheless, the protection provided to the agreement-enforcing party through Articles 5(1)(m) and 7(1)(d) is highly valuable considering the wide scope of the DHJC itself.[307] This protection is furthered by the inability of an agreement-derogating party to avail itself of a *forum non conveniens* defence at the requested court.[308] Indeed, as noted by Beaumont, there is evidence of such jurisdictional 'hurdles' being accepted by some courts.[309] As such, while some of the DHJC's rules operate to the detriment of the parties' agreement,[310] such rules are necessary for the proper administration of justice in relation to judgments which are not the subject of a choice of court agreement but will be recognised and enforced under the DHJC through other Article 5(1) bases.[311]

Conflicting Choice of Court and Arbitration Agreements

The NYC, COCC and the DHJC are silent with regard to circumstances whereby parties' 'ill-drafted' contracts contain conflicting arbitration and exclusive choice of court agreements covering the same dispute in equal weight.[312] In assessing whether this conflict should be reconciled by the rules of the COCC, Schulz justifies the absence of such rules on the basis that 'real conflicts will be rare' as one of the agreements is usually found invalid or inapplicable.[313] Parties are not advised to include both agreements in conflict as despite the rarity, the courts have adopted divergent approaches where the parties' intentions have been difficult to

[307] Draft of the Hague Judgments Convention arts 5(1)(m), 7(1)(d). Unlike the Choice of Court Convention, the object and purpose of the Draft Hague Judgments Convention is not focused on ensuring the effectiveness of exclusive choice of court agreements.
[308] Draft of the Hague Judgments Convention art 14(2).
[309] Beaumont, 'Respecting Reverse Subsidiarity' (n 7) 6.
[310] Draft of the Hague Judgments Convention arts 7(1)(d)-(f).
[311] Draft of the Hague Judgments Convention art 5(1).
[312] Beaumont, 'Hague Choice of Court Agreements Convention' (n 76) 140; R Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9 J Private Int'l L 361, 362; Born, *International Commercial Arbitration* vol 1 (n 3) 784.
[313] A Schulz, 'The Future Convention on Exclusive Choice of Court Agreements and Arbitration' (Preliminary Document No 32, Permanent Bureau, June 2005) 4-5, available at <https://assets.hcch.net/upload/wop/jdgm_pd32e.pdf> accessed 27 October 2018.

decipher.[314] The approaches however generally favoured the arbitration agreement.[315] Some commentators attribute the courts' approaches to a 'notion of superiority'[316] of arbitration in addition to the NYC's 'pro-enforcement bias'.[317]

In terms of the COCC, contracts which include these conflicting forum selection agreements should be outside the scope of the convention; although a 'court' in the Article 3(a) definition of 'exclusive choice of court agreement' does not cover an arbitral tribunal due to the arbitration exclusion under Article 2(4),[318] agreements also conferring jurisdiction to an arbitral tribunal should be considered non-exclusive in order to be consistent with the contracting state's obligations towards the NYC under Article 26(1) and (3).[319] Rendering the exclusive choice of court agreement non-exclusive suggests it may be within the scope of the DHJC,[320] however, the reflection of the COCC's arbitration exclusion in the DHJC's Article 2(3),[321] and the state's obligations under Article 24(1) and (2) denotes that an agreement conferring jurisdiction to both a court and an arbitral tribunal will also be outside the scope of the DHJC.[322] An exception suggested by Garcimartín and Saumier is where the defendant does not contest the jurisdiction of the court of

---

[314] S Balthaser, 'Best Practice in International Arbitration' in S Balthasar (ed), *International Commercial Arbitration Handbook* (CH Beck Hart Nomos 2016) 19; Garnett, 'Coexisting and Conflicting' (n 312) 361-62.

[315] *Judgment of 1 February 1979, Techniques de l'Ingénieur v Sofel*, 1980 Revue De L'Arbitrage 97 (Paris Tribunal de Grande Instance); *Paul Smith ltd v H&S International* [1991] 2 Lloyd's Rep 127; *Axa Re v Ace Global Markets Ltd* [2006] EWHC 216 (Comm); *Ace Capital Ltd v CMS Energy Corp* [2008] 2 CLC 318.

[316] S Brekoulakis, 'The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?' (2007) 24 J Int'l Arbitration 341, 354-55; Garnett, 'Coexisting and Conflicting' (n 312) 362.

[317] van den Berg (n 59) 155.

[318] Choice of Court Convention arts 2(4), 3(a); Hartley and Dogauchi (n 6) 50; Brand and Herrup (n 52) 42.

[319] Choice of Court Convention arts 26(1), 26(3); Hartley and Dogauchi (n 6) 89, 91, 93; Brand and Herrup (n 52) 42; Beaumont, 'Hague Choice of Court Agreements Convention' (n 76) 140-41; Garnett, 'Coexisting and Conflicting' (n 312) 385.

[320] Draft of the Hague Judgments Convention art 5(1)(m); Garcimartín and Saumier (n 7) para 220.

[321] Choice of Court Convention art 2(4); Draft of the Hague Judgments Convention, art 2(3); Garcimartín and Saumier (n 7) paras 66-68.

[322] Draft of the Hague Judgments Convention arts 24(1)-24(2).

origin by invoking the arbitration agreement; although in principle this means there would be no conflict between the agreements,[323] the judgment would be within the scope of the DHJC.[324]

The respect granted to arbitration and the NYC by the COCC and DHJC does not necessarily imply that the courts' 'pro-arbitration'[325] approach will, nor should, remain. Schulz' acceptance of the manner in which courts are dealing with the conflict in practice implies that Schulz accepts the degradation of choice of court agreements when balanced with arbitration agreements.[326] However, the COCC's objective of 'ensuring the effectiveness of exclusive choice of court agreements'[327] as well as the DHJC's aim of 'enhancing the practical effectiveness'[328] of judgments will contribute to an ethos of neutrality between choice of court agreements supported by these two Instruments, and arbitration agreements supported by the NYC.[329] With the absence of case law, it is argued that emphasis will be on the courts of contracting states to act in accordance with this ethos by adopting a 'pro-enforcement' attitude—analogous to the NYC's 'pro-enforcement bias'[330]—towards choice of court agreements. Indeed, a 'pro-enforcement' approach has been impliedly suggested by Joseph in relation to courts' interpretation of the COCC's Article 9 due to its similarity with the NYC's Article V.[331] This is further justified by arbitration's 'superiority' being attributed to the presence of a framework for the recognition and enforcement of awards – the NYC.[332] Such an approach will increase the likelihood that a choice of court agreement will be upheld in cases of conflict.

---

[323] Failing to contest jurisdiction and arguing on the merits is accepted as implicit consent to jurisdiction in most states. Garcimartín and Saumier (n 7) para 174.
[324] Garcimartín and Saumier (n 7) para 67.
[325] Garnett, 'Coexisting and Conflicting' (n 312) 385; Born, *International Commercial Arbitration* vol 1 (n 3) 777.
[326] Schulz, 'The Future Convention' (n 313) 6.
[327] Choice of Court Convention pmbl.
[328] Garcimartín and Saumier (n 7) para 8.
[329] Indeed, one of the aims of the Choice of Court Convention with regard to choice of court agreements is to replicate the positive impact that the New York Convention had on arbitration agreements, thus enhancing enforcement. Hartley and Dogauchi (n 6) 31; Garnett, 'Coexisting and Conflicting' (n 312) 385.
[330] van den Berg (n 59) 155.
[331] Joseph (n 18) 539.
[332] Brekoulakis (n 316) 355.

Recommended Agreement

Based purely on the findings of this article, this author recommends an exclusive choice of court agreement to be included in international commercial contracts as opposed to an arbitration agreement under the NYC, or a non-exclusive agreement such as an asymmetric or quasi-exclusive agreement under the DHJC. This is justified by the greater certainty and predictability granted to the parties by the COCC. The COCC's autonomous choice of law rule provides predictability for the parties by expressly designating the law of the chosen state,[333] preventing double standards regarding the validity of the agreement between multiple fora,[334] and limiting the risk of irreconcilable judgments from parallel proceedings.[335] This contrasts with the difficulties encountered under the NYC which only expressly refers to choice of law under Article V(1)(a),[336] as well as the unpredictability generated by the absence of direct jurisdictional rules under the DHJC which leaves the validity of the agreement to be decided by rules of national law.[337] The elaborate text of the COCC and the availability of the explanatory report renders terms such as 'null and void' clearer under the COCC than under the NYC.[338] Parties can also easily identify whether their agreement will be within the subject-matter scope of the COCC through Articles 1 and 2,[339] as opposed to the uncertainty of the NYC's arbitrability requirements.[340] Although the non-chosen court is given significant scope to continue proceedings through the COCC's numerous Article 6 exceptions, not only are these exceptions largely implicitly present under the NYC's Article II, their high threshold also renders them of little significance in practice.[341] At the recognition and enforcement stage, the COCC's

[333] Choice of Court Convention arts 5(1), 6(a), 9(a).
[334] Schulz , 'The 2005 Hague Convention' (n 71) 438.
[335] ibid 438; Nielsen (n 133) 111.
[336] New York Convention arts II(3), V(1)(a); text to n 60.
[337] Garcimartín and Saumier (n 7) paras 144, 309.
[338] New York Convention art II(3); Choice of Court Convention arts 5(1), 6(a), 9(a); text to n 82.
[339] Choice of Court Convention arts 1-2.
[340] New York Convention arts II(1), V(2)(a); text to n 96.
[341] New York Convention art II(3); Choice of Court Convention art 6; Hartley and Dogauchi (n 6) 61; Brand and Herrup (n 52) 92-93; text to n 106.

public policy exception provides the least uncertainty in comparison to that of the NYC and DHJC.[342] The presence of an express procedural fraud refusal ground provides predictability as this constitutes an implicit ground under the NYC's Article V(2)(b), and is even wider under the DHJC.[343]

While parallel proceedings can be initiated by an agreement-derogating party under the COCC, this also constitutes a concern for agreements under the NYC and the DHJC.[344] The risk of irreconcilable judgments from such proceedings is also minimised by the parties' access to the DHJC's Article 7(1)(d) to prioritise the decision of the chosen court,[345] as well as the presence of the COCC's Article 9(f) and (g) refusal grounds which are absent from the NYC.[346] The absence of *lis pendens* also indicates that the parties will not be subject to a 'race to the court'; this contrasts with the position of agreements under the DHJC which will be subject to a *lis pendens* rule in the requested state.[347] The enforcement of the agreement will also be enhanced overall by a foreseeable 'pro-enforcement' approach in favour of choice of court agreements by national courts, thus also implying that the exclusive choice of court agreement will be considered neutrally when conflicting with an arbitration agreement.[348]

Conclusion

Despite the current dominance of the NYC and arbitration agreements in international commercial dispute resolution, this article confirms

[342] New York Convention art V(2)(b); Choice of Court Convention art 9(e); Draft of the Hague Judgments Convention art 7(1)(c); text to nn 149, 167.
[343] New York Convention art V(2)(b); Choice of Court Convention art 9(d); Draft of the Hague Judgments Convention art 7(1)(b); Otto and Elwan in Kronke, Nacimiento, Otto and Port (n 145) 374; Born, *International Commercial Arbitration* vol 3 (n 136) 3704-05.
[344] Cremades and Madalena (n 255) 508; Fentiman (n 46) 97; Garcimartín and Saumier (n 7) para 309.
[345] Draft of the Hague Judgments Convention art 7(1)(d); Garcimartín and Saumier (n 7) paras 422-23.
[346] Choice of Court Convention arts 9(f)-(g); Tang, *Jurisdiction and Arbitration Agreements* (n 6) 252.
[347] Draft of the Hague Judgments Convention art 7(2).
[348] text to n 329.

that greater certainty and predictability will be granted to commercial parties in international disputes through a choice of court agreement following the wide ratification of the COCC and DHJC. The analysis of certain issues in jurisdiction as well as recognition and enforcement under the three Instruments identifies that in contrast to the NYC, the detailed provisions of the COCC and DHJC provide clarity as they expressly refer to matters which have been implicitly considered under the NYC's provisions – such as party incapacity and fraud matters. The detail therefore does not increase the complexity of the provisions but enhances certainty and predictability for the parties. This is demonstrated by the benefits derived from the COCC's autonomous choice of law rule, and the clarity of agreement enforcement under the COCC which contrasts with the NYC and its arbitrability requirements. The COCC and DHJC's public policy and fraud refusal grounds also provide more predictability, which is enhanced by the DHJC's autonomy-based refusal ground of Article 7(1)(d).

The article highlights that despite the scope available for a party to derogate from an agreement under the three Instruments, this scope is particularly extensive under the NYC. It was additionally established that an ill-drafted commercial contract including conflicting forum selection agreements will be interpreted neutrally by national courts with the potential of a 'pro-enforcement' approach in favour of choice of court agreements. The benefits derived from both the COCC and the DHJC on the basis of the findings of this article also suggested than an exclusive choice of court agreement would offer greater certainty and predictability for commercial parties in comparison to other agreements covered by the NYC and DHJC. Without further reiteration of the conclusions summarised by Chapter VII, these determinations emphasise the favourability of choice of court agreements under the COCC and DHJC in comparison to arbitration agreements under the NYC, following the equal ratification of the three Instruments.

The United Nations Human Rights Council's Performance: Achievements and Challenges

AHMAD USMARWI KAFFAH*

Abstract

In 2006, the United Nations Human Rights Council was created amid public distrust regarding its predecessor's performance on the promotion and protection of human rights. The pitfalls besetting the United Nations Commission on Human Rights were to be addressed after the HRC entered the picture of human rights promotion and protection. However, the problem of politicisation has led to the Human Rights Council being assessed as contributing little that is expected in replenishing the public trust that was degraded as a result of its predecessor's poor performance. As part of the Human Rights Council, the Universal Periodic Review is assigned to assist the HRC against the politicisation that affects its decision and additional norm-setting process. The Universal Periodic Review is successful in shaping states' behaviour to obey the guidelines of report-making as part of an interactive dialogue approach, though the Universal Periodic Review is not optimal in monitoring as part of the control mechanism. By using the principle of cooperation and genuine dialogue and the principle of non-selectivity as the assessment benchmarks, this article argues that the HRC is a little bit better than its predecessor, but has not contributed much as expected.

Keywords: Human rights; United Nations Commission on Human Rights; United Nations Human Rights Council; Universal Periodic Review

Introduction

In order to respond to human rights violations around the world, the United Nations established a body called the Human Rights Council (HRC) in 2006. It replaces and takes over the mandate of its predecessor, the United Nations Commission on Human Rights (UNCHR). The most important objective of the HRC is to ensure the

promotion and protection of human rights. To some extent, its aim is to continue the success of norm-setting, such as the Universal Declaration of Human Rights (UDHR), initiated by the UNCHR.

Nevertheless, the issue of politicisation which existed in the regime of the UNCHR cannot be shaken off by its successor. Since the HRC was created, many abuses of human rights have been perpetrated. A good example of this is the abuses reportedly occurring in Palestine, controlled by the State of Israel since 1948. This has occurred even though the UNHRC has been endowed with the new power of conducting Universal Periodic Reviews (UPRs), which strengthen monitoring action over countries.[1] Although there has been much dialogue, it has not been possible to find an appropriate solution to these problems. This article will assess whether the performance of the HRC has been good enough to overcome the pitfalls and problems of its predecessor. It is widely believed that the HRC cannot perform its best since politicisation still plays a large role in every aspect of the HRC's work. The UPR also does not seem to be able to achieve its target in monitoring all violations of human rights issues. This article will attempt to explore what actions have been taken since the creation of the HRC.

The first section will look at the UNCHR's performance in order to understand exactly the legacy that the HRC inherited. After that, the following section deals with assessing the HRC's performance by looking at its mandates, with subsections on the promotion and protection of human rights. The contribution that the UPR has made also needs to be assessed in order to achieve a holistic systematic understanding of the subject. The next section will explain the effect of politicisation as this affects almost every aspect of the HRC's work. The last section provides a conclusion.

---

* SH, LLM (General Law), LLM (Energy Law), PhD Candidate, University of Aberdeen. Ahmad is a qualified lawyer and serves as the Deputy of Legal and Legislative Counselling, Democratic Party of Indonesia, one of the country's largest political parties.

[1] Manfred Nowak and Julia Kozma, 'Research Project on A World Human Rights Court:
A World Court of Human Rights' (2009) Swiss Initiative to Commemorate the Sixtieth Anniversary of the Universal Declaration of Human Rights 12, available at <https://bim.lbg.ac.at/files/sites/bim/World%20Court%20of%20Human%20Rights_BIM_0.pdf> accessed 28 April 2014.

Performance of the United Nations Commission on Human Rights

The United Nations Commission on Human Rights was established in 1946[2] and operated for more than half a century. Its main focus was to set standards on human rights; however, it did not have the power 'to consider violations of human rights until 1967'.[3] The UNCHR lacked the capacity to act in response to complaints related to human rights.[4] From that point, the UNCHR was able to deal with any issues of violations and its authority was expanded, particularly over promoting human rights, implementing them, and monitoring its implementations.[5] As such, the protection of international human rights law needs more attention and the implementation standard should be monitored periodically by treaty bodies and mandate holders, supported by a Sub-Commission.[6]

The successful performance of the UNCHR was to prepare a mission and to introduce the concept of the universality of human rights flourishing within and being accepted by international society. This success was also the beginning of the standard-setting norms which enacted one of the topics chosen for and within the regulation within the declaration.[7] This declaration was the UDHR, drafted in 1948.[8] In the beginning, international society did not necessarily obey such new concepts. The UDHR was seen as upholding Western values, and it is true the concept was purely a creation of the West. Notwithstanding, customary law that existed at that time which the majority of nation-states accepted, and they set about enforcing it

[2] United Nations Research Guides, 'Commission on Human Rights 1946' (2014), available at <http://research.un.org/en/docs/humanrights/charter#13202485> accessed 28 April 2014.
[3] Rhona Smith, *International Human Rights* (Oxford University Press 2012) 61.
[4] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, OUP 2008) 138.
[5] Rosa Freedman, 'The United Nations Human Right Council: A Critique and Early Assessment' (2011) University of London PhD thesis, 24, available at <https://qmro.qmul.ac.uk/jspui/bitstream/123456789/2418/1/FREEDMANUnitedNations2011.pdf> accessed 6 May 2014.
[6] Tomuschat (n 4) 24-25.
[7] ibid 61, 135.
[8] United Nations High Commission of Human Rights, 'Universal Declaration of Human Rights' (1996-2012), available at <http://www.ohchr.org/en/udhr/pages/introduction. aspx> accessed 28 April 2014.

within their nations.[9] From a theoretical perspective, this majority acceptance reflected a theory of monism, emphasizing international human rights values as unified within domestic culture and law.[10] Although the key thing of making reconciliation on the plurality of reasonable interpretations of human rights norms were some treaties made after that time, such as the International Covenant on Economic and Social Cultural Rights and the International Covenant on Civil and Political Rights.[11] These treaties have made commonly accepted interpretations of a customary nature legally binding, obliging signatory states to obey the UDHR as hard law, rather than soft law.

These facts, however, are not enough to categorise its record as being a successful one. The UNCHR had to be ready to accept its position as the subject of criticism as the result of not doing enough to fulfil its mandate. After its authority was expanded, the UNCHR was supposed to tackle problems relating to human rights violations.[12] Unfortunately, up until its final year in existence, the UNCHR failed to prove it had achieved that goal fully.[13] The failure is a striking fact that the UNCHR was unsuccessful to respond to human rights violations reportedly committed by Israel. For example, Stephen Lendman states, 'Since 1948, Israel denied its Arab citizens fundamental human and civil rights and increasingly fewer of them to many Jews. In the Territories, it's far worse under military occupation and Israeli laws afford no protection to Palestinians'.[14]

It is also important to highlight the attention given to these failures of the UNCHR by former Secretary General Kofi Annan:

> Yet the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States

[9] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 GJICL 287.
[10] Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 CLR 628.
[11] Freedman (n 5) 24-25.
[12] Howard Tolley Jr, *The UN Commission On Human Rights* (Westview Press 1987) 15.
[13] ibid.
[14] Stephen Lendman, 'Human Rights Abuses in Israel and Occupied Palestine' (*Dissident Voice*, 2010), available at <http://dissidentvoice.org/2010/02/human-rights-abuses-in-israel-and-occupied-palestine/> accessed 1 May 2014.

> have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.[15]

The striking reality of the UNCHR's performance was the problem of politicisation arising from the internal workings of the UNCHR itself. This politicisation left the UNCHR unable to complete action on human rights violations, impeding the joint mission of the UN on maintaining world peace.[16] The politicisation affected the UNCHR to not easily impose sanctions on the member states. An example of this is that the UNCHR was spending more time on matters relating to Israeli conflicts, without finding a conclusion, instead of paying attention to the abuses occurring in other countries, such as China.[17] Usually, the politicised agenda focuses on unnecessary matter, ignoring other violations beyond the interest of key states, a problem that could not be dealt with by the UNCHR.

Moreover, for regional groups (Asian, African, Caribbean, Western European, Latin American, and so on), when violations occur, their concern is more for their own national and regional agendas, which ignore the human rights which are supposed to be enforced.[18] The UNCHR failed to draw the attention of such regional groups to be responsible for human rights violations as a priority, rather than their domestic agendas. The problem of regionalism is a form of politicisation as the failure of the UNCHR, and is recognised as the key problem affecting the UNCHR's performance.[19]

In 2006, the General Assembly of the United Nations enacted Resolution 60/251, establishing the HRC to replace the UNCHR. As a

---

[15] Office of the United Nations Secretary General, 'In Larger Freedom: Towards Development Security and Human Rights for All' (2005) A/59/2005 para 182, available at <http://www. refworld.org/docid/4a54bbfa0.html> accessed 29 April 2014.
[16] Rosa Freedman, 'New Mechanism of the UN Human Rights Council' (2011) 29 NQHR 290.
[17] ibid.
[18] ibid.
[19] ibid.

subsidiary organ of the General Assembly, the HRC has the duty to continue the achievements and redress the shortcomings of its predecessor.[20] The HRC was established in Geneva with forty-seven members, and has additional methods to undertake its mission based on cooperation in order to enhance the fulfilment of its mandates, such as by gathering information through UPRs and by using an interactive dialogue approach to prevent the violation of human rights.[21] The HRC has also tried to remain transparent and fair, to minimise the chances of becoming overly politicised, as was the fate of its predecessor.

Assessing the Human Rights Council's Performance

In order to assess to what extent the HRC has handled its given responsibilities adequately, it should be assessed based on the mandates that were given to the HRC, and whether it has been able to enhance the quality and achievement of these mandates.[22] The assessment of those mandates should also be done in relation to the founding principles in Resolution 60/251, to determine the extent to which the principles were adhered to by the HRC.[23]

The principle of cooperation and genuine dialogue and the principle of non-selectivity become the benchmarks to critically analyse the work of the HRC in affecting the behaviour of states. The HRC's performance in promoting and protecting human rights depends on the particular case and issue.[24] Whether the HRC performs better than its predecessor is based on the following standards: (i) to what extent the politicisation problem within the promotion of human rights has been dealt by the HRC, by using the principle of coordination and the principle of non-selectivity to prevent member states being separated in blocs or regional coalition when deciding norms-setting; (ii) to what extent has the HRC adhered to the principles of cooperation and genuine dialogue in protecting human rights values between states, and particularly in the context of

[20] United Nations General Assembly, 'Human Rights Council: Resolution 60/251' (2006), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf> accessed 1 May 2014.
[21] ibid.
[22] ibid.
[23] ibid.
[24] General Assembly (n 20) para 10.

prisoners of the United States at Guantanamo Bay; and (iii) the extent to which the UPRs work, adhering to the principle of cooperation and genuine dialogue, and the principle of non-selectivity.

Council Mandates

The main function of HRC is to ensure that the mandate of Article 1(3) of the United Nations Charter is met. The article states that importance must be given and urgent action is needed in order to promote and encourage respect for human rights.[25] In order to fulfil this mandate, the HRC should avoid the failure of the UNCHR and ensure that fair treatment is at the forefront of its work by treating all reports on human rights violations from around the world equally. This aim is set out in Resolution 60/251, which states, 'All human rights are universal, indivisible, interrelated, interdependent, and mutually reinforcing', and that 'all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis'.[26]

The attempt at providing 'a fair and equal manner' by giving technical assistance, capacity building and overcoming the violation of human rights by promoting and protecting human rights values can be assessed by using the principle of cooperation. These boil down to the message contained in the Resolution, where the HRC must 'serve as a forum for dialogue on thematic issues on all human rights'.[27] It is thus important to look at the American context to understand to what extent the HRC can overcome the failure of its predecessor in exercising its mandates.

Promotion of Human Rights

The first mandate given to the UNCHR and the HRC is to promote human rights. The principle of coordination exists within the enforcement method. This promotion must be done in accordance with the principle of coordination, where the HRC must be an adequate coordinator in enforcing human rights, and such coordination must not be carried out by way of coercion and not even in accordance with the necessary conditions of development. It is thus

[25] United Nations Charter art 1(3).
[26] General Assembly (n 20) para 3.
[27] ibid para 12.

plausible to argue that when good coordination is absent then such promotion of human rights will not reach its full potential. Promotion here means the way to provide the state with information about human rights, offering technical assistance toward its enforcement, and providing good norm-setting as a roadmap for enforcement. [28]

The first and foremost concern of the UNCHR and the HRC is the standard-setting of human rights enforcement. This began with the UNCHR, where 'it has over the years established dozens of instruments designed to bring into being, consolidate, and strengthen human rights'.[29] These measures reflect the UNCHR's serious actions taken to promote human rights standards. However, it has been less productive in showing the needs of some additional standards and as such, creating critiques from many individual states. For instance, in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, there was just such a rejection, and it was blocked at the first stage.[30] The fact shows that the norm-setting was not based on the pure necessary condition of the development as a result of politicisation within decision-making processes affected by the interests of some states.[31]

In the era of the HRC, such a problem was repeated again in matters of enhancing the standard of norm-setting in order to respond to any kind of necessary condition. The HRC was requested by Resolution 60/251 to increase the promotion of human rights education.[32] After the HRC was created in 2006, the new standards for educational enhancement were not a part of the HRC's program and were not considered a high priority.[33] The new standard is never discussed and coordinated by HRC to member states, though it is a

[28] General Assembly (n 20) para 12.
[29] Tomuschat (n 4) 61, 135.
[30] ibid; United Nations General Assembly, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 36/55' (1981), available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx> accessed 15 August 2020.
[31] Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press 2016) 9.
[32] General Assembly (n 20) para 5(a).
[33] Philips Alston and Ryan Goodman, *International Human Rights Law* (OUP 2013) 702.

form of the principle of coordination.[34] Some new creative standards are needed in the future to respond to challenges, as has been contended by International Council on Human Rights Policy:

> At the same time, standard-setting may take new forms in the future, and those involved may need to organise in new ways— while the creation of the HRC, which replaced the Commission on Human Rights (CHR or Commission) in 2006, provides an opportunity to respond creatively to the challenges encountered in standard-setting to date. For all these reasons, it is a good moment to consider what we can learn from past experiences. Looking back, at a moment of change, may help us to understand what we can most usefully take forward into the future.[35]

Politicisation has meant that norm-setting standards for education and other policy issues cannot be executed comprehensively by the HRC. The interest of some member states in the institutional body, whether in the HRC or, previously, in the UNCHR, has affected the roadmap of standard-setting features, which may not be in accordance with the future necessary conditions of human rights enforcement.[36] Political interest has meant selective aspects were set aside from the priority agenda of the HRC and the UNCHR.[37] In this sense, the principle of non-selectivity standard is likely not carried out by the HRC.

The selective aspects focused on a certain case are a common problem which indicates politicisation has taken place. Both the UNCHR and the HRC overwhelmingly focused on Israeli conflict, without paying equal attention to other conflicts,[38] even though such

---

[34] Philips Alston and Ryan Goodman, *International Human Rights Law* (OUP 2013) 702.
[35] ICHRP, 'Human Rights Standard: Learning from Experience' (2002) 4, available at <http://www.ichrp.org/files/reports/31/120b_report_en.pdf> accessed 4 May 2014.
[36] David A Lake and Wendy Wong, 'The Politics of Networks: Interests, Power, and Human Rights Norms' (University of California at San Diego 2007) 1; Freedman (n 5) 100.
[37] Freedman (n 5) 194.
[38] ibid 193.

a prolonged conflict itself cannot put to an end until now. Politicisation has limited the agenda for certain issues, as a result of the lack of creative norm-setting that may be able to encourage member states to pay more attention to other serious conflicts. The previous focus on Israel has not changed to other important conflicts or turbulences that may stimulate the occurrence of grievous violations of human rights. Again, this is because of political requests from influential member states to keep an eye on the Israeli conflict, and as a result, the principle of non-selectivity was violated.[39]

In the light of the above, the performance of the UNCHR, which was precluded by the weakness of its standard-setting, does not seem to have been improved by the HRC. The HRC is not paying any more attention to enhancing the quality of standard-setting in education and other priority agendas. This is important in order to maintain and strengthen the protection of human rights in the future. Additionally, good standard-setting will make the interaction throughout monitoring the enforcement become more effective and efficient as well as ensure the robustness of the interrelated cooperation.

Protecting Human Rights

In attempting to protect human rights, the HRC acts as a protector of their universality. The term protector means that 'the HRC should be concerned to ensure that its duty is carried out in accordance with its certain wishes'.[40] The wishes of the United Nations through the General Assembly are, most importantly, to protect the promulgation of human rights values and to respond to any abuses as soon as possible. In Resolution 60/251, it is stated that protection should be afforded in an equal manner. The HRC shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair manner.[41] That would mean all countries should have equal treatment for any matters of human rights reports or claims.

The assessment report of member states within the HRC is there should be no distinction between countries, whether they are

[39] ibid 194.
[40] Jonathan Law (ed), *Oxford Dictionary of Law* (Oxford University Press 2009) 435.
[41] General Assembly (n 20) para 3.

developing or developed ones. However, a major concern of the General Assembly, ever since the UNCHR was created, is that the protection of human rights is not equal, and seems to be focused on the interests of the United States as the world's leading power. This is a case of politicisation, which makes human rights enforcement only followed certain commands of certain regional powers. And when a violation of human rights occurs within powers like the United States, the HRC cannot provide coordination for sanctions for a violation that may occur. Regionalism of that kind uses power to force or apply pressure to decision-making processes, such as through the use of bloc voting as a group tactic.[42] Thus the lack of full control over the potential of human rights violations should come as no surprise in the job performance of the HRC.

The reported abuses of prisoners at Guantanamo Bay are considered a serious offence against human rights.[43] American officers at Guantanamo Bay officers have reportedly committed torture, prisoners continue to be held there, and the United States has refused to provide information about them to the international community.[44] The failure of the HRC to get information from the United States is evidence the HRC did not conduct coordination for interactive dialogue and information gathering as parts of the principle of coordination. Even though serious violations of human rights were reported, where the world cannot do anything to stop it, and only the HRC is hoped to have a dialogue with the United States. Freedman lists allegations against the United States, including 'renditions and secret detentions, torture and other abuses[,] particularly at Guantanamo Bay, widespread and systematic racial discrimination, torture and ill-treatment in jails and police custody, ill-treatment of female prisoners, and the disproportionate use of the death penalty on ethnic minorities and low-income groups'.[45]

The HRC seems to lack the capacity to condemn such violations. These issues also illustrate that (i) the monitoring system is not working as it should and (ii) the HRC is likely to have deliberately

[42] Freedman (n 5) 165.
[43] Tom Campbell, *The Legal Protection of Human Rights* (OUP 2011) 193.
[44] United Nations Human Rights Committee, 'Concluding Observations of the Human Rights Committee, United States of America' (2006) UN Doc CCPR/C/USA/CO/3 para 12.
[45] Freedman (n 5) 24-25, 260; Human Rights Committee (n 44) para 12.

turned a blind eye to it. If the second reason is the actual reason, it seems the HRC is being used as a 'bully pulpit'. In this sense, the HRC can justifiably take action against this breach of human rights even if the majority of the victims are former terrorist groups and minorities. The HRC made many requests to the United States government, and 'the HRC sought to discharge its mandate through attempts to protect victims of various US human rights violations'.[46] However, there has been no response from the state party.

The case above shows the challenges of applying the universality of human rights, and some people argue that human rights values should be based on each culture. This notion, of course, was criticized by the majority of member states. Similarly, whatever the reason for American officers to carry out such reported abuses, whether or not it is useful to collect any information, the inherent rights of these prisoners must be respected by the United States. The violations committed by American officers, which the majority of states have criticized, should be brought to an end as soon as possible. After an interactive dialogue, the HRC should find a solution and inform the United States that it should cease its actions. The HRC should give recommendations to ensure such protection.[47]

The dialogue method, where the HRC must 'contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies',[48] has not been very effective. The terms of dialogue that are contained in the paragraph have been misused and are not fair. The record of the HRC shows that the United States has been a major subject of debate in almost every dialogue. The HRC has paid more attention to the United States than to most other situations, such as those in Darfur, Burma, Zimbabwe,[49] North Korea and Syria, which received relatively little attention from the HRC.[50] Those states should get attention equal to what the United States has received. Therefore, when the HRC fails to provide equal attention to those states, it could be argued that the HRC fails to solve the problem that has existed since the UNCHR regime. The case is also the same in regard to the enforcement of the

[46] Freedman (n 5) 24-25, 260; Human Rights Committee (n 44) para 12.
[47] General Assembly (n 20) para 3.
[48] ibid para 12 s 5(f).
[49] Freedman (n 5) 24-25, 260-62.
[50] ibid.

new mechanism, about the periodic review that should be taken by HRC. The mechanism does not appear to have altered any of the problems that beset the UNCHR.

Universal Periodic Review as a New Mechanism

The creation of the HRC should have provided a new positive aura to help overcome the problems faced by the UNCHR, in terms of making the human rights body more transparent and fairer.[51] The presence of the HRC should also be providing more accurate information and giving good recommendations that are suitable for the state or individual circumstances. To achieve this point, the General Assembly made some big changes within the HRC's framework system, one of which was to enact the Universal Periodic Review (UPR). The periodic review program will help to overcome any inconsistent reporting and information as a result of issues being selected and the politicisation of the body.

To What Extent Can the UPR Adhere to the Founding Principles?

As a new mechanism, the UPR program constitutes a new concept to overcome such issues of politicisation and bias. In principle, the concept is not based on important sources of law such as treaties and customary law, but through, and solely dependent on, Resolution 60/251. The General Assembly has absolute power and discretion to determine and enforce this concept without the intervention of states or any regional group. Such intervention normally politicises the issues of human rights which creates bias and affects the performance of the HRC in undertaking its responsibility to promote 'universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner'.[52]

In the light of the above, Resolution 60/251 emphasizes one of the leading changes to the HRC with regard to the function of UPR:

> Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by

[51] Carlos Santiago Nino, *The Ethics of Human Rights* (OUP 1991) 179.
[52] General Assembly (n 12) 2.

> each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the HRC shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after holding its first session.[53]

The term 'objective and reliable information' addresses the series of measures that have to be taken by the HRC in order to avoid politicisation. Politicisation has to be understood to mean 'where political discussions unrelated to the particular debate occur at an organisation or body'.[54] In a UPR, each state is obligated to gather all kinds of information, collect the important samples regarding the violation issue and the outcome of each document has to be sorted based on the necessary condition of the HRC. The necessary condition has to be based on how the body mechanism works. The universality of human rights must also be in line with the principle of equal treatment without discriminating due to the capacity or power of the state in question.

The first outcomes were published in 2008 by the Office of the High Commissioner on Human Rights (OHCHR), one of the main actors in the HRC,[55] and many only focused on particular issues such as women and the rights of children.[56] The new mechanism performs well in actively support a smooth transition of supporting the Committee on the Elimination of Discrimination against Women, from the Department of Economic and Social Affairs.[57] Although there are no clear explanation of whether the success is caused by the

[53] General Assembly (n 12) 2.
[54] Freedman (n 5) 19, 24-25.
[55] Alston and Goodman (n 33) 698, 702.
[56] United Nations High Commissioner on Human Rights, 'Report Activities and Result' (2008) 112, available at <http://www.ohchr.org/Documents/Press/OHCHR_Report_2008.pdf > accessed 1 May 2014.
[57] ibid 28.

interactive dialogue that being the main task of the new mechanism. If so what kind of dialogues was conducted is still not clear from the report.

The HRC also successfully makes the new mechanism's profile to be promoted in some countries, through a workshop training concept conducted in such places as Morocco, Indonesia, and Panama.[58] The workshop has increasingly created an awareness of member states in using commonly accepted guidelines in preparing reports as their reporting obligations.[59] The successful event that attracts member states' attention is questionable as the aspect of report-making is just a fine-grained issue than the problems of a grieve violation of human rights in some states that require a consistent promotion of human rights.[60] Overall, the new mechanism is successful in changing the behaviour of states at least in preparing reports and claims in line with the guidelines for the common core document. The report made by the OHCHR about the new mechanism generates insight into a perspective that the new mechanism is better than the UNCHR's performance.

The achievements above are however general issues that were reported, and do not pay much attention to providing a full overview of actions in human rights situations. The lack of a full overview seems that the reports published by the HRC are in fact 'treaty body reports on those treaties the state had ratified and as a compilation of additional credible information on the human rights situation prevailing in the country under review, which is prone to focus on the selected issue'.[61] The report also lacks 'a full overview of the prevailing human rights situation'[62] and fails to eliminate politicisation by holding on to the principle of a non-selectivity standard as part of the founding principles.[63] The principles relating to the guidelines of work and 'guide its relationship to the individual state should be based on a non-selective standard'.[64] The General

[58] ibid 56.
[59] ibid.
[60] Neil J Mitchell and James M McCormick, 'Economic and Political Explanations of Human Rights Violations' (1988) 40 World Politics 476, 476-498.
[61] Smith (n 3) 61-62.
[62] ibid.
[63] Freedman (n 5) 19, 24-25, 111.
[64] ibid 119.

Assembly emphasises Article 9 of Resolution 60/251: '[t]he importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization'.[65]

In this regard, the General Assembly sets out such basic standards in order to encourage the HRC to adopt and report any human rights issues based on the human rights standard itself. The General Assembly has tried to avoid the problems of politicisation within each aspect of the document reports. The HRC must be in a neutral position without being at the side of a certain state or supporting any organisation and regional group agenda. The HRC should eliminate double standards: 'These principles reflect negotiating positions that the HRC should move away from the UNCHR's confrontational shaming and blaming which was widely viewed as ineffective'.[66]

Has the UPR Done Its Job Well?

Further to Kofi Anan's concerns about human rights enforcement guidelines, the General Assembly has determined that the HRC should have an agenda to provide a report about the extent to which countries have fulfilled their human rights obligations.[67] States who desire to validate their human rights credentials need to be active in promoting, monitoring and enforcing human rights values. The mechanism of the UPR must be consistent with the aims of the HRC's mandate in order to improve performance after the UNCHR. Therefore, there is not one state that has not both joined the surveillance and been willing to be supervised.

Surveillance is important, because 'we cannot then deny it the freedom to decide for itself which perpetrators it wished to

[65] General Assembly (n 20) 2.
[66] Tomuschat (n 4) 111, 138.
[67] Freedman (n 16) 290-95; United Nations General Assembly, 'Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005' (8 June 2005), UN Doc A/59/HlPM/CRP.1 para 88; United Nations General Assembly, 'Assembly President Previews Possible Outcome of Summit on UN Reform' (3 June 2005), available at <www.un.org/news> accessed 18 August 2020.

condemn'.[68] We have found out which states need such surveillance. As such, the mechanism of the UPR should be focused 'on a range of human rights abuses, not just gross and systemic situations'.[69] The UPR has proven that they could back up and give support to the self-organising process of civil society stakeholders within the United States, the United Kingdom, Switzerland, Brazil and Ireland.[70] The presence of the UPR has successfully increased the participation of civil society stakeholders in respecting the issue and condemning any abuses of human rights. It is a form of carrying out the principle of cooperation and genuine dialogue. Although, this performance has not affected the participation of society in the global South.[71]

The absence of society in the global South opens an opportunity for politicisation tactics by protecting the interest of group alliances with its neighbour. For example, in 2008, there was a political decision from African states group to end the mandate attached to them, 'at that time already degraded in status from a fully-fledged country mandate monitoring and critically assessing the human rights situation to a mandate of technical assistance conducted by an Independent Expert'.[72] Such a fact was because the UPR did provide accurate information and as a result some states, such as the Democratic Republic of the Congo, did not receive enough attention from the HRC.[73] The situation increased the human rights crisis which is a good place for the regional organisation, such as the African Union, to play a dominant role in conflict resolution.[74] The way that the UPR reports are submitted also increases the chances of politicisation: '[t]he report is less instructive than the report to be submitted to the relevant expert bodies'.[75] The report is also submitted by states concerned without conducting direct monitoring that is supposed to be done by the UPR.[76]

---

[68] Eric Heinze, 'Even-Handedness and the Politics of Human Rights' (2008) 21 HRJ 16.
[69] Freedman (n 16) 290-96.
[70] Theodor Rathgeber, *Performance and Challenges of the UN Human Rights Council* (International Policy Analysis 2013) 11.
[71] ibid.
[72] ibid 11-12.
[73] ibid.
[74] ibid.
[75] Tomuschat (n 4) 138, 143.
[76] ibid 138, 143.

The UPR is a new mechanism that is hoped to undertake the HRC's mission to overcome its predecessor's shortcomings. In light of the above, it is clear that politicisation remains and exists in human rights enforcement. despite its relatively respectful achievement, the new mechanism of the UPR is not enough as a remedy in order to provide fair and accurate information.

Problem of Politicisation

As well as the difficulties in applying its mandate, politicisation is a big problem that seems to be complicated to deal with. It plays a significant role and affects the HRC's performance. The greasing of palms also plays a key role in proliferating the interests of some domestic agendas.

Humphrey writes that politicisation of interests in the era of the UNCHR played a dominant role in slowing down its work. For example, the UNCHR devoted itself to the issue of and should draft again to the rights of the child, which was a principle that already exists in the UDHR and had been accepted by the League of Nations.[77] At the same time, France found many difficulties in proposing the issue connected to the asylum to the UN and only became part of the declaration in 1977 when it was adopted in the Declaration on Territorial Asylum.[78] It was in fact a very important issue and more attentions should have been paid to it. This reflects what Humphrey says that politics is never far away from human rights.[79] An example can be seen in the behaviour of the United States in every covenant that gives no opportunity to the Communist countries 'to pose as their chief champion' in formulating human rights rules.[80] The HRC cannot override such political pressure which distracts it from its successful duty to apply a principle of non-selectivity that provides an equal opportunity to member states be a part of the norm-setting formulation.

[77] John Humphrey, *Human Rights and the United Nations Great Adventure* (Transnational Publishers 1984) 231.
[78] ibid.
[79] ibid 25.
[80] ibid 231.

In the HRC regime, there was a desire to end the problems enumerated above and ensure that the principles of cooperation and non-selectivity play a greater role. Particularly, it encourages the HRC to take a neutral position and act quickly when there is a violation. The principle was breached, however, after such a violation of human rights occurred in a Special Session committed by Israel after it had occupied purported Palestinian territory.[81] The HRC did not utilise its power of coordination with other member states to request Israel to withdraw its military. The United States, which has played a dominant role in enforcing human rights since World War II,[82] has not been vocal and did not encourage the HRC to take immediate and serious action against Israel.

Furthermore, at a regional level, politicisation happens in a collective way. The African group, for instance, protects the interest of its states.[83] On the situation in Darfur, 'collective positions were taken throughout almost all of the Special Sessions, with regional groups and political blocs seeking to further political objectives'.[84] Again the HRC seems not sensible with this case, which may be able relieved by intense coordination with relevant states. Moreover, 'the same pattern emerged regarding states from the Global North which sought, during contentious sessions, to shield allies or to further unrelated political agendas'.[85] In this regard, politicisation can be said to be more sophisticated in terms of the tricks and strategies played by regional groups. In brief, the HRC failed to provide a remedy and solve such problems.

Conclusion

In conclusion, the United Nations Commission on Human Rights was beset by problems in its performance which affected its mandates as a result of politicisation and not being able to undertake its roles of promotion and protection. Thus, the United Nations Human Rights Council was created to replace it in 2006. The main duty of the new body was to ensure that the problems suffered by its predecessor

[81] Freedman (n 5) 19, 24-25, 111, 389.
[82] M Shah Alam, 'Enforcement of International Human Rights by Domestic Courts in the United States' (2010) 10 ASICL 29.
[83] Freedman (n 5) 24.
[84] ibid.
[85] ibid.

would not happen again. To discharge its mission, it obtained a new power of Universal Periodic Review which allows it to carry out a review of human rights issues and conduct an interactive dialogue with countries.

To some extent, the attempts to promote human rights can be assessed as a success. During the UNCHR's tenure, it succeeded in norm-setting and created the Universal Declaration of Human Rights. In the HRC's era, the norm-setting has been reduced, for example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was blocked by the member states as it was not considered necessary. Additionally, the purported abuses that have been committed by Israel since 1948 have not been satisfactorily dealt with by the HRC. It seems incapable of acknowledging their existence. Instead, the level of human rights promotion has been reduced since the new mechanism seems merely to entertain the interests of some countries, particularly the United States. Some cases that need to have more attention paid to them have been dismissed as the HRC seems more concerned with America's problems in each dialogue, and this does not reflect the principle of non-selectivity.

The UPR performs well in actively supporting transition of the Committee on the Elimination of Discrimination against Woman from the Department of Economic and Social Affairs. The UPR is successful in changing the behaviour of states at least in preparing reports and claims in line with the guidelines for the common core document. The UPR has adhered to the principle of cooperation and genuine dialogue that lead member countries to follow the provided guidelines.

However, the UPR and its dialogue function does not seem to be functioning as it should, as when the HRC is unable to halt the abuses reportedly committed by the United States at its Guantanamo Bay detention centre. This is a pitfall which shows that the HRC does not play a neutral role. Additionally, it is plausible to say that the HRC is just the bully pulpit of the UN, since it does not act fairly. In the principle of non-selectivity, the HRC also fails to show that it plays an impartial role.

Therefore, this article asserts that, to some extent, the HRC through the UPR supports the Elimination of Discrimination against

Women and has changed states' behaviour to follow commonly accepted standards in report-making. The HRC obtains its positive assessment from the adherence to the principle of cooperation and genuine dialogue. Beyond that, it is difficult to say that there is a blueprint to follow. Instead, the HRC goals of the promotion and protection of human rights, in the context of the principle of non-selectivity, have been hampered. Human rights violations asserted to have been committed by Israel since 1948 are strong evidence that the HRC has failed in its objectives. Recommendations made by the HRC to the United States have never been respected. This is due to the way that the HRC just focuses on the requests by some elite states. In addition, politicisation happens at a regional level, where, for example, the African groups conspire to collectively block action in order to meet the future political objective. The stigma that this has created can never be divorced from the HRC's performance except if it manages to overcome such shortcomings but this seems impossible.

Cultural Property Preservation: Legal Perspectives and Realities at the National, Regional and International Levels

PANAYIOTIS ARIS VASSILAS*

Abstract

The emergence of the need to protect cultural property as the means to safeguard the cultural heritage of all mankind is undisputed. Cultural property sites have long been targeted by opponents during armed conflicts taking the form of hate crimes, as well as by criminals who do not hesitate to loot and steal valuable artefacts from museums or their original context and sell them in the black market, spurring the growth of the illicit trade in cultural property. The aim of this paper is to delineate the grievance of this issue, as well as stress its contemporary nature and importantly analyse the laws in place to address the multiplicity of instances where the protection of cultural property is needed. The outcome of this paper is that enhanced state cooperation is to be encouraged as it forms the key to safeguarding the cultural heritage of all mankind through the protection of cultural property.

Keywords: Armed conflict, antiquities, art, artefacts, cultural property, illicit trade

Introduction

The need to ensure the protection of cultural property treasures is pivotal.[1] Undoubtedly, cultural property has a precedent of being a target by usurpers within different socio-political contexts, furnishing the need to call for and ensure special protection.[2] The international

* LLB (Scots Law with English Law), LLM (International Commercial Law), University of Aberdeen.

[1] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) No 3511.

[2] Koen De Jager, 'Claims to International Property under International Law' (1988) 1 LJIL 183, 185.

community has been eager to protect cultural property. Especially, the atrocities of the World War II rendered necessary a regime towards the enhanced protection of cultural property within multiple and variable contexts pivotal.

Part I of this Article draws out the scope and engages in the debate of what is cultural property, introducing the various challenges surrounding the legal concept in terms of definition and linguistic variations, whilst delineating that the principal rationale to entrench protection which translates to the safeguarding of the cultural heritage of all nations, is something that can be achieved both individually, *eg*, in an interstate manner, and collectively, *ie*, through international cooperation.[3]

Part II delineates the biggest threats to which cultural property can be subjected, namely when it becomes a target during armed conflicts. In understanding the grievances resulting from the military targeting of cultural property, it is necessary to analyse the origin and standing of the contemporary international law in situations involving armed conflict, the circumstances that have triggered its efficacy and the responses of the international community. The leading instrument in this regard is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), which along with its two Protocols regulate belligerent behaviour during the occurrence of conflict. Particularly important is to stress the prevalence of the problem in the twenty-first century, *eg*, the destruction of cultural treasures located in the Middle East and Mali, hate crimes expressed through 'iconoclasm'.[4] Within such contexts, but not restrictively, the illicit trade in artefacts thrives.

Part III looks at the art market and importantly how this market is multi-layered, particularly that regardless of the magnitude of legal provisions at the international stage, *eg*, the 1970 UNESCO Paris Convention and the 1995 Rome UNIDROIT Conventions, which aim to tackle art smuggling, the illicit trade in artefacts is still flourishing. Reportedly, towards this end indirect actors such as museums,

[3] Frank G Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 IJCP 376, 377.
[4] Emma Cunliffe, Nibal Muhesen and Marina Lostal, 'The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations' (2016).

auction houses and private collectors contribute to the growing impact of the illicit trade in artefacts, whilst emphasis will be placed on the laws of EU concerning the circulation of cultural property within its internal market, but most importantly focus will be placed on UK and US jurisdictions, which are the leading proponents of the contemporary art market.

Finally, Part IV focuses on the need to encourage cooperation between the states at international level and domestic actors at a national stage, through mechanisms that aim at guaranteeing protection in times of emergency and contributing towards the tackling of the illicit trade in cultural objects.

In a nutshell, the aim of this Article is to delineate the dangers cultural property is subjected to and underline the need for cooperation to tackle the issues arising thereof, to safeguard the cultural heritage of humanity.

Cultural Property: Concept and Underlying Principles

Introducing the Concept

Understanding the essence and encompassing the scope of cultural property has been an area of controversy in academia.[5] Some academics describe it as a 'product of political construct' of fundamental importance to the identity of the authorities claiming it with the ideas of nationalism and 'romanticism' penetrating the legal and socio-political context of dealing in cultural property.[6] Pragmatically, when identifying cultural property as a product of political constructivism or more broadly as an 'umbrella term', it reflects the width of debates surrounding the concept, whereas the divergent and oftentimes conflicting claims of different actors raise disputes of an international character.[7] This Article suggests that cultural property is nevertheless a legal concept but for its political

[5] Stefan Groth, *Negotiating Tradition: The Pragmatics of International Deliberations on Cultural Property* (Göttingen Studies in Cultural Property 2012) 1-3.
[6] Neil Asher Silberman, 'The Crux of the Matter' in James Cuno (ed), *Who Owns Antiquity? Museums and the Battle Over our Ancient Heritage* (Princeton University Press 2008) 9.
[7] Silberman (n 6) 11-13; Groth (n 5) 3.

prolongations. Admittedly, its idiom in English delineates 'an expression of and testimony to human creation'.[8]

The term 'cultural property' was officially introduced by the 1954 Hague Convention[9] for the Protection of Cultural Property in the Event of Armed Conflict and it includes movable and immovable objects, including structures, with artistic, archaeological, historical, religious, and ethnological features that add to the shape of the common heritage of mankind.[10] The Preamble of the Convention is of utmost importance, as it stresses the need for protection and respect for cultural property at an international level, implying that departure from it results in international losses.[11]

The 1970 UNESCO Convention[12] also provides a list of what it regards as cultural property but setting a different approach to its boundaries, clarifying that those elements falling under its cloth form and shape the history, evolution and distinctive cultural character of a state's heritage.[13] The importance of this approach towards cultural property is decisive, as it imposes national identities, legal interests, and territorial confinements on the circulation of artefacts, allowing states to control the market of tangibles they regard cultural property as well as seek their surrender when illicitly removed.[14]

The differing approaches taken by the leading conventions seemingly illustrate the conflict between national and international culturalism, *ie*, the contrasting perceptions towards the common cultural heritage of humanity and the national heritage of a state.[15] A prominent example of this conflict is the case with the Parthenon

[8] Manlio Frigo, 'Cultural Property v Cultural Heritage: A "Battle of Concepts" in International Law?' (2004) 854 IRRC 367, 370.
[9] Hague Convention 1954 art 1.
[10] John H Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 AJIL 831, 831-32.
[11] ibid.
[12] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) No 11806 art 1.
[13] Merryman (n 10) 832.
[14] ibid.
[15] Lorenzo Casini, 'Italian Hours": The Globalization of Cultural Property Law' (2011) 9 IJCL 362, 363; Anne Sullivan, 'Law and Diplomacy in Cultural Property Matters' (1991) 10 Museum Management and Curatorship 220-22.

marbles. Greece claims restitution as they form an integral part of the country's cultural identity, whereas the British Museum wishes to retain them because they are of universal interest, whilst their return would be a great loss for Britain.[16] Criticisms over the internationalist approach though regard the commodification of cultural property in that such artefacts should not be in the marketplace.[17] While these criticisms clearly express the fact that not all cultural property is fit for the art market, many in academia stress that nationalistic restrictions should not be promoted because when the circulation of cultural property in the international market is limited or even prohibited, the illicit trade in such objects increases with all the negative outcomes it embraces.[18]

Legal Concept of Property

Cultural property, however, as a term has been criticised for bearing the notion of legal proprietorship and thus treating cultural objects as ordinary goods favouring the proprietor's, *eg*, economic, rights limiting or even extinguishing the endurance of the means that safeguard the sound existence of an object with cultural importance.[19] This is a pragmatic approach as it delineates the nature of cultural objects in that they can enter the market and be sold.[20] The effect of legal proprietorship is fundamental as it allows states and individuals to rely on it for repatriation of stolen cultural property.[21] The connotation of ownership however, is not exhaustive as it is subject to

[16] Nadia Banteka, 'The Parthenon Marbles Revisited: A New Strategy for Greece' (2016) 37 U Pa J Int'l L 1256, 1257, 1261-63.
[17] Pauno Soirila, 'What's Yours Is Mine: Indeterminacy in Cultural Property Restitution Debate' (2014) 1 U Helsinki 19, 19-20.
[18] John H Merryman, 'Cultural Property Internationalism' (2005) Int'l J Cult Property 12, 32.
[19] Lyndel V Prott and Patrick O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (2005) Int J Cult Property 307, 309-10.
[20] Robert Uerpmann-Wittzack, 'Introduction: Cultural Heritage Law and the Quest for Human Identities' in Evelyne Lagrange, Stefan Oeter, and Robert Uerpmann-Wittzack (eds), *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer 2018) 3.
[21] Sophie Vigneron, 'Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects' in Valentina Vadi and Hildegard E G S Schneider (eds), *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Springer 2014) 123; *The Islamic Republic of Iran v Barakat Galleries* [2007] EWCA Civ 1374 (CA).

legal limitations that are interfering with the idea of strict-unfettered ownership.[22]

It can thus be derived that the term property connotes materiality namely; the attribution of certain features that characterise a cultural object.[23] Importantly it connotes public or private ownership and exhibits certain qualities, *eg*, the element of tangibility or even that of intangibility under intellectual property.[24] Subsequently, using the term property serves in the author's view a fundamental role; it delineates the boundaries of the concept and thus crystallises its interference with the more abstract concept of cultural heritage.

Cultural Heritage and Cultural Property

Cultural heritage is defined as encompassing the developments of human expression through the centuries as a testimony of human evolution, tradition and practices.[25] It includes movables and immovables[26] as well as intangibles,[27] connoting the 'inheritance' of cultural material and practices exercised by the societies within which they emerged.[28] It is therefore argued that the concept of cultural property covers limited interests, *ie*, mainly tangible objects, whereas that of cultural heritage seems more appropriate and flexible to cover the plethora of other areas that the notion of 'property' does not cover, *ie*, the intangible.[29]

---

[22] Prott and O'Keefe (n 19) 310.

[23] Uerpmann-Wittzack (n 20) 4; Gabriele D'Amico Soggetti, 'Blue Helmets for Culture: Involving Communities in the Protection of Their Heritage' in Evelyne Lagrange, Stefan Oeter, and Robert Uerpmann-Wittzack (eds), *Cultural Heritage and International Law Objects, Means and Ends of International Protection* (Springer 2018) 168; Martin Gerner, 'Managing Cultural Sustainability: Safe Haven, Cultural Property, and Sustainability in Best Practice' in Evelyne Lagrange, Stefan Oeter, Robert Uerpmann-Wittzack (eds), *Cultural Heritage and International Law Objects, Means and Ends of International Protection* (Springer 2018) 180.

[24] Prott and O'Keefe (n 19) 312.

[25] Uerpmann-Wittzack (n 20) 1-4; Prott and O'Keefe (n 19) 307-08.

[26] *Eg*, artefacts, antiquities, and tangible items including buildings; Prott and O'Keefe (n 19), 308-09.

[27] *Eg*, ideas, techniques, standards of conduct, practices, history, and dance movements; Prott and O'Keefe (n 19) 308-09.

[28] Prott and O'Keefe (n 19) 310-11; Frigo (n 8) 369.

[29] Uerpmann-Wittzack (n 20) 4.

Divergence of Languages and Linguistic Expressions

The major problem that gave rise to this battle of forms is the interplay of multiple linguistic and national language variations when interpreting or even drafting an International Convention.[30] Multilingualism might prove problematic when translating international instruments, as translations often times may introduce similar but not identical concepts.[31] The adverse effect of this is that the absence of uniformity embraces different legal implications, as no internationally explicit definition of either cultural property or cultural heritage exists; confusingly each convention provides its own definition.[32]

An important observation is to be concluded here; seemingly the concept of cultural heritage covers a broader area, ascribing cultures in their totalities in comparison with the English usage of cultural property.[33] This drives us to consider the term cultural property as inherent and sub-divided to the concept of cultural heritage.[34] Moreover, some scholars believe that the two concepts supplement one another; as cultural property is linked to elements of the much broader notion of cultural heritage and vice versa, whereupon the means of safeguarding the scope of cultural heritage are established through protecting what is regarded more 'concrete' as a concept, that of cultural property.[35] Nevertheless, even though there is seemingly no unanimity in this context, the concept of cultural property is what this paper seeks addressing because it advocates the emergence for cultural property protection as the means of safeguarding cultural heritage.

Aims of Cultural Property Law and Factors Triggering Protection

The underlying principle of cultural property law is to protect the integrity of a cultural item and especially cultural treasures because they are exceptional, in the sense that they express the skills and

[30] Uerpmann-Wittzack (n 20) 4-5.
[31] For example, in some countries, cultural property translates to 'cultural goods'. Uerpmann-Wittzack (n 20) 4; Frigo (n 8) 370.
[32] Frigo (n 8) 375; Fechner (n 3) 377.
[33] Uerpmann-Wittzack (n 20) 2, 4; Frigo (n 8) 369.
[34] Frigo (n 8) 369.
[35] ibid 377.

attributes of other individuals or cultural manifestations of the past of a nation.[36] The necessity to protect is, therefore, pivotal as cultural property can be vulnerable to the discretion of different socio-political events. In this regard calls for protection arise during both peacetime and armed conflict periods, with an increased level of emergency in the outbreak of any politically related conflict.[37]

Situations like targeting or attacking, pillage, looting, and stealing from museums and archaeological sites, are crimes that can arise in either period.[38] The mandate which cultural property law is seeking to accomplish vests within a regulatory framework that aims to limit these practices and tackle the illicit trade in artefacts and antiquities, as the occurrence of such practices leads to the cultural misappropriation of a state's cultural heritage.[39] Moreover, as the main aim of cultural property law is to preserve the integrity of cultural tangibles and sites, it also encompasses situations concerning the physical preservation and maintenance of cultural property for both movables and structures for measures to be taken for protection from various natural phenomena. [40]

Developments and Early Calls for Protection

Historically, the most commonly encountered practice in the aftermath of a war was the pillage of the defeated country's territory its treasures by the conqueror.[41] The destruction of towns and the plunder of cultural property was an inevitable showcase of the conqueror's power, which simultaneously aimed at extinguishing the

---

[36] Fechner (n 3) 382.
[37] ibid 381.
[38] Suzanna Veres, 'The Fight against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention' (2014) 12 Santa Clara J Int'l L 91, 94-95.
[39] Fechner (n 3) 389-90.
[40] The Royal Society, 'Cultural Heritage: Building Resilience to Natural Disasters', available at <https://royalsociety.org/~/media/about-us/international/g-science-statements/2017-may-cultural-heritage.pdf?la=en-GB> accessed 28 February 2019.
[41] Caroline Ehlert, 'Prosecuting the Destruction of Cultural Property in International Criminal Law: with a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage' (2013) 2013 BRILL 15, 15; De Jager (n 6) 183; Stanislaw E Nahlik, 'International Law and the Protection of Cultural Property in Armed Conflicts' (1976) 27 HLJ 1069, 1071.

defeated state's civilisation.[42] An early example is the Roman occupation and pillage of the Greek realms during the third and second centuries BC which resulted to the transfer of countless Greek masterpieces to Rome, a move that signalled, according to many, the supremacy of the Greek culture over its conqueror.[43] Within this spectrum early calls for cultural property protection arose. Greek and later Roman philosophers stressed the problem and proclaimed protection for structures such as sacred sites, monuments, and temples. The custom of pillaging cultural treasures, however, predominated and continued through the Middle Ages.[44]

The first steps towards cultural property protection date back to the initiative of Charlemagne, who asserted the wrongfulness of cultural property confiscation from the state of origin.[45] His stance influenced the involvement of the Christian Church, at the Synod of Charrox in AD 989, to proclaim the introduction of special protections, for solemn property and places of worship, to be followed by the belligerents.[46] Calls for protection, however, spread outside territorial boundaries to protect Christianity's sacred sites in the Middle East. However, historical evidence showcases that the Crusades led to massive massacres and profound cultural property misappropriations in the Middle East, including the looting of Constantinople, a Christian Orthodox city and capital of Byzantium by the Crusaders in 1204.[47]

It was not until the Renaissance and the ideas of Enlightenment that protection of the arts became a prevalent issue.[48] Calls for cultural property protection in due military conflicts emerged through the

---

[42] Ehlert (n 41) 15; De Jager (n 2) 183; Jerome J Pollitt, 'The Impact of Greek Art on Rome' (1978) 108 Transactions of the American Philological Association 155, 156; Evangelos Kyriakides, 'Illegal Trade in Antiquities: A Scourge That Has Gone On for Millennia Too Long' (*The Conversation*, 15 June 2018), available at <https://theconversation.com/illegal-trade-in-antiquities-a-scourge-that-has-gone-on-for-millennia-too-long-98093> accessed 3 February 2019.
[43] Pollitt (n 42) 155.
[44] Ehlert (n 41) 16; De Jager (n 2) 183-84.
[45] De Jager (n 2) 184.
[46] Ehlert (n 41) 16; Christiane Johannot-Gradis, 'Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?' (2015) 97 900 1253, 1257-1258.
[47] Johannot-Gradis (n 46) 1255.
[48] Nahlik (n 41) 1071.

matrix of international law; even Hugo Grotius stressed its importance where avoiding any interference did not affect the belligerents' military operations.[49] During this period, until the dawn of the twentieth century, a remarkable number of peace treaties aimed at the repatriation of cultural property to the state of origin.[50]

The famous jurist Emer De Vattel[51] also argued that the seizure and destruction of the opponent's cultural property was never the 'rightful object of the war',[52] but provided an exception. He introduced the doctrine of military necessity, a justification where interference was deemed necessary to succeed in a military operation.[53] De Vattel influenced the increased respect for cultural property protection in many countries, this was evidenced in the eighteenth century[54]. Not all states at the time developed views towards respect for the opponent's cultural treasures; Prussia still recognised the confiscation of goods as a method of property acquisition, and reportedly 'it came as a shock' when Napoleon sacked Europe's most valuable masterpieces for the Louvre.[55] Napoleon 'legitimised' his actions through treaties signalling his legal proprietorship, but these were subsequently overturned after his fall by the Allies and the Congress of Vienna in 1814 and 1815, which aimed at the repatriation of the seized masterpieces.[56]

The era after Napoleon's fall witnessed a tremendous flourish in cultural property protection through the establishment of domestic laws for protection to 'monuments of art and sciences' during military conflicts.[57] This is reflected in a list of remarkable treaties, codes and declarations, including the Lieber Code of 1863, the Saint Petersburg Conference of 1868, the Brussels Declaration of 1874, and the Manual of 1880 by the Institute de Droit International that contributed towards the enaction of the Hague regimes of 1899 and 1907 (international

[49] Ehlert (n 41) 16.
[50] De Jager (n 2) 184.
[51] Ehlert (n 41) 17.
[52] Ehlert (n 41) 17; De Jager (n 2) 184.
[53] Ehlert (n 41) 17; John Henry Merryman, 'The Free International Movement of Cultural Property' (1998) 31 NYU J Int'l L & Pol 1, 3.
[54] De Jager (n 2) 184-85; Nahlik (n 41) 1071.
[55] ibid.
[56] De Jager (n 2) 184-85.
[57] De Jager (n 2) 184–85; Nahlik (n 41) 1071-72.

conventions delineating belligerent behaviour with indirect provisions for cultural property protection during warfare),[58] the peace treaties at the end of World War I (Versailles, Saint-Germain-Laye, and Trianon), the Treaty of Riga of 1921, and the Pan-American Roerich Pact Treaty of 1935, which introducing the concept of treating the subjects it encompassed in conflict and inspired the Hague Convention.[59] The enactment of treaties dealing directly or indirectly with cultural property preservation contributed towards its establishment as international customary law; however, the aftermath of World War proved the Hague regime had 'loopholes' which needed to be addressed.[60] This gave rise to calls for the drafting of a new convention to the old Hague regime. The discussions, however, were interrupted by the commencement of World War II.[61]

World War II brought violations of cultural property on an 'unprecedented scale'.[62] The Nazis burned towns and seized or destroyed the cultural treasures of many of the countries they occupied, causing an irreversible loss of cultural heritage.[63] Reportedly, 21,903 masterpieces were seized and 427 museums destroyed, causing a detrimental impact on the cultural heritage of mankind.[64] Subsequent international organisations, treaties and declarations urging the return of the confiscated artworks aimed at the restitution of the *status quo antebellum* regarding respect and protection of cultural property and contributed towards the subsequent drafting of International Conventions dealing explicitly with cultural property matters, signalling the prohibition of cultural property confiscation by the conqueror and the surrender of any looted cultural element.[65]

---

[58] Ehlert (n 41) 23, 26-27.
[59] De Jager (n 2) 185-86; Nahlik (n 41) 1072-75; Johannot-Gradis (n 46) 1258; Ehlert (n 41) 25.
[60] De Jager (n 2) 185-86; Nahlik (n 41) 1075.
[61] Nahlik (n 41) 1076.
[62] De Jager (n 2) 186; Nahlik (n 41) 1076.
[63] De Jager (n 2) 186; Nahlik (n 41) 1076; Leila Amineddoleh, 'Monuments Men, Hidden Treasures, and the Restitution of Looted Art' (2014) 25 NYSBA EASJ 16.
[64] De Jager (n 2) 186.
[65] De Jager (n 2) 186; Nahlik (n 41) 1076-77; Johannot-Gradis (n 46) 1259.

UNESCO and Cultural Property Preservation

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is an international organisation that pioneered setting and establishing among its primary aims the need to protect and safeguard all nations' cultural property as the 'common treasure of the mankind'.[66] One of its preliminary aims was to revive the 'cultural life' of the pillaged European continent. Since the 1950s, UNESCO has expanded its influence globally and has attained the status of an 'activist multicultural' organisation cooperating with other international bodies, including the ICRC.[67] In order to achieve that aim, the organisation has gained the capacity to set and suggest the adoption of guidelines and most importantly, conventions that aim at the development of its goals.

UNESCO also acts as an administrative office for its instruments aspiring to achieve the close cooperation of its member states on cultural heritage matters.[68] The organisation has subsequently developed a rich body of Conventions that deal with cultural heritage matters in its totality.[69] It includes the 1954 Hague Convention[70] for the Protection of Cultural Property in the event of armed Conflict and the 1970 Convention on the Illicit Movement of Cultural Property both examined in the following parts of this paper, the 1972 World Heritage Convention with its famous 'World Heritage List' and the 2001 Underwater Cultural Heritage Convention,[71] alongside with the 2003 Intangible Heritage Convention and the 2005 Convention on the Protection of Cultural Expression.[72]

---

[66] Gael M Graham, 'Protection and Reversion of Cultural Property: Issues of Definition and Justification' (1987) 21 Int'l L 755, 767-68.
[67] ibid.
[68] Graham (n 66) 767; Memorandum of Understanding between the United Nations Educational, Scientific and Cultural Organization and the ICRC (201) No 3942.
[69] Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 12 December 1975) No 15511.
[70] These include the 1954 Convention and 1999 Protocols.
[71] Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009).
[72] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007).

Council of Europe and European Court of Human Rights

The Council of Europe is a political organisation created in the aftermath of World War II, better known for its goal to entrench the protection of human rights in more than forty-seven countries in Europe.[73] Of particular interest in this regard is the European Court of Human Rights' (ECHR) case law showcasing the interplay between cultural property protection and private interests.[74] Under this case law, the right to property[75] translates to the right of 'peaceful enjoyment of one's possessions' subject to any limitations imposed due to public interest and other domestic or international provisions.[76] For the justification of such interference, to strike a fair balance among the conflicting interests of the litigants, the Court employs tests of proportionality, balancing state and individual interests.[77] The Court has applied these mechanisms in various instances.

Examples include *Beyeler v Italy*,[78] concerning the troublesome sale of a work by Van Gogh, where the Court deemed Italy's exercise of their pre-emptive right incompatible with the tests of fair balance and proportionality; *SCEA Ferme de Fresnoy v France,*[79] concerning the preservation of architectural heritage in France, where the Court found the public authorities had not interfered adversely with the claimant's business; and *Potomska and Potomski v Poland,*[80] where the claimants were unable to build on their land as it was listed as a historic site and the state was reluctant to compensate them. Other examples include *Matas v Croatia*,[81] affecting the claimant's business, and *Fürst von Thurn und Taxis v Germany*,[82] concerning supervision of

[73] Mateusz Maria Bieczyński, 'The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property' (2017) 3 SACLR 255, 258.
[74] Fabian Michl, 'The Protection of Cultural Goods and the Right to Property Under the ECHR' in Evelyne Lagrange, Stefan Oeter, Robert Uerpmann-Wittzack (eds), *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer 2018) 113.
[75] ECHR Protocol 1 art 1.
[76] Michl (n 74) 112.
[77] ibid 112-13.
[78] *Beyeler v Italy* [GC] no 33202/96 ss 114–22 (ECHR 2000-I).
[79] *SCEA Ferme de Fresnoy v France* no 61093/00 (ECHR 2005-XIII).
[80] *Potomska and Potomski v Poland* no 33949/05 (29 March 2011).
[81] *Matas v Croatia* no 40581/12 (4 October 2016).
[82] *Fürst von Thurn und Taxis v Germany* no 26367/10 (14 May 2013).

a public body of a private library and its archives belonging to the claimant.

The Council of Europe has also contributed towards the preservation of cultural heritage throughout Europe establishing cooperation with other international entities.[83] Its body of treaties includes the 1954 European Cultural Convention,[84] which calls for the preservation of the 'common cultural heritage of Europe';[85] the 1985 Granada Convention,[86] delineating policies for the conversation of the 'European architectural heritage'; the 1992 Valetta Convention[87] on the 'Protection of Archaeological Heritage', aiming the protection of archaeological treasures and the prevention of unauthorised excavations.[88] It also includes the 2005 Faro Framework Convention,[89] which underlines the variety of benefits that cultural heritage conservation confers on a pan-European level reflecting the development of contemporary communities, and the 2017 Nicosia Convention[90] on offences relating to cultural property, which replaces an unpopular 1985 Delphi[91] Convention.[92] To date, only Cyprus and

[83] 'Co-Operation with The Council of Europe' (UNESCO Diversity of Cultural Expressions 2019), available at <https://en.unesco.org/creativity/policy-monitoring-platform/co-operation-council-europe> accessed 8 February 2019; 'Offences Relating to Cultural Property' (Council of Europe 2019), available at <https://www.coe.int/en/web/culture-and-heritage/cultural-property> accessed 7 February 2019.

[84] European Cultural Convention 1954 (opened for signature 19 December 1954, entered into force 5 May 1955) ETS No 018.

[85] Graham (n 66) 783.

[86] Convention for the Protection of the Architectural Heritage of Europe (opened for signature 3 November 1985, entered into force 1 December 1987) ETS No 121.

[87] European Convention on the Protection of the Archaeological Heritage (Revised) (opened for signature 16 January 1992, entered into force 25 May 1995) ETS No 143.

[88] Bieczyński (n 73) 258-59.

[89] Council of Europe Framework Convention on the Value of Cultural Heritage for Society (opened for signature 27 October 2005, entered into force 1 June 2011) CETS No 199.

[90] Council of Europe Convention on Offences relating to Cultural Property (opened for signature 19 May 2017) CETS No 221.

[91] European Convention on Offences relating to Cultural Property (opened for signature 23 June 1985) ETS No 119.

[92] Council of Europe Convention on Offences relating to Cultural Property (n 90) pmbl; Magdalena Pasikowska-Schnass, 'Cultural Heritage in EU Policies' (European Parliamentary Research Service) PE 621.876 (June 2018) 2-3; Bieczyński (n 73) 258-59.

Mexico have ratified the Nicosia Convention, and it remains to be seen if other states will follow. The continuing work of the Council is further reflected by its calls for greater cooperation between the Council, the EU and UNESCO in order to improve the disciplinary means upon which cultural heritage and community awareness are developed.[93]

Protection in the Event of Armed Conflict

The biggest threat towards the integrity of cultural property occurs when it becomes a target during armed conflicts. This foregoing will analyse the international regime that regulates and condemns the deliberate targeting and destruction of cultural property during armed conflicts and it will examine those instances where violations occurred.

1949 Geneva Conventions and 1977 Additional Protocols

The 1949 Geneva Conventions and their 1977 Additional Protocols are of utmost importance within the context of cultural property, because they regulate belligerent conduct during armed conflict.[94] The 1977 Protocols are significant as they explicitly protect cultural property during wartime, especially where a state has not acceded to the 1954 Hague Convention, and the Protocols have attained the status of international customary law. However, where the states involved have ratified the 1954 Convention then the provisions of the 1954 instrument precede the provisions of the 1977 Protocols.[95] The Protocols confer general protection for civilian property[96] and special protection for cultural property during armed conflict prohibiting 'acts of hostility' against it.[97] Under the general protection principles, targeting and seizure of civilian property are expressly prohibited,

[93] Recommendation 2038 (2014); Pasikowska-Schnass (n 92) 1-11.
[94] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950); Ehlert (n 41) 37-38.
[95] Add'l Protocol I 1977 art 53; Add'l Protocol II 1977 art 16.
[96] Add'l Protocol I 1977 art 52; Ehlert (n 41) 72.
[97] Add'l Protocol I 1977 art 53; Add'l Protocol II 1977 art 16.

with an exception where such property is converted into a justified 'military objective'.[98] However, Protocol I limits this exception, as it confers immunity and prohibits hostilities over public and private institutions and dwellings, notwithstanding military use.[99]

Cultural property, as defined by the Additional Protocols,[100] falls under special protection, and its status forbids 'any act of hostility directed against it'.[101] Academic commentary provides that the wording of the Articles is deliberately drafted to align with the Hague Convention 1954.[102] Their difference, however, is that under the Additional Protocols 'no actual damage' is required to constitute infringement, as it suffices if it can be demonstrated that 'an act of hostility was directed against it'.[103] It must be emphasised that the Additional Protocols impose a higher level of protection in comparison with the 1954 Hague Convention but do not address protection during peacetime.[104]

1954 Hague Convention and Its Efficacy, Developments and Impact

The drafting of the Hague Convention (1954) for cultural property protection in the event of warfare arose in the aftermath of World War II, on the initiative of UNESCO for an effective and comprehensive convention on cultural property protection.[105] The Convention provides a general definition for cultural property, using a set of detailed but simultaneously abstract categories,[106] signifying a non-exhaustive list of elements which enjoy protection.[107] The main aim is

---

[98] 'Their nature, location, purpose or use'. Add'l Protocol I art 52; Ehlert (n 41) 72-73.

[99] 'In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used'. Add'l Protocol I 1977 art 52.

[100] Add'l Protocol I 1977 art 53(a); Add'l Protocol II 1977 art 16.

[101] Add'l Protocol I 1977 art 53; Add'l Protocol II 1977 art 16.

[102] Ehlert (n 41) 74.

[103] ibid 74-75.

[104] ibid 77.

[105] Sigrid Van der Auwera, 'UNESCO and the Protection of Cultural Property during Armed Conflict' (2013) 19 IJCP 1, 6.

[106] Hague Convention 1954 art 1.

[107] David A Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law' (1993) 1 BU Int'l L J 349, 355.

to ensure that its parties are protecting items falling under the umbrella of cultural property in both peace and armed conflict situations, strictly prohibiting acts of seizure, pillage and the likes, while Protocol I expressly forbids the removal of cultural property from an occupied area.[108] The Convention further introduced the special white-and-blue sign for buildings and institutions enjoying special protection and further requires that where works of art are stored in 'special refuges', these are to be recorded in the international register introduced by the Convention.[109] The register, however, was initially criticised as being too restrictive because it only covered cultural property located away from industrial and military areas.[110]

The Convention also addressed the international customary rule of military necessity, a mechanism that acts as an exception to the Convention's general rule for protection to justify those instances where interference with targeting of cultural property sites is deemed critical for the advancement of a military operation, thus, indicating that the protection of cultural property is not always guaranteed under the 1954 instrument.[111] This clause inevitably became the instrument's weakness, illustrated well by the atrocities that took place during the Yugoslavian conflicts, such as the destruction of Mostar Old Bridge[112] and the ruining of the Old Town of Dubrovnik.[113] Both properties enjoyed special protection under the 1954 Convention and were included in the World Heritage List, while

[108] Hague Convention 1954 arts 3-4, 18-19; Meyer (n 107) 355; Eric A Posner, 'International Protection of Cultural Property: Some Sceptical Observations' (2007) 8 Chi J Int'l L 213, 216.

[109] Hague Convention 1954 arts 6, 8, 16-17; Meyer (n 107) 355; Joshua E Kastenberg, 'The Legal Regime for Protecting Cultural Property During Armed Conflict' (1997) 42 AFLR 277, 291.

[110] Andrea Cunning, 'The Safeguarding of Cultural Property in Times of War and Peace' (2003) Tulsa J Comp & Int'l L 211, 222; Maja Sersic, 'Protection of Cultural Property in Time of Armed Conflict' (1996) 27 NYIL 2, 10-1.

[111] Hague Convention 1954 art 4(2); Laurie Rush (ed), *Archaeology, Cultural Property and the Military* (The Boydell Press 2010) 10.

[112] *Prlic et al* (*Prlic Second Indictment*) IT-04-74-T (11 June 2008).

[113] *Prosecutor v Strugar* IT-01-42 (31 January 2005); *Prosecutor v Jokic* IT-01-42/1-S (18 March 2004).

their destruction violated Protocols I and II of the 1949 Geneva Conventions.[114]

In *Prosecutor v Tadic*,[115] the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that 'each party to the conflict' would be accountable where breaches of the 1954 Convention occurred.[116] Investigations held by UNESCO revealed that the attacks were deliberate and intentional. The Yugoslav government resorted to the doctrine of military necessity to justify its actions, while the Serbs claimed 'imperative military necessity', claiming that the Croats were breaching the 1954 Convention with the presence of military facilities in Dubrovnik.[117] However, UNESCO observed that the targeting was a deliberate attack upon properties[118] of significant cultural importance.[119] This was further reflected in *Prosecutor v Strugar*,[120] where the ICTY condemned the destruction of Dubrovnik, as the city had removed any elements that would constitute it a military target and therefore the atrocities against it could not be justified.[121]

These events triggered the international community to introduce a second protocol to the Convention which prescribed 'clearly defined conditions' for triggering the defence of military necessity, significantly restricting the extent of its application.[122] The new protocol further introduced detailed provisions on criminal offences[123] for the misappropriation of cultural property requiring

---

[114] Johannot-Gradis (n 46) 1261; David Keane, 'The Failure to Protect Cultural Property in Wartime' (2004) 14 DePaul JT&IPL 1, 20; Paige Casaly, 'Al Mahdi before the ICC: Cultural Property and World Heritage' (2016) 14 JICJ 1999, 1207-10.
[115] *Prosecutor v Tadic* (*Jurisdiction*) 35 ILM 32 (1996) [98].
[116] ibid; Keane (n 114) 21.
[117] Keane (n 114) 24.
[118] '[T]he Mostar Bridge, the historic centre of Sarajevo, the Roman villas at Split, and four-thousand-year-old archaeological sites at Vuhovar', ibid.
[119] ibid 22.
[120] *Prosecutor v Pavle Strugar* IT-01-42 (31 January 2005) 295.
[121] Johannot-Gradis (n 46) 1265; Casaly (n 114) 1207-08.
[122] Add'l Protocol II 1999 art 6; Johannot-Gradis (n 46) 1261.
[123] '…(a) making cultural property under enhanced protection (and thus only in this specific case) the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; (e) theft, pillage or

states to recognise and introduce similar measures respectively clarifying their extension to civil conflicts.[124] The 1999 protocol further limits the extent to which the concept of military necessity applies, requiring that any emergency requiring interference with protected property must be proportionate with or even exceed the damage.[125] Academic commentary prescribes that the 'cardinal principles' of the international customary laws of conduct[126] are explicitly applicable within the context of cultural property protection during military conflict.[127]

The new protocol also rendered the register more effective by recognising that special protection should be accrued for cultural property situated close to or within industrial and military areas, as precise targeting is easily facilitated today.[128] The 1999 protocol also clarifies that general and special protection of cultural property enjoy the same level of protection, which can be lost where they are subject to military use constituting it a target. The difference lies in that for cultural sites enjoying special protection, the defending national party must abstain from converting these sites into military targets, *eg*, by locating their military equipment in such sites with the belief that the enemy will not attack, as this constitutes a gross infringement of the instrument.[129] In contrast, cultural property under general protection may under exceptional circumstances be converted into a military base, *eg*, where this deemed critical to accommodate a military

misappropriation of, or acts of vandalism directed against cultural property protected under the Convention'; Add'l Protocol II 1999 art 15 (adopted 26 March 1999, entered into force 9 March 2004).

[124] Posner (n 108) 216; Keane (n 114) 33; Stefano Manacorda, 'Criminal Law Protection of Cultural Heritage: An International Perspective' in Stefano Manacorda and Duncan Chappel (eds), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (Springer 2011) 29.

[125] Rush (n 111) 10-11.

[126] These are the concepts of military necessity, distinction (distinguishing cultural heritage sites restraint in interference), proportionality (balancing military aims with the requirement to respect cultural property of the enemy), and precaution (cautiousness as to the means and methods employed), Johannot-Gradis (n 46) 1260-64.

[127] ibid.

[128] Keane (n 114) 32.

[129] Especially if the sites are listed on the World Heritage List under the 1972 UNESCO Convention.

objective, provided that such an act can be justified on reasonable grounds.[130]

The general view on the Convention alone, however, irrespectively of its international customary law status, excluding Protocol II, is that it has failed in its mission to eliminate cultural property mistreatment and destruction, as the pillage of cultural sites is still linked with the occurrence of military events globally.[131] Academic commentary has described the 1954 Convention as 'toothless', proving its ineffectiveness by reflecting on the massive targeted destruction of Iranian UNESCO listed cultural heritage sites[132] in the 1980s, during the wars between Iran and Iraq.[133] Iraq's invasion of Kuwait is another atrocious instance of cultural property and heritage 'massacres' as Kuwait's museums were sacked of their contents and their interiors destroyed. Iraq argued, however, that they acted in accordance with the Convention[134] as the removal of Kuwait's cultural property was an attempt to preserve it from destruction and looting.[135] Another instance where the Convention was violated and the doctrine of military necessity misused can be traced during the Gulf Wars, where the US ended up attacking Iraqi cultural property sites as the latter located military equipment in sites of cultural value.[136]

The inefficacy of the 1954 Convention is reflected on the basis that criminal prosecution is self-enforced, so that only the devastated party can raise proceedings against another for the destruction of its cultural heritage sites.[137] This implies that it is in the hands of the international community to protect cultural property by ratifying the Convention alongside its two protocols, as increasing the support towards the instrument in its totality translates to better enforcement and better outcomes.[138] This is particularly the picture today, as more than 130 states, including the UK, have ratified the 1954

---

[130] Keane (n 114) 32.
[131] Posner (n 108) 216; Meyer (n 107) 351; UNESCO Convention 1970 art 7(b)(ii).
[132] UNESCO Convention on Cultural and Natural Heritage.
[133] Cunning (n 110) 229.
[134] Hague Convention 1954 art 5.
[135] Cunning (n 110) 229-30; Posner (n 108) 216; Kastenberg (n 109) 293.
[136] Posner (n 108) 214.
[137] Cunning (n 110) 228.
[138] ibid 229.

Convention.[139] The creation of the ICTY and the International Criminal Court are examples of the increasing impact that the Hague Convention 1954 has in awakening states' awareness on the need to protect cultural property.[140]

Armed Conflict and Cultural Property in the Twenty-First Century

The challenges that trigger the integrity of the Convention continue to occur and many instances prove that. The two protocols have seemingly failed to meet their ends notwithstanding their pivotal contribution and this is because military-related abuse continues to thrive, causing the irreplaceable destruction of the cultural treasures of humanity.[141] Contemporary examples ascribe especially the occurrence of cultural property reaps and destruction due to the outbreak of civil disputes that led to the uprising and dominance of terrorist groups, which are huge stroke to the heart of national and global cultural heritage.[142]

In 2003, during the US invasion of Iraq, the National Library and Museum of Baghdad were subjected to devastating pillage of their national cultural treasury with the razing actively taking place in the shadow of the war by thieves who knew the library and the museum possessed valuables that would sell well in the black market.[143] In 2011, the looting of the Cairo Museum was amongst the outcomes of the 'Arab Spring'.[144] The world has further witnessed the atrocities of ISIL, 'the self-proclaimed State of Iraq and Levant', engaging in the

---

[139] Cultural Property (Armed Conflicts) Act 2017; 'Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention. the Hague, 14 May 1954' (UNESCO), available at <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha> accessed 11 March 2019.
[140] Cunning (n 110) 232.
[141] Gerner (n 23) 178.
[142] ibid.
[143] Neil Brodie, '2003 Looting of the Iraq National Museum, Cultural Heritage Resource' (2019), available at <https://web.stanford.edu/group/chr/drupal/ref/the-2003-looting-of-the-iraq-national-museum > accessed 12 March 2019; 'US Accused of "Crime of The Century": Pillage of Baghdad Museum' (2019), available at <https://www.dawn.com/news/96329> accessed 12 March 2019; Gerner (n 23) 177.
[144] ibid.

unrestrained pillage and destruction of Iraq's and Syria's cultural heritages, and the destruction of UNESCO listed heritage sites in Mali by extremists.[145]

More specifically, Syria has incurred a huge loss as archaeological sites such as the ancient remains of Palmyra and religious institutions were subjected to irreplaceable damage with adverse implications to Syria's divergent cultural heritage.[146] Notwithstanding that grievance, the desperate refugees who escaped the massacres sought refuge at various archaeological sites with all the negative implications that such an interference invokes.[147] Furthermore, the usage of museums, mosques and the like for military purposes further extends the loss of Syria's cultural treasures stressing the fear that cultural archaeological objects may have forever been lost in the black market or completely destroyed.[148]

Undoubtedly, the iconoclastic character of this vandalism aims at the elimination of religious pinpoints in Syria.[149] This is evident by the unhesitant destruction of 'historic shrines and tombs', religious institutions and objects, in a manner that indicates 'religious extremism'.[150] Syria is party to the Hague Convention 1954, but has not acceded to the second protocol; the national law however, provides for criminal prosecution in the event of destruction and prohibits the illegal trade of Syrian cultural objects as 'the ownership of all of Syria's antiquities and artefacts vests to the state'.[151] The tragic implication of the situation in Syria is the difficulty to trace and hold the perpetrators accountable for their crimes as there are many officials involved in single terrorist groups or extremist organisations.[152]

---

[145] ibid (n 143).
[146] Cunliffe, Muhesen and Lostal (n 4) 1-3; Ana Filipa Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' in *London Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (2016) 22, 25-26, available at < http://works.bepress.com/ana_filipa_vrdoljak/38/ > accessed 6 March 2019.
[147] Cunliffe, Muhesen and Lostal (n 4) 3.
[148] ibid 8, 12.
[149] ibid 4.
[150] ibid 3.
[151] ibid 15.
[152] ibid 19.

Statute of the International Criminal Court

The Statute of the International Criminal Court (ICC) is another legal instrument which condemns the destruction of cultural property and empowers the Court to hear such disputes. The wording of the statute departs from the more detailed Hague provisions, though it is similar to the 1907 Hague Convention because it ascribes as general provisions a list which defines the protection of archaeological sites alongside hospitals.[153] The statue distinguishes between international and domestic conflicts, forbidding any acts against cultural property and imposing criminal penalties on violators in accordance with Protocol II of the 1954 Hague Convention.[154] Also in line with the 1954 Convention Protocol II and the Geneva Protocols, the ICC Statute penalises mere unsuccessful attacks directed on protected properties and does not require the occurrence of damages to deem a party guilty.[155]

Al Mahdi before the ICC

Al Mahdi is the first case before the ICC concerning the destruction of cultural property and cultural heritage sites as a primary criminal offence.[156] The case concerned the destruction of mausoleums[157] and cemeteries[158] listed in the UNESCO World Heritage List in Mali, a loss with adverse multidimensional implications to the identity and

---

[153] Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 EJIL 203, 210.
[154] ICC Statute arts 8(2)(b)(ix), 8(2)(e)(iv)**;** Frulli (n 153) 210-11.
[155] Frulli (n 153) 212.
[156] Casaly (n 114) 1200; Shiva Jayaraman, 'The Destruction of Cultural Property at the International Criminal Court: The Prosecutor v. Al Mahdi' (2017) 50 International Immersion Program Papers 1, 2, available at <http://chicagounbound.uchicago.edu/international_immersion_program_papers/50> accessed 8 March 2019.
[157] These were '(i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii)the door of the Sidi Yahia Mosque; (ix) the Bahaber Babadié Mausoleum and (x) the Ahmed Fulane Mausoleum, both adjoining the Djingareyber Mosque'; *The Prosecutor v Ahmad Al Faqi Al Mahdi* 15 ICC-01/12-01 (24 March 2016) 34.
[158] *Prosecutor v Al Mahdi* (n 157) 36.

religion of communities globally, with particular regard to their 'outstanding universal cultural value'.[159] Al Mahdi was a member of an extremist party aiming for the enforcement of Sharia law in Mali.[160] During the summer of 2012 he consulted, directed and inspected the destruction of religious sites, monuments and archaeological areas in Timbuktu that were perceived as 'idolatrous': "visible vice"'.[161]

Al Mahdi was accused under the ICC Statute[162] of 'the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments which were not military objectives' and the prosecutor found him guilty as 'director co-perpetrator'[163] for directing, persuading and generally contributing towards the occurrence of these grave offences.[164] The prosecutor provided that the charges against the defendant concern the wreckage of 'irreplaceable historic monuments as an assault on the dignity and identity of entire populations and their religious and historical roots' and further noted their global significance describing them as 'a chapter in the history of humanity'.[165] The Court reflected the prosecutor's indictment against the defendant and seemingly linked the local community's mourning with the global significance of the loss.[166] The Court sentenced Al Mahdi to nine years in custody, 'the minimum sentence suggested by the prosecution' due to 'mitigating circumstances' on the defendant's, part including the admission of his liability.[167] The Court's reasoning that '…crimes against property are generally of lesser gravity than crimes against persons' is of course pragmatic, but it seems that the sentence imposed on the defendant does not ascribe to the gravity of the loss incurred and imposes a negative precedent for subsequent cases.[168]

[159] Casaly (n 114) 1200, 1212; *Prosecutor v Al Mahdi* (n 157) 39.
[160] Casaly (n 114) 1210-11; Jayaraman (n 156) 7.
[161] Casaly (n 114) 1211; Jayaraman (n 156) 7.
[162] ICC Statute art 8(2)(e)(iv).
[163] ICC Statute art 25(3)(a).
[164] ICC Statute arts 25(3)(b)-(c); *Prosecutor v Al Mahdi* (n 157) 23; Casaly (n 114) 1212; Jayaraman (n 156) 10; Vrdoljak (n 146) 12.
[165] Casaly (n 114) 1212; Jayaraman (n 156) 12; Vrdoljak (n 146) 12.
[166] *Prosecutor v Al Mahdi* (n 157) 39; Casaly (n 114) 1213-14.
[167] *Prosecutor v Al Mahdi* (n 157) 93, 109.
[168] Casaly (n 114) 1214.

In a nutshell, ensuring the protection of cultural property during armed conflicts is pivotal. Unfortunately, even though there is a rich body of legal instruments that stress the need for protection and condemn violators, the deliberate targeting and destruction of cultural property is still an issue that haunts the international community and admittedly has shown its weakness: the lack of cooperation among states to better address the issue. Notwithstanding that, within such contexts, art looting and the illicit trade in artefacts is thriving. The next chapter will analyse the gravity of the illicit trade in art and antiquity and the legal provisions in place to address the issue.

Illicit Trade in Artefacts

Preliminary Remarks

The circulation of cultural property in the black market is a matter of utter urgency as its growing effect has adverse effects on the cultural heritage of all nations.[169] The major concern here is that addressing or even worse, tracing the illicit trade in art and antiquities is 'notoriously difficult'.[170] This limitation comes with further restrictions as in many instances art admirers interfere with the black market under the cloth of the 'white market', unaware of their acquisition's illicit character or the sellers bad faith. This occurs because it is intrinsically difficult to pinpoint cultural tangibles as stolen, even for experts, where the loss is undocumented or unknown and little is known about the origin or even the attributes of the item, especially if damaged.[171]

According to academic opinion, it forms a grey area, implying those situations of 'laundering' (*cf* blackening) where a stolen or illegally removed object is circulated in the licit market, but no tracing of its provenance can be deducted and the market regulations do not constitute it 'entirely legal or illegal'.[172] The implication that we derive

[169] Veres (n 38) 93.
[170] Christa Roodt and Bernadine Benson, 'Databases for Stolen Art: Progress, Prospects and Limitations' (2015) SA Crime Quarterly 52.
[171] Leila Amineddoleh, 'The Role of the Museums in the Trade of Black-Market Cultural Heritage Property' (2013) 18 Art Antiquity and Law 227, 243.
[172] Siobhán Ní Chonaill, Anaïs Reding and Lorenzo Valer, 'Assessing the Illegal Trade in Cultural Property from a Public Policy Perspective' (2011) Rand

from that is also the difficulty to distinguish between the licit and illicit markets, as the latter's 'lucrative' character acts 'underground', and frequently under the veil of the licit market, implying 'the readiness of the market to accept illicit products' in the licit market.[173] This stresses the illicit trade unregulated character as it has been described as 'a very dangerous place' inhabited by corruption.[174]

Academic commentary further draws on the assumption that the prevalence of the black market has so much developed in that it only comes second to illegal trade practices on drugs, guns, and money laundering, with the belief that approximately 50,000 to 100,000 articles are stolen per annum, with the American Federal Bureau of Investigation (FBI) estimating proceeds exceeding $6 billion annually.[175] These numbers are particularly worrying, especially when considering they ascribe mere speculations, implying that the actual width of the illegal trafficking may surpass the estimated proposition.[176] The problem seems to endure as the multiplicity of factors that influence the theft of cultural objects and their circulation in the black-market increases with countervailing effects globally. In stressing this argument, it is not just the illicit character of the theft per se that triggers attention to this problem but the adverse impact that such actions impose on societies at a domestic and international level, as well as the physical and intellectual cultural loss borne by both the public and private domain.[177]

Corporation Europe, available at <https://www.rand.org/content/dam/rand/pubs/documented_briefings/2011/RAND_DB602.pdf> accessed 3 February 2019.

[173] Jessica Dietzler, 'On Organized Crime in the Illicit Antiquities Trade: Moving beyond the Definitional Debate (2013) 16 Trends Org Crim 329,330,332, available at < https://doi.org/10.1007/s12117-012-9182-0 > accessed 4 February 2019; Alice Stevenson, 'Why Archaeological Antiquities Should Not Be Sold on the Open Market, Full Stop' (*The Independent*, 16 July 2017).

[174] Toby Hill, 'The Art Market: Unregulated, Unscrupulous and Worth Billions' (*Artlyst*, 12 November 2012), available at < https://www.artlyst.com/news/the-art-market-unregulated-unscrupulous-and-worth-billions/ > accessed 6 February 2019.

[175] Veres (n 38) 94; Alexandra M S Wilson, 'The Business of Art Theft: Assessing Auction House Standard of Care and the Sale of Stolen Cultural Property' (2015) 4 American Business Law Review 505, 506; Amineddoleh (n 171) 227-28.

[176] Dietzler (n 173) 329, 332-33.

[177] Amineddoleh (n 171) 227.

1970 Convention

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property addresses the prohibition of illicit trade in artefacts and requires cooperation among its contracting state parties for the repatriation of wrongfully removed cultural treasures.[178] It is important to note that for enhanced cultural property protection, the Convention requires its contracting parties to institute public bodies and where necessary order penalties in order to establish an effective import-export control system to control the domestic market on cultural property.[179] However, the Convention does not address the situation where conflicting claims arise or the existence of an 'indefeasible right' of each member state to proclaim certain cultural treasures as inalienable, hindering the whole situation.[180] In this regard, it is important to note that for the repatriation of cultural property the Convention is enforced through cross-governmental diplomatic actions.[181]

1995 UNIDROIT Convention

The 1995 UNIDROIT Convention[182] was introduced to facilitate cooperation with the 1970 Convention for matters relating to the return of stolen cultural property.[183] This Convention emerged because the 1970 Convention mechanisms are restrictive government actions.[184] This is problematic because individuals had no recourse to the 1970 Convention unless their state's government was willing to act on their behalf.[185] This triggered the incentive for a new Convention, focusing on private law, to address the issues arising from illegally removed private cultural objects.[186] UNESCO was closely involved

[178] Vignero (n 21) 127.
[179] Lyndel V Prott, 'UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects' (1996) 1 ULR 59.
[180] De Jager (n 2) 188.
[181] ibid; Prott (n 179) 65.
[182] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) (opened for signature 24 June 1995, entered into force 1 July 1998).
[183] Prott (n 179) 61-62.
[184] De Jager (n 2) 188; Prott (n 179) 65.
[185] Prott (n 179) 62-63.
[186] ibid 60-61.

during the negotiations for the drafting of this new 'supplementary' Convention, to ensure compatibility with the 1970 Convention.[187] The Convention allows for private actions to be raised by individuals, as well as state actions to be raised for the restitution of illegally exported cultural property to the courts of the country where their property is situated and where the set criteria are met.[188] The scope of the 1995 Convention further includes objects lawfully or unlawfully excavated but illicitly removed, which are nevertheless deemed as stolen.[189] For a party to succeed in its claim, it must act within the time limitation provided by the 1995 Convention once the claimant traces the location of the stolen object.[190]

European Union Law

The European Union allows the circulation of cultural objects in all of its member states, save for 'national treasures', recognising the need to protect valuable properties to preserve the cultural heritage of those member states.[191] As regards the illicit removal of cultural property from the country of origin, European Union law addresses the issue in a 'twofold way', requiring licensing for goods to be exported both within and outside the Union, with the latter instance requiring relevant certificates to that effect[192] and by requiring the return of illicitly exported cultural property of a member state.[193] The necessity for these rules emerged because of the Union's free market, which led to the elimination of custom checks and subsequently, export rules on the circulation of cultural property were deemed necessary to facilitate the repatriation of illicitly exported objects within the Union.[194]

---

[187] Prott (n 179) 60-61, 70.
[188] UNIDROIT Convention art 5(3); Veres (n 38) 101; Prott (n 179) 62-67.
[189] UNIDROIT Convention art 3; Prott (n 179) 64-67.
[190] UNIDROIT Convention arts 3(3)-(6), 5(5); Veres (n 38) 101.
[191] Treaty on the European Union and the Treaty on the Functioning of the European Union [2012] OJC 326/01 art 36; Vigneron (n 21) 130.
[192] European Council Regulation 3911/92 (9 December 1992) [1992] OJ L 395, 1; European Council Regulation 116/2009 (18 December 2008) [2009] OJ L 39, 1.
[193] European Council Directive 93/7/EEC [1993] OJ L 074 -079; Vigneron (n 21) 130.
[194] Vigneron (n 21) 130.

The United Kingdom, in implementing EU law in this regard, provides for the commencement of proceedings aiming the restitution of illicitly exported property within one year of tracing the whereabouts of the object(s) and within thirty years since the date of the export, save for public and ecclesiastical treasures, the time-threshold lifted up to seventy-five years, and upon return provides for the reimbursement of a good faith purchaser.[195]

English Law

Under English law, courts do not hear claims related to the infringement of a foreign country's export laws, save for European Union member states and states that acceded to the 1999 Hague Protocol,[196] even in cases circulating cultural property. That is because the enforcement of a foreign state's public regulations are 'non-justiciable' on the ground that they contradict the principle of the state's sovereignty, and the courts are further subject to the English choice of law rules.[197] This is reflected in the leading case of *Attorney General of New Zealand v Ortiz*,[198] where the Court of Appeal and the House of Lords rejected enforcement of New Zealand's request for the repatriation of illegally removed cultural property from its territory because no proprietary interests vested with the claimant.[199] The main rationale is that 'the courts of one country should not act to benefit another sovereign'.[200] The English courts distinguished between 'enforceable and non-enforceable public laws' and stressed that where claims are raised on behalf of other sovereign states with no pleas for the enforcement of sovereign rights, then the courts will be able to hear their claims.[201]

Acts of administration do not impose sovereignty rights, and they can be heard by foreign courts illustrating that foreign states can request the repatriation of cultural property removed from their

[195] Return of Cultural Objects Regulations 1994 No 501; Vigneron (n 21) 130.
[196] Cultural Property (Armed Conflicts) Act 2017 s 16; Return of Cultural Objects Regulations 1994 No 501; Vigneron (n 21) 130.
[197] Vigneron (n 21) 119-21.
[198] (1982) 3 WLR 570.
[199] Vigneron (n 21) 122-23.
[200] ibid 120-21.
[201] *Mbasogo and the Republic of Equatorial Guinea v Logo Ltd and Others* [2006] EWCA Civ 1370 50; Vigneron (n 21) 121.

territory provided that they have a claim as the legal owner and can succeed once they establish their proprietary interest.[202] This is reflected in *Islamic Republic of Iran v Barakat Galleries Ltd*,[203] where Iranian authorities raised a claim for the restitution of stolen antiquities offered for sale in London; Iran sued to claim ownership of the antiquities and succeeded because they established that they had a proprietary interest over them.[204] In this regard, academic commentary is calling for solidarity among the international community, particularly for the reciprocal recognition of each state's regulations on export controls (save for situations where this contradicts each state's public policy), contesting the British courts' approach, as the illicit trade in antiquities is considered a crime.[205]

Main Factors Feeding Illicit Trade

The main actors in the trafficking of cultural property ascribe the features of professional criminals who aim for monetary returns through the sale of stolen cultural objects; art dealers selling stolen antiquities through auction houses or other private or public institutions, acting in either good or bad faith.[206] The general assumption is that poorer countries are where theft and wrongful removal of cultural objects usually occur, but empirical evidence suggests that even big-market states suffer. Countries like France, Italy, and Russia admittedly have rich inventories of cultural treasures with Western Europe and the United States forming the centre of black-market transactions.[207]

The driving engine behind the illicit trafficking of cultural property is that many suppliers are not hesitant to take risks in order to meet their clients' demands for items of artistic or historical value encompassing rare and peculiar features.[208] Client demand being the root of the problem whereby the black market enjoys its underpinning foundations, is the key to defeat the illicit trade in antiquities and

[202] *Mbasogo and the Republic of Equatorial Guinea v Logo Ltd and Others* [2006] EWCA Civ 1370 50; Vigneron (n 21) 121.
[203] (2007) EWCA Civ 1374.
[204] Vigneron (n 21) 119.
[205] ibid 125-29.
[206] Ní Chonaill, Reding and Valer (n 172) 4.
[207] ibid.
[208] Roodt and Benson (n 170) 5.

artefacts. The mission, however, is inherently difficult as institutional bodies in the art and antiquities circles ascribe 'well-documented links' with looted property and an important criticism is that by acquiring such property, they 'fuel' criminals to steal.[209]

Museums, private institutions, even auction houses have regularly been accused of encouraging directly or indirectly illegal trade in cultural property.[210] In contemporary times, this is of increased concern considering the heat surrounding the Middle East over the past decades. In fact, it comes as no surprise that the market is dominated by looted and illegally exported items.[211] The most worrying part is that the international community's articulations that criminal and terrorist organisations loot and export artefacts and antiquities to fund their atrocious endeavours, a practice widely attributed to ISIS.[212] This raises further concerns not only because it encourages looting in the Middle East, but also in that the Western community aids the terrorists' atrocities.[213] Therefore, there is no room for explanations of the type that Westerners are buying looted cultural property from Syria to protect it from terrorists, as it is these practices that fund operations of terror globally and further impair the integrity of cultural treasures in the areas of conflict.[214]

What is important here is that museums must be deterred from interfering with cultural property seemingly linked with the black market as they may be accessary to the advancement of the illicit trafficking and 'terrorism-linked activities.'[215] In this regard, the International Council Of Museums (ICOM) has addressed a set of rules on museum regulatory frameworks but these are mere guidelines and have no legal enforcement at domestic or at

[209] Amineddoleh (n 171) 228, 236.
[210] Frank Kuitenbrouwer, 'The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance' (2005) 13 Eur Rev 597, 598-99.
[211] Amineddoleh (n 171) 229.
[212] Leila Amineddoleh, 'How Western Art Collectors are Helping to Fund ISIS' (*The Guardian*, 26 February 2016); Fiona Rose-Greenland, 'How Much Money has ISIS Made Selling Antiquities? More than Enough to Fund Its Attacks' (*The Washington Post*, 3 June 2016).
[213] Amineddoleh (n 212).
[214] ibid.
[215] Amineddoleh (n 171) 228.

international level.[216] This does not mean that domestically and internationally we are at a standstill, as the increased calls towards the restitution of stolen or illegally removed cultural property has seen tremendous utilisation.[217]

Looted Antiquities in Trade

What is required, however, is to observe and stress the way in which the looting of cultural treasures and particularly antiquities are conducted and its devastating consequences.[218] By referring to devastating consequences, stress is laid on the fact that looting is interlinked with ruins, as the individuals who sack archaeological sites are usually professionally unfit to conduct excavations and work with archaeological treasures, notwithstanding their inability to assess the importance of archaeological sites and their contents.[219] This is further stressed by the fact that plunderers are searching for aesthetically appealing objects to concentrate high revenues in the illicit market. They do not hesitate to remove parts from sculptures, even treat objects they consider non-worthy carelessly, which an expert will deem as important to human history and academia.[220]

Admittedly, the indirect effect of the black-market looting is so severe in that ignorant individuals thirsty for monetary revenues, destroy without realising or even caring about evidence of the past, eliminating the traces of important information of previous civilisations, as antiquities which reach the black market are often deliberately 'stripped' of information as to their origin and context.[221] This has subsequently adverse impacts on both the physical integrity of archaeological sites and the intellectual sterilisation of cultural sciences.[222] A characteristic example is the looted Kanakaria Mosaics,

---

[216] ibid 228-29.
[217] ibid 230.
[218] ibid.
[219] Veres (n 38) 95-96; Amineddoleh (n 171) 230.
[220] Veres (n 38) 95-96; Amineddoleh (n 171) 230; Ní Chonaill, Reding and Valer (n 172) 4.
[221] Veres (n 38) 95-96; Patty Gerstenblith, 'Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past' (2009) DePaul University College of Law Technology, Law and Culture Series Research Paper 09-005 171, 172, available at < https://papers.ssrn.com/sol3/papers.cfm?abstractid=1367260 > accessed 23 February 2019.
[222] Veres (n 38) 96; Gerstenblith (n 221) 170.

the removal of which caused damage on both the removed mosaics and the church's walls.[223] The mosaics were illicitly exported and sold to a private individual but were later retrieved by the Autocephalous Church of Cyprus through court proceedings raised against the bad faith purchaser.[224]

Issues with Auction Houses, Art Dealers and Forgeries

In the United Kingdom, the law did not differentiate until very recently the legal framework for the purchase of cultural property from that applied for ordinary goods.[225] The governing principle is still the Latin maxim *caveat emptor*, which connotes buyers should be careful in their transactions as the absence-silence of any fraudulent or misleading information given in any description made by the seller cannot render the seller liable, especially if it is suspected that the object is stolen, but the buyer nevertheless wishes to proceed.[226] This is still particularly important in transactions involving art and cultural objects, as conducting 'independent due diligence' prior to purchase, including records of the seller's honesty and professionalism, ensures the legal title and the authenticity of the work.[227]

The advancement of technology aids a prospective buyer through the availability of various databases[228] listing stolen cultural property.[229] This practice assists a buyer to raise action and succeed against persons, including legal ones, where it is deemed that the

[223] *Autocephalous Greek Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc* (SDNY 1989) 717 F Supp 1374, 1377.
[224] Christiane Bourloyannis and Virginia Morris, 'Autocephalous Greek Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts Inc' (1992) 86 AIJL 128, 128-33.
[225] Sale of Goods Act 1979 (B2B Transactions); Consumer Rights Act (B2C Transactions); Adrian Parkhouse and James Carleton, 'England and Wales' in Bruno Boesch, Massimo Sterpi and Michele O'Sullivan (eds), *The Art Collecting Legal Handbook* (Thomson Reuters UK 2016) 107, 108, available at < https://www.farrer.co.uk/globalassets/news-articles/downloads/art-collecting-legal-handbook-england-and-wales-chapter.pdf> accessed 24 February 2019.
[226] Cultural Property (Armed Conflicts) Act 2017 s 17(1)(3); Parkhouse and Carleton (n 225) 108.
[227] Parkhouse and Carleton (n 225) 108.
[228] *Eg*, the Interpol, ICOM Red List, FBI, Art Loss Register and Art Recovery International databases list stolen cultural property; Parkhouse and Carleton (n 225) 108-09.
[229] Parkhouse and Carleton (n 225) 108-09.

artwork was stolen if it can be proven that the item in question was listed after the transaction was concluded and the buyer was given false information or misrepresentation by disclosing the relevant evidence.[230] A good faith purchaser can therefore sue for fraud where he was the victim of deception with the burden to prove that for example, the seller knowingly sold them a replica instead of the original.[231] Subsequently, purchasers should be cautious for the inclusion of warranties on the artwork's authenticity in the contract and include clauses that recognise the purchaser's right to rescind the contract where 'the cultural commodity' is stolen or is a sham.[232]

American Case Law

The problem with auction houses is that their business indirectly supports the illicit trade in artefacts and antiquities.[233] This was particularly the case after World War II, where the circulation of Nazi-looted art with limited or no provenance and unknown or broken chain of title had either resided in the museums of the countries where they were traced[234] or sold through auction houses to museums or private individuals worldwide.[235] In addition, prominent auction houses have regularly been involved in the sale of stolen objects with generated profits for their businesses.[236] One crucial thing to address here is that auction houses are not usually purchasing the artworks they offer for sale; their role is that of an intermediary in the contract for the sale of an artwork, in return for monetary revenues from both parties.[237] Furthermore, auction houses, including leading names in

[230] Cultural Property (Armed Conflicts) Act 2017 s 17; Parkhouse and Carleton (n 225) 109.
[231] Leila Amineddoleh, 'Purchasing Art in a Market Full of Forgeries: Risks and Legal Remedies for Buyers' (2015) 22 International Journal of Cultural Property 419, 428.
[232] ibid 427.
[233] Wilson (n 175) 507.
[234] *Eg*, the return of Gustav Klimt paintings in *Republic of Austria v Altmann* (2004) 541 US 677.
[235] Wilson (n 175) 507; 'Looted Artefacts Removed from Auction' *BBC News* (2 April 2014), available at < https://www.bbc.co.uk/news/entertainment-arts-26848890 > accessed 28 February 2019
[236] Wilson (n 175) 508.
[237] ibid 509-10.

London and New York, have periodically been subject to complains that they promoted the sale of stolen cultural property.[238]

In *Abrams v Sotheby*,[239] a case concerning the sale of a 'collection of Renaissance-era Hebrew books and manuscripts', Sotheby's failed to delineate the collection's provenance even though due diligence was exercised. Nevertheless, the Court found it inadequate and ordered its removal from auctioning.[240] Another instance is the case concerning artwork stolen from the Schloss family in Paris during World War II. Both Christie's and Sotheby's offered the painting for sale, with the former failing to disclose the troubled provenance of the work, whereas the latter, even though in due diligence acknowledged the painting's provenance did not remove it and forwarded its sale.[241] Reportedly, auction houses have made the headlines for facilitating the sale of stolen antiquities with no details on their provenance and providing information that aimed to deceit for their legitimacy.[242] This signifies that even though there are instances where auction houses indeed operated in good faith and exercised due diligence, there are also situations where their actions deliberately avoided such undertakings.[243] And in *Menzel v List*,[244] Perls, an art dealer who had sold the painting to the good faith purchaser, challenged the return of the painting he purchased from a gallery in Paris based on the 'industry custom' that a 'reputable gallery represented the clear title of the work'.[245] However, the court condemned his justification, providing that had Perls expressly asserted the painting's disputed title, he could escape liability and decided that he was accountable for breach of implied warranty of title, ordering the restitution of the painting to its rightful owners and the recovery of its market value to

---

238 Wilson (n 175) 511.
239 *Abrams v Sotheby Parke-Bernet Inc* (1984) (NY Sup Ct 42255-84) 2-5.
240 Wilson (n 175) 511.
241 ibid 512.
242 ibid 513; Neil Brodie, 'Auction Houses and the Antiquities Trade' in S Choulia-Kapeloni (ed), *Third International Conference of Experts on the Return of Cultural Property* (Archaeological Receipts Fund 2014) 63-67, available at <https://traffickingculture.org/publications/auction-houses-and-the-antiquities-trade/> accessed 25 February 2018.
243 Wilson (n 175) 511.
244 *Menzel v List* (NY Ct App 1969) 246 NE2d 742, 804.
245 Wilson (n 175) 516; Christine Steiner and Bee-Seon Keum, 'Art Law: Looking Back, Looking Forward' (2017) 20 Chapman L Rev 119, 125-26.

the good faith purchaser.[246] The same was applied in *Port v Wertz*,[247] where indifference to the work's provenance on the art dealer's part left him accountable to the good faith buyer.[248]

Forged Antiquities

The black market has further drawbacks as its structure allows the circulation of undocumented objects implying that the circulation of forgeries claiming to be originals is not an impossible scenario.[249] In this regard, the smuggling of an excavated or illegally removed object from an undiscovered archaeological site has significant implications, as it diminishes its intellectual value limiting our knowledge to its aesthetic characteristics which separated from the whole have little to say about originality.[250] Subsequently, looting and disposal of antiquities in the 'underground' circles of illicit trade impacts the integrity of cultural property, as objects sold on the black market are generally categorised as fake.[251]

Forged Artworks and Paintings

Issues with forgeries are more commonly encountered with artworks and particularly paintings. The need to distinguish the authentic work corresponds to the astronomic amounts paid for the acquisition of works attributed to distinguished artists, as it is obvious that a person or entity is willing to pay millions for original works and not replicas.[252] In the recent leading case of *Lagrange v Knoedler Gallery,*[253] the plaintiff alleged the gallery was involved in the sale of forgeries as the painting he acquired from them proved to be a forgery as 'anachronistic elements' were traced, not ascribed Pollock's painting techniques.[254] The plaintiff's claim followed a series of other filings[255] against the gallery, which led to the revelation that the latter was

[246] *Menzel v List* (n 244) 804.
[247] *Porter v Wertz* (NY Sup Ct 1979) 68 A2d 141, 141.
[248] Wilson (n 175) 517.
[249] Gerstenblith (n 221) 172.
[250] ibid.
[251] ibid.
[252] Amineddoleh (n 231) 422-23.
[253] *Lagrange v Knoedler Gallery* (SDNY 2011) 11-cv-8757.
[254] Amineddoleh (n 231) 422-23.
[255] *De Sole v Knoedler Gallery* (SDNY 2015) 137 F Supp 3d 387, 395.

indeed involved in a series of frauds, even though it claimed to be unaware of the forgery believing in the works' originality. The sale of more than forty artworks supplied by an individual who admitted her cooperation with a forger for the production of the works.[256] The increase in monetary revenues through the sale of art contributes to an increasing incentive to forge with opinions arguing that probably 'half of the art on the international market could be forged'.[257] This stresses the need for future purchasers to exercise due diligence to ensure that the work they are interested to acquire is authentic, as well as not stolen and the only way to establish that is by referring to professionals for the undertaking of scientific tests to examine a work's attributes, provenance and legal title.[258]

Proposals for Future Development

Without doubt, significant steps towards the enforcement for the protection of cultural property have taken place in past decades. As the problem with artefacts continues, however, this Article suggests proposals to bolster the existing legal regime.

Encourage Ratification of Protocol II

The uprising of 'iconoclastic' wars against cultural property in the preceding decade has caused the loss of an unparalleled number of cultural treasures.[259] These events have 'shocked the conscience of humanity'[260] and therefore triggered the need for collective cooperation to halt further misappropriation and destruction of cultural property. Within this spectrum and especially, considering the current situation in the Middle East and Mali, it is suggested that to achieve the desired level of cooperation more states should accede to and ratify Additional Protocol II of the 1954 Hague Convention, which provides for an enhanced level of protection as it limits the

[256] Amineddoleh (n 231) 422-23; Azmina Jasani, 'De Sole v Knoedler Gallery: A Field of Red Flags' (*Art@Law* 2016), available at <https://www.artatlaw.com/archives/2016-jan-dec/de-sole-v-knoedler-gallery-field-red-flags > accessed 7 March 2019; Steiner and Keum (n 245) 126-27.
[257] Amineddoleh (n 231) 420.
[258] ibid 424-25.
[259] Cunliffe, Muhesen and Lostal (n 4) 4, 13.
[260] Casaly (n 114) 1207-10.

applicability of the military necessity clause.[261] The importance of the second protocol is highlighted by the fact that it introduces criminal offences, instructing states to incorporate similar mechanisms in their domestic laws to pursue actors for their crimes in conflict and peace.[262] Subsequently, the ratification of the second protocol by more states can encourage further accession and thereby increase its impact and efficacy, lifting it to the podium of international customary law.

Safe Havens for Cultural Property

Even though other conventions[263] and institutional guidelines[264] provide for special refuges, the Guidelines of the International Law Association[265] introduce a different approach to the concept, focusing on the 'potential impact' a hazardous situation may cause to the delicate context of a cultural object.[266] The guidelines provide for both times of peace and times of armed conflict, showcasing the pragmatic school of thought that cultural property is not threatened only under human hostilities, but its integrity can be very well endangered by the occurrence of various natural phenomena.[267] Obviously, the concept aims at preserving the integrity of cultural treasures, and especially when in danger an uncertain or risky event is likely to occur, whether natural or man-made.[268] Therefore, relocation in this situation is necessary at another specifically designated area within that state for shelter or its removal 'from the sovereign territory of the source state' to that of a neighbouring or cooperating state.[269]

---

[261] Uerpmann-Wittzack (n 20) 7-8; Craig J S Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37 CWILJ 177, 215.
[262] Posner (n 108) 216.
[263] *Eg*, Add'l Protocol II 1977 arts 14, 18.
[264] *Eg*, ICOM Code of Ethics for Museums (June 2017), available at <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> accessed 2 August 2020.
[265] Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material 2008.
[266] Gerner (n 23) 187.
[267] ibid.
[268] Nikolaus Thaddäus Baumgartner and Raphael Zingg, 'The Rise of Safe Havens for Threatened Cultural Heritage' (2018) 25 International Journal of Cultural Property 323, 324.
[269] Gerner (n 23) 187.

It should be noted that if a third state is 'entrusted' by the source state to provide a shelter for cultural property under this concept, then it acts as a 'fiduciary' and bears the obligation to protect it on behalf of the source state.[270] The Swiss model shows UNESCO's imperative to supervise the undertaking of such plans under its auspices.[271] Furthermore, the 'safe haven state' must exercise due diligence and pay particular regard on the sound provenance of the property purporting to enjoy the protection of the safe-haven mechanism in its territory with strict prohibitions for property acquired through illicit means.[272] Switzerland has been described as 'the perfect role model' on its plan and other states have made their own steps to follow.[273] Even if some concerns have been raised about its efficacy it is highly recommended that if states apply it in alignment with UNESCO's supervision then an international shield of protection can be established.[274]

UNESCO Blue Helmets for Culture

The introduction of 'Blue Helmets for Culture' by Italy was the immediate aftermath of the atrocities that occurred earlier this decade surrounding the cultural heritage rapine of all mankind.[275] The main aim of this mandate is to encourage collaboration at the international level, employing 'mechanisms of rapid mobilisation of experts' encompassing civilian and military features specialised in cultural heritage protection to guide and train local communities, aiding the safeguard of their 'cultural wealth' in the event of upcoming during armed conflicts.[276] This however, comes with inherent limitations as the enforcement of the mandate should be forwarded through domestic measures to achieve the desired cooperation among the local communities and the mechanism, and it has to be stressed that this concept does not address the participation into the battlefield for antiquities preservation.[277]

---

[270] Gerner (n 23) 188, 191.
[271] ibid 188, 191; Baumgartner and Zingg (n 268) 340.
[272] Gerner (n 23) 189.
[273] Gerner (n 23) 190, 194; Baumgartner and Zingg (n 268) 327-29.
[274] Baumgartner and Zingg (n 268) 329-45.
[275] D'Amico Soggetti (n 23) 163.
[276] ibid 164.
[277] ibid 166.

Its actions merely include the duty to act timely due to their proximity to pursue the safe removal of cultural property from possible targeted areas in times where prioritisation for human lives precedes the goodwill to protect cultural property.[278] The Italian model serves as an example of a public authorities' mechanism employing volunteers that will act immediately in cases of emergency for the removal of cultural property from possible targeted areas to pre-designated shelters.[279] It is therefore strongly advisable for states to adhere in the Blue Helmets for Culture scheme, employ cooperation and enforce these mechanisms during emergencies to safeguard cultural treasures, turning the embryonic status of Blue Helmets for Culture into the ambitious 'guardianship' status it envisions.[280]

Tackling Illicit Trade in Antiquities

The illicit trade in cultural property is a big stroke to the integrity of the licit market, but more importantly on the blood flow of our cultural heritage as it hinders its continuity, constituting irreplaceable deprivation on a state's identity.[281] This is especially true concerning illegally excavated objects.[282] Academic commentary has proposed a corpus of possible means upon which the tackling of illicit trade can be addressed. However, the approaches suggested are largely contradictory in nature as some ask for stricter regulatory market frameworks with stricter import-export rules, whereas others call for more a relaxed approach and the free circulation of artefacts and antiquities in the market.[283] These calls however contradictory in nature they may be clearly prescribe in the author's view, the desire of private individuals to build and enrich their collections on the one hand, and on the other, the state's will to protect cultural property and enrich their inventories, conferring monetary returns for their preservation, study and scientific developments.

The need to protect cultural property from being a trophy in the hands of ignorant persons is therefore pivotal. Consequently, in the author's view, better cooperation among the states should be

[278] D'Amico Soggetti (n 23) 170.
[279] ibid.
[280] ibid 171.
[281] Veres (n 38) 94-95.
[282] ibid.
[283] Gerstenblith (n 221) 182-83, 187-93.

encouraged to design a new pioneering instrument lifting away the restrictions national laws impose and create a special regime that will regulate and control the circulation of cultural property globally. This can only be achieved through an international collaboration between states and other international actors, institutions and organisations to track the inefficiencies of the current Conventions, bridging the gaps and find a common ground upon which a market that will serve all states' interests can be functional.[284] This may sound very ambitious and simple in theory, however, in practice it is inherently difficult to achieve the collective approval of a market mechanism that will regulate the imports-exports of more than 130 states, it is worth trying though, at least if it can, at a minimum introduce measures that will deter people from acting within the lucrative matrix of the illicit market.

Obviously, the means upon which the close cooperation can be established is through the employment of an international body like UNESCO, which would act as the central column of an international commercial institution. Through it, its member states will be able to conclude bilateral or multilateral treaties with other states concerning their commercial relations and the interplay of legal frameworks on the import, export and circulation of cultural items ascribing the practices of trade unions like the European Union or the United States.[285]

Conclusion

Cultural property is the means through which our common cultural heritage, as well as that of each nation, is preserved. This has raised the need to protect it as that cultural treasures are vulnerable and oftentimes exposed to the corruption of belligerents. In this regard, the international community raised the threshold and enacted Conventions to limit belligerents' acts of vandalism against cultural property. As it has been observed, even though huge steps have been traced in awakening the awareness of the nations as to the pivotality to respect cultural property and cultural treasures, the war against it continues, and it has taken various forms, including the tendency to

[284] Veres (n 38) 111.

[285] Vigneron (n 21) 130; Raymond Fisman and Shang-Jin Wei, 'The Smuggling of Art and the Art of Smuggling: Uncovering the Illicit Trade in Cultural Property and Antiques' (2009) 1 Am Econ Journal 82, 84.

destroy sites of cultural and historical importance at a local and international level by extremists. These events have been considered as instances of serious atrocities with the international framework unable to stop them. Of course, this is an inherently difficult practice as even though international instruments condemn the destruction of cultural property and cultural heritage sites, they cannot practically and timely stop the corrupt perpetrators during the course of destruction.

This Article also discussed the issues with illicit trade practices in artefacts and antiquities as well as the growing impact of the black market globally, drawing on the factors and devastating consequences of looting such objects for monetary returns. Within this context, it also examined the international, regional and domestic legal framework, the legal implications emanating through illicit trade practices and import-export policies, as well as situations where stolen or forged property was sold by art dealers or through auction houses showing the gravity of such issues.

Nevertheless, even though it is inherently difficult to tackle the destruction of cultural property during armed conflicts and related situations, this paper has recommended proposals for acting in times of emergency and the concept of safe havens for vulnerable moveable cultural property, as well as the encouragement for cooperation through treaty accession in order to be able to pursue such criminals and do not leave such crimes unpunished. It also addressed ways in which the trafficking of cultural property can be limited, emphasising on the need for collective cooperation among the states.

Should the Jurisdiction of the Scottish Land Court be Expanded to the Scottish Land and Environmental Court?

ALEXANDER JOHNSON*

Abstract

Scotland has no designated court to hear environmental cases. Instead, cases that concern the environment are brought under judicial review. However, judicial review is expensive and procedurally complicated. Scotland's current position is in breach of the United Nations Economic Council for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention establishes a system built on three pillars: the right of access to environmental information, public participation in environmental decision making and access to environmental justice. As there is no environmental access to environmental justice in Scotland, Scotland is in breach of the Aarhus Convention. To remedy the situation, Scotland should look to follow the examples set by the Land and Environmental Court in New South Wales, Australia and India's National Green Tribunal. Both of these courts have been praised in tackling environmental law by providing affordable access to justice. Scotland should look to extend the jurisdiction of the Scottish Land Court to the Scottish Land and Environmental Court. The Scottish Land Court is well-established in Scotland and would support the growth of an environmental court. In doing so, Scotland will be able to provide access to environmental justice and thus become compliant with the Aarhus Convention.

Keywords: Aarhus Convention; environmental law; Scottish Land Court

Introduction

Environmental awareness has transcended to the forefront of our attention through the activism of environmentally conscious individuals such as Greta Thunberg, who believes 'this is above all an

emergency and not just any emergency. This is the biggest crisis humanity has ever faced'.[1] In 2017 forty-five Scottish lochs were defiled by toxic pesticides from fish farms.[2] The impact of pollution can have detrimental effects on our ecosystem; but what action can be taken on behalf of people living in Scotland when environmental standards are infringed? Since Scotland has no recognised environmental court, judicial review is often the enforcer of environmental standards. However, this process is costly, thus significantly diminishing access to justice. One solution that would increase affordable access to justice would be to create a court in Scotland dedicated to enforcing environmental regulations. Throughout, this article will argue that the Scottish Land Court should be reformed to bring environmental matters within its subject-matter jurisdiction. In order to achieve this, a description of the Scottish Land Court will be provided. However, the focus of the article is to convey the importance in providing access to environmental justice through expanding the Scottish Land Court to the Scottish Land and Environmental Court.

Scottish Land Court

Section 3 of the Small Landholders (Scotland) Act 1911[3] established the Scottish Land Court, which 'continued in being under Section 1 of the Scottish Land Court Act 1993'.[4] The Agricultural Holdings (Scotland) Act 1991 and Crofters (Scotland) Acts 1993 and 2010 confer upon the Scottish Land Court the jurisdiction to solve a variety of farming disputes.[5] The Agricultural Holdings (Scotland) Act 1991[6]

* LLB (Scots Law with English Law), DPLP, University of Aberdeen. Alexander is a trainee solicitor at Douglas Gilmour and Son/Pike and Chapman in the Scottish Borders.

[1] Ben Davies, '21 of Greta Thunberg's Best Quotes' (*Curious Earth*, 2 June 2019), available at <https://www.curious.earth/blog/greta-thunberg-quotes-best-21> accessed 15 July 2019.

[2] Rob Edwards, 'Revealed: Scandal of 45 Scottish Lochs Trashed by Pollution' (*The Herald*, 26 February 2017), available at <https://www.heraldscotland.com/news/15118242.revealed-scandal-of-45-scottish-lochs-trashed-by-pollution/> accessed 23 July 2019.

[3] Small Landholders (Scotland) Act 1911 c 49 s 3.

[4] Scottish Land Court Act 1993 c 45 s 1.

[5] Scottish Land Court Act 1993.

[6] Agricultural Holdings (Scotland) Act 1999 asp 11 s 14C(3).

allows the Land Court to determine whether a tenancy exists,[7] carry out improvements 'to enable the tenant to fulfil the tenant's responsibilities to farm the holding in accordance with the rules of good husbandry',[8] and dealing with notices to quit.[9] The Crofters (Scotland) Act 1993 further increases the jurisdiction over acquisition of crofts,[10] the boundaries of a croft, and rights of access and rent for a croft.[11] The Scottish Land Court can also hear appeals 'against a decision by the Scottish Environmental Protection Agency to impose a fixed monetary penalty'.[12]

The Scottish Land Court is staffed by agricultural experts, thus placing the court in a unique position to provide expert decision-making.[13] However, as previously mentioned, there is no recognised court to handle infringements of environmental regulations. Dr Ben Christman highlighted that 'the costs of environmental litigation can run into six figures', giving the example of the John Muir Trust's unsuccessful challenge to a windfarm development in 2017 which led to a £539,000 bill to the Scottish government and SSE plc.[14] Arguably, the current position in Scotland is in infringement of the UNECE Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention is 'an international treaty concerned with environmental protection and the rights of individuals in relation to environmental decision making'.[15] Scotland does not provide affordable access to justice for infringements of environmental regulations. Therefore, the Scottish Land Court should

[7] Agricultural Holdings (Scotland) Act 1999 s 60.
[8] ibid.
[9] ibid s 23.
[10] Crofters (Scotland) Act 1933 c 44 s 13.
[11] Scottish Land Court, 'Jurisdiction', available at <http://www.scottish-land-court.org.uk/about/jurisdiction> accessed 23 July 2019.
[12] Environmental Regulation (Enforcement Measures) (Scotland) (Order) 2015 s 8.
[13] Scottish Land Court, 'Overview', available at <http://www.scottish-land-court.org.uk/about/overview> accessed 1 August 2019.
[14] Ben Christman, '21 years of Aarhus: How Long the Wait for Affordable Access to Environmental Justice in Scotland?' (*Scottish Legal News*, 25 June 2019), available at <https://www.scottishlegal.com/article/dr-ben-christman-21-years-of-aarhus-how-long-the-wait-for-affordable-access-to-environmental-justice-in-scotland> accessed 1 July 2019.
[15] Scottish Government, 'Developments in Environmental Justice' (March 2016).

look to expand its jurisdiction to provide a 'one stop-shop for environmental, planning and land matters'.[16]

Currently there is an ongoing consultation looking at merging the Scottish Land Court and Land Tribunals.[17] The consultation is seeking opinions on whether an expansion of the Scottish Land Court would be worthwhile. Arguably, any expansion of the Scottish Land Court should be welcomed as it would demonstrate that the Land Court is capable of handling an expansion of their jurisdiction. Notwithstanding, an inclusion of the Land Tribunals to the Land Court would be a small step in reaching the full potential of the Land Court.

Scottish Land and Environmental Court

Why Does Scotland Have No Environmental Protection Court?

On March 18, 2016, the Scottish Government launched a consultation that investigated developments in environmental justice. The Scottish Government believed it was not 'appropriate to set up a specialised environmental court or tribunal at present'.[18]

However, the consultation was largely criticised for its narrow scope in assessing environmental justice. The concern of the Law Society of Scotland, Professor Reid, the UK Environmental Law Association and the Scottish Environment Link was that 'whereas the paper only considered court reform, environmental justice is much wider than the cases which come to court'.[19] Notwithstanding calls to take a holistic approach to environmental justice, the majority of respondents favoured the creation of an environmental court. Professor Reid argued, 'to the extent that a higher court is desirable,

[16] New South Wales Land and Environment Court, 'History', available at <http://www.lec.justice.nsw.gov.au/Pages/about/history.aspx> accessed 13 August 2019.
[17] Scottish Government, 'The Future of the Land Court and the Land Tribunal: Consultation' (27 July 2020).
[18] Scottish Government, 'Developments in Environmental Justice in Scotland: Analysis and Response' (29 September 2017), available at <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/pages/5/> accessed 23 July 2019.
[19] ibid.

continuing the current practice of conferring jurisdiction on the Scottish Land Court seems sensible'.[20]

Notwithstanding the Law Society of Scotland's support to consider effective means of increasing access to environmental justice, it believed that the creation of a special environmental court would be futile. '[W]e do not believe that it would be effective or would provide value for money to establish a separate court to deal with environmental matters'.[21] The Scottish Government agreed with the position of the Law Society of Scotland.

In addition, the Scottish Government adopted the position that while an environmental court would reduce costs, it would not make a significant improvement as cases may be appealed to the Supreme Court. However, the analysis adopted by the Scottish Government is narrow, as it fails to consider the benefits of an easily accessible court. Allowing citizens the opportunity to initiate claims through a specialised environmental court would help increase access to justice, while the introduction of an environmental court may not make a significant reduction to the cost of litigation proceedings. The establishment of an environmental court would help provide victims with an avenue to pursue justice, case precedents will aid in the development of environmental law and an enforcement procedure may act as a useful deterrent against rogue landowners.

Moreover, the Scottish Government believe the uncertainty of Brexit impacts Scotland's commitment to the Aarhus Convention. The Convention Is based on three pillars: the right of access to environmental information, public participation in environmental decision making and access to environmental justice.[22] However, a committee looking into compliance conveyed Scotland is not currently meeting the standards set by the Aarhus Convention.[23]

---

[20] Ibid (n 18).
[21] ibid.
[22] ibid.
[23] Committee to UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 'The Implementation of Decision VI/8k on Compliance by the United Kingdom of Great Britain and Northern Ireland with Its Obligations under the Convention' (September 2017).

Therefore, the Scottish Government's position is juxtaposed: it maintains a desire to fight climate change and increase environmental justice but demonstrates no effort in adhering to the standards set by the Aarhus convention.

Why Does Scotland Need an Environmental Court?

The Rio Declaration on Environment and Development (Rio Declaration)[24] and the Aarhus Convention[25] provide 'international standards of best practices for countries' environmental governance'.[26] Providing access to the three pillars[27] of access rights is seen as the most effective way of meeting environmental standards of access to justice, access to information and public participation.[28]

Principle 10 of the Rio Declaration states, 'States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to justice and administrative proceedings, including redress and remedy, shall be provided'. [29] Similarly, the Aarhus Convention states, 'In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law'.[30] The Rio Declaration and Aarhus convention convey the best practices in environmental governance. However, Scotland comes nowhere near meeting such standards. Judicial Review is expensive and procedurally complex.

[24] Rio Declaration on Environment and Development (adopted 16 June 1972) 31 ILM 874 (1992).
[25] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001).
[26] United Nations Environment Program, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (September 2016).
[27] G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Institute 2009) 6-9; V Nanda, V Pring and G Pring, *International Environmental Law and Policy for the Twenty-First Century* (2nd edn, Brill 2013) 97-158.
[28] ibid 27.
[29] ibid 23.
[30] Aarhus Convention art 9.

Therefore, Scotland does not operate an inexpensive or free-of-charge regime which facilitates access to environmental justice.

In 2017 it was reported, '[Forty-five] lochs around Scotland's coast have been contaminated by toxic pesticides from fish farms that can harm wildlife and human health'. [31] Salmon and Trout Conservation UK criticised the Scottish Environmental Protection Agency for its lack of action in the matter. In addition, the 'John Muir Trust had to abandon an appeal in relation to a [sixty-seven] turbine windfarm after faced with legal bills of £500,000'.[32]

These two examples highlight Scotland's disconformity with the Aarhus Convention. The former represents environmental harm being committed and omissions in holding the relevant body/person to account. If a specialist environmental court were established, it would allow claimants to initiate legal proceedings where there has been a degradation in the quality of the land. Due to the complexity and cost of initiating such procedures, many people are put off. Through a simplification of the procedure it may increase public participation through claims brought. The later, emphasises pursuing access to justice is an expensive endeavour. There is no inexpensive procedure that allows claimants to initiate claims in a specialist environmental court.

In order to overcome such an issue, the jurisdiction of the Scottish Land Court should be expanded to bring environmental matters under its purview. The Scottish Land Court has simplified the process of making an application to the court; there are detailed instructions advising the public on how to initiate applications to court.[33] Therefore, if a specialist Environmental Court were to adopt such a method, it will decrease complexity in bringing claims to court and minimise cost. Overall, this will help increase access to Justice,

---

[31] ibid (n 2).

[32] Scottish Conservative and Unionist Party, 'Plans to Create Environmental Court to Help Communities and the Countryside' (February 2018), available at <http://www.scottish-conservatives.com/2018/02/plans-to-create-environmental-court-to-help-communities-and-the-countryside> accessed 15 August 2020.

[33] Scottish Land Court, 'Making an Application', available at <http://www.scottish-land-court.org.uk/using/making-an-application > accessed 15 August 2020.

increase public participation and align Scotland with the Aarhus convention.

Why Should the Scottish Land Court be Expanded?

Scotland will host world leaders at the 2021 United Nations Climate Change Conference.[34] Scotland wants to demonstrate to the world that their house is in order by having strong climate emergency plans. However, by failing to establish a specialist environmental court, Scotland has demonstrated its inadequacy in fighting climate change, as there is no court to hear claims brought where environmental harm has been committed.

In order to overcome that inadequacy, a beneficial course of action would be to extend the Scottish Land Court into the Scottish Land and Environmental Court. India's National Green Tribunal, established in 2010 as a specialised court handling environmental matters,[35] was praised by the World Wildlife Fund Scotland (WWF). The WWF stated, 'Since its establishment it has become the primary authority on environmental jurisprudence in India and has created a field of judicial activism on its own. Importantly, the tribunal is a court of law with original and appellate jurisdiction. It is able to review both the factual aspects of environmental cases as well as the substantive legal issues of cases - an important issue from the environmental aspect'.[36]

The success of India's National Green Tribunal demonstrates that an extension of the Scottish Land Court would most likely be a success. A specialist court focused on environmental cases will aid in the growth of environmental law in Scotland. The benefits of such are vast, as it will increase Scotland's compliance with the Aarhus Convention. While conveying Scotland's positive attitude in fighting climate change by providing a court where claims can be brought against those who infringe the well-being of our environment.

[34] UK Climate Change Conference, 'Why Glasgow', available at <https://www.ukcop26.org/the-conference/> accessed 15 August 2020.
[35] Pring and Pring, *Greening Justice* (n 27) 26.
[36] ibid.

Notwithstanding, any expansion arising from current consultations on merging the Land Court with the Land Tribunals for Scotland.[37] The Scottish Land Court is comprised of experts in farming and agriculture. These experts assist the judiciary in its decision-making role, contributing to better informed decision making. In the event a specialist environmental court is set up in Scotland, experts will play a vital role in assisting the judiciary with their understanding of the interplay between science and environmental law. Science plays a fundamental role in understanding how best to protect and manage our environment. The science can be complicated and convoluted in understanding. Therefore, the judiciary will need to be informed to aid their understanding, placing them in a better position to interpret the law.

Justice Brian Preston, Chief Judge of the Land and Environmental Court in New South Wales, said, '[T]he Judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations…Increasingly, it is being recognised that a court with special expertise in environmental matters is best placed to pay this role in the achievement of ecologically sustainable development'.[38] The role of experts will be vital in aiding the judiciary in their understanding of the science behind environmental law.

Conclusion

The Scottish Land Court was established in 1912, and through its settled status, provides a suitable foundation for the extension of its jurisdiction into the Scottish Land and Environment Court. The Scottish Land Court has simplified the procedure for bringing a case to court through detailed instructions. The Scottish Land Court will be able to share its expertise and experience in the development of an environmental court. Currently, Scotland does not meet the standards set by the Aarhus Convention, to which the United Kingdom is a signatory. Scotland thus fails in providing access to justice through no recognised environmental court. Judicial review is costly and procedurally complex. Therefore, through the extension of the

[37] Pring and Pring, *Greening Justice* (n 27) 17.
[38] B Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Environmental L Rev 396, 398.

Scottish Land Court to the Scottish Land and Environment court, Scotland will be able to meet the standards set by the Aarhus Convention and provide a '"one stop shop" for environmental, planning and land matters'.[39]

[39] New South Wales Land and Environment Court (n 16).

Scottish Dog Breeding Legislation: It's in the Dog House

LOUISE SARAH WALKER*

Abstract

In Scotland, the scale and nature of the puppy trade has drastically increased since the enactment of the Breeding of Dogs Act 1973 and the Animal Health and Welfare (Scotland) Act 2006. This article concludes that the current legislation is outdated and ineffective. In September 2018, the Scottish Government acknowledged the desire for reform in a consultation document titled 'The Licensing of Dog, Cat and Rabbit Breeding Activities in Scotland'. While this article welcomes reform, it suggests that the Scottish Government's proposals ought to show greater regard for enforceability and for the accountability of breeders.

Keywords: Animal welfare; dog breeding; puppy trade

Current Dog Breeding, Dealing and Selling Legislation in Scotland

In Scotland, dog breeding is regulated by the Breeding of Dogs Act 1973, as amended by the Breeding of Dogs Act 1991, and the Breeding and Sale of Dogs (Welfare) Act 1999.[1] The 1973 Act stipulates that a licence is required where a bitch gives birth to a total of five or more litters within a twelve-month period,[2] and provides the penalties for breaching this provision.[3] It is the responsibility of local authorities to enforce this legislation.

* LLB (Hons) (First Class), DPLP (Distinction), University of Aberdeen.

[1] All analysis of the Breeding of Dogs Act 1973 (1973 Act) in this Article includes analysis of the amendments made by the Breeding of Dogs Act 1991 and the Breeding and Sale of Dogs (Welfare) Act 1999 (1999 Act).

[2] 1973 Act (n 1) s 4(3); 1999 Act (n 1) s 4A(3).

[3] The 1999 Act declares, '(1) A person guilty of an offence under section 8 [of the Act] is liable on summary conviction to (a) imprisonment for a term not exceeding three months, or (b) a fine not exceeding level 4 on the standard scale, or to both'. 1999 Act (n 1) s 9.

In 2005, the Scottish Parliament recognised that additional provisions[4] were required 'to modernise, strengthen and consolidate Scottish animal welfare legislation for domestic and captive animals'.[5] These provisions were enacted in the Animal Health and Welfare (Scotland) Act 2006.[6] The 2006 Act is now the principal legislation for animal welfare in Scotland. The 2006 Act places animal owners in Scotland under a legal duty to care for the animals that they are responsible for.[7] Section 24 of the 2006 Act stipulates five needs that dog breeders must satisfy for a licence to be granted.[8] In addition, it outlines that a failure to comply with these five needs shall constitute an offence.[9]

Issues with Existing Legislation

Since these Acts came into force, the scale and nature of the puppy trade has drastically increased.[10] It is estimated the puppy trade in Scotland is worth more than £13 million a year,[11] with 45% of sales being online.[12] Notably, one in four puppies purchased online dies

[4] Animal Health and Welfare (Scotland) Bill (SP Bill 47).
[5] Animal Health and Welfare (Scotland) Bill Policy Memorandum para 2.
[6] Animal Health and Welfare (Scotland) Act 2006 (2006 Act).
[7] ibid, s 18. The explanatory notes to the 2006 Act state, '[R]esponsibility for an animal is only intended to arise where a person can be said to have assumed responsibility for its day-to-day care, or for a specific purpose, or by virtue of owning it… [I]n addition, a person who is in charge of the animal is also responsible for it. This applies whether the person owns or is in charge of the animal on a temporary or permanent basis…'. 2006 Act (n 6) s 18.
[8] ibid, s 24(3). This section of the statute declares, '(3) For the purposes of subsection (1) an animal's needs include—(a) its need for a suitable environment, (b) its need for a suitable diet, (c) its need to be able to exhibit normal behaviour patterns, (d) any need it has to be housed with, or apart from, other animals, [and] (e) its need to be protected from suffering, injury and disease'. The explanatory notes to the 2006 Act make it clear this is not an exhaustive list. 2006 Act (n 6) s 24.
[9] 2006 Act (n 6) s 24(1).
[10] British Broadcasting Corporation, 'BBC Investigates: The Dog Factory' (2015). The Pet Food Manufacturers' Association found that 21% of households in Scotland own a dog. Pet Food Manufacturers' Association, available at <https://www.pfma.org.uk/dog-population-2017> accessed 30 May 2020.
[11] Scottish Government, 'Scoping Research on the Sourcing of Pet Dogs, from Illegal Importation and Puppy Farms 2016-2017' (2018) 4.
[12] This represents a 25% increase in online puppy sales over 2018. Scottish Government, 'New Drive to Curb Online Puppy Sales' (2019), available at <https://www.gov.scot/news/new-drive-to-curb-online-puppy-sales/> accessed 17 August 2020.

before the age of five.[13] It is evident that the current legislation is ineffective and outdated, as it fails to account for the increase in the puppy trade, particularly in relation to the sales of puppies over the Internet.[14]

In September 2018, the Scottish Government acknowledged the desire for reform in a consultation document titled, 'The Licensing of Dog, Cat and Rabbit Breeding Activities in Scotland'. [15] The Consultation ran for a twelve-week period, from 7 September to 30 November 2018. The objective of the Consultation was to promote animal welfare in a manner that is '…not unduly burdensome for those doing a good job at present…'.[16] This Article will consider whether the proposals outlined in the Consultation would achieve this objective.

Enforceability

To ensure the enforceability of the law, legislators ought to have the utmost regard to ensuring that the law is both clear and standardised across all local authorities in Scotland. This transparency is particularly relevant in relation to licence conditions, as both animal welfare experts and the public have found it challenging to distinguish between legal and illegal trade.[17] Indeed, a successful reform ought to reflect the requirement for change, whilst ensuring that the law does not deter responsible breeders by being unduly burdensome.

[13] ibid (n 12).
[14] Scottish Society for the Prevention of Cruelty to Animals, 'The Impact of the Dog Trade on Canine Welfare: The Current Situation and Recommendations for Policy and Practice' (2018), available at <https://www.ed.ac.uk/files/atoms/files/illegal_dog_trade_briefing_paper.pdf> accessed 30 May 2020.
[15] Scottish Government, 'The Licensing of Dog, Cat and Rabbit Breeding Activities in Scotland' (2018).
[16] ibid 6.
[17] The Scottish Government recognises that '[i]t's often very difficult to distinguish between what's legal and what's illegal… just because they give you a license doesn't mean to say that you're legal. What that means is you've got a piece of paper that says you've got a license but it doesn't mean to say that you're not compromising welfare'. Scottish Government (n 11) 17.

Further, the law should be cost-effective and practical for local authorities to enforce.[18] This Article considers that the proposals outlined in the Consultation are significantly stricter than the existing law and caution should be taken to guarantee that any reform is practical for local authorities to enforce. Not only would stricter legislation place local authorities under additional strain, the cost of enforcing reform should reflect the amount of funding allocated by the Government.[19] There is support for the stricter regulations that the Consultation proposes, however, this Article considers that the Consultation fails to account for the practicalities of enforcing these proposals. Ultimately, any reform ought to encourage a high regard for animal welfare, whilst ensuring that legislation can realistically be enforced.[20]

Licencing

The Consultation purports to update the dog breeding licence requirements based on 'current scientific and technical evidence'.[21] Three areas of licensing are identified for reform: extending the requirements for a licence, additional licence requirements and independent accreditation.[22]

Extending the Requirement for a Licence

The Scottish Government recognises that the current threshold of five or more litters before a licence is automatically required is overly lenient, as it allows breeders to sell forty puppies without adhering to any licencing requirements or tax regulation.[23] Consequently, the lack of regulation results in unregulated breeders and the maltreatment of puppies. Instead, the Consultation proposes that the minimum threshold for requiring a licence should either be: that everyone who breeds dogs, regardless of the number of puppies bred, requires a licence or that only those breeders whose bitches

[18] British Veterinary Association, 'Consultation Response' (2017) para 20.
[19] The Consultation Document does not refer to the budget for dog breeding, nor does it make any suggestions as to how this would be implemented. Scottish Government (n 15).
[20] ibid 5.
[21] ibid 7.
[22] ibid.
[23] ibid 7.

produce three or more litters in a twelve-month period require a licence.[24]

Admittedly, requiring all breeders to have a licence would provide Scotland with a significantly stricter approach than any other jurisdiction within the United Kingdom.[25] However, this would require every person who breeds a dog to have a licence, thus placing an unduly restrictive burden on otherwise responsible dog owners.[26] For example, owners whose dog falls pregnant unintentionally are subject to the costs and the administrative burdens of registering for a licence.[27]

With regard to the Consultation's latter proposal of a threshold of three or more litters in a twelve-month period before requiring a licence, this would align the Scottish legislation with that of England and Wales[28] and would also increase consumer protection and promote taxation disclosure.[29] However, more benefits would be reaped if the threshold was two litters. Indeed, a requirement for

---

[24] ibid.

[25] The Welsh regulations state that a breeder requires a licence when breeding three or more litters of puppies in a twelve-month period. Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 s 5(1)(a). English and Irish regulations state that a breeder requires a licence when breeding three or more litters of puppies in a twelve-month period. Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 s 19(c); Welfare of Animals (Dog Breeding Establishments and Miscellaneous Amendments) (Northern Ireland) Regulations 2013 s 2(a). In other countries, applicable thresholds are more advanced. In Texas, for example, dog breeders are only subject to regulation when they have eleven or more breeding bitches and are involved in selling puppies. Elizabeth Choate, 'Puppy Mill Ban Passes in Texas Legislation' (2011) 1 PR Newswire Ass'n 1.

[26] Explanatory Memorandum to the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 para 8.3. It was determined that 64% of the public surveyed supported reducing the licensing threshold to three or more litters, with the majority of those who disagreed of the opinion that this threshold should be reduced even further.

[27] OneKind, 'Scotland's Puppy Profiteers' (November 2017) 35, available at <https://www.onekind.scot/wp-content/uploads/The-Puppy-Profiteers-single-page-version.pdf> accessed 30 May 2020.

[28] Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 s 5(1)(a); Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 s 19(c); Welfare of Animals (Dog Breeding Establishments and Miscellaneous Amendments) (Northern Ireland) Regulations 2013 s 2(a).

[29] OneKind (n 27) 35.

breeders who produce more than one litter would not place unduly burdens on the breeder as the cost of holding a licence is minor compared to the income that the sale of two or more litters generates.[30] Additionally, imposing a licence requirement for two or more litters would not be unduly burdensome on those whose dogs are unintentionally pregnant.

The British Veterinary Association suggest that a practical means of enforcing a reduced threshold would to be to require dog breeders to register online through a local authority. [31] The establishment could then be inspected when the threshold was reached. This would provide local authorities with contact details for the dog breeders in their area,[32] whilst providing local authorities with the 'capacity and resource to inspect, regulate and enforce dog breeding…'.[33] In turn, requiring online registration and a licence for breeders with the two litters per year requiring a licence would ensure that breeders are held readily accountable.

Additional Licencing Requirements

In 2010, the Code of Practice for the Welfare of Dogs came into effect to 'promote guidance and give examples of good practice' and sets out the five needs established in the 2006 Act in detail.[34] However, as the Code does not have any legislative effect, it is unenforceable.[35] This is problematic, as without a legally binding definition, there is a wide scope as to the definitions of the five needs outlined in the 2006

[30] OneKind (n 27) 35.
[31] British Veterinary Ass'n (n 18) para 18; OneKind (n 27) 35.
[32] The Scottish Government asserts that researchers have found that a lack of knowledge regarding puppy-trading legislation is the main reason people buy an illegally-bred puppy. Scottish Government (n 11) 40.
[33] British Veterinary Ass'n (n 18) para 21.
[34] Scottish Government, *Code of Practice for the Welfare of Dogs* (2010), available at <https://www2.gov.scot/Resource/Doc/304660/0095599.pdf> accessed 30 May 2020. The 2006 Act grants ministers power to make codes of practice to provide practical guidance on the 2006 Act, 2006 Act (n 6) s 37.
[35] ibid.

Act.[36] Notably, it is considered that the existing welfare standard required of dog breeding is lower than for agricultural animals.[37]

In acknowledgement of these conditions, the Consultation proposed requirements that were broadly similar to those established in the 2006 Act,[38] however provided more detail.[39] Additionally, it is proposed that a maximum of twenty breeding dogs can be held at any one licensed site within a year period.[40] This Article supports these proposals, as greater clarity of what a breach of the law entails would allow for a stricter enforcement of the law.

Independent Accreditation

Independent accrediting bodies offer voluntary schemes which breeders can join to sell dogs. The Consultation suggested that a possibility to relieve local authorities of the costs of imposing the strict proposals would be to reduce the frequency of local authority inspections for breeders who are affiliated with the United Kingdom's National Accreditation Body.[41] For dog breeders, the Assured Breeder Scheme is currently the only United Kingdom Accreditation Service accredited body.[42] As the Assured Breeder

---

[36] 2006 Act (n 6) s 24(3).

[37] The explanatory notes to the 2006 Act recognise the welfare offence extends a similar level of protection to both farmed and non-farmed animals. 'The Dog Factory' draws a comparison between welfare conditions of farmed animals and puppies, concluding a lower standard is required for puppy breeding than is required of agricultural animals. OneKind states that the conditions in a puppy farm would 'compare unfavourably with the most intensive livestock farming environments'. 2006 Act (n 6) s 24; BBC (n 18); OneKind (n 28) 4.

[38] 2006 Act (n 6) s 24(3)(1).

[39] The Consultation proposes that the local authority should be satisfied that dogs, cats and rabbits are: '(a) at all times kept in accommodation that is of an appropriate construction and size with appropriate exercise facilities, temperature, lighting, ventilation and cleanliness; (b) provided with appropriate whelping facilities; (c) supplied with suitable food, drink and bedding; and (d) supplied with adequate facilities to enable them to exhibit normal behaviour patterns'. Scottish Government (n 15) 8.

[40] ibid.

[41] United Kingdom National Accreditation Body (UKAS).

[42] The purpose of the Assured Breeder Scheme is 'to promote good breeding practice and help prospective purchasers to identify those breeders who breed responsibly'. The Kennel Club, Assured Breeder Scheme, available at <https://www.thekennelclub.org.uk/breeding/assured-breeder-scheme/scheme-requirements-and-recommendations/print> accessed 30 May 2020.

Scheme is independent, breeders are subject to both the high standard of the scheme and the local authority licence requirements.[43] Indeed, a dual-system would allow local authorities to delegate some responsibility, however, the response to the English Review of Animal Licensing in 2017 highlighted concerns with a dual-system.[44] The primary concern was that, in reality, the creation of a two-tier system would result in a loss of revenue and expertise for local authorities.[45] If implemented, an agreement would be required stating that both bodies should work in tandem to minimise any detriment to local authorities. In addition, there are concerns that confusion may arise where complaints are to be lodged.[46]

Ultimately, this Article rejects this proposal on the grounds that enforcing a dual system would be challenging that does not damage local authorities and that the complaints process is crucial in ensuring that breeders adhere to the licensing standards. Instead, this Article considers that Scotland should introduce a similar system to the Animal Activity Star Rating System in England. This system applies a set of standards to rate each 'establishment' on a star rating. Breeders who receive a high star rating will receive a longer licence.[47] The intention of such a system would be to reduce local authority inspections, whilst maintaining a single-level system. Unfortunately, due to its novelty, it has not been possible for sufficient analysis to be conducted to determine the success of this system. Therefore, Scotland should observe the outcome of this scheme prior to enacting a similar scheme.

---

[43] ibid (n 42)

[44] The issues regarding the puppy trade are similar in England and Scotland. Therefore, the comments in this review remain of merit when examining Scots law on the puppy trade.

[45] Department for Environment, Food and Rural Affairs, *Review of Animal Establishments Licensing in England: Next Steps* (HM Government 2018) 8, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588817/animal-licensing-review-next-steps.pdf> accessed 30 May 2020.

[46] This is an important procedure in the dog breeding industry as it allows for buyers to alert the authorities if there are concerns over the welfare of puppies in the establishment.

[47] Dep't for Environment, Food and Rural Affairs (n 45) 6.

Greater Risk-Based Assessment

The Consultation proposed a greater risk-based assessment for all licensed establishments.[48] In order to achieve this, it would be beneficial to adopt a system that is similar to the Star Scheme implemented in England.

The Consultation also suggested that 'more compliant licence holders' should have reduced fees.[49] Understandably, breeders who are affiliated with the ABS would welcome a reduction in cost, as the registration fees are high and the onerous standards are costly to implement. Yet, it is unlikely that this will improve the welfare of puppies in Scotland, as any reasonable reduction would be insufficient compared to the lucrative income that non-compliant breeders earn. Thus, priority should be given to improving the welfare of dogs in Scotland and this would be better achieved through the other means suggested in this Article.

Fit and Proper Person Test

The 1999 Act provides that those who have committed an offence of animal cruelty are subject to a maximum of three months' imprisonment, a fine and a ban on keeping animals.[50] Therefore, it is unsurprising that puppy farming is prevalent in Scotland as the penalty for puppy farmers is small in comparison to the vast potential monetary gains. Accordingly, in 2017 a puppy farmer was found guilty of nine offences under the 2006 Act and one offence under the Pet Animals Act 1951.[51] As a penalty, the offender received, 'a six-month Restriction of Liberty Order, fined £500 and disqualified for owning, keeping or selling animals…for a period of [ten] years.'[52] In comparison, the Scottish Society for Prevention of Cruelty to Animals spent eighteen months and £150,000 caring for the forty-five dogs seized.[53] This inadequacy is particularly stark upon comparing the penalties with other crimes where cruelty is not directly inflicted. For example, fly tipping has a maximum prison

[48] Scottish Government (n 15) 9.
[49] ibid.
[50] s 9.
[51] OneKind (n 27) 12.
[52] ibid.
[53] ibid (n 27).

sentence is five years.[54] As such, the current penalty does not reflect the seriousness of the crime and is insufficient in deterring puppy farmers.[55]

In acknowledgement of this inadequacy, the Scottish Government have considered that an appropriate maximum penalty for serious animal cruelty offences is five years' imprisonment.[56] Further, for less serious offences, a fixed penalty should be provided. [57] Whilst the Scottish SPCA welcome this increased sentence, it is noted that the timescale for animal cases in courts requires improvements if the reform is to be effectively enforced.[58] If enacted, Scotland would have the same penalties as England and Wales[59] and Northern Ireland.[60] These penalties seem appropriate and would act as a deterrent. However, in practice, any reform that includes the judiciary is costly and places the courts under added strain. The Scottish Government acknowledge that the current legislation is insufficient and propose that a 'fit and proper person test' should be implemented.

In considering the approach taken in other jurisdictions, Finnish law presents a suitable alternative to the current penalties. In Finland, is a national register containing the details of offenders who have been restricted from keeping animals.[61] Similar registers have

[54] Environmental Protection Act 1990 s 33(9)(b).
[55] Battersea Dogs and Cats Home, 'Sentencing for Animal Cruelty in Scotland' (2017) 2, available at <http://notfunny.battersea.org.uk/wpcontent/uploads/2017/08/Sentences_ cruelty_report_Scotland.pdf> accessed 30 May 2020.
[56] Scottish Government, *A Nation with Ambition: The Government's Programme for Scotland 2017-2018* (2017) 91.
[57] ibid.
[58] Scottish SPCA, 'The Future for Animal Welfare in Scotland: Our Beliefs and Ambitions' (2018) 3, available at <https://www.scottishspca.org/media/13894416/The-Future-for-Animal-Welfare.pdf> accessed 30 May 2020.
[59] In England and Wales, the maximum five years' imprisonment is due to be enforced following the approval the Animal Welfare (Sentencing and Recognition of Sentience) Bill in 2017.
[60] Welfare of Animals (Northern Ireland) Act 2011 s 31(1A)(b).
[61] In Finland, the Act on the Animal Keeping Ban Registry (21/2011) came into force in June 2011 and has the effect that the details of offenders who have faced criminal sanctions or court-imposed prohibitions on keeping animals should be kept by the Legal Register Centre.

been implemented in the United States of America[62] and, in 2012, a petition was made to implement such a register in Wales.[63] In response, the Welsh Government closed the petition on the basis of 'practical, legal and ethical concerns'.[64] However, in 2018, the Royal Society for the Prevention of Cruelty to Animals released a paper re-examining the scope for a Welsh Animal Offender Register.[65] The paper concluded that whilst there is strong support for the introduction of such a register, further scientific research is required and data protection issues must be addressed.

In Scotland, introducing a Scottish Animal Offender Register that records both the details of offenders who have been cautioned and those convicted would provide the main enforcers of animal welfare legislation in Scotland (the police, local authorities and the Scottish SPCA) with a comprehensive list of potential repeat offenders.[66] The register would form the 'fit and proper person test', with those listed failing the test. In recent research, the Scottish

[62] The largest registers in the United States are in New York and Tennessee. The New York register was enacted by the Animal Abuse Registration and requires bodies to check the register prior to selling an animal in order to prevent offenders from purchasing animals. In comparison, the closed registers in Finland and Tennessee are aimed at promoting the offender's conviction to enable the whole community to take action against the individual. Act on the Animal Keeping Ban Registry (21/2011) (n 61); Tennessee Animal Abuse Registry, available at <https://www.tn.gov/tbi/tennessee-animal-abuse-registry.html> accessed 30 May 2020.

[63] National Assembly for Wales Petition Committee, 'Campaign for a Welsh Animal Offenders Register' (2013), available at <http://www.senedd.assembly.wales/documents/s11062/Coversheet.html?CT=2> accessed 30 May 2020.

[64] In particular, there were concerns over vigilantism, the rights of individuals and data protection issues associated with open registers. National Assembly for Wales Petition Committee (n 63).

[65] RSPCA, 'Examining the Case for an Animal Offender Register for Wales' (Royal Society for the Prevention of Cruelty to Animals 2018), available at <http://politicalanimal.org.uk/wp-content/uploads/2018/09/RSPCA-Cymru-Examining-the-case-for-an-Animal-Offender-Register-for-Wales-July-2018-1.pdf > accessed 30 May 2020.

[66] Scottish SPCA (n 58) 3.

SPCA has found that there is an increased likelihood of child abuse[67] or domestic abuse if animal abuse has been committed in a household.[68] Therefore, such a register may be useful in determining potential future animal abuse.[69]

Prohibition of Harmful Breeding Practices

Moreover, the influence of cultural events on consumer behaviour has increased demand for dogs, in particular designer dogs.[70] In 2017, the Scottish Government considered that without 'capricious and impulsive buyers' harmful dog breeding practices would not be profitable.[71] The primary concern with harmful breeding is the lasting medical implications on the dog that occur from the utter lack

[67] Department of Health, Home Office, and Department for Education and Employment, *Working Together to Safeguard Children: A Guide To Inter-Agency Working to Safeguard and Promote Welfare of Children* (HMSO 2018), available at <https://www.nspcc.org.uk/globalassets/documents/research-reports/understanding-links-child-abuse-animal-abuse-domestic-violence.pdf> accessed 30 May 2020. In this report, child abuse is defined as 'when someone causes significant harm to a child or young person under 18 years of age. Significant harm occurs when a child's physical, emotional, or mental health or development is impaired as a consequence of abuse or neglect. The abuser is usually someone more powerful than the child or young person. Often it is an adult but it can be other children such as brothers, sisters or friends'.

[68] National Society for the Prevention of Cruelty to Children, 'Understanding the Links: Child Abuse, Animal Abuse and Domestic Violence' (2007) 4, available at <https://www.nspcc.org.uk/globalassets/documents/research-reports/understanding-links-child-abuse-animal-abuse-domestic-violence.pdf > accessed 30 May 2020. The NSPCC defines domestic violence as 'a pattern of behaviour which is characterised by the exercise of control and the misuse of power by one person, usually a man, over another, usually a woman, within the context of a current or former intimate relationship'. Animal abuse is defined as 'the intentional harm of an animal. It includes, but is not limited to, wilful neglect, inflicting injury, pain or distress, or malicious killing of animals'.

[69] ibid.

[70] The BBC recognises that the trend for fashionable dogs was met with a growing passion for dog shows. Crufts is often criticised for this. British Broadcasting Corporation, 'Woof! A Horizon Guide to Dogs' (2015); Scottish Government (n 11) 102; Scottish Government, Proposed Responsible Breeding and Ownership of Dogs (Scotland) Bill 2018, available at <http://www.parliament.scot/S5MembersBills/20180502_Final_Draft_Consultation_ Responsible_Dog_Ownership_(003).pdf > accessed 30 May 2020.

[71] Scottish Government (n 11) 123.

of regard for the dog's fitness for purpose.[72] There is currently no legislation in place to prevent such harmful breeding practices in Scotland. The Consultation proposed that breeding dogs with a disposition for genetic conditions should be discouraged, with licences including the requirement that breeding practices will not include those which can cause the puppy to suffer from a medical condition.[73] Consequently, this would decrease the number of 'designer dogs' available to consumers. To ensure that such a law is enforceable, it would be beneficial to supplement any legislation with public education on harmful breeding practices.

It is evident that the lack of consumer education limits the enforceability of dog breeding legislation, as the continued demand for harmfully bred puppies encourages offenders to engage in illegitimate practices.[74] Whilst the Consultation failed to address this, the Scottish Government has introduced several campaigns, including '#LookBeyondCute', with the purpose of educating the public on the illegal puppy trade and harmful practices.[75] Undoubtedly, campaigns increase public awareness on the mistreatment of dogs. However, enacting an education scheme on a statutory footing would ensure that education remains of importance.

Traceability

Furthermore, consumers are now placing their trust in the 17,680 online advertisements for puppies that appear each year.[76] Illegal breeders exploit the use of these advertisements, as the lack of consumer contact reduces the accountability of sellers.[77] The introduction of a statutory requirement for all Internet

[72] ibid (n 11). The documentary acknowledges that some physical changes as a result of breeding can have severe consequences. For example, King Charles Spaniels now have skulls that are too small for their brains, often resulting in neurological damage. The BBC asserts that pugs in the UK are inbred to the extent that although there are 11,000 pugs, it is equivalent to only fifty being distinct individuals. British Broadcasting Corporation, 'Pedigree Dogs Exposed' (2008).
[73] Scottish Government (n 15) 9.
[74] Scottish SPCA (n 14) 9.
[75] Scottish Government (n 12); Scottish SPCA, 'Say No to Puppy Dealers', available at < https://www.saynotopuppydealers.co.uk > accessed 30 May 2020.
[76] Scottish Government (n 11) 120.
[77] ibid.

advertisements to include a registration or licence number would ensure that sellers are held accountable.[78] In France, sellers are required to provide their business number,[79] allowing potential buyers the validity of the seller and obtain the seller's details.[80] This was enacted to 'ensure a better management of the dog and cat trade' and to improve the control of sales.[81] With regard to Scotland, HM Revenue and Customs operates differently to the French business identification system, however, a similar concept should be introduced in that seller's can be identified and held accountable.

Conclusion

The Consultation addressed many of the key issues relating to dog breeding that have arisen since the enactment of the 1973, 1999 and 2006 Acts. Whilst the proposals promote animal welfare, this Article recognises that the Scottish Government have not accounted for the enforceability and practicalities of the proposals. As such, it would be desirable that the minimum threshold of litters prior to requiring a licence should be reduced to two litters per twelve months, instead of the three litters as proposed in the Consultation. Coupled with this, all breeders ought to be required to register their details online to improve traceability. To minimise the pressure on local authorities, Scotland should consider adopting a similar system to the English Star Rating System and increase the penalties imposed on those who do not comply with the legislation. Ultimately, the

---

[78] ibid (n 11) 148.

[79] In France, this is referred to as 'SIREN', or *Systéme d'Identification du Repertoire des Entreprises Nombre*.

[80] Buyers are able to obtain the seller's name and address. To ensure the law is not unduly burdensome for non-professional breeders, individuals who sell less than one litter per year do not have to conform with this. Instead, they must register the sale in the *Livre des Origines Français* (French Book of Origins). *L'Actu Des Animaux: Nouvelle Réglementation Pour La Vente De Chiens et Chats* (Animal News: New Regulations for the Sale of Dogs and Cats), available at <https://www.santevet.com/articles/nouvelle-reglementation-pour-la-vente-de-chiens-et-chats> accessed 30 May 2020.

[81] Communiqué de Press du Conseil des Ministres du 7 Octobre 2015 (Report to the President of the Republic on the Trade and Protection of Pets on 7 October 2015) No 2015-1243, available at <https://www.legifrance.gouv.fr/affichLoi Publiee.do;jsessionid=3B2CE1852D8B 251B39A9574E3B711B9A.tpdila18v_3?type= general&idDocument=JORFDOLE000031283093> accessed 30 May 2020. The legislation's purpose is to '*assurer un meilleur encadrement du commerce de chiens et de chats*', to 'ensure better management of the dog and cat trade'.

Scottish Government must ensure the drive for reform continues and that reform is introduced. It is imperative that such reform is practical to enforce, promotes animal welfare and sufficiently penalises those who do not adhere to the law.

The Sick Child of the Berne Parent: The Limited Protection of Moral Rights in the United Kingdom and the European Path for Harmonisation

MIKOLAJ KUDLINSKI*

Abstract

Moral rights originate in continental Europe and have for long been treated by the common law jurisdictions as the alien concepts, which were difficult to incorporate into the entrepreneur-oriented copyright laws of the United Kingdom and the United States. Nevertheless, in order to fulfil the United Kingdom's international obligations under the Berne Convention of 1886, moral rights were introduced into the United Kingdom's legal system under Chapter IV of the Copyright, Designs and Patents Act 1988. However, it is argued that the manner in which the United Kingdom integrated moral rights into its copyright law was inadequate, and the British system does not properly reflect the nature of moral rights. Consequently, the British moral rights system provides a smaller degree of protection than its continental European counterparts. Accordingly, this article analyses the manner in which moral rights are protected in the United Kingdom and will discuss a potential European route for the harmonisation of moral rights, following the recent judgment of the Court of Justice of the European Union in Deckmyn v Vandersteen.

Keywords: Artistic works; copyright; droit d'auteur; harmonisation; moral rights; right of integrity; right of paternity

Introduction

Copyright law distinguishes between the economic and moral rights of authors. Economic rights protect authors' financial interests, whereas moral rights protect the non-pecuniary nature of their works. It is generally accepted that common law jurisdictions have a lower threshold of protection than their continental European

counterparts. This article will analyse the development of moral rights under international law and will discuss whether the United Kingdom satisfies its international obligations in applying the moral rights of paternity and integrity. It will be concluded that moral rights protection in the UK suffers from various shortcomings resulting from the peculiar nature of the British copyright system. Nonetheless, moral rights protection cannot be neglected, as in the age of digital technology, authors are particularly exposed to the exploitation of their creations. Consequently, this article will discuss whether harmonisation of moral rights, commenced on the European level by the Court of Justice of the European Union (CJEU) with its recent judgment in the case of *Deckmyn v Vandersteen*, could potentially improve the protection of authors' non-pecuniary interests in the United Kingdom and in the European Union.

Theory of Moral Rights

Moral rights originated in continental Europe. In particular, the German *Sturm-und-Drang* movement and the rise of individualism during the nineteenth century undermined the view that artistic works consisted only of the works' mimesis.[1] Instead, during the Romantic period, the Western tradition recognised the importance of intellectual creation in the artistic domain.[2] Likewise, the personality-oriented theories of Kant, Hegel, and Fichte laid the foundations for the emergence of authors' moral rights.[3] Namely, these theories stated that authors were inextricably connected with their works, as the creations mirrored the authors' personalities.[4]

---

* LLB (Hons) (First Class), University of Aberdeen; LLM (Distinction), University of Edinburgh; MSc Candidate, Christ Church College, University of Oxford. The author would like to thank Adam Strukwoski and the editors of *Aberdeen Student Law Review* for their valuable comments on the draft of this article.

[1] Stig Strömholm, 'Droit Moral: The International and Comparative Scene from a Scandinavian Viewpoint' (2002) 42 Scand Studies L 217, 222.

[2] ibid 222-23.

[3] Martin Kretschmer and others, 'The History and Philosophy of Copyright' in Simon Frith and others (eds), *Music and Copyright* (Edinburgh University Press 2004); Marie-Christine Janssens, 'Invitation for a "Europeanification" of Moral Rights' in Paul Torremans (ed), *Research Handbook on Copyright Law* (2nd edn, Edward Elgar 2017) 200.

[4] Strömholm (n 1) 227-29.

This concept underpins the monist[5] copyright law systems of, *inter alia*, France,[6] Germany[7] and the Scandinavian countries.[8]

Contrariwise, the Anglo-American tradition emphasises the economic role of copyright. This view originates in Locke's theory of natural law, which states that ownership is a natural consequence of the individual's labour implemented into the process of creation.[9] This theory presupposes that the author's pecuniary interests are protected from economic exploitation.[10] This principle is well illustrated by Lord Wilberforce, who stated in *LB (Plastics) Ltd v Swish Products Ltd* that 'one man must not be permitted to appropriate the result of another's labour'.[11] Accordingly, in common law jurisdictions, copyright law aims to mitigate the negative impact of the market on the author's financial interest.[12]

Despite the dominance of profit-oriented justifications for copyright in the UK, in *Millar v Taylor*, the court stated that the author should not only have the right to reap the pecuniary profits resulting from the work, but also to 'judge when to publish' and 'choose not only the time, but the manner of publication'.[13] Thus, it seems that the English courts have recognised moral rights

[5] In monist states, domestic and international law are united, and international law does not have to be translated into national law in order to be legally binding. Dualist states, on the other hand, recognise the conceptual difference between national and international law, and international law must be translated into national law in order to obtain legally binding force. Jordan J Paust, 'Basic Forms of International Law and Monist, Dualist, and Realist Perspectives' in Marko Novakovic (ed), *Basic Concepts of Public International Law: Monism and Dualism* (University of Belgrade 2013) 245-48; Joseph G Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 British Year Book Int'l L 66.

[6] Jane Ginsburg, 'Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1989) 64 Tulane L Rev 991, 1005-23.

[7] Adolf Dietz, 'The Moral Right of the Author: Moral Rights and the Civil Law Countries' (1994) 19 Columbia J L Arts 199.

[8] Strömholm (n 1) 220.

[9] John Locke, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (John Wiley & Sons 2014) V s 27.

[10] Simon Stokes, *Art and Copyright* (Bloomsbury 2012) 17-18.

[11] [1979] FSR 145 at [149].

[12] Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 35-47.

[13] [1769] 4 Burrow 2303 at [2397], per Lord Mansfield.

protection since the Statute of Anne.[14] However, protection was thereafter afforded under separate tort law remedies of defamation, passing off, and breach of confidence, and was not part of copyright law itself.[15]

Moral Rights under International Law

It follows from the foregoing that the conceptual differences between the dualist Anglo-American approach and the monist continental European approach resulted in a dichotomy between the respective standards of moral rights protection.[16] Therefore, it was clear that the divergent views on moral rights might have led to conflicts under international law. In fact, copyright protection eventually became a problem of location.[17] For instance, European authors, duly protected in their own countries, realized that their creations were being exploited for the profit of American publishers as the result of lower moral rights standards in the United States.[18] To solve this issue, several means were introduced in order to harmonise the treatment of moral rights on the international level, among which was the Berne Convention for the Protection of Literary and Artistic Works 1886.[19]

The Convention provides in Article 1 that its main purpose is to 'constitute a union for the protection of the rights of authors in their literary and artistic works'. Moreover, Article 6*bis* sets out the international baseline for moral rights of paternity and integrity. However, the threshold of protection under the Berne Convention is considered to be fairly low, and due to the divergent copyright standards across the signatory states, the makers of the Convention had to balance the interests of the common law and the *droit d'auteur*

[14] Stokes (n 10) 18-19.
[15] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1994) 19 Columbia J L Arts 229, 231-37.
[16] Eleonora Rosati, 'Just a Laughing Matter? Why the Decision in *Deckmyn* is Broader than Parody' (2015) 52 Common Market L Rev 511, 526.
[17] Mira Sundara Rajan, 'Moral Rights and Copyright Harmonization: Prospects for an "International Moral Right"' (2002) 17 BILETA Annual Conference Proceedings 1.
[18] ibid, 1-2.
[19] Another such convention was the Paris Convention for the Protection of Industrial Property 1883, which preceded the Berne Convention.

states in order to reach a consensus on this problematic issue.[20] Despite the aforesaid effort, France considered the moral rights protection standard under the Berne Convention to be 'minimalistic',[21] whereas the United States resisted ratification of the Convention until 1988, because the moral rights provisions were deemed to be contrary to its public policy interests and the property-oriented approach to copyright contained in Article 1(8) of the United States Constitution. [22] In sum, the Berne Convention establishes only a minimal protection guideline, resulting from the conflicting national interests of the signatory states.

Moreover, Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) provides that the signatories of the Agreement shall comply with Articles 1 through 21 of the Berne Convention, including Article 6*bis*. However, the importance of Article 6*bis* is greatly diminished within the ambit of Article 9(1) of the TRIPs Agreement, as the latter excludes moral rights from the World Trade Organisation (WTO) Dispute Settlement Understanding (DSU).[23] The DSU is a powerful body, which ensures compliance with the provisions of the TRIPs Agreement. Conversely, the Berne Convention is bereft of any effective enforcement methods.[24] Thus, the exclusion of moral rights from the DSU gives an impression that moral rights are not particularly valued under international law. The reason for this exclusion is often attributed to the pressure exercised by the United States on the rest of the WTO members to allow the United States to avoid dispute settlement proceedings under TRIPs.[25] As Professor Dinwoodie neatly sums up, the standardisation of copyright law has been 'subsumed within the broader apparatus of trade relations'. [26] On this account, the subsumption of copyright to trade bears numerous consequences for

[20] Sam Ricketson, *Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Queen Mary College/Kluwer 1987) paras 8.95-8.111.
[21] Dietz (n 7) 200-02.
[22] Elizabeth Schéré, 'Where Is the Morality: Moral Rights in International Intellectual Property and Trade Law' (2017) 41 Fordham Int'l L J 773, 777-78.
[23] Graeme Dinwoodie, 'The Architecture of the International Intellectual Property System' (2001) 77 Chicago-Kent L Rev 995, 1004-06.
[24] ibid 995.
[25] Schéré (n 22) 779-80.
[26] Dinwoodie (n 23) 1003.

moral rights. On one hand, the lack of an international moral rights standard allows the signatories of TRIPs to flexibly set their own standards of protection.[27] On the other, the exclusion of moral rights from the WTO dispute settlement mechanism renders these rights less important, compared to other aspects of copyright, such as the idea expression dichotomy, which is subject to constant scrutiny under the TRIPs Agreement.[28] As Sundara Rajan argues, this may lead to 'the general loss of status, prestige and practical value' of moral rights, especially in the age of modern information technology.[29]

Contrariwise to the sacrifice of moral rights on the altar of trade relations under TRIPs, the World Intellectual Property Organisation (WIPO) seems to be more favourable of moral rights protection. Namely, WIPO enacted the Copyright Treaty of 1996 (WCT) and the Performances and Phonograms Treaty of 1996 (WPPT). These treaties seem to counter the negative effect of the TRIPs Agreement on moral rights.[30] For instance, Article 5 of the WPPT 1996, modelled on Article 6*bis* of the Berne Convention, extends moral rights protection to performers by safeguarding their moral rights for the time being of their economic rights.[31] In addition, Article 8 of the WCT, despite its primary economic purpose, strongly resembles the moral right of divulgation, as it allows the creator to authorise any communication of the work to the public.[32] Thus, the WIPO treaties strengthen moral rights protection, which has been neglected under TRIPs. However, since the creation of the TRIPs Agreement, the WTO has become the primary forum for international copyright law.[33] As a result, the importance of WIPO has been diminished. Indeed, following the introduction of the TRIPs Agreement, the WIPO is primarily tasked with research and aiding the copyright law

[27]Mira Sundara Rajan, 'Moral Rights in the Digital Age: New Possibilities for the Democratization of Culture' (2002) 16 Int'l Rev L Comp Tech 187, 189-90.
[28] ibid 190.
[29] ibid.
[30] Sundara Rajan (n 17) 7.
[31] Jörg Reinbothe and others, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (OUP 2015) paras 8.5.11-8.5.21.
[32] Sundara Rajan (n 17) 7.
[33] ibid 6.

reform across the world.[34] Therefore, the subordination of WIPO to the TRIPs Agreement, and the WTO in general, renders WIPO's treaties subservient to the wider international trade regime.[35]

In sum, it follows that the higher threshold of moral rights protection could not be achieved on the international level because of the divergent national moral rights standards across various legal systems and the subordination of moral rights to trade. This conflict of interests is well evidenced by the manner whereby Article 6*bis* of the Berne Convention was implemented in the United Kingdom.

Moral Rights Protection in the United Kingdom

Moral rights provisions have been incorporated into the law of the United Kingdom under Part I, Chapter IV of the Copyright, Design and Patents Act 1988 (CDPA). The CDPA created four moral rights: the right to be identified,[36] the right to object to derogatory treatment,[37] the right against false attribution,[38] and the right of privacy.[39] The first two rights aimed to implement Article 6*bis* of the Berne Convention into UK law.[40] Furthermore, the right against false attribution emerged from the revision of the rights already existing under section 43 of the Copyright Act 1956.[41] Lastly, the right of privacy was a new right, introduced to address the problem concerning the initial ownership of copyright resulting from the implementation of the CDPA.[42] Therefore, it follows that the 1988 Act did not incorporate Article 6*bis* verbatim, but instead the legislator decided to enact four different provisions in order to adjust the standard of protection to the peculiar UK copyright system.[43] At the same time, the CDPA imposed a number of limitations on the

[34] Sundara Rajan (n 17).
[35] ibid 6-7.
[36] Copyright, Design and Patents Act (1988) s 77.
[37] ibid s 80.
[38] ibid s 84.
[39] ibid s 85.
[40] William Cornish, 'Moral Rights under the 1988 Act' (1989) 11 European Intellectual Prop Rev 449, 449.
[41] ibid.
[42] ibid 449-51.
[43] Lionel Bently and others, *Intellectual Property Law* (4th edn, OUP 2014) 273.

application of moral rights under UK law.[44] For that reason, the manner whereby Article 6*bis* was incorporated in the UK was regarded as 'cynical, or at least half-hearted'.[45] To understand this issue further, it is worth analysing the application of the rights of paternity and integrity under the CDPA through the prism of the UK's international obligations.

Right of Paternity

Section 77(1) of the CDPA provides that the author of a literary, musical or dramatic work and the director of a film have a right to be identified as authors of the relevant works, once the works are communicated to the public. The moral rights of an author will be breached, if any of the conditions for infringement specified in Section 77(2)-(8) of the Act take place[46] without the consent of the author.[47] However, there are numerous exceptions to the application of the right of paternity. First of all, the right applies only to the relevant works; it does not apply to computer programs, computer-generated works, and typefaces.[48] This exception is considered to be in non-conformity with Article 10 of the TRIPs Agreement, which specifies that computer programs shall be protected as literary works.[49] In fact, the denial of protection to these types of work is often attributed to practical reasons rather than policy-based considerations.[50] Secondly, Section 78(1) requires that the right of paternity must be asserted; the assertion must be accomplished in a formal manner. [51] For that reason, this requirement is deemed difficult to reconcile with Article 5(2) of the Berne Convention, which stipulates that the exercise of moral rights shall be free from formalities.[52] In fact, the assertion requirement provides an outcome

[44] ibid (n 43).
[45] Jane Ginsburg, 'Moral Rights in a Common Law System' (1990) 1 Entertainment L Rev 123, 129.
[46] Gillian Davies and others (eds), *Copinger and Skone James on Copyright* (17th edn, Sweet & Maxwell 2019) para 11-12.
[47] Copyright, Design and Patents Act (1988) s 87(1).
[48] ibid s 79(2) (a)-(c).
[49] Davies and others (n 46) para 11-30.
[50] ibid.
[51] Bently and others (n 43) 276-77.
[52] David Vaver, 'Moral Rights Yesterday, Today and Tomorrow' (1999) 7 Int'l J L Info Tech 270, 273.

different from what the Berne Convention has intended, as it places a bigger burden on the author, than it does on the user.[53] Thirdly, Section 79(3) limits the application of the right of attribution in the context of works made in the course of employment. Namely, when the employer, who is also the owner of the copyright, authorises reproduction of certain works, then the right of paternity ceases. Arguably, this exception is justified by the entrepreneur-oriented approach of the UK copyright law; the employer is allowed to exploit the work of which he or she has full ownership.[54]

Fourthly, under Section 79(4) the right of attribution is limited by the fair dealing exception for the purpose of reporting current events by means of broadcasting, sound recording, or cable programme. As Cornish notes, in this respect the press have a wider exception from the obligation to identify than the broadcasters, as newspaper publishers do not have to bother themselves with the question whether the reported affairs are current or not.[55]

Right of Integrity

Similar to the right of paternity, Section 80 of the CDPA has been introduced in order to give effect to Article 6*bis* of the Berne Convention, and states that the author has a right to object to the derogatory treatment of the work, if the treatment amounts to a distortion or mutilation or is otherwise prejudicial to his honour or reputation. [56] Accordingly, 'treatment' is defined under Section 80(2)(a) as 'any addition to, deletion from, alteration to or adaptation of the work', other than a translation of literary or dramatic work or a mere change of key or register in musical work.[57] This provision seems to be narrower than the scope of Article 6bis of the Berne Convention, which provides that 'treatment' consists of 'any distortion, mutilation or other modification of, or other derogatory

[53] ibid (n 52).
[54] Bently and others (n 43) 279.
[55] Cornish (n 40) 450.
[56] Copyright, Design and Patents Act (1988) s 80(2) (b); Davies and others (n 46) para 11-43.
[57] Cornish (n 40) 452.

action in relation to the work'.[58] Moreover, the Berne Convention does not justify the exclusion of integrity rights from translations or changes of key or register, which often can be so severe that they could affect the integrity of the said works.[59] It is therefore argued that the narrow scope of the application of the integrity right under the CDPA 1988 does not protect the works against non-transformative uses.[60]

In addition, courts in the United Kingdom have struggled in defining the meaning of 'derogatory treatment'. For instance, in *Tidy v Trustees of the Natural History Museum*, the court accepted that the reduction in size of a cartoon satisfied the meaning of 'treatment', but such a change in size did not amount to a distortion. [61] Likewise, in *Pasterfield v Denham*,[62] the treatment of the work at issue involved removal of some of its elements and changes in colour of the remaining parts. For those reasons, it satisfied the statutory definition of 'treatment'. Nevertheless, the court held that 'what the plaintiff must establish is that the treatment accorded to his work is either a distortion or a mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author is himself aggrieved by what has occurred'.[63]

On the other hand, in *Harrison v Harrison*, the court put forward a more liberal interpretation of 'treatment'. [64] For the judge, 'treatment' could be seen as a 'general concept' and a 'spectrum of possible acts'. [65] Otherwise, any precise definition of 'treatment' would have failed. Instead, the limitations of 'treatment' should be measured by the potential prejudice to the author's honour or reputation. [66] Such an interpretation more accurately conforms to

[58] Laddie and others, *The Modern Law of Copyright and Designs* (3rd edn, Sweet & Maxwell 2000) para 13.18.
[59] Davies and others (n 46) para 11-47.
[60] Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) 406.
[61] [1995] 39 IPR 501 at [504], per Rattee J.
[62] [1999] FSR 168.
[63] ibid at [182].
[64] [2010] ECDR 12.
[65] ibid at [60].
[66] ibid.

Article 6*bis* (1) of the Berne Convention, which refers to the broad term of 'other derogatory actions', and even seems to avoid the need for any 'treatment' whatsoever.[67]

The foregoing prompts a discussion on the meaning of 'derogatory treatment', which amounts to 'distortion or a mutilation', and whether the treatment must also be 'otherwise prejudicial to the author's honour or reputation'.[68] For instance, in *Tidy*, counsel for the plaintiff submitted two alternative claims: (i) that the defendant's actions constituted a distortion of the plaintiff's work, and (ii) that the defendant's actions were 'otherwise prejudicial' to the honour or reputation of the plaintiff.[69] This peculiar interpretation of Section 80(2)(b) of the CDPA was also considered in *Delves-Broughton v House of Harlot Ltd*.[70] In this case, the court found that the distortion took place on the ground that the author had implemented certain creative effort into the production of the work, without also recognising that the distortion was prejudicial to his honour or reputation.[71] For that reason, it is argued that the more liberal interpretation of Section 80(2)(b) applied in *Delves-Broughton* results from judicial acknowledgement of the author's personality, which plays a key role in the process of creation and implies the need to respect the integrity of the work.[72]

However, the approach taken in *Delves-Broughton* sits uneasily in relation to the earlier authorities, such as *Confetti Records v Warner Music UK Ltd*. In *Confetti Records*, the court held that when treatment amounts to a distortion or a mutilation, but it is not prejudicial to the author's honour or reputation, it would not give ground to an action for a breach of the integrity right.[73] The court reached the same conclusion in the earlier judgment in *Pasterfield*.[74] For that reason, *Delves-Broughton* is unlikely to be followed in the future; the words

[67]Marta Iljadica, 'Graffiti and the Moral Right of Integrity' (2015) 3 Intellectual Prop Quarterly 266, 271.
[68] Copyright, Design and Patents Act (1988) s 80(2) (b).
[69] *Tidy* (n 62) at [504].
[70] [2012] EWPCC 29.
[71] ibid at [24], per Campbell QC.
[72] Iljadica (n 67) 273.
[73] *Confetti Records v Warner Music UK Ltd* [2003] EMLR 790 at [150].
[74] *Pasterfield* (n 62) at [182].

'or otherwise prejudicial to the author's honour or reputation' shall be read within the ambit of distortion and mutilation. In this regard, the two leading textbooks on copyright law are of the same opinion.[75] Moreover, Davies and others argue that because the parties in *Delves-Broughton* were not properly represented, the relevant authorities were not cited to the court and an unsatisfactory outcome was reached.[76] Furthermore, in *Pasterfield*, the plaintiff referred to the Canadian case of *Snow v The Eaton Centre Ltd*, where the court held that the words 'prejudicial to his honour and reputation' had a certain subjective element 'as long as the element was reasonably arrived at'.[77] Nevertheless, the court in *Pasterfield* did not accept this argument; in the UK, potential prejudice is measured against the objective standard of third parties.

It follows from the above that UK law imposes a number of restrictions on the application of the rights of paternity and integrity, which leads some scholars to comment that these rights are recognisable 'only as the sickly children of the Berne parent'.[78] In fact, moral rights protection in the UK attracts various criticisms. Firstly, it is argued that CDPA does not go much, if at all, beyond the minimal guidance established by Article 6*bis* of the Berne Convention. For instance, France, unlike the United Kingdom, recognises the right of divulgation, which is considered as a higher threshold of protection than the minimal Berne standard.[79] Likewise, other common law jurisdictions, such as India, are more expansive in their method of interpreting the provisions of the Berne Convention, but this approach seems unlikely to be followed in the UK.[80] Moreover, UK courts struggle to reconcile strong protection for authors' moral rights with the fundamental elements of the UK legal system, which leads them to interpret moral rights provisions in a fairly conservative manner.[81] For example, the courts consistently

[75] Laddie and others (n 58) para 13-18; Davies and others (n 46) paras 11-48.
[76] Davies and others (n 49) para 11-48.
[77] 70 CPR (2d) 105 at [106], per O'Brien J.
[78] Gillian Davies and others, *Moral Rights* (Sweet & Maxwell 2010) 80.
[79] Jonathan Griffiths, 'Moral Rights from a Copyright Perspective' in Fabienne Brison and others (eds), *Moral Rights in the Twenty-First Century* (Larcier 2015) 77-78.
[80] *Sehgal v the Union of India* [2005] FSR 39; Davies and others (n 46) para 11-53.
[81] Griffiths (n 79) 82.

require authors to objectively prove damage to their reputation in order to claim a breach of the integrity right.[82] Arguably, this requirement encapsulates the peculiar nature of UK copyright law, which does not respect the highly personal nature of moral rights.[83]

Furthermore, UK copyright law can be distinguished from its continental European counterparts on the ground that Section 87(2)-(4) of the CDPA allows for the moral rights to be waived, which contrasts with the inalienable nature of moral rights in the *droit d'auteur* states.[84] Under the CDPA, waiver can either be formal, or informal, the latter being established by contract or estoppel.[85] Waivers have been introduced as the result of the pressure exercised by entrepreneurs, who wanted to increase their bargaining power in contract drafting.[86] In fact, the possibility to waive moral rights results in an imbalance of power; when an unknown author wishes to be expressly named, the publisher can object to that through insisting on the waiver to be contained in the contract.[87] However, the law should never allow the publisher to abuse his power in such a manner, and it should not allow for the author to be forced to relinquish his right. Thus, waivers are seen as great shortcomings of the UK moral rights protection, which does not live up to its Berne baseline.[88] It can therefore be concluded that the lower standards of moral rights protection in the UK result from the peculiar nature of UK copyright law, which favours entrepreneurial freedom over authors' rights.

Harmonisation of Moral Rights

Internationalisation of moral rights has been suggested to improve the low moral rights standards in certain states, including the UK, as in fact all states recognise some sort of moral rights protection.[89]

---

[82] *Confetti Records* (n 73) at [149]-[150].
[83] Rupert Sprawson, 'Moral Rights in the 21st Century: A Case for Bankruptcy?' (2006) 17 Entertainment L Rev 58, 62.
[84] Cornish (n 40) 452.
[85] Copyright, Design and Patents Act (1988) s 87(2)-(4).
[86] Cornish (n 40) 452.
[87] ibid.
[88] ibid.
[89] Sundara Rajan (n 17) 29.

However, standardisation would be problematic to accomplish. First of all, academics attribute the difficulty in the process of harmonisation to the cultural differences between states, which result in the reluctance of some legal systems to incorporate alien concepts.[90] Moreover, copyright laws in the common law states do not follow 'an ideal trajectory' and sit uneasily in relation to the systemic differences between the common and civil law jurisdictions.[91] Secondly, the conflicting interests of authors and entrepreneurs, present in the common law tradition, pose an obstacle to potential harmonisation.[92] This results in the tendency of international law to value trade relations over the personal interests of authors, which is evidenced by the diminished importance of moral rights under the TRIPs Agreement.

Interestingly, the European Union seems to be the pioneer of copyright harmonisation in Europe. For instance, the Directive 2001/29/EC, 'On the harmonisation of certain aspects copyright and related rights in the information society'[93] is seen as one of the most ambitious attempts to harmonise copyright in the European Union.[94] However, moral rights protection seems to lie outwith the scope of the harmonisation process. For example, in the Infosoc Directive, moral rights provisions are only mentioned in Recital 19, which, similarly to Article 9(1) of the TRIPs Agreement, leaves moral rights protection to domestic legislators.[95] The Database Directive is of similar effect.[96] Likewise, the Computer Programs Directive 2009/24/EC only refers to the protection of authors' economic rights.[97]

---

[90] Irini Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' (1997) 4 Intellectual Prop Quarterly 478, 485–88.
[91] Griffiths (n 79) 80-83.
[92] Dworkin (n 15) 257-59.
[93] Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001, 'On the harmonisation of certain aspects of copyright and related rights in the information society' (2001) OJ L 167.
[94] Mira Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (OUP 2011) 276.
[95] ibid.
[96] Database Directive 96/9/EC, pmbl para 28.
[97] Sundara Rajan (n 94) 275.

On the other hand, the Directive 2001/84/EC, 'On artists' resale rights' aims to ensure adequate resale rights provisions in all member states. This Directive is primarily concerned, as in Recital 3, with the award of resale royalties across the member states. Nevertheless, Article 1 of the Directive provides that resale rights shall be non-transferable and incapable of waiver, which resembles the inalienable nature of moral rights. This is, however, only a minor recognition of moral rights within the European Union, compared to their exclusion in all other Directives.[98] Accordingly, the failure of moral rights harmonisation under European Union law is attributed to the compromise between the conflicting interests of the *droit d'auteur* states and the United Kingdom.[99] In fact, this compromise is considered by some scholars to be 'disappointing', given the legislative power of the European Union in this regard.[100]

Nevertheless, in *Deckmyn v Vandersteen*,[101] the Court of Justice of the European Union articulated the need for a uniform application of European Union copyright law across member states. This case concerned the question of how the definition of parody should be understood under the Infosoc Directive. Even though *Deckmyn* did not concern moral rights *per se*, it is argued that the CJEU might have henceforth undertaken a *de facto* harmonisation of moral rights and their methods of enforcement.[102] Firstly, the CJEU stated that authors have 'legitimate interests' to ensure that their works will not be linked with any discriminatory or racist message.[103] This arguably limits the scope of the integrity right to instances, where the legitimate interest arises as the result of the parody's pejorative content.[104] As a consequence, the states that tend to interpret the right of integrity fairly broadly will be required by European Union law to narrow down their interpretation of this right to instances, where the author's work is associated with a derogatory or racist

[98] Sundara Rajan (n 94).
[99] Irma Sirvinskaite, 'Toward Copyright Europeanification: European Union Moral Rights' (2010) 3 J Int'l Media and Entertainment L 263, 271-72.
[100] Sundara Rajan (n 94) 277.
[101] Case 201/13 *Deckmyn v Vandersteen* [2014] ECDR 21.
[102] Rosati (n 16) 525; Janssens (n 3) 219.
[103] *Deckmyn* (n 101) at [31].
[104] Rosati (n 16) 527.

message.[105] Moreover, the notion of 'legitimate interest' sits uneasily in relation to the *droit d'auteur* jurisdictions, as often the 'legitimate interest' would vest in the copyright holder, who does not necessarily have to be the author.[106] As a result, the 'legitimate interest' could, in theory, subsist in persons who have not created the work. Likewise, it is uncertain how the concept of 'legitimate interest' is precisely linked with the concept of moral rights in general.[107]

It follows from this that the judgment in *Deckmyn* proves to be problematic in terms of its application. Nevertheless, it is seen as the CJEU's attempt to reduce national divergences in copyright law, which is needed to foster the European Union internal market.[108] Thus, despite the problems associated with the application of the judgment on national level, the decision in *Deckmyn* has been a small step toward the harmonisation of moral rights in Europe. The bigger step, however, would have to be taken by the European Commission. In fact, in 2013 the Commission carried out a public consultation on further harmonisation of copyright law, where the vast majority of institutional users and academics declared their support for copyright harmonisation, including the standardisation of moral rights.[109] That being said, it is uncertain how Brexit will affect the European developments on copyright law. The United Kingdom's departure from the European Union could render moral rights harmonisation more feasible, as the different policy interests will cease to obstruct the harmonisation process.[110] It is also speculated that the UK government and the courts will continue to develop UK copyright law under the umbrella of European law.[111] Regardless of the impact of Brexit on the harmonisation process, any future attempt to harmonise moral rights law on the level of the

[105] Rosati (n 16).
[106] ibid 527-28.
[107] ibid.
[108] ibid 522.
[109] Public Consultation on the Review of EU Copyright Rules (December 2013) 89-91.
[110] Richard Arnold and others, 'The Legal Consequences of Brexit through the Lens of IP Law' (2017) 101 Judicature 65, 71-72.
[111] ibid; Graeme B Dinwoodie and others, 'Brexit and IP: The Great Unravelling' (2017) 39 Cardozo L Rev 967, 989.

European Union will likely build on the judgment in *Deckmyn*, where uniformity was favoured over divergent national approaches. *Deckmyn* may therefore pave the way for a common European moral rights protection standard in the future, which will mitigate the adverse impact of the divergent national moral rights protection mechanisms on authors' rights.

Objections to Moral Rights

Despite the general endorsement of moral rights among the academics, this concept is subject to criticism in common law jurisdictions. For instance, it is often claimed that moral rights protection is built on the assumption that the interests of the public equal those of an artist.[112] This, however, is not necessarily true, as society may have an interest in destroying the work that the artist wants to preserve and *vice versa*.[113] Likewise, the concept of art has evolved. For example, contemporary art, which often consists of modifications or even destruction of other works, sits uneasily in relation to the moral right of integrity. In fact, destruction is often art in itself; moral rights provisions bar contemporary artists from creating through alterations or destruction.[114] On this account, it is argued that the law is 'on a collision course with the very art it seeks to defend'.[115] Therefore, it may seem that, in certain circumstances, moral rights appear to be unjustified, as they hamper the development of modern art.

Furthermore, Landes argues from the economic perspective that the imposition of moral rights protection increases transaction costs for authors.[116] Moreover, the existence of extensive moral rights protection mechanisms arguably results in a lower demand for art in the market.[117] That being said, in his study Landes notices a paradox: despite the lower potential earnings, authors tend to choose states

---

[112] Henry Hansmann and others, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' (1997) 26 JLS 95, 102-07.
[113] Amy Adler, 'Against Moral Rights' (2009) 97 California L Rev 263, 273-76.
[114] ibid 279-90.
[115] ibid 265.
[116] William Landes, 'What Has the Visual Artist's Rights Act of 1990 Accomplished?' (2001) 25 J Cultural Econ 283, 289-90.
[117] ibid.

with higher moral rights protection standards, as these states are able to provide them with a friendlier working environment and other non-pecuniary benefits.[118] In addition, Hansmann and Santilli submit that the lack of a sufficient moral rights protection results in a rise of negative externalities, which cannot be mitigated by the common law remedies.[119] Consequently, without sufficient moral rights protection mechanism, authors interests are not adequately safeguarded.

Therefore, it seems that authors often value moral rights over their pecuniary interests, especially in the era of modern information technology, when their works are constantly exposed to exploitation. Digital technology allows the works to be countlessly disseminated and changed on various levels.[120] Moreover, the methods whereby technology attempted to minimise its negative effect on works of authorship, such as watermarks and encryption, have proved ineffective.[121] In fact, authors cannot exercise any control over the digital modifications of their works and are bereft of the necessary protection.[122] For that reason, moral rights deserve adequate systemic recognition, which ideally should be achieved through harmonisation of copyright on the international and European levels, as uniformity shall be valued over the divergent national interests, for the protection of authors' rights.

Conclusion

This article has argued that the moral rights' protection under the CDPA does not satisfy the UK's international obligations under the Berne Convention. The reason for that is often attributed to the conflicting interests between authors and entrepreneurs, which result from the profit-oriented nature of UK copyright law. Harmonisation has been offered as one of the solutions to the problem of inadequate moral rights standards in the UK. However, under the TRIPs Agreement, moral rights have been sacrificed on the

[118] ibid (n 116) 294-300.
[119] Hansmann and others (n 112) 109-10, 126-27.
[120] Anil Samtani and others, 'The Impact of Digital Technology on Moral Rights' (2017) 23 Comp Telecom L Rev 109, 109-10.
[121] ibid 110.
[122] ibid.

altar of trade. For that reason, it is argued that the EU and the CJEU should take the leading role in the harmonisation process, which is likely to be seen in the future, as studies have shown that authors often value their moral interests over pecuniary profits. In sum, despite the considerable criticism of the moral rights concept, moral rights should be adequately protected, especially in the age of digital technology, when artists are constantly exposed to the exploitation of their works.

How Could the Current Non-Proliferation Regime Be Improved?

ALINA HOLZHAUSEN*

Abstract

By March 2020, the Nuclear Non-Proliferation Treaty (NPT), which is considered the key pillar of the current nuclear non-proliferation regime, had been in force for fifty years. However, even though the NPT is the most universal existing treaty, it faces several challenges, such as North Korea's withdrawal from the treaty in 2003, nuclear activities in Iran, Iraq and North Korea, and the debate about the treaty text itself. In order to strengthen the nuclear non-proliferation regime, this Note examines the current regime and offers proposals for its improvements. It focuses on the most important difficulties in the interpretation of the NPT text, the lack of authority and capacity of the International Atomic Energy Agency (IAEA) and the suitability of the United Nations Security Council (UNSC) in the regime. While offering solutions for each of these issues, it can be seen that different approaches, such as inter alia *the amendment of the treaty text, or the promotion of the universality of the Additional Protocol, can lead to an improvement of the current nuclear non-proliferation regime. Those improvements must be made to prevent a collapse of the non-proliferation regime.*

Keywords: Additional Protocol; International Atomic Energy Agency; Nuclear Non-Proliferation Treaty; Nuclear Weapon States; Non-Nuclear Weapon States; United Nations Security Council

Introduction

The Nuclear Non-Proliferation Treaty (NPT) can be seen as the key pillar of the current nuclear non-proliferation regime, which is essential for the world's security and order.[1] It contains three main

* German First Law Examination, Universität Bayreuth; Maître en droit, Université de Bordeaux; LLM, PhD Candidate, University of Aberdeen.

[1] Treaty on the Non-Proliferation of Nuclear Weapons (opened for signature 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT); Oliver Thränert,

foci: nuclear disarmament, nuclear non-proliferation and cooperation in the peaceful use of nuclear energy.[2] By distinguishing between Nuclear Weapon States (NWS) and Non-Nuclear Weapon States (NNWS), the NPT codifies a quid pro quo relationship, and thereby a grand bargain, between the treaty's 188 state parties.[3] Nevertheless, the NPT, as the most universal existing treaty concerning arms control in the world, seems to be at a crucial point since its opening for signature.[4] North Korea's withdrawal from the treaty in 2003, nuclear activities in Iran, Iraq and North Korea, and the debate about the treaty text itself corroborate this belief.[5] According to Tanya Ogilvie-White, the NPT 'is facing an uncertain future, despite its reputation as one of the most important treaties after the UN-Charter'.[6] Therefore, the question arises how the current nuclear non-proliferation regime could be improved.

In order to answer the question, this Note first examines the principal interpretation difficulties of the NPT text. Second, it discusses the lack of authority and capacity of the International Atomic Energy Agency (IAEA). Third, it looks at the suitability of the United Nations Security Council (UNSC) in the NPT regime. By offering proposals for improvements of the raised issues, this Note demonstrates that the contemporary nuclear non-proliferation regime could, and should, be improved in order to prevent a collapse of the regime.

'Would We Really Miss the Nuclear Nonproliferation Treaty' (2008) 63 Int'l J 327; Harald Müller, 'The Future of the Non-proliferation Treaty' in Luciano Maiani, Said Abousahl and Wolfango Plastino (eds), *International Cooperation for Enhancing Nuclear Safety, Security, Safeguards and Non-Proliferation: 60 Years of IAEA and EURATOM* (Springer 2018).

[2] Jorge Morales Pedraza, 'How Nuclear-Weapon States Parties to the Non-proliferation Treaty Understand Nuclear Disarmament' (2017) 17 Public Org Rev 211.

[3] NPT art IX(3); Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (OUP 2011) 27; Michael Spies, 'Iran and the Limits of the Nuclear Non-Proliferation Regime' (2007) 22 Am U Int'l L Rev 401.

[4] Müller (n 1); Thränert (n 1); Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009).

[5] George Bunn, 'The Nuclear Nonproliferation Treaty: History and Current Problems' (Arms Control Association 2003), available at <https://www.armscontrol.org/act/2003_12/Bunn> accessed 01 November 2019; Tanya Ogilvie-White, 'Challenges Facing the Nuclear Non-Proliferation Treaty' in Anthony Burke and Rita Parker (eds), *Global Insecurity* (Palgrave Macmillan 2017).

[6] Ogilvie-White (n 5).

Lack of Specificity and Precision in the NPT Text

Article IV(1)

Article IV(1) of the NPT constitutes one of the most discussed issues of the treaty: the aim of non-proliferation on the one hand, and the peaceful use of nuclear energy on the other.[7] According to the treaty's text, parties to the treaty have an 'inalienable right…to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of the Treaty'.[8] Inalienable right can be understood as a 'strong language intended to convey deep legal meaning, analogous to the recognition in Article 51 of the UN Charter of an "inherent right" of self-defence'.[9]

Thus, the question arising is if Article IV(1) must be read in such a way that the inalienable right is restricted by Articles I and II of the Treaty. According to Article I, NWS undertake not to transfer nuclear weapons or other explosive devices, while according to Article II, NNWS consent not to receive them.[10] It could be argued that the wording in conformity with Articles I and II of the NPT must be understood as taking precedence over the peaceful use of nuclear energy, which meant that the inalienable right is subsidiary to the treaty's Articles I and II.[11] However, this interpretation of Article IV(1) would diminish the strong meaning of inalienable right, which is why Article IV(1) is not restricted by Articles I and II.[12]

Nevertheless, exploitation of Article IV(1) should be prohibited due to the fact that facilities and materials for the peaceful use of nuclear energy can be used to build nuclear weapons.[13] Even though 435 nuclear power reactors were in operation at the end of 2011, the further growth of nuclear power is expected in several countries all

---

[7] NPT art IV(1).
[8] ibid.
[9] Joyner (n 4).
[10] NPT arts I and II.
[11] Joyner (n 4); Lawrence Scheinmann, 'Article IV of the NPT: Background, Problems, Some Prospects' (*Weapons of Mass Destruction Commission* 2004), available at <https://wiki.bnl.gov/nuclearpediaNNSS/images/c/c9/Scheinman.pdf> accessed 4 November 2019.
[12] Joyner (n 4).
[13] Scheinmann (n 11).

over the world. [14] This shows that the tension between non-proliferation and the peaceful use of nuclear energy increases.

To reduce this tension, one approach could be the application of international environmental law. Using nuclear energy involves a high number of environmental risks.[15] It is, therefore, important to have legally-binding international norms in the field of environmental law which embank those risks and at the same time impose high requirements for nuclear power plants. Until now, legal rules are produced mainly by the IAEA and the Organisation for Economic Co-operation and Development (OECD), which are important, although not all are legally binding.[16] Thus, legally-binding norms would not only address the environmental issue, but also the peaceful use of nuclear weapons.

Article VI

According to Article VI of the NPT, NWS should promote nuclear disarmament.[17] However, instead of taking disarmament measures, NWS are pursuing plans to modernise their nuclear arsenals, which in 2015 consisted of approximately 15,700 nuclear weapons, around 10,300 of which were active.[18] This can be traced back to interpretation difficulties of the treaty, which arise in regard to a terminable obligation of disarmament. According to the treaty text, '[E]ach of the parties undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament'.[19] The interpretation difficulties concern especially 'negotiations in good faith' and 'to an early date', as the language used is very vague. The International Court of Justice (ICJ) issued an Advisory Opinion in 1996 to the effect that the obligation contained in Article VI is not a mere obligation to negotiate, but an obligation to negotiate in good faith, which is a fundamental principle

[14] Giorgio Franceschini, 'The NPT Review Process and Strengthening the Treaty: Peaceful Uses' (2012) 11 NP Papers 1.
[15] Michael Bothe, 'The Peaceful Use of Nuclear Energy and the Protection of the Environment' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law* vol 3 (TMC Asser Press 2016).
[16] ibid.
[17] NPT art VI.
[18] Morales Pedraza (n 2).
[19] NPT art VI.

of international law.[20] Furthermore, NPT parties agreed on final documents at several NPT review conferences, for example on principles and objectives for nuclear non-proliferation and disarmament, on the thirteen steps and the plan of action consisting of sixty-four points.[21] However, no NWS has yet taken any steps toward disarmament in good faith as stated by the ICJ and as agreed by the NPT parties.[22]

In order to overcome these interpretation difficulties, an amendment of the treaty text would be a possible solution. According to Article VIII(1), any party to the treaty may propose amendment.[23] Moreover, any amendment 'must be approved by a majority of the votes of all the parties to the Treaty, including the votes of all NWS and all other parties which...are members of the Board of Governors'.[24] Even though an amendment of the NPT would be possible, the amendment procedure itself is difficult and includes several steps, which is why an amendment of Article VI will probably fail during the amendment process.

Another issue which arises is that NNWS feel betrayed by NWS, because NNWS comply with their obligations, while NWS do not.[25] Because of the legal nature of the NPT, which is a contract treaty with its quid pro quo nature, and not a law-making treaty, its validity could become questionable when NWS further breach their treaty obligations.[26] According to Article 60(2) of the Vienna Convention on the Law of Treaties, a material breach of a multilateral treaty by one of the parties entitles the other parties to either suspend the operation of the treaty or to terminate it.[27] This would mean that NNWS would

[20] International Court of Justice, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] 26 ICJ Rep 99; Joyner (n 4).
[21] Review Conference NPT/Conf.1995/32 Final Document (Decision 2); Review Conference NPT/Conf.2000/28 Final Document (Part I); Review Conference NPT/Conf.2010/50 (Part I); Joyner (n 4).
[22] Joyner (n 4).
[23] NPT art VIII (1).
[24] ibid art VIII (2).
[25] Harald Müller, 'The Nuclear Non-proliferation Treaty in Jeopardy? Internal Divisions and the Impact of World Politics' (2017) 52 The International Spectator 12.
[26] Joyner (n 4).
[27] Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 60.

not be obliged by Article II any more.[28] Yet, no independent body has stated that NWS are, in fact, in breach of the obligation of Article VI.[29] Even though a legal decision about a material breach is not necessary to entitle NNWS to disobey the treaty, it would be an accurate solution to determine the validity of such a measure. Otherwise, it would only be one state's word against another, which leads to a political issue.

A more general solution would be an adoption of a ban treaty in which disarmament is more clearly regulated. The UN voted on the Treaty on the Prohibition of Nuclear Weapons (TPNW) in 2017, which will enter into force when fifty states have ratified it.[30] To this day, only thirty-three states have ratified the TPNW.[31] However, it has been already a success in that effect that nuclear weapons are as banned as biological[32] and chemical weapons[33] in international law for the first time. This can be linked back to the fact that the humanitarian aspects of the possible use of nuclear weapons came to the fore. The NPT text contains in its preamble that the devastation of a nuclear war would affect everyone and; therefore, every effort has to be made to avert the danger of such a war and measures have to be taken to safeguard the security of peoples.[34] This consideration has since been recapitulated in NPT and United Nations General Assembly (UNGA) documents.[35] But even though the UN voted on this treaty, the facts that it still needs seventeen ratifications to enter

---

[28] Joyner (n 4).
[29] ibid.
[30] Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, opened for signature 20 September 2017); John Zarocostas, 'The UN Adopts Treaty to Ban the Use of Nuclear Weapons' (2017) 390 The Lancet 349.
[31] United Nations Treaty Collection, 'Chapter XXVI Disarmament 9. Treaty on the Prohibition of Nuclear Weapons' (*United Nations Treaty Collection*), available at <https://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en> accessed 5 November 2019.
[32] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Biological Weapons and on Their Destruction (opened for signature 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163.
[33] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1975 UNTS 45.
[34] NPT pmbl.
[35] Maya Brehm, 'Whose Security is it Anyway? Towards a Treaty Prohibition of Nuclear Weapons' (31 May 2016) *Blog of the European Journal of International Law*, available at <http://www.ejiltalk.org/whose-security-is-it-anyway-towards-a-treaty-prohibition-of-nuclear-weapons/> accessed 5 November 2019.

into force and that none of the NWS took part in either the negotiation process or in the ratification of the treaty, cast shadows on its potential success.[36] It is unsure if the TPNW makes a difference for nuclear disarmament.

The IAEA's Lack of Authority and Capacity

The IAEA is, according to Article III(A)1 of the IAEA Statute, 'authorized to encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world'.[37] To assure compliance with the NPT, NPT Article III(4) states that NNWS 'shall conclude agreements to meet the requirements of this Article either individually or together with other states in accordance with the Statute of the [IAEA]'.[38] The IAEA has adopted the basic safeguard agreement[39] and the comprehensive safeguard agreement[40] which oblige states to report information on fissionable material and give the IAEA the right to verify that nuclear material is not used to build nuclear weapons.[41] In addition, a voluntary Additional Protocol was adopted to strengthen the ability of the IAEA in such a manner that it can detect undeclared nuclear material easier and that it has broader access to nuclear locations on a state's territory.[42]

However, it is questionable if the adoption of the Protocol was sufficient enough to strengthen the IAEA because so far, only 136 states and Euratom ratified Additional Protocols.[43] Even though Iran concluded a safeguard agreement with the IAEA in 1974 but not Additional Protocol, the Agency uncovered nuclear materials and

---

[36] Zarocostas (n 30).
[37] Statute of the International Atomic Energy Agency (entered into force 29 July 1957) 276 UNTS 3 art III.
[38] NPT art III; IAEA Statute.
[39] IAEA Safeguards System (INFCIRC/66) 1965.
[40] IAEA Safeguards System (INFCIRC/153) 1972.
[41] Carlton Stoiber and others, *Handbook on Nuclear Law* (International Atomic Energy Agency 2003).
[42] IAEA Safeguards System (INFCIRC/540) 1997; Michael D Rosenthal, 'United Nations Security Council Resolution 2231 & Joint Comprehensive Plan of Action' (2016) 55 Int'l Legal Materials 98.
[43] IAEA Additional Protocol (*International Atomic Energy Agency*), available at <https://www.iaea.org/topics/additional-protocol> accessed 6 November 2019.

activities which were not declared in the agreements in 2002.[44] As this shows, the efficiency of safeguard agreements is dependent upon the will of states in regard to declaring nuclear sites and activities. Thus, a universal Additional Protocol would further strengthen the IAEA because without a universal Additional Protocol, incidents like Iran will not be prohibited because of the danger of undeclared materials and sites. States which have not concluded an Additional Protocol yet, have to be persuaded to do so. The Additional Protocol could be made attractive by benefiting NNWS or disadvantaging non-concluding states, for example with not receiving nuclear material.[45] Until such mechanisms might be invented, initiatives to promote the universality of the Additional Protocol need to be continued.[46]

In addition, the IAEA lacks authority concerning non-compliance measures. The NPT text does not provide any measures for non-compliance. The IAEA Statute states that the Agency shall notify the UNSC if questions arise in connexion with activities of the Agency that are within the competence of the UNSC.[47] Article XII(C) states that the Board can, in case of determined non-compliance, directly curtail or suspend assistance which is provided by the Agency or by a member and it can call for the return of materials and equipment made available to the non-compliant member. [48] The Agency can also suspend any non-compliant member from the exercise of the privileges and rights of membership in accordance with Article XIX. [49] Non-compliance should be reported to all member states, the UNSC and the UNGA.[50] To set this process in motion, non-compliance must be determined by inspectors first. However, the term 'non-compliance' is defined neither in the NPT nor in the IAEA Statute. Only the Board of Governors' precedential determinations can indicate its meaning.[51] Because of difficulties determining non-compliance within precedent determinations in the case of Iran, the

[44] Rosenthal (n 42).
[45] Masahiko Asada, 'The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol' (2011) 16 Journal of Conflict & Security Law 3.
[46] ibid.
[47] IAEA Statute art III(B)4.
[48] ibid art XII(C).
[49] ibid.
[50] ibid.
[51] Joyner (n 4).

IAEA could not determine it during two and a half year inspections after the uncovering.[52] Nevertheless, it reported the 'non-compliance' to the UNSC and UNGA, whereupon the UNSC adopted a resolution with sanctions against Iran.[53] From a legal point of view, the requirements of Article XII(C) of the IAEA Statute were not given, which is why this act of report was not in accordance with IAEA Statute. The resolution of the IAEA could only have been based on Article III(B)4, but not on Article XII(C), of the IAEA Statute. Hence, it is no surprise that Iran claimed that the IAEA was guided by member states with big influence.[54]

To prohibit wrong implementations of the IAEA Statute, a legal definition of non-compliance in the IAEA Statute would help to make the non-compliance process more transparent and to protect it from political influence. It could be included with an amendment of the IAEA Statute, which can be made in accordance with Article XVIII.[55]

The IAEA could also be strengthened through closing lack of capacity. As the example of Iran demonstrates, sanctioning non-compliance takes too long. It would be more efficient if non-compliance measures followed as quickly as possible.[56] For that reason, the IAEA must be equipped with the essential staff and technology to act promptly, which could be provided by larger funds for the Agency.

The Suitability of the UNSC in the Non-Proliferation Regime

As seen above, non-compliance incidents shall be reported to the UNSC. Problematic is that NWS are the same states as the five permanent members of the UNSC: China, France, Russia, the United

[52] Joyner (n 4); Orde F Kittrie, 'Enforcement and the Future of the Nuclear Nonproliferation Regime' (2007) 101 Proceedings of the American Society of Int'l Law Annual Meetings 433.
[53] UNSC Res 1696 (31 July 2006) UN Doc S/Res/1696; IAEA Res GOV/2005/77 (24 September 2005); IAEA Res GOV/2006/13 (4 February 2006); Kittrie (n 50).
[54] Mark Hibbs, 'Iran and the Evolution of Safeguards' (16 December 2015) *Carnegie Endowment for International Peace*, available at <https://carnegieendowment.org/2015/12/16/iran-and-evolution-of-safeguards-pub-62333> accessed 7 November 2019.
[55] IAEA Statute art XVIII.
[56] Paul Lewott, 'Strengthening the Nuclear Nonproliferation Regime' (2010) Council on Foreign Relations Special Report 1.

Kingdom and the United States of America.[57] It is dubious that NWS are part of decisions against NNWS and, hence, it is hard to imagine that the UNSC is an independent body in case of non-compliance by NNWS.

Those doubts exist not only because of the interests of NWS in the non-proliferation regime but also because of other permanent member interests as seen in the cases of Iran and North Korea. North Korea has been in non-compliance with the NPT obligations for eleven years, and the UNSC has not adopted a single resolution because of China's concern that a collapse of the North Korean regime would cause a massive wave of refugees to enter China.[58] In the case of Iran, Resolution 1737 was not strong enough because it imposed export restrictions and assets freeze instead of oil or other economic embargos, which would have been a real disaster for Iran.[59] The reason was the refusal of Russia and China, because both states closed deals with Iran at the time of the vote.[60] All those facts make it highly questionable if the UNSC is a suitable body to sanction non-compliance within the context of the non-proliferation regime. Another international body could be a solution. Because of the fact that the UNSC is one of the highest international bodies, it is difficult to find another organ which could be addressed in the case of non-compliance.[61]

Therefore, another approach could be national measures. In case of Iran, Europe could have stopped exporting goods to Iran for the time of non-compliance with the NPT, which would have been fatal for Iran, as Europe is a very notable importer for Iran.[62] Such national measures might not solve the issue as a whole, but they could have an immense impact on an immediate cease of non-compliance.

---

[57] Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 23; NPT art IX(3); Morales Pedraza (n 2).
[58] Kittrie (n 50).
[59] UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737; Kittrie (n 50).
[60] Kittrie (n 50).
[61] United Nations, 'Main Organs' (*United Nations*), available at <https://www.un.org/en/sections/about-un/main-organs/index.html> accessed 9 November 2019.
[62] Kittrie (n 50).

The analysis of the resolutions against Iran increases the concerns about the suitability of the UNSC. According to the UN Charter, the UNSC can adopt resolutions based on Chapter VII when it determines 'the existence of any threat to the peace, breach of the peace, or act of aggression'.[63] The UNSC has never referred to the latter requirement in its initial Resolutions against Iran.[64] It just stated that it is 'mindful of its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security'.[65] The UNSC determined a threat to the peace the first time in Resolution 1984, five years after the first resolution against Iran.[66] This reasoning is hardly reconcilable with the UN Charter. It raises suspicions that the UNSC reacted because of the political influence of some UNSC members, and not because legal requirements were given.

It remains to be hoped that the UNSC implements the UN-Charter in future resolutions concerning the non-proliferation regime as it does in other resolutions based on Chapter VII, as per Article 39.

Conclusion

The current non-proliferation regime has a lot of problems, which lie within the vague language of the NPT text and the deciding bodies, the IAEA and the UNSC. However, there are possible solutions including different approaches which could improve the non-proliferation regime, such as for example the application of international environmental law, an amendment of the NPT, and a universal Additional Protocol. Those improvements have to be made in order to guarantee the preservation of the current regime, as incidents like Iran in the past and the present, and the possible collapse of the Joint Comprehensive Plan of Action show.[67] If all NWS

[63] UN Charter art 39.
[64] UNSC Res 1696 (31 July 2006) UN Doc S/Res/1696; UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737; UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747; UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803; UNSC Res 1929 (9 June 2010) UN Doc S/Res/1929.
[65] ibid.
[66] UNSC Res 1984 (9 June 2011) UN Doc S/Res/1984.
[67] Patrick Wintour, 'Iran Nuclear Deal in Jeopardy after Latest Enrichment Breach' *The Guardian* (7 July 2019), available at <https://www.theguardian.com/

and NNWS pull together, comply with their obligations and do not withdraw from the NPT, a world without nuclear weapons could be possible one day. Yet it must be remembered that states are sovereign that they cannot be pushed to act, even if it would help the world's order.

world/2019/jul/07/un-inspectors-to-verify-iran-claim-it-has-broken-nuclear-deal> accessed 9 November 2019.

Aberdeen Student Law Review
Guidelines for Contributors

The Editorial Board is keen to receive submissions from past and present students of the School of Law, University of Aberdeen.

The purpose of the ASLR is to showcase the work of the students of the University of Aberdeen, highlighting the many areas of law that are taught and researched at this university. As such, we welcome submissions on any such areas of law.

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)
- Full Research Papers (4,000 to 10,000 words)

All the limits specified above include footnotes.

Submissions are welcome from students at all stages, from first year undergraduate to postgraduate PhD level. Students may submit a piece of work that has been written as part of their degree, or may write something specifically for the ASLR. Articles must provide a critical analysis of a particular area of law, publication or judicial decision. They should be original and relevant, and aim to make an interesting contribution to the academic debate. The Editorial Board anonymously reviews each piece of work, before it is 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 on HeinOnline and in law libraries across the UK.

All submissions must conform to the ASLR House Style and must be accompanied by a title page and a signed declaration of originality; further information on this can be found on the ASLR website at www.abdn.ac.uk/law/student-activities/aberdeen-student- law-review-95

Finally, all submissions (including the title page, declaration of originality and manuscript) must be sent to aslr@abdn.ac.uk under the subject 'Submission for ASLR' every year.

ASLR Contact Details:

Aberdeen Student Law Review

c/o C41, Block C, Taylor Building School of Law, University of Aberdeen United Kingdom
AB24 3UB

Web: www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95.php

Email: aslr@abdn.ac.uk

Twitter: @AberdeenSLR

Volume 10 of the Aberdeen Student Law Review is Kindly Sponsored by

All those involved with the Aberdeen Student Law Review would like to thank Stronachs for their support. For further information, please contact:

Stronachs LLP
28 Albyn Place Aberdeen
AB10 1YL

Email: info@stronachs.com

Phone: 01224 845845

Web: www.stronachs.com