

Aberdeen Student Law Review

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**November 2014
Volume 5**

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FOREWORD BY THE HON. LORD WOOLMAN
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Each year I am lucky enough to be asked to provide a foreword for the Aberdeen Student Law Review. Each year I am struck both by the broad range of topics and by the care that has gone into each article. The vitality of Scots law depends upon constant scrutiny and evaluation. We are lucky to have talented and committed young lawyers who are willing to perform that task. I commend this year's issue to you.

Stephen Woolman
1st October 2014

INTRODUCTION TO VOLUME FIVE

Welcome to the fifth volume of the Aberdeen Student Law Review (ASLR), which is published a little later than previously this year due to a record number of quality submissions for assessment and peer review being received. The prior editorial efforts of Dominic Scullion, Leanne Bain, Colin Mackie and Ilona Cairns represent difficult acts to follow when selecting, reviewing, editing, proofing and publishing Volume Five, and it is with sincere gratitude that we record our thanks to all of them for their valuable assistance in helping us maintain the ASLR's standards into this fifth year. Additionally, publication of a review to the current standard would not be possible without the ongoing sponsorship and genuinely warm, practical and sincere support afforded to us by Stronachs LLP and we welcome the opportunity to record our thanks to them in this latest edition.

The ASLR has become something of an institution on campus, and this is due in no small measure to the backing that the Law School provides. Special mention is due to Head of School Anne-Michelle Slater, Sarah Duncan, Margaret Ross and Tamas Gyorfi. Additional thanks are due to Professor John Paterson, who was particularly enthusiastic in securing increased submissions from students in Oil and Gas Law this year; submissions that this year's Board felt were vital in a University journal given the acknowledged strength of the University's Law School in this area.

Having strong local sponsorship and Law School support ever-present allowed us to focus on the more routine, painstaking and difficult editorial tasks involved in seeing a potential article through from its initial submission to it actually being printed. Thanks are due to all our Editorial Board for their diligent efforts in setting the 'potential for publication' bar so high. We would also like to thank all our anonymous peer reviewers for their diligence, expertise and excellent feedback. Our Assistant Managing Editors, Mhairi Gavin and Euan West merit special mention for their huge efforts in preparing this year's Review for publication at its final stages.

Editorial backslapping however, should pale into the background when the ASLR's purpose is revisited. The ASLR has been, and remains, a showcase for what are deemed the best examples of topical legal writing submitted for potential publication by the University Law School's students, postgraduates and alumni. It is *their* Review. Many articles of really high quality had to be eventually ruled out from publication this year, principally on the ground that the Review's format could not fit them. None of those rejected should be discouraged. We hope sincerely that upon reading Volume Five, Aberdeen students, postgraduates, and alumni will feel freshly enthused and will forward the best written examples of their creativity for consideration for Volume Six. All of the submissions selected for publication this year were, we feel, original, well-argued, topical, likely to appeal to our diverse readership, and (most importantly) reflective of the very high standards set, taught and learned by students within the School of Law at Aberdeen University. We commend their work to you and trust you will agree with our view of their efforts.

Andrew Merry and Philip Glover
Joint Managing Editors, October 2014

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The Couple on No-one's Lips: Allowing Perfect Imperfections in Scottish Cohabitations

CARRY CHEN*

Abstract

*Cohabitation is an increasingly popular family structure in modern society. In response to this change, section 28 of the Family Law (Scotland) Act 2006 was enacted to provide limited rights to cohabiting couples on the breakdown of their relationship. However, the poor drafting of the legislation reduced the effectiveness and usefulness of section 28. This paper analyses the problems in making a claim for financial provision under section 28(2)(a) and considers the impact of the recent Supreme Court judgment in *Gow v Grant*¹ on such problems. Through an examination of various reform methods, recommendations will be proposed for the future of section 28(2)(a) claims. This paper contends that the Supreme Court judgment has cured various deficiencies in the drafting of the legislation and the issues that remain are 'early days' effects which should dissipate after section 28(2)(a), read with the Supreme Court judgment, has settled in.*

1. Introduction

Scotland, in common with many other Western jurisdictions, has since the 1960s experienced relatively rapid demographic change.² In response to the greater diversity of family life in Scotland, the Family Law (Scotland) Act 2006 (the '2006 Act') gives some recognition to people who live together without marriage or civil partnerships and provides limited financial remedies at the end of cohabiting relationships. These provisions are not intended to accrue to cohabiting couples marriage-equivalent legal rights, or to undermine the freedom of those who have deliberately opted out of marriage or of civil partnerships.³ Instead, they represent a middle way between the protection offered to spouses or civil partners and none at all by recognising unmarried cohabitants and giving some protection to those who are economically vulnerable when the relationship ends.

Section 28 of the 2006 Act is the first legislative provision in Scots law to give a former cohabitant the opportunity to make a claim for financial provision from his or her former partner when the relationship ends within the parties' lifetimes. The introduction of section 28 is a welcome addition to Scots family law, as the position

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¹ *Gow v Grant* [2012] UKSC 29.

² Fran Wasoff, Jo Miles and Enid Mordaunt, 'Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006' (October 2010)

<www.crfr.ac.uk/assets/Cohabitation-final-report.pdf> accessed 7 October 2014, 1.

³ SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 65.

of cohabitants prior to the 2006 Act was considered overall to be both uncertain and potentially unjust.⁴ However, the development of the 2006 Act was a long and gradual process which began in 1990, and in the course of that process the purpose of section 28 altered. Consequently, when it was first introduced, there was generally widespread criticism over the manner in which section 28 had been drafted.⁵ The omission of a guiding principle for section 28 has been a significant factor in the uncertainty over both the intended scope of the provision as well as the manner in which it should be interpreted and applied by the courts.

This article will examine the problems in making a claim under section 28(2)(a) after all the procedural matters have been satisfied.⁶ It will contend that the poor drafting of the legislation has been the cause of the problems encountered by both judges and practitioners in constructing and applying section 28(2)(a). This paper will also seek to determine the extent to which the UK Supreme Court (UKSC) in *Gow v Grant*⁷ has cured some of the deficiencies in the drafting of the legislation. It will be argued that following the judgment of the Supreme Court, section 28(2)(a) is now in the position it should have been in when it was enacted if it had been drafted properly.

It will be demonstrated that it was the intention of the legislators to establish fairness as the underlying aim of section 28. The surprising omission of fairness as a guiding principle, along with the unfettered discretion afforded to the courts in determining whether an award should be made, led to inconsistent and contradictory case law. This seriously diluted the usefulness and effectiveness of a claim under section 28(2)(a). It will be argued that the UKSC judgment has established fairness as the guiding principle of section 28 and provided direction for courts to exercise their discretion. The provisions have also been broadened in order for fairness to be achieved after a full assessment of the facts and circumstances of the individual case.

However, uncertainty remains over how the courts will exercise their discretion when determining fairness and as to how to quantify a claim under section 28(2)(a). It will be demonstrated that uncertainty is inevitable over such matters in a claim where the underlying aim is fairness and based on contributions and sacrifices. The article will seek to determine whether it is possible, and indeed desirable, to reduce the current uncertainty. It will be argued that although desirable, it is difficult to achieve. Furthermore, much of the uncertainty that remains is because section 28(2)(a), read in conjunction with the UKSC judgment, has not yet had sufficient time to settle in. It is hoped that, over time, some of the current

⁴ Frankie McCarthy, 'Cohabitation: lessons from north of the border?' (2011) 23 Child & Family Law Quarterly 277, 279.

⁵ Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, *Cohabitation* (2nd edn, W Green 2011) para 1-07.

⁶ For coverage of the issues as they concern a claim under sections 28(2)(b) and (2)(c), the procedural matters in making a claim under section 28 and cohabitation agreements, which for reasons of space will not be considered in this paper, see Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, *Cohabitation* (2nd edn, W Green 2011); For a discussion of the issues concerning the range of orders a court can make under section 28, see Jo Miles, Fran Wasoff and Enid Mordaunt, 'Reforming Family Law – The Case of Cohabitation: 'Things May Not Work Out As You Expect'' (2012) 34 Journal of Social Welfare & Family Law 167.

⁷ *Gow* (UKSC) (n 1).

uncertainty will dissipate with increasing precedent, and a claim under section 28(2)(a) will be both an effective and useful provision for cohabitants.

This paper will be structured as follows: Part 2 will provide a definition of a cohabitant; Part 3 will examine the background of section 28, the general approach to the application of section 28(2)(a) and the achievements of section 28(2)(a) so far; Part 4 will examine the problems encountered in a claim under section 28(2)(a); Part 5 will consider the decision of the UKSC in *Gow v Grant* and the implications of it; and finally, in Part 6, recommendations will be made as to the future of section 28(2)(a) claims after an analysis of several reform methods.

2. Definition of a Cohabitant

Section 25(1) of the 2006 Act defines a cohabitant as either member of a couple who live or have lived together as if they were husband and wife or civil partners.⁸ That definition is supplemented by the terms of section 25(2), which lists a number of factors to which a court shall have regard when determining whether or not a person is a cohabitant, namely the length of time the couple have or had been living together, the nature of their relationship during that period and the extent and nature of any financial arrangements between them during that period.

Although this additional provision has been described as “intellectually incoherent” in that it apparently seeks to redefine the definition in section 25(1),⁹ it can be said to express the intention of the Scottish Executive to give a clear message that the legislation was intended to apply to long-term and enduring relationships. There is however, no set minimum prescribed period for the duration of cohabitant relationships because of the Scottish Executive’s concern that such a period would be ‘arbitrary, rigid and unresponsive to individual cases.’¹⁰ Therefore the additional factors are likely to reinforce the idea that it is the quality of the cohabitation as a whole, as opposed to merely the length of cohabitation, which determines whether or not there is a cohabiting relationship.

3. Section 28 in Scotland

A. Development of Section 28

The consultation and discussion about cohabitation and the potential need for legal rights for cohabitants to be established began with the Scottish Law Commission (‘SLC’) *Discussion Paper on The Effects of Cohabitation in Private Law* in May 1990.¹¹ This was followed up by the SLC *Report on Family Law*¹² in 1992, which contained the foundation of the proposed reform as well as a draft Bill. The SLC submitted that there was a strong case for some limited reform of Scottish private law to enable

⁸ Although spouses and civil partners can both be said to be in a cohabiting relationship, ‘cohabitants’ in this paper means people who do not cohabit with a spouse or a civil partner.

⁹ Joe Thomson, *Family Law Reform: Annotations to Family Law (Scotland) Act 2006* (W Green 2006) 30.

¹⁰ SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 67.

¹¹ Scottish Law Commission, *Discussion Paper on the Effects of Cohabitation in Private Law* (Scot Law Com DP No 86, 1990).

¹² Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992).

certain legal difficulties faced by cohabiting couples to be overcome and to enable certain anomalies to be remedied.¹³ It was stated that any reform 'should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair'.¹⁴

It was with the need for distinction between marriage and cohabitation in mind that the SLC rejected a comprehensive system of financial provision on termination of a cohabitation comparable to the system of financial provision on divorce in the Family Law (Scotland) Act 1985 (the '1985 Act').¹⁵ Instead, the SLC recommended only the adoption of the principle contained in section 9(1)(b) of the 1985 Act,¹⁶ which requires fair account to be taken of economic advantages gained by one party and economic disadvantages by the other party, within the context of a marriage. The Report stated it would be 'unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship simply lie where they fall' and that the principle in section 9(1)(b) could be applied 'quite readily and appropriately' to cohabitants.¹⁷ However, the reasoning for applying this principle was not to impose on cohabitants a solution based on a particular view of marriage, but rather to give cohabitants the benefit:

[O]f a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to make contributions and sacrifices without counting the costs or bargaining for a return.¹⁸

Therefore, the application of section 9(1)(b) to cohabitants was intended to correct imbalances that arise from contributions or sacrifices in a relationship if it was fair to do so. Indeed, the draft Bill attached to the Report included a clause to the effect that the court should only make an award if 'having regard to all the circumstances of the case it is fair and reasonable to make' it.¹⁹

The SLC also recognised the potential difficulties in quantifying a claim based on contributions or sacrifices, which could often not be valued precisely. It was submitted that, notwithstanding such difficulties, the recommended provision 'would provide a way of awarding fair compensation, on a rough and ready

¹³ An example of a possible anomaly is the situation whereby a remedy is provided under section 9(1)(b) of the Family Law (Scotland) Act 1985 for economic contributions and sacrifices made during a cohabitation which is followed by a short marriage and then divorce, but not for those made during a cohabitation of equal length and similar nature which ends without a marriage: Scottish Law Commission *Family Law Report on Aliment and Financial Provisions* (Scot Law Com No 67, 1981) para 3.98.

¹⁴ Scottish Law Commission, *Report on Family Law* (n 12) para 16.1.

¹⁵ Family Law (Scotland) Act 1985, s 9. The SLC explicitly rejected, amongst others, applying to cohabitants the principle of fair sharing of matrimonial property in section 9(1)(a). Note that fair sharing is equal sharing unless there are special circumstances justifying a departure from this norm: Family Law (Scotland) Act s 10(1).

¹⁶ Scottish Law Commission, *Report on Family Law* (n 12) para 16.23. Although the Scottish Law Commission recommended a slightly narrower formula than that used in section 9(1)(b) of the 1985 Act, it was a result of their concern that the provision was too vague and too wide. They also recommended such an amendment to the 1985 Act.

¹⁷ *ibid* para 16.18.

¹⁸ *ibid*.

¹⁹ *ibid* Draft Family Law (Scotland) Bill, cl 36(2).

valuation, in cases where otherwise none could be claimed.’²⁰ This approach is to be commended, since necessary reforms should not stall on the issue of difficulty. What is necessary to minimise the difficulty is a well drafted piece of legislation.

The lengthy transition from the 1992 Report to the final Act was not straightforward.²¹ In March 1999, the Scottish Office Home Department issued a Consultation Paper²² seeking views on the SLC’s proposals. The Scottish Executive²³ produced a White Paper in 2000²⁴ and a Consultation Paper in April 2004,²⁵ both of which recommended adopting section 9(1)(b) for cohabitants as part of a ‘fair regime’ in order to provide some legal safeguards to ease the legal difficulties cohabitants may encounter, where the effect of the current law can be considered harsh and unfair.

A Bill was finally introduced to the Scottish Parliament on February 7, 2005, by the then Justice Minister, Cathy Jamieson. The policy objective was stated as being:

[T]o introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends.²⁶

In line with their policy following previous consultations, the Scottish Executive did not intend to give marriage-equivalent rights to cohabitants.²⁷ The Scottish Executive was also keen to provide courts with flexibility and discretion in cases in order to secure ‘fair and just outcomes’.²⁸ Furthermore, the intention of the Bill was to entitle an economically disadvantaged cohabitant, as a result of the relationship, to some recompense.²⁹ This reference to recompense suggests the use of the principle of fairness to compensate for losses suffered.

What is surprising about the Bill Policy Memorandum is the emphasis on the protection of the vulnerable over the aim of achieving fair and reasonable outcomes, which had been prevalent in previous consultations. The Justice 1 Committee, whilst supporting the Scottish Executive’s aim of protecting vulnerable individuals, noted

²⁰ *ibid* para 16.20.

²¹ In the 14 years in between, family law became a matter devolved to the Scottish Parliament.

²² Scottish Office Home Department, *Improving Scottish Family Law* (March 1999) <<http://web.archive.org/web/200012090948/http://www.scotland.gov.uk/library/documents-w8/isfl-00.htm>> accessed 7 October 2014.

²³ The Scottish Executive took up the process of consultation following the inauguration of the Scottish Parliament. It should also be noted that the Scottish Executive is now known as the Scottish Government.

²⁴ Scottish Executive, *Parents and Children* (2000) <www.scotland.gov.uk/Topics/Justice/law/17867/FLSA2006/13804/ParentsandChildren> accessed 7 October 2014.

²⁵ Scottish Executive, *Family Matters: Improving Family Law In Scotland* (April 2004) <www.scotland.gov.uk/Publications/2004/04/19220/35697> accessed 7 October 2014.

²⁶ SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 64.

²⁷ *ibid* para 65.

²⁸ *ibid* para 75.

²⁹ Scottish Parliament Justice 1 Committee, ‘Justice 1 Committee Official Report 16 March 2005’ (March 2005) col 1632 <<http://archive.scottish.parliament.uk/business/committees/justice1/or-05/J105-0802.htm>> accessed 7 October 2014.

that there was no requirement of vulnerability in the Bill because the justification of the claim was 'equity and reasonable expectations rather than financial vulnerability'.³⁰ This is logical, since this would extend the scope of the provision to all those who have suffered disadvantages and made contributions in a relationship without gaining any advantages, regardless of their financial position when the relationship terminates.

The Scottish Executive reviewed the suggestions and concerns of the Justice 1 Committee and explained that the function of the law in relation to cohabitants should be both protective and remedial:

Protective in the sense that the law should safeguard the interests of those in cohabiting relationships who may be vulnerable by virtue of their exposure to risk or harm. Remedial in the sense that the law should provide a fair and just basis for sorting disputes between cohabitants when things go wrong.³¹

Therefore, it seems clear that the underlying aim of section 28 is to provide a fair and just outcome to ensure all those vulnerable parties are protected. The Scottish Executive stated that the law needs to provide a 'framework for fair remedy when committed relationships founder'.³² Consequently, the Scottish Executive proposed a framework for compensation where one partner could show that they have suffered net economic disadvantage in the interests of the relationship and emphasised that the financial provision proposed would focus on compensation for an imbalance in the economic outcomes experienced by the parties as a result of their relationship.³³

Furthermore, when debating the provisions of the revised version of section 28,³⁴ Justice Minister Cathy Jamieson stated that one of the things the Executive had been trying to ensure was:

[T]hat any financial award that the courts make to an applicant addresses the net economic disadvantage that that person may face as a direct result of joint decisions that were made by the couple during the relationship.³⁵

The importance to achieve fairness for both parties was later noted. Consequently, it seems the intention of the Bill before it was passed was that 'any overall economic disadvantage of one party at the end of the relationship was to be compensated by the other, with a view to achieving fairness'.³⁶

³⁰ Justice 1 Committee, 'Justice 1 Committee Report' (SP Paper 401, 8th Report, 2005 (Session 2)) para 193 <<http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#cohabsafe>> accessed 7 October 2014.

³¹ Hugh Henry, 'Scottish Executive Response to Justice 1 Committee Stage 1 Report', (August 2005) 14 <<http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/SEresponseFamilyLawStage1.pdf>> accessed 7 October 2014.

³² *ibid* 14.

³³ *ibid* 17.

³⁴ The revised version included the balancing provisions in ss28(4), (5) and (6) of the 2006 Act.

³⁵ Scottish Parliament, 'Meeting of the Parliament: 15 December 2005' (December 2005) col 21908 <www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4622&mode=pdf> accessed 7 October 2014.

³⁶ Malcolm, Kendall and Kellas (n 5) para 1-09.

B. Implementation and General Approach to Application of Section 28(2)(a)

The 2005 Bill was finally passed by the Scottish Parliament, receiving Royal Assent on January 20, 2006, and the Family Law (Scotland) Act 2006 came into force on May 4, 2006. However, section 28 has been subject to much criticism. This is a result of its poor drafting, which provides no underlying aim or any guidance on how to interpret and apply the provision. It is surprising that fairness was not incorporated into section 28 as the underlying principle, especially when the concept of fairness is mentioned throughout the consultation process.

Section 28(2)(a) allows the court to make an order requiring payment to the applicant of a capital sum of an amount specified in the order.³⁷ Before it can do so, the court must be satisfied that, after a full assessment, there is either a net economic advantage to the defender as a result of the applicant's contributions or a net economic disadvantage to the applicant suffered in the interests of the defender and/or a relevant child. The correct approach to this balancing exercise was uncertain when it was first introduced. However, with the assistance of the authorities to date, it is possible to establish a standard approach to the application of section 28(2)(a). Indeed, the courts now seem to take a step-by-step test to decide if an order should be made.³⁸ This approach does not deal with all the issues that arise when dealing with a claim under section 28(2)(a), but it does assist in making an assessment of the overall position for a potential claimant more straightforward.³⁹

The first step in an application of section 28(2)(a) is to satisfy the procedural requirements. It must be established that the claimant was in a cohabiting relationship and that it ended during the parties' lifetimes.⁴⁰ There are other preliminary considerations to be addressed, such as the requirement under section 28(8) that the application was made not later than one year after the day on which the cohabitants ceased to cohabit, and matters of jurisdiction which are set out in section 28(9). Only once these requirements have been satisfied can the claimant move on to consider the substantive position in relation to the claim to be made.

Secondly, before the court can exercise its discretion to make an award of a capital sum to a former cohabitant, it must consider the matters set out in section 28(3), namely:

- (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
- (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of –
 - (i) the defender; or
 - (ii) any relevant child.

³⁷ Joe Thomson, *Family Law in Scotland* (5th edn, Tottel Publishing,) para 8.6.

³⁸ *G v F* 2011 SLT (Sh Ct) 161, [14] (Sheriff McCartney).

³⁹ Malcolm, Kendall and Kellas (n 5) para 1-13.

⁴⁰ For a discussion of the potential for dispute over when exactly parties are deemed to have stopped cohabiting see Malcolm, Kendall and Kellas (n 5) para 1-04.

These two matters, however, do not constitute a threshold test to be met before a court can consider whether any award should be made. Consequently, there is no requirement for the matter to stop if there is no evidence of either an economic advantage to the defender or an economic disadvantage to the pursuer. This is the most appropriate and logical approach, since there is nothing in the terms of section 28 to support a threshold test, and section 28(2)(a) simply requires the court to 'have regard' to the various matters set out in the subsections.⁴¹

Furthermore, there is no requirement for both aspects of section 28(3) to exist in order for there to be a claim.⁴² The UKSC held in *Gow v Grant* that the underlying principle of section 28 is one of fairness, and it is designed to correct any overall net imbalance arising from contributions made or economic disadvantages suffered in the interests of the relationship.⁴³ Therefore, an economic imbalance can be measured by reference to the advantages gained by the defender from contributions made by the pursuer, or by reference to the disadvantages suffered by the pursuer in the interests of the defender or any relevant child, or, indeed, both could exist.⁴⁴ If both matters in section 28(3) had to be established for a claim, it would narrow the provision and create an unintentional hurdle for claimants.

The third step requires the court to assess whether there is scope for offsetting either or both of the matters in section 28(3). This mandatory balancing exercise for the court is directed by the terms of section 28(4), which states that when considering whether or not to make an order under section 28(2)(a), the court 'shall' ⁴⁵ have regard to the matters in subsections (5) ⁴⁶ and (6). ⁴⁷ Therefore, subsections (4), (5) and (6) have a significant impact on the application of the section.

Through a close examination of the subsections however, there is a clear link between the matters in subsections (3)(a) and (5) on the one hand, and between subsections 3(b) and (6) on the other.⁴⁸ Accordingly, the more natural and straightforward interpretation of section 28(2)(a) results in the court applying firstly subsections (3)(a) and (5) to the facts of the case. This requires the court to consider whether the defender has derived any economic advantage from contributions made by the applicant and offset against that any economic disadvantage suffered by the defender in the interests of the pursuer or a relevant child.⁴⁹ Secondly, the court

⁴¹ *Lindsay v Murphy* 2010 Fam LR 156, [63] (Sheriff Miller).

⁴² Sheriff Hogg stated that account must be taken of ss 28(5) and (6) because of the wording 'shall' in the provisions: *Jamieson v Rodhouse* 2009 Fam LR 34, [44] (Sheriff Hogg).

⁴³ *Gow* (UKSC) (n 1) [33] (Lord Hope).

⁴⁴ Malcolm, Kendall and Kellas (n 5) para 1-15.

⁴⁵ This differs from the definition in section 28(2), which requires the court to 'have' regard to subsection (3), rather than 'shall'.

⁴⁶ Family Law (Scotland) Act 2006, s 28(5): The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interest of the applicant or any relevant child.

⁴⁷ *ibid* s 28(6): The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any relevant child is offset by any economic advantage the applicant has derived from contributions made by the defender.

⁴⁸ *Lindsay* (n 41) [63] (Sheriff Miller).

⁴⁹ For a discussion of the possible difficulties in determining a 'relevant child', which will not be covered in this paper for reasons of space, see Elaine Sutherland, *Child and Family Law* (2nd edn, W Green 2008) para 16-200.

should apply subsections (3)(b) and (6). This requires the court to consider whether the applicant has suffered any economic disadvantage in the interests of the defender or a relevant child, and to offset against that any economic advantage the pursuer has derived from contributions made by the defender.

This approach has been adopted in a number of reported cases,⁵⁰ and it has been endorsed at appellate level by Sheriff Principal Dunlop QC in *Mitchell v Gibson*:

[I]t is not appropriate to put all matters into a single melting pot and come to a view about where the balance of advantage and disadvantage falls. The balancing processes required to produce an answer to each of the questions posed by subs.(3) are separate and defined by the provisions of subss.(5) and (6) respectively.⁵¹

This logical approach follows the precise requirements of the 2006 Act.⁵² It ensures that the court makes a full assessment as to whether or not there is an economic imbalance arising from the cohabitation. Furthermore, there is no explicit requirement that the court must 'balance' any economic advantages (or disadvantages) pertaining to one party against those pertaining to the other. Therefore, any offsetting is assessed for each party individually, not comparatively.⁵³

The final, and arguably the most uncertain, step is the application of the court's discretion. Even after a full assessment of the case and the court finding that there is a net economic imbalance arising from the cohabitation, the making of an award is by no means guaranteed. Section 28(2)(a) provides that the court 'may', after having regard to all these preliminary matters, make an award of a capital sum payment. The UKSC in *Gow v Grant* confirmed that the court has complete discretion in deciding whether to make an award and the amount to be awarded.⁵⁴ Section 28(7) also provides the court with wide discretion to specify the timing of the payments required and whether they should be made by instalments.⁵⁵

C. Success and Achievements of Section 28(2)(a)

The 2006 Act has achieved a lot for Scottish cohabitants and their children.⁵⁶ When it came into force on 4th May 2006, there were over 150,000 couples cohabiting in Scotland.⁵⁷ By 2008, there was an estimated population of 372,000 cohabiting adults in Scotland.⁵⁸ As the number of cohabiting couples continues to rise,⁵⁹ the introduction of section 28(2)(a) is a step in the right direction to reflect the reality that

⁵⁰ See for example: *Lindsay* (n 41); *Jamieson* (n 42).

⁵¹ *Mitchell v Gibson* 2011 Fam LR 53, [10] (Sheriff Principal Dunlop).

⁵² Malcolm, Kendall and Kellas (n 5) para 1-17.

⁵³ *Lindsay* (n 41) [61] (Sheriff Miller).

⁵⁴ Provided there is a basis in fact for such a decision: *Gow* (n 1) [42] (Lord Hope).

⁵⁵ It should be noted, however, that the court has no discretion to extend the period of time allowed for an action to be raised under section 28(8).

⁵⁶ Wasoff, Miles and Mordaunt (n 2) 123.

⁵⁷ Leslie Gordon and Jenny Nobbs, 'Cohabitation: The New Legal Landscape' (2006) 51(5) *Journal of the Law Society of Scotland* 20.

⁵⁸ Wasoff, Miles and Mordaunt (n 2) 8.

⁵⁹ 'Number of Cohabiting Couples Rises, ONS Figures Suggest' *BBC News* (1 November 2012) <www.bbc.co.uk/news/uk-20174078> accessed 7 October 2014.

family structures are changing. By providing limited rights to cohabitants, the position of Scottish cohabitants when a relationship terminates is much better than that of their equivalents in England and Wales.⁶⁰ The introduction of section 28(2)(a) has created a financial remedy for cohabitants on the termination of their relationship where none previously existed.⁶¹ Furthermore, section 28(2)(a) can act as a bargaining tool in negotiations between parties, which would be preferable to litigation.

However, whereas the case law has shown a somewhat consistent approach to the application of section 28(2)(a), the courts have struggled to find a simple and clear way to interpret and apply section 28. It is clear that section 28 is hardly a model of simplicity and it lacks the crisp clarity of the original SLC proposal.⁶² The substantial reliance on an overriding discretion placed in the hands of the courts, in the absence of an underlying aim and guidance as to how that discretion should be exercised, has caused inconsistencies and uncertainty in the interpretation and application of section 28. The difficulties and uncertainties in making a claim under section 28(2)(a) have led to criticism of the usefulness and effectiveness of the provision, with the view forming that although it has some benefits, there is 'unfulfilled potential'.⁶³ Consequently, it has so far not been as effective an instrument in correcting harsh and unfair situations as it should have been had the legislation been better drafted.

4. Interpretation and Application: The Problems in Making a Claim Under Section 28(2)(a)

A. Inconsistent and Contradictory Approaches to Construction

Despite the consistent reference to fairness throughout the consultation process leading up to the enactment of the 2006 Act, there is no underlying aim or any guidance given on how to construe section 28. This lack of guidance, along with the unfettered discretion given to the courts under section 28(2), has caused uncertainty as to the correct interpretation of the provision for both courts and practitioners.⁶⁴

The first substantial case⁶⁵ concerning section 28(2)(a) was *CM v STS*.⁶⁶ Lord Matthews stated that, although not identical, sections 28(3), (5) and (6) and section 9(1)(b) of the 1985 Act are 'so similar' that the Scottish Parliament 'must have intended the courts to approach them in the same way'.⁶⁷ Consequently, with the assistance of section 9(1)(b) case law, Lord Matthews held that the burden of

⁶⁰ Rob Hines & Andrew Birtles, 'Before You Leap...' (2012) 162(7523) *New Law Journal* 958.

⁶¹ The pre-2006 remedies were at best difficult to operate and expensive, and at worst simply failed to respond to particular types of problems: Scottish Law Commission (n 11).

⁶² Elaine Sutherland, *Child and Family Law* (2nd edn, W Green 2008) para 16-192.

⁶³ Wasoff, Miles and Mordaunt (n 2) 98.

⁶⁴ 89% of practitioners in a survey (with 62 respondents) viewed interpretation of the cohabitation provisions of the 2006 Act as one of the biggest problem areas of the 2006 Act: Wasoff, Miles and Mordaunt (n 2) 55.

⁶⁵ *Fairley v Fairley* 2008 Fam LR 112, heard by Lord McEwan, was earlier but all that was decided in the case was that the separation happened after the coming into force of the 2006 Act so that the action was competent.

⁶⁶ 2008 SLT 871 (OH) (Lord Matthews).

⁶⁷ *ibid* [272] (Lord Matthews).

cohabitation must be borne fairly, seemingly meaning equally, regardless of the fact that there is no provision to that effect in the 2006 Act.⁶⁸ In effect, Lord Matthews applied the principle of equal sharing of matrimonial property in section 9(1)(a) of the 1985 Act.

This equal sharing approach, however, was not the intention of the legislators.⁶⁹ Additionally, Lord Matthews failed to engage in the appropriate balancing exercise and instead offset the applicant's disadvantages against the defender's disadvantages, which is not provided for under section 28.⁷⁰ Furthermore, although the provisions contained in the two Acts are similar, they are not identical. Importantly, the absence in the 2006 Act of any equivalent to the principle of fair sharing of matrimonial resources or, indeed, to the notion of matrimonial property, results in substantially different starting points of principle between the two pieces of legislation.⁷¹ Under the 1985 Act, the principle is that the net value of the matrimonial property will be shared fairly, with the rebuttable presumption being that property will be shared fairly if it is shared equally. The rebuttable presumption at the end of cohabitation is that each party will retain his or her own property.⁷² Consequently, the basis of the 1985 Act scheme is 'one of entitlement, whereas the basis of the 2006 Act scheme is discretion'.⁷³ Additionally, there exists greater scope for departure from the basic principle under the 1985 Act, with a further four principles provided, whilst for cohabitants under section 28 the only issue is whether one party has a net economic disadvantage at the end of the relationship.⁷⁴ Nevertheless, although Lord Matthews' approach has been criticised as 'seriously flawed',⁷⁵ it does not alter the fact that the poor drafting of the provision, lack of underlying aim and guidance, along with the wide discretion afforded to the courts made this construction possible.

Whilst subsequent cases have not followed Lord Matthews' approach, the courts have struggled to find a consistent approach.⁷⁶ However, the Inner House in *Gow v Grant* held that section 28 is different in both substance and in form from sections 8 to 10 of the 1985 Act, which thus has 'no bearing on the construction of section 28'.⁷⁷ Furthermore, the use of case law on sections 8 to 10 of the 1985 Act as guidance in the construction of section 28 was rejected. The Inner House also commented that the financial provision is 'in the nature of compensation for an imbalance of economic advantages or disadvantages'.⁷⁸ Additionally, the objective of section 28 was stated to be limited in scope, and that it was intended to 'enable the

⁶⁸ *ibid* [289] (Lord Matthews).

⁶⁹ Sheriff Mackie noted that although the intention of the Parliament was to adopt a different approach between financial arrangements that apply to spouses or civil partners and cohabitants, no guidance was given regarding which approach to take: *Gow v Grant* 2010 Fam LR. 21 [39].

⁷⁰ *Lindsay v Murphy* (n 41) [61] (Sheriff Miller).

⁷¹ Malcolm, Kendall and Kellas (n 5) para 1-10.

⁷² *F v D* 2009 Fam LR 111, [7] (Sheriff Hendry).

⁷³ *Lindsay v Murphy* (n 41) [59] (Sheriff Miller).

⁷⁴ Malcolm, Kendall and Kellas (n 5) para 1-10.

⁷⁵ Joe Thomson, *Family Law in Scotland* (6th edn, Bloomsbury Professional 2011) para 8.6.

⁷⁶ For example, compare the approach taken by Sheriff Mackie in *Gow v Grant* 2010 Fam LR 21 with Sheriff Miller in *Lindsay v Murphy* (n 48).

⁷⁷ *Gow v Grant* [2011] CSIH 25, [3] (Lord Drummond Young).

⁷⁸ *ibid*.

court to correct any clear and quantifiable economic imbalance that might have resulted from the cohabitation'.⁷⁹ Although this approach has been followed in subsequent cases,⁸⁰ this narrow interpretation of the objective could limit the number of applicants and thus could not be seen to provide the financially vulnerable with adequate protection. Moreover, the Inner House gave a negative decision, in that it gave guidance on how section 28 should *not* be construed, rather than how it was to be construed.

B. Width of the Court's Discretion

Section 28(2) of the 2006 Act gives the court an unfettered discretion as to whether or not an award of capital is to be made. The 2006 Act does not, however, provide any guidance as to it how the court should exercise its discretion nor does it provide an underlying aim. Therefore, the terms of section 28 do not require the court to make any order if economic advantage or disadvantage is established; it does no more than allow the court to do so.⁸¹ Although it has been recognised that the discretion must be exercised reasonably,⁸² the width of the court's discretion is a problematic area for practitioners.⁸³ Consequently, with uncertain advice, the more financially vulnerable that the provisions were intended to protect may be discouraged from making a claim under section 28(2)(a) because of the uncertainty and risk involved.

It was the intention of the legislators to provide the court with sufficiently wide discretion because the Bill should not be too prescriptive when people are not.⁸⁴ Indeed, the Scottish Executive felt it was 'right and proper' that the courts should consider 'any and all relevant factors'⁸⁵ in order to reach 'appropriate' judgments, rather than constructing rules and provisions to accommodate every circumstance.⁸⁶ Such rules and provisions are neither desirable nor possible in a completely new area of law such as this. However, there is a distinction between a complete lack of rules and provisions on one hand and some limited guidance and an underlying principle on the other; otherwise the courts have no direction to reach the 'appropriate' judgments the Scottish Executive desires.

The case law has suggested some factors that may have a bearing on the exercise of the court's discretion, such as significant contributions from one party to the other party's living costs over the duration of the cohabitation,⁸⁷ post-

⁷⁹ *ibid* [4] (Lord Drummond Young).

⁸⁰ For example see: *G v F* (n 38) (Sheriff McCartney); *Harley v Robertson* 2011 WL 6329320 (Sheriff Caldwell).

⁸¹ *G v F* (n 38) [47] (Sheriff McCartney).

⁸² *ibid* [48] (Sheriff McCartney).

⁸³ 85% of practitioners in a survey (with 60 respondents) viewed the width of the court's discretion as a problem area of the 2006 Act: Wasoff, Miles and Mordaunt (n 2) 55.

⁸⁴ See Kirsty Finlay in Justice 1 Committee (n 29).

⁸⁵ Scottish Parliament (n 35) Justice Minister Cathy Jamieson at col 21908.

⁸⁶ Scottish Executive (n 25).

⁸⁷ It may be reasonable for the court to take into account that one of the parties have made a significant contributions towards the parties' living costs over the cohabitation: Malcolm, Kendall and Kellas (n 5) para 1-21.

cohabitation contributions⁸⁸ and reference to resources.⁸⁹ However, without any guidance or an underlying aim, it will be extremely difficult to predict what factors the court will take into account in the exercise of its discretion. This seems contrary to the policy objective of greater certainty, fairness and clarity.

C. Quantification of a Claim

The issue of quantifying a cohabitant's claim under section 28 has been a matter of some difficulty for practitioners.⁹⁰ Yet again, no guidance is provided for in the 2006 Act. Quantification of gains and losses in capital, income or earning capacity would be unlikely to cause great difficulty in the majority of cases.⁹¹ The greatest difficulty in quantification arises when a value has to be placed on non-financial contributions, which, under section 28(9), specifically include looking after any relevant child or any home in which the parties cohabited. Although this may be possible by looking at the cost of buying such services,⁹² in some cases, such as where one is trying to assess the value of the pursuer's contributions with reference to the improved earning capacity of the defender, it may be almost impossible to achieve quantification of the claim. Furthermore, it has been suggested that case law relating to section 9(1)(b) may still offer some guidance as to the quantification of such gains or losses.⁹³ Even if this is possible, the level of guidance that can be provided is doubtful.⁹⁴

The Inner House in *Gow v Grant* held that section 28 was only intended to correct any 'clear and quantifiable' economic imbalance that might have resulted from cohabitation.⁹⁵ This is an extremely narrow approach and it would seem to preclude anything other than an accurate arithmetical approach to quantification. Therefore, parties who were intended to be protected by the legislation may be excluded simply because their claim is difficult to quantify with any accuracy. This precise approach was not the intention of the legislators.⁹⁶ It also seems to contradict the legislation, which specifically includes non-financial contributions and those that are by their nature difficult to quantify. Furthermore, it would be unusual for parties

⁸⁸ Nothing in the provision limited 'contributions' as defined in section 28(9) only in so far as made during the period of cohabitation: *Lindsay v Murphy* (n 41) [67] (Sheriff Miller).

⁸⁹ Sheriff McCartney stated that in the exercise of the court's discretion, the court must consider the particular facts and circumstances of the individual case, and then consider whether or not weight should be attached to present financial circumstances and resources: *G v F* (n 38) [48].

⁹⁰ Malcolm, Kendall and Kellas (n 5) para 1-28.

⁹¹ Gains and losses in capital can be examined by looking at the actual capital introduced into the relationship; gains and losses in income can be assessed by looking at the level of income during the course of the cohabitation; gains and losses in earning capacity would possibly rely on being able to establish comparators. It should be noted that any increase in value has to be demonstrated as having derived from the claimant's contributions.

⁹² Malcolm, Kendall and Kellas (n 5) para 1-29.

⁹³ *ibid* para 1-11.

⁹⁴ In most divorce actions, economic advantage and disadvantage claims under section 9(1)(b) are much more muted since the main award will normally be the fair sharing of the matrimonial property: Family Law Bulletin, Cases in Brief, *CM v STS*, (2008) CSOH 125, 98(Sep).

⁹⁵ *Gow* (Inner House) (n 77) [4] (Lord Drummond Young).

⁹⁶ Scottish Law Commission (n 12) para 16.20.

to keep a full and detailed account of their finances throughout the cohabitation.⁹⁷ It is not in the nature of relationships for contributions and sacrifices made to be precise, and consequently the approach adopted by the Inner House would be unable to provide fair and 'appropriate' awards in many cases.

D. Determining an Economic Advantage, Disadvantage and Contribution

In terms of section 28(9) an economic advantage includes gains in (a) capital; (b) income; and (c) earning capacity, with a disadvantage being construed accordingly.⁹⁸ In the majority of cases, there should not be great difficulty in assessing what constitutes either a gain or a loss in capital or earning capacity.⁹⁹ However, there has been an element of confusion in assessing gains or losses in income. It was common in arguments made to attempt to satisfy a claim for a loss or gain in income to rely on the fact that one party rather than the other bought and paid for food¹⁰⁰ or household bills.¹⁰¹ The Inner House in *Gow v Grant*, however, held that section 28 was not designed to deal with 'any wider financial issues that might have arisen between parties'.¹⁰² Indeed, it was not the intention of the legislators to provide a provision for such detailed scrutiny of the parties' expenditure during the cohabitation. However, the Inner House was not explicit in its decision and did not provide any clarification on what 'wider financial issues' can include.

Furthermore, there is no determinative list of what may or may not be considered to be an economic advantage or disadvantage. Rather, the three defined categories of gains or losses included under section 28(9) are identical to those under section 9(2) of the 1985 Act. Therefore, since the Inner House in *Gow v Grant*¹⁰³ seemingly confined its rejection of section 8 to 10 case law to matters of construction of section 28, there has been uncertainty as to whether or not cases decided under section 9(1)(b) could provide some limited guidance as to what may be considered appropriate to take into consideration as an economic advantage or disadvantage.¹⁰⁴ Until clarification is received on this matter, however, use of section 9(1)(b) case law for this purpose must be approached with caution. Whilst the Inner House did not explicitly reject this approach, it did nothing to promote it.

⁹⁷ Sheriff Mackie noted that no one prepares for their relationship to fail: *Gow* (Sheriff Court) (n 69) [67].

⁹⁸ For example, losses in any of the three categories.

⁹⁹ For example, earning capacity can be affected if one party gives up a career to care for children or, indeed, their partner; whilst a party may suffer a loss of capital if he/she pays a substantial sum towards the cost of a property that is in the name of the other party: *Malcolm, Kendall and Kellas* (n 5) para 1-25.

¹⁰⁰ An applicant stated she had paid for her own and her son's food during the cohabitation: *Jamieson* (n 49) [6] (Sheriff Hogg).

¹⁰¹ An applicant stated that she paid a monthly bill to Virgin Media, which covered the parties' television and telephone accounts: *F v D* (n 72) [17] (Sheriff Hendry).

¹⁰² *Gow* (Inner House) (n 77) [4] (Lord Drummond Young).

¹⁰³ *ibid*.

¹⁰⁴ It has been suggested that where the definitions are in effect identical, it could allow for direct comparisons of what has been considered to constitute an economic advantage or disadvantage under the 1985 Act: *Malcolm, Kendall and Kellas* (n 5) para 1-11.

E. Connection Between Contributions and Interests

Section 28(3)(a) requires a connection to be established between the economic advantage gained by the defender and the contribution from the pursuer that has given rise to that gain.¹⁰⁵ Similarly, in relation to the assessment of a pursuer's economic disadvantage, section 28(3)(b) requires the pursuer to demonstrate that the economic disadvantage claimed has been suffered in the interests of the defender or any relevant child.¹⁰⁶ There has been uncertainty however, regarding what is to be considered as 'in the interests of.' The Inner House in *Gow v Grant* held that what is required is for the pursuer to show that any economic disadvantage was suffered 'in a manner intended to benefit the defender'.¹⁰⁷ However, there is no requirement for such a narrow interpretation of the provision,¹⁰⁸ and it may further restrict the number of cases brought under section 28(2)(a), especially since the balancing exercise required in subsections (5) and (6) also require such a connection between contributions and interests. This interpretation by the Inner House was not what the Scottish Executive intended, since it stated that a cohabitant should show that 'he or she has made more contributions or sacrifices in the interests of the relationship'.¹⁰⁹ The introduction of a test of intention has the potential to be severely unfair in many cases, since it is not uncommon for a party in a relationship to suffer economic disadvantage in one's own interests as well as in the interests of the defender or the relevant child.

5. *Gow v Grant*: The UKSC Judgment

It is fair to say that the Inner House in the case *Gow v Grant*¹¹⁰ did not deal with many of the issues regarding interpretation and application of section 28. As previously discussed, the decision arguably made a claim under section 28(2)(a) even more difficult to pursue in certain aspects. Importantly, the case was taken to the UKSC. There, Lord Hope gave the principal judgment in this leading case concerning a claim under section 28(2)(a), with significant contributions from Lady Hale.

A. The Judgment

¹⁰⁵ Therefore, if the defender's economic advantage has not been derived from contributions of the pursuer, the court would be unlikely to make an award on that basis see: *Selkirk v Chisholm* 2011 Fam LR 56.

¹⁰⁶ A 'relevant child' is defined in section 28(10) as a child of the couple or who is accepted as a child of the family.

¹⁰⁷ *Gow* (Inner House) (n 77) [9] (Lord Drummond Young).

¹⁰⁸ Sheriff Principal Dunlop, whilst holding that there was no warrant for requiring economic disadvantage to have been suffered solely in the interests of the defender, noted that all that was required was to establish that any disadvantage was suffered in the interests of the defender 'to some extent', and the fact the pursuer has suffered economic disadvantage in one's own interest as well as in the interest of the defender was a factor the court may take into account in the overall exercise of its discretion: *Mitchell v Gibson* (n 51) [13] para 13.

¹⁰⁹ Hugh Henry (n 31), 17.

¹¹⁰ *Gow* (Inner House) (n 77).

Through an examination of the background to the legislation, Lord Hope clarified that fairness is the guiding principle of section 28.¹¹¹ The purpose of the judicial exercise is to achieve fairness between both parties to the relationship in the assessment of any capital sum that the defender is ordered to pay to the applicant. Importantly, Lord Hope distinguished between the concept of 'fairness' in the context of section 28 of the 2006 Act and section 9(1) of the 1985 Act. Thus, 'fairness' in the context of section 28 did not mean equal sharing. Instead, section 28 seeks to achieve fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship.¹¹²

Furthermore, Lord Hope held that the approach in the application of section 28 is indeed different from the approach in the application of section 9.¹¹³ Although there are identical expressions in the two provisions, the wording and context of section 9 is different to that of section 28, thus requiring the court to conduct an 'entirely different exercise' between the two schemes.¹¹⁴ However, Lord Hope found that section 28 was designed to achieve the same purpose as section 9(1)(b), namely to award fair compensation, on a rough and ready valuation in cases where otherwise none could be claimed.¹¹⁵ Consequently, cases decided under section 9(1)(b) may be of assistance in determining what the court might take into account as an economic advantage, disadvantage or contribution.¹¹⁶

Lord Hope stated the wording of subsections (3), (5) and (6) should be read broadly rather than narrowly.¹¹⁷ Therefore, although the phrase 'in the interests of the defender' in sections 28(3)(b) and (6) can be taken to mean 'in a manner intended to benefit the defender', such an interpretation is too narrow and thus is not compulsory.¹¹⁸ Additionally, Lord Hope felt it is more important to look at the 'effect of the transaction rather than the intention' because there is no requirement that any economic disadvantage suffered by the applicant was in the defender's interests only.¹¹⁹ Failing to do so would not give effect to the true meaning and effect of the provisions.¹²⁰

Lord Hope also held that the overriding principle of section 28 was one of fairness, and regard should be had as to where the parties were at the beginning of their cohabitation and where they were at the end.¹²¹ Therefore, to approach section 28 on the basis that it was intended to correct any 'clear and quantifiable' economic imbalance that might have resulted from cohabitation is too narrow.¹²² Indeed, contributions and sacrifices in non-commercial relationships of the kind that family

¹¹¹ Lord Hope found that there has been a consistent emphasis on fairness to both parties in the pre-legislative consultations and discussions: *Gow* (Supreme Court) (n 1) [31].

¹¹² *ibid* [33] (Lord Hope).

¹¹³ *ibid* [35] (Lord Hope).

¹¹⁴ *ibid* [15] (Lord Hope).

¹¹⁵ *ibid* [36] (Lord Hope).

¹¹⁶ *ibid*.

¹¹⁷ *ibid* [33] (Lord Hope).

¹¹⁸ *ibid* [38] (Lord Hope).

¹¹⁹ *ibid*.

¹²⁰ Although this case dealt with sections 28(3)(b) and (6) of the 2006 Act, the broad approach would also apply to sections 28(3)(a) and (5).

¹²¹ *Gow* (UKSC) (n 1) [40] (Lord Hope).

¹²² *ibid* [36] (Lord Hope).

law must deal with cannot often be valued precisely.¹²³ Furthermore, it would be unusual for parties to keep full and detailed accounts of their finances from the start of the cohabitation. Therefore, a 'broad brush' approach is necessary in the majority of cases.

Lord Hope confirmed that section 28 afforded courts complete discretion over both the making of an award and the amount to be awarded, provided there is a basis in fact for the decision it takes.¹²⁴ Additionally, well recognised principles limit the scope for interference by the appellate court. Thus, an appellate court should not interfere with a decision unless it can be shown that the judge, in the exercise of his discretion, misdirected himself in law or failed to take account of a material factor or reached a result which was manifestly inequitable or plainly wrong.¹²⁵

B. Analysis of the Judgment

Whereas the Inner House decision had been criticised for its narrow scope and objective, and led to concern as to whether it would be possible to make meaningful use of the 2006 Act, the UKSC decision provides clarification of section 28 and provides fresh hope that there is still scope for a fair outcome in cohabitants' claims.¹²⁶ Firstly, the judgment corrected some of the deficiencies in the drafting of the legislation. It seems that with the establishment of the overriding principle of fairness, as well as the purpose of the judicial exercise taken to be achieving fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interest of the relationship, section 28(2)(a) is finally set to achieve what the legislators intended. Secondly, the rejection of a requirement to prove intention to benefit the defender avoids the introduction of an unnecessary test which is neither set out in section 28 itself nor is in line with the aims of the legislation to rectify financial imbalance between former cohabitants.¹²⁷ Furthermore, the broad construction of the provisions to allow contributions made in the interests of the relationship rather than solely in the interests of the defender or any relevant child will help ensure a fairer outcome in cases. Finally, the courts must take a 'broad brush' approach to quantification rather than an accurate arithmetical approach. Although a 'broad brush' approach is likely to be more uncertain, it would be better suited to provide fair and 'appropriate' awards, as well as being in line with the intention of the legislators and the provision itself.

Nevertheless, although the UKSC has clarified certain issues, uncertainty and difficulties continue to exist in claims made under section 28(2)(a). Firstly, the notion of fairness is by no means certain. Subjectivity is inherent in fairness. Although the court is required to decide what is fair, each party will have a different

¹²³ *ibid.*

¹²⁴ *ibid* [42] (Lord Hope).

¹²⁵ *Gray v Gray* 1968 SC 185, 193 (Lord Guthrie).

¹²⁶ Fiona Sasan, 'Cohabitees and the Principle of Fairness' (2012) 57(8) *Journal of the Law Society of Scotland* 15.

¹²⁷ Additionally, the requirement of intention may involve complex argument and reduce the efficiency of cases: Rebecca Kelly, 'Calculating the Cost of Cohabitation: A Consideration of *Gow v Grant* (Scotland) [2012] UKSC 29' (2013) 47 *The Law Teacher* 102, 107.

view as to what is fair.¹²⁸ Secondly, the extent of guidance from section 9(1)(b) cases in determining an economic advantage, disadvantage and contribution under section 28(9) is uncertain, since the provision has received relatively little attention because of the other principles available under the 1985 Act to spouses and civil partners.¹²⁹

Finally, and most importantly, uncertainty remains over two major issues, namely how the court will exercise its discretion and how to quantify a claim under section 28(2)(a). Although Lady Hale commented on the potential usefulness of a list of factors that a court should take into account when exercising its wide discretion,¹³⁰ no such factors were given. Instead, the amount awarded to the respondent in the first instance, which Sheriff Mackie had arrived at from a 'broad brush' approach,¹³¹ was upheld. Although a 'broad brush' approach is favoured to an accurate arithmetical approach, the complete lack of guidance in the quantification of a claim makes it extremely difficult for practitioners to offer clients certain and clear advice. Additionally, as a consequence of the broad judicial discretion as to the interpretation of 'fairness', courts and practitioners will continue to find it difficult to quantify such claims.¹³²

Furthermore, Lord Hope stated that Sheriff Mackie's decision at first instance¹³³ was 'well within the band of reasonable decisions that were open to her',¹³⁴ which emphasises the width of the court's discretion. The 'band' of reasonable decisions will undoubtedly change depending on the facts and circumstances of a case. Although this is appropriate and desirable, it may be difficult for a judge, in certain cases, to determine the band of reasonable decisions without any factors the court should take into account when exercising its discretion or any guidance as to how to quantify a claim under section 28(2)(a). Therefore, the overall position for courts, practitioners and ultimately cohabitants has not altered significantly.

C. Impact on a Claim Under Section 28(2)(a)

The first reported case after the UKSC judgment was *Whigham v Owen*.¹³⁵ Lord Drummond Young, whilst following the UKSC's judgment, confirmed that uncertainty and difficulties remain in a claim under section 28(2)(a). The difficulty with the notion of fairness is compounded with the broad discretion given to the

¹²⁸ Andrew Gibb, 'It's just not fair!' (2012) 119(Sep) Family Law Bulletin 4, 6.

¹²⁹ It should also be noted that although the concepts are apparently identical, their application are rather different. For example, section 11(2) of the 1985 Act requires the court to balance advantages or disadvantages pertaining to one party against those pertaining to the other, whereas the offsetting is assessed for each party individually, not comparatively, in a section 28(2)(a) claim.

¹³⁰ *Gow* (UKSC) (n 1) [55] (Lord Hope).

¹³¹ *Gow* (Sheriff Court) (n 69) (Sheriff Mackie).

¹³² Morven Douglas and Karen Gibbons, '*Whigham v Owen*: A Step Forward in the Law of Cohabitation?' (*Balfour and Manson*, 21 May 2013) <www.balfour-manson.co.uk/news-events/news/archive/440/whigham-v-owen-a-step-forward-in-the-law-of-cohabitation/> accessed 7 October 2014.

¹³³ *Gow* (Sheriff Court) (n 69) (Sheriff Mackie).

¹³⁴ *Gow* (UKSC) (n 1) [43] (Lord Hope).

¹³⁵ *Whigham v Owen* [2013] SCOH 29 (Lord Drummond Young).

courts, which 'most judges and sheriffs feel uncomfortable with'.¹³⁶ The biggest difficulty Lord Drummond Young found was how to approach the quantification of a claim without any proper guidance in the legislation as to what the amount of that award should be. However, he did note that awards in cohabitation cases should generally be lower than those in divorce.¹³⁷ Although Lord Drummond Young made reference to the Scottish Law Commission's recommended approach in quantifying a claim under section 29,¹³⁸ he did not provide an explanation as to how he arrived at his figure.

In the more recent case of *Smith-Milne v Langer*,¹³⁹ Sheriff-Principal Pyle commented that although uncertainty remains in the quantification of a claim, this is a necessary consequence of a broad brush approach. Furthermore, he was of the opinion that over time, the build-up of case law may reduce the uncertainty for judges and practitioners. Indeed, the case of *Cameron v Lukes*¹⁴⁰ has shown that 'proper, evidential material' must exist in order to found the court's decision in any section 28 application.¹⁴¹ Nevertheless, the current situation for cohabitants is still by no means perfect. Therefore, bearing in mind the policy objective of achieving greater certainty, fairness and clarity, various reform methods for future claims under section 28(2)(a) will now be examined.

6. The Future of a Claim Under Section 28(2)(a)

A. Statutory Intervention

The cause of a majority of the problems and difficulties faced by judges and practitioners when dealing with a claim under section 28(2)(a) is the poor drafting of the Scottish legislation, which left many important issues of principle unarticulated and lacked any guidance on matters of interpretation and approach.¹⁴² However, with fairness established as the guiding principle of section 28 and clarification on matters of construction and purpose of the provisions, it is contended that the UKSC decision in *Gow v Grant*¹⁴³ has cured various deficiencies in the legislation. Accordingly, the position for cohabitants upon the cessation of their relationship is now what it should have been had the 2006 Act been drafted properly.

The problem of uncertainty and the difficulties it currently causes should be regarded as 'early days' effects, which is to be expected for a new piece of legislation such as section 28, which 'breaks new ground' rather than merely adding to existing law.¹⁴⁴ Therefore, over time, it is likely that practitioners will become more familiar with the operation of section 28(2)(a). Additionally, with the incidence of

¹³⁶ *ibid* [10] (Lord Drummond Young).

¹³⁷ *ibid* [12] (Lord Drummond Young).

¹³⁸ Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009).

¹³⁹ 2013 Fam LR 58 (Sheriff Principal Pyle).

¹⁴⁰ 2013 WL 7090818 (Sheriff Principal Scott).

¹⁴¹ *ibid* [18] (Sheriff Principal Scott).

¹⁴² Jo Miles, Fran Wasoff and Enid Mordaunt. 'Cohabitation: Lessons From Research North of the Border?' (2011) 23 *Child & Family Law Quarterly* 302, 317.

¹⁴³ *ibid*. The caution is issued by Ira Ellman.

¹⁴⁴ Wasoff, Miles and Mordaunt (n 2) 124.

cohabitation expected to increase in the future, it is logical to assume that the incidence of cohabitation breakdown will also increase. Therefore, through a build-up of case law, it is hoped that greater guidance can be sought from it by both judges and practitioners in order to approach section 28(2)(a) claims with more confidence. A clear example is provided by the financial provisions upon divorce within the 1985 Act, which, although now having become very workable, also took time to settle in.¹⁴⁵ It is hoped that after the inevitable bedding-in period, the same will apply to the 2006 Act, and judges and practitioners will feel much more at ease when dealing with section 28(2)(a) claims in the future.

Furthermore, even the best-laid plans and guidance can have unintended or unexpected consequences.¹⁴⁶ The legislators do not need to look any further than section 28 to acknowledge this universal truth. Reforming the law relating to cohabitants brings special controversy, and any proposal has both advantages and disadvantages. Thus, there is a great level of risk in any new legislation. With the underlying principle of fairness established and a general consensus on the approach to the application of section 28(2)(a) cases, the courts are now much better placed to deal with section 28(2)(a) claims than when the 2006 Act was enacted. Consequently, it would be unwise for the legislators to interfere now when the platform has been set to achieve greater consistency, fairness and clarity. Instead, at least for the time being, the legislators should allow the courts to apply the current law, ensuring the decision of *Gow v Grant*¹⁴⁷ is followed, and bear in mind the valuable caution: 'Be careful. Things may not work out as you expect'.¹⁴⁸

B. Limiting The Court's Discretion

It is clear that the width of the court's discretion provided by section 28(2) is uncomfortable for both judges and practitioners. The UKSC has emphasised this discretion by stating that there is a 'band of reasonable decisions' open to judges. This can make it even more difficult to predict an outcome in order to give clearer advice to clients, whilst reducing the possibility of appeal.¹⁴⁹ Therefore, it has been suggested that a list of discretionary factors to be taken into account in the exercise of the court's discretion, like those found in the (UK) Law Commission's *Report on Cohabitation: The Financial Consequences of Relationship Breakdown*,¹⁵⁰ may be a useful addition to section 28.¹⁵¹

¹⁴⁵ *ibid* 60. Practitioners responding to a study regarding their experiences with the cohabitation provisions of the 2006 Act recalled their experience of the divorce financial provisions in the 1985 Act, stating it took a period of time for the initial difficulties and uncertainties to dissipate.

¹⁴⁶ Jo Miles, Fran Wasoff and Enid Mordaunt, 'Reforming Family Law – The Case of Cohabitation: 'Things May not Work Out As You Expect'' (2012) 34 *Journal of Social Welfare and Family Law* 167, 167.

¹⁴⁷ *Gow* (UKSC) (n 1).

¹⁴⁸ Miles, Wasoff and Mordaunt (n 146) 167.

¹⁴⁹ Gordon Junior, 'Gow v Grant – Section 28 Family Law (Scotland) 2006 Explained' (2012) 80(3) *Scottish Law Gazette* 65, 68.

¹⁵⁰ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

¹⁵¹ *Gow* (UKSC) (n 1) [55] (Lady Hale).

Although the 2006 Act has provisions which are similar in many respects to those which the Law Commission recommends,¹⁵² a closer inspection reveals substantial differences. The Law Commission's recommendations, which have not been implemented,¹⁵³ include a relatively 'weak'¹⁵⁴ discretion given to courts because of a proposed list of factors to be taken into account in the exercise of the court's discretion.¹⁵⁵ It is true that greater legislative detail reduces the need for later judicial elaboration, and the 'principled discretion'¹⁵⁶ may reduce some uncertainty for both judges and legal practitioners.¹⁵⁷ However, the reduction in uncertainty comes at the cost of reduced flexibility in the face of idiosyncrasies of particular cases.¹⁵⁸ It should be remembered that cohabitation is 'a less formal, less structured and more flexible form of relationship than either marriage or civil partnership',¹⁵⁹ and this must be reflected in the law. Whether an appropriate set of discretionary factors can be developed to take account of all the different types of cohabiting relationships is doubtful, especially at a time where cohabitation is ever-increasing. Therefore, in order to ensure fairness can be achieved in all cases, it is likely that any guidance given will not be exhaustive, and overall uncertainty will remain.¹⁶⁰

Both advisers and decision makers seem to instinctively shrink from a scheme which, by its nature, involves a wide degree of judicial discretion in arriving at an award. However, such wide discretion is familiar in other jurisdictions and to suggest that it is a complete novelty to the Scottish courts would be a mistake.¹⁶¹ Indeed, Lord Hope famously characterised the scheme of section 9 as 'essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense'.¹⁶² A list of factors to be taken into consideration under in a section 28(2)(a) claim is desirable.¹⁶³ It would make it easier for practitioners to predict the outcome of clients' cases. However, the law in a new and complex area such as this should not be made easier just for the sake of it.¹⁶⁴ Instead, the law must be able to adapt to all cases, whatever the facts and circumstances, and provide fair outcomes and adequate protection. If a list is to be introduced, it must not inhibit the court's

¹⁵² HC Deb 6 March 2008, vol 472, col 122WS.

¹⁵³ HC Deb 6 September 2011, vol 532, col 15WS.

¹⁵⁴ A strong discretion is where 'the judge is at liberty to arrive at the order by taking into account whatever factors, and attaching to them whatever normative significance, he or she thinks fit': Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 *Law Quarterly Review* 438, 461.

¹⁵⁵ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (n 150) para 4.38. There are five discretionary factors proposed.

¹⁵⁶ *ibid*, paras 4.15 – 4.17.

¹⁵⁷ Miles, Wasoff and Mordaunt (n 142) 316.

¹⁵⁸ *ibid* 319.

¹⁵⁹ *Lindsay v Murphy* (n 41) [58] (Sheriff Miller).

¹⁶⁰ For example, the Cohabitation Bill provided a list of 15 discretionary factors, the last one being 'any other circumstance which the court considers relevant'. The variety of the list of factors meant the objective of the provision was unclear.

¹⁶¹ Robert Gilmour, 'Section 28 and Section 9(1)(b) – How Do They Relate?', (2013) SLT 265, 266.

¹⁶² *Little v Little* 1990 SLT 785, 787.

¹⁶³ Rebecca Kelly, 'Calculating the Cost of Cohabitation: A Consideration of *Gow v Grant* (Scotland) [2012] UKSC 29' (2013) 47 *The Law Teacher* 102, 108.

¹⁶⁴ If this were the case, the Supreme Court should have simply upheld the decision of the Inner House in *Gow v Grant*: Gibb, (n 128) 6.

ability to achieve fair outcomes in section 28(2)(a) claims. Therefore, the narrow context envisaged for an award being made in the Law Commission's proposals is undesirable.¹⁶⁵ Furthermore, discretionary factors, and the Law Commission's proposals as a whole, will not reduce the uncertainty in the quantification of a claim,¹⁶⁶ another major difficulty faced by judges and practitioners in a section 28(2)(a) claim.

C. Quantification – Guidance

Quantification of claims remains difficult for both courts and practitioners. Therefore, guidance regarding how to quantify a claim under section 28(2)(a) is highly desirable so as to achieve greater certainty in the law. However, it is in the nature of a claim based on contributions or sacrifices to be difficult to value precisely. As previously discussed, there are some non-financial contributions that will be impossible to quantify. Additionally, the adoption of a 'broad brush' approach rather than one requiring precise calculation is to ensure that, after a full assessment of the facts and circumstances of the individual case, the court has flexibility to make a fair award for any net economic imbalance. Consequently, it would be 'unwise to be overly prescriptive' about the order which the court should make to redress any economic imbalance.¹⁶⁷

The difficulty in providing the right level of guidance can be seen in the 'appropriate percentage' approach recommended by the SLC.¹⁶⁸ Although this approach was created for section 29 of the 2006 Act,¹⁶⁹ it was designed to assist the courts to quantify claims without any guidance from the legislation. Therefore, it is possible to envisage an equivalent scheme for a claim under section 28(2)(a) as follows. Firstly, the court would determine the extent, expressed as a percentage, to which the claimant should be regarded as a spouse or civil partner for divorce purposes.¹⁷⁰ The percentage is fixed by reference to only three factors: (i) the length of the cohabitation; (ii) the interdependence of the couple, financially and otherwise, and (iii) the financial and non-financial contributions the claimant had made to their life together.¹⁷¹ The court's discretion is solely focused on the nature of the parties' relationship, rather than the financial positions the cohabitants end up in. Thus, the 'scheme's rationale is to reward for past inputs, not provision for future needs'.¹⁷² Finally, the judge will determine what the applicant would have been entitled to on divorce and pay the cohabitant the appropriate percentage.¹⁷³

¹⁶⁵ Malcolm, Kendall and Kellas (n 5) para 156.

¹⁶⁶ Rebecca J Probert, 'A Review of Cohabitation: The Financial Consequences of Relationship Breakdown Law Com No 307 (HMSO 2007)' 41 *Family Law Quarterly Review* 521, 532.

¹⁶⁷ *Gow* (UKSC) (n 1) [55] (Lady Hale).

¹⁶⁸ Scottish Law Commission (n 138).

¹⁶⁹ s 29 allows a surviving cohabitant to make a claim for financial provision following the death of their partner.

¹⁷⁰ The maximum percentage is 100% so that a cohabitant cannot be awarded a greater sum than she would have obtained if she had been the deceased's surviving spouse or partner: Scottish Law Commission (n 138) para 4.18.

¹⁷¹ *ibid* para 4.14.

¹⁷² David Nichols, 'Reform of the Law of Succession' (2010) 14 *Edinburgh Law Review* 306, 312.

¹⁷³ Scottish Law Commission (n 138) para 4.22.

The 'appropriate percentage' approach, which has not been implemented, is not without its problems. It still leaves the court with much discretion, since the court is required to fix the appropriate percentage. Additionally, no guidance is given as to the weight of each of these factors.¹⁷⁴ Therefore, uncertainty remains over how the judge will weigh each factor and calculate the appropriate percentage. Furthermore, the 'veil of ignorance'¹⁷⁵ created by looking purely at the past can cause unfairness in cases where a former cohabitant has made a significant contribution to the other after the end of the cohabitation. Consequently, this approach may not be best suited for the purpose of a claim under section 28(2)(a), namely, to achieve fairness between both parties to the relationship in the assessment of any capital sum that the defender is ordered to pay to the applicant. Overall, this proposal seems unlikely to reduce the current uncertainty regarding quantification of section 28(2)(a) claims, whilst potentially undermining the underlying principle of fairness which lies at the heart of the award made under this provision.¹⁷⁶

There is optimism however, that quantification of claims will become easier and more predictable after the provision has had a chance to 'bed-in'.¹⁷⁷ Furthermore, it is hoped that over time there will be guidance from decisions of the higher courts which will further reduce the current uncertainty.

D. Increasing Public Awareness

The media publicity surrounding the 2006 Act focused mainly on reforms to divorce laws, and overshadowed the cohabitation provisions. Consequently, the current lack of public knowledge of the financial provisions available to cohabitants upon the termination of their relationship is a major concern.¹⁷⁸ If people do not know about it, they will not claim it. If the provisions are unused, they may as well not be there. The strict one-year time limit to bring a claim under section 28(2)(a), with no discretion given to the court to extend it, means that it can easily be missed if unaware of the provisions. Additionally, improving public awareness will provide a better balance between liberty and protection, by allowing parties who wish to opt-out of this provision to do so by putting in place a pre-cohabitation agreement.

There is an even greater danger that the limited media publicity afforded to increased rights for cohabitants results in cohabitants deriving a false sense of security from their own misconceptions, thereby failing to conclude cohabitation agreements when they would have done so if they had the appropriate knowledge.¹⁷⁹ Indeed, the public's misconception of a 'common law marriage' is both startling and concerning.¹⁸⁰ Furthermore, with the judicial divergence over how

¹⁷⁴ Amanda Spalding, 'People's Choice' (2011) 56(7) *Journal of the Law Society of Scotland* 20.

¹⁷⁵ This is known as the 'veil of ignorance': Scottish Law Commission (n 138) para 4.19.

¹⁷⁶ *Gow* (UKSC) (n 1) [31] (Lord Hope).

¹⁷⁷ Wasoff, Miles and Mordaunt (n 2) 59.

¹⁷⁸ Miles, Wasoff and Mordaunt (n 146) 170.

¹⁷⁹ Elaine Sutherland, 'From "Bidie-in" to "Cohabitant" in Scotland: The Perils of Legislative Compromise' (2013) 27(2) *International Journal of Law, Policy and the Family* 143, 160.

¹⁸⁰ 57% of respondents in a survey in Scotland believed that unmarried couples who live together have a 'common law marriage' that gives them the same rights as married couples: Scottish Executive

to apply the new legislation, lay people could be forgiven for failing to understand the precise content of the new provisions, when they apply and the implications for their lives. The introduction of cohabitation laws in England and Wales may increase public awareness, but since such laws will not be introduced until at least the next Parliament,¹⁸¹ the onus is on the Scottish Government to increase public awareness of the correct law relating to cohabitants. Increasing public awareness is now paramount in Scotland with the ever-rising number of cohabiting couples who are unaware of their legal rights.¹⁸² Otherwise, section 28(2)(a) can never fulfil its full potential as a useful and effective tool for providing fair outcomes and offering adequate protection.

7. Conclusion

The introduction of section 28 is a step in the right direction. The objectives behind the Act, namely to introduce greater certainty, fairness and clarity into the law and to protect the economically vulnerable, are necessitated by modern needs. The Scottish legislators should therefore be commended for taking the initiative to reflect the reality that the incidence of cohabitation is increasing. However, the introduction of a good concept has not led to a good law. The poor drafting of the legislation left many important issues of principle unarticulated and provided no guidance to courts as to how to interpret and apply the provision. This lack of direction to the courts, compounded by the unfettered discretion given to them, has led to varying and contradictory case law. Furthermore, following the narrow approach taken by the Inner House in *Gow v Grant*¹⁸³ on the construction and purpose of section 28, the effectiveness and usefulness of the provision was seriously doubted.¹⁸⁴ The UKSC however, has cured some of the deficiencies in the drafting of the legislation. The courts have now been given direction as to how to exercise their broad discretion when deciding whether an award should be made, namely to achieve fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship.¹⁸⁵

Nevertheless, uncertainty remains over how the courts will exercise their discretion when determining the notion of fairness, and the difficulties in quantifying a claim without any guidance persist. There is no doubt that greater clarity and certainty can be achieved by providing discretionary factors and guidance as to how to quantify a claim. It will become easier for the practitioners to

and Centre for Research on Families and Relationships, University of Edinburgh, 'Family Formation and Dissolution: Trends and Attitudes Among the Scottish Population' (Research Findings No43/2004) <www.scotland.gov.uk/Resource/Doc/47171/0029610.pdf> accessed 7 October 2014

¹⁸¹ HL Deb 6 September 2011, vol 730, col WS19.

¹⁸² Lucy Adam, 'Court Ruling Hits Couples Who Cohabit' *Herald Scotland* (5 July 2012) <www.heraldscotland.com/news/crime-courts/court-ruling-hits-couples-who-cohabit.18062801> accessed 7 October 2014

¹⁸³ *Gow* (Inner House) (n 77).

¹⁸⁴ Kirsty Malcolm, 'Gow v Grant – The Appeal, A Help or a Hindrance?' (*Murray Stable*, 2 September 2011) <www.murraystable.com/assets/files/articles/Gow_v_Grant_The_Appeal,_a_help_or_a_hindrance.pdf> accessed 7 October 2014.

¹⁸⁵ *ibid* [33] (Lord Hope).

predict the outcome. However, the underlying aim of the provision has been established as fairness. It should be kept in mind that the distinction between discretion and rules is one that lies along a spectrum, not a sharp dichotomy.¹⁸⁶ Even with the most in-depth research and discussions, it will be extremely difficult to achieve the appropriate balance between the right level of discretion afforded to judges, necessary to ensure they are able to deal with all types of different cohabiting relationship, and any guidance or rules introduced to create more certainty. At a time where there have not been many cases going through court, it will make the task of formulating such guidance even harder. Therefore, it is currently better for the law to be uncertain yet able to provide a fair outcome than a law that is certain but is unable to adapt to certain cases in order to achieve fairness.

The uncertainty and difficulties that remain in a claim under section 28(2)(a) should be seen as 'early days' effects. Especially in such a controversial and difficult area as this, the provisions cannot have been expected to operate immediately without difficulties. After all, it took time for the divorce provisions under the 1985 Act to settle in. Following the decision of *Gow v Grant*,¹⁸⁷ which clarified fairness as the guiding principle and stated that a broad approach should be taken, the law is now at the position it should have been when it was enacted had it been drafted properly. Therefore, section 28(2)(a), read in conjunction with *Gow v Grant*,¹⁸⁸ should now be given time to bed in. It is hoped that over time there will be enough decisions of the higher courts to guide judges and practitioners so that much of the uncertainty will be dissipated. After all, section 28 is not a magic wand. It is the beginning of a process to provide adequate protection to cohabitants necessitated by an evolving society. The current situation provides an opportunity, as much as it does uncertainty, for potential claimants. It should be remembered the position of Scottish cohabitants is already much better than their equivalents in England and Wales, where no such 'practicable and fair' remedy exists.¹⁸⁹ Therefore, the legislators should be slow to interfere unless it will improve the current law. Indeed, the lesson from Ireland is that devising a legislative scheme to provide protection for cohabitants is no easy task.¹⁹⁰ What currently requires urgent attention is the need to increase public awareness of these rights for cohabitants, especially with the strict one-year time limit to bring a claim. This will also ensure the balance of liberty and protection is maintained by allowing those who wish to opt-out of section 28 to do so. Otherwise, the current law should be allowed to settle in, with a detailed examination of its progress in a few years' time. It is hoped that any such future research will show that greater certainty, fairness and clarity in the law have all been achieved.

¹⁸⁶ Miles, Wasoff and Mordaunt (n 146) 319.

¹⁸⁷ *Gow* (UKSC) (n 1).

¹⁸⁸ *ibid*.

¹⁸⁹ *ibid* [56] (Lady Hale).

¹⁹⁰ John Mee, 'Cohabitation Law Reform in Ireland' (2011) 23 *Child & Family Law Quarterly* 323, 323.

The Road to the Referendum on Scottish Independence: the role of law and politics

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Abstract

In September 2014, the United Kingdom was on the brink of a constitutional crisis. The recent referendum on Scottish independence was the most constitutionally significant event the United Kingdom has encountered in several years. The fact that the constitution was able to facilitate the possibility of such fundamental change by allowing a fair, legal and decisive referendum is no mean feat. The massive role played by politics, and relatively minor role played by the law, in engineering the circumstances for the referendum can shed light on the nature of the British constitution. Despite the British constitution's gradual move towards a form of legal constitutionalism over the last few decades, the constitutional approach to the referendum on Scottish independence can be seen as a victory for the political constitution. In the context of significant constitutional reform, political agreement was preferred to judicial adjudication. This challenges the presumption that recourse to legal action and appeal to the judiciary are more desirable than political means of constitutional reform.

1. Introduction

'Rarely do we have an opportunity to debate an issue as fundamental as the future of our country'.¹ Following the landmark majority of the Scottish National Party (SNP) in the 2011 Scottish Parliamentary elections, such an opportunity arose. By virtue of a manifesto commitment to hold a referendum on Scottish independence,² the constitutional future of Scotland was called into question.

In January 2012, a dispute arose between the governments at Westminster and Holyrood over the process to be adopted to instigate this constitutional change. This dispute brought the complex relationship between law and politics in the British constitution to the forefront of public discourse. Scotland's ambiguous constitutional status,³ initiated by the union of Scotland and England in 1707, kept

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¹ Margaret Curran, HC Deb (15 January 2013) vol 556, col 752.

² SNP Manifesto 2011 at 28.

³ The historically unusual character of the United Kingdom and the evolutionary nature of its constitution have created a situation where the constituent parts of the UK have very little definitive

alive through an independent legal system and nationalist tendencies, and exacerbated by devolution in 1998, adds further complication to the issue of independence and the appropriate process for achieving that independence. 'What happened in legal and political (and hence constitutional) terms when Britain was created as a country is a matter open to several interpretations'.⁴

A theoretical challenge to Scottish independence, based on a constitutional interpretation of Britain's conception, will be addressed later. Before that, the concepts of law and politics and the relationship between the two need to be defined, and the characterisation adopted for present purposes highlighted. Secondly, the differing models of political and legal constitutionalism will be outlined. Thirdly, the constitutional effect of the Scotland Act 1998 (hereinafter 'the Scotland Act') will be examined. Thereafter, the political disagreement over the competence of the Scottish Parliament to legislate for a referendum on Scottish independence will be scrutinised and the possible reaction of the judiciary if called upon to adjudicate on this issue will be examined. Next, the resolution of this disagreement in October 2012 and the inference that can be drawn from this 'Agreement' regarding the nature of the constitution will be considered. Finally, the aforementioned challenge to legislation paving the way for Scottish independence will be analysed.

2. Law and Politics

Law and politics are interdependent disciplines. Although often represented as competing principles, this dichotomy is unhelpful:⁵ 'Any separation between legal and political power is purely conceptual...there can be no real legal authority without some political power... [and] there is rarely real political power without some legal authority'.⁶ Articulating a comprehensive definition of politics would be impossible. However, in developing an understanding of the term, certain key characteristics can be posited. Politics is 'bound up with questions of power and authority'.⁷ It attempts to find a 'right' answer to disputes in circumstances '...where there is no overarching rational or objective standard or principle for resolving that dispute'.⁸ This difficulty arises due to the 'simultaneous existence of different groups, hence different interests and different traditions, within a territorial unit under

constitutional status. Scotland is often described as a nation and a country, however it is not (at the time of writing) a fully independent state. Scotland's status within the British constitution is unclear.

⁴ I Loveland *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (5th edn, OUP, Oxford 2009) 45.

⁵ M Loughlin, *Sword and Scales* (Hart Publishing, Oxford 2000) 12.

⁶ E Christodoulidis *et al*, *Jurisprudence: Themes and Concepts* (Routledge Cavendish, London 2007) 4.

⁷ Loughlin, *Sword and Scales* (n5) 6.

⁸ *ibid* 123-4.

common rule'.⁹ Whenever an attempt is made to exert authority over a group of people, there will be politics.

The definition of law is similarly problematic. Generally, the law can be viewed in three ways. The first, associated with 19th century jurist John Austin, is law as command: 'a law is a command which obliges a person or persons to a course of conduct'.¹⁰ Viewed in this way, as commands of the 'political superior',¹¹ law 'presents itself as the output of the political process'.¹² The second school of thought is law as custom: '...law is the product of decisions and practices which have been built up over many generations'.¹³ The law has evolved over time, founded upon reason, tradition and an 'innate measure of right and wrong'.¹⁴ Viewed in this way, the law is 'a set of conventional practices which frame, but do not establish, political order'.¹⁵ Thirdly there is the notion of law as right. The law, founded upon liberty, autonomy and justice, operates as a constraint on political power to ensure individual freedom. Viewed in this way, law is superior to politics; the law is 'a set of foundational principles providing the framework within which politics is to be conducted'.¹⁶ When law is based on a foundation of individual rights, politics is cast in a negative light. Politics is 'dangerous and potentially destructive'.¹⁷

Clearly, the relationship between law and politics changes depending on how one defines these concepts. These categories of 'law' are not mutually exclusive and are far from exhaustive, only scratching the surface of the massive jurisprudential question, 'What is law?' However, outlining basic definitions of these 'competing, but also related, modes of public discourse'¹⁸ provides the starting point for determining the role each played in the lead up to the referendum on Scottish independence. Law as right has limited relevance: 'the ethical questions about the right of self-determination that bedevil debates around secession in other states have hardly arisen in the Scottish case'.¹⁹ Moreover, this 'right' is not a legal one.²⁰ It is unclear whether Scotland has the right to self-determination under public international law. Generally the right is only enjoyed by colonial territories.

⁹ B Crick, *In Defence of Politics* (5th edn, Continuum, London 2000) 17-18.

¹⁰ J Austin, *The Province of Jurisprudence Determined* [1832] (Weidenfeld and Nicolson, London 1955) 24

¹¹ *ibid* 23.

¹² Loughlin, *Sword and Scales* (n5) 9.

¹³ *ibid* 218.

¹⁴ *ibid* 10.

¹⁵ *ibid* 218.

¹⁶ *ibid* 223.

¹⁷ *ibid* 223.

¹⁸ M Loughlin 'Constitutional Law: the Third Order of the Political' in N Bamforth and P Leyland (eds), *Public Law in a Multilayered Constitution* (Hart Publishing, Oxford 2003) 27, 30.

¹⁹ M Keating, *The Independence of Scotland* (OUP, Oxford 2009) 81.

²⁰ There is no scope within the framework of the British constitution for legal accommodation of political claims to the sovereign right of the Scottish people - see N Walker 'Scottish Self-Government and the Unitary Constitution' in L Farmer & S Veitch (ed) *The State of Scots Law* (Butterworths, London 2001) 97, 99.

According to Malcolm Shaw, '...self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not yet convincingly happened.'²¹ In any case, a right to self-determination under international law would be unenforceable in domestic courts.²² Law as command, in the form of the Scotland Act, is the main focus of this article. The fundamental law argument, based on law as custom, will be explored later as a challenge to the orthodox view that, following amendment of the Scotland Act in February 2013, the competence of the Scottish Parliament to legislate on a referendum concerning Scottish independence was beyond legal challenge.

When discussing the interaction between law and politics, several relationships are engaged. 'Law and politics collide and combine in a dazzling variety of (not always compatible) ways'.²³ The relationship between law and politics could refer to the relationship between legal and political institutions, legal and political actors or the academic disciplines of law and politics. Similarly, it may denote the relationship between theories of law and theories of politics or the relationship between a particular legal value, for instance individual privacy, and a particular political value, such as national security.²⁴ For the purposes of this article, the only concern is with the first two relationships: namely that between political and legal institutions (i.e. the courts and the legislature) and that between legal and political actors (i.e. judges and politicians). Although any attempt to 'uncover the one true relationship of law to politics... is doomed to fail',²⁵ by looking at the nature of the British constitution and how it has functioned in the face of potential dissolution in relation to Scotland, light can be shed on the role law and politics play in the modern day constitutional order.

The independence debate encapsulates elements of both law and politics providing a platform for examining the constitutional relationship between the two. From one perspective, Scottish independence can be seen as a purely political issue. If politics is concerned with questions of power and authority then independence is political in the sense that it would entail a transfer of power and authority from Westminster to Holyrood. Whether Scotland should become independent or not is a matter of personal judgement. Consequently, independence could be seen as a question of politics.

Alternatively, Scottish independence could be seen as a purely legal issue: does the Scottish Parliament have the competence to legislate for a referendum on

²¹ M Shaw, *International Law* (5th edn, CUP, Cambridge 2003) 231.

²² In Britain, international law is only enforceable if it has been incorporated into domestic law by an Act of Parliament.

²³ A Tomkins 'In Defence of the Political Constitution' (2000) 22(1) *Oxford Journal of Legal Studies* 157, 169.

²⁴ *ibid* 166.

²⁵ *ibid* 169.

Scottish independence? Framed in this way the question is strictly legal, as the answer depends upon judicial interpretation of the Scotland Act, which limits the competence of the Scottish Parliament.

Clearly, whether Scottish independence is regarded as legal or political depends on how one frames the question. In reality, Scottish independence is neither purely political nor purely legal. However exploring the various legal arguments surrounding Scottish independence highlights the important role played by politics in the British constitution and emphasises the limited utility of the law, in the form of judicial intervention, in this context. This can go some way to debunking the myth that ‘...an answer to any issue can always be found in the body of law’²⁶; a misconception which, it could be said, ‘needs to be put right as a matter of some urgency’.²⁷

3. Legal and Political Constitutions

Before addressing the role of law and politics in the context of Scotland’s constitutional development, it is necessary to outline the relationship between law and politics in the British constitutional order. Constitutional discourse can be broadly separated into two categories: political constitutionalism and legal constitutionalism. This distinction is usually formulated in terms of accountability. A political constitution secures accountability through ‘political means such as debate, questioning, and investigative scrutiny, both in Parliament and through the media’.²⁸ A legal constitution secures accountability ‘...through the legal institutions of the courts, by judges, and through the legal means of adjudicative litigation’.²⁹ However, when discussing Scottish independence, it is not the accountability of those exercising political authority that is under consideration. Rather, it is the prospect of significantly changing the format of the constitution itself. It is from this perspective that the conflicting ideals of political and legal constitutionalism will be examined. Does the method of constitutional reform adopted to facilitate a referendum on Scottish independence suggest a legal or political constitution?

John Griffith, who laid the foundation for the idea of a political constitution,³⁰ claimed that ‘it is not possible to argue that something in Britain’s political constitution is ‘unconstitutional’, only that it is ‘politically unwise or undesirable’’.³¹ This is because ‘the constitution is no more and no less than what happens.

²⁶ Loughlin ‘Constitutional Law: the Third Order of the Political’ (n18) 49.

²⁷ Tomkins ‘In Defence of the Political Constitution’ (n23) 170.

²⁸ A Tomkins ‘The Role of the Courts in the Political Constitution’ (2010) 60 University of Toronto Law Journal 1, 2.

²⁹ *ibid.*

³⁰ G Gee & G Webber ‘What is a Political Constitution?’ (2010) 30(2) Oxford Journal of Legal Studies 273, 277.

³¹ J Griffith ‘The Brave New World of Sir John Laws’ (2000) 63 Modern Law Review 156, 175.

Everything that happens is constitutional. And if nothing happened that would be constitutional also'.³² This prospect of everything, regardless of its nature or content, being constitutional provokes legitimate concern among those suspicious of unrestricted bureaucratic control. However pragmatic reality may assuage this apprehension: 'a political institution that can do anything, in the sense of there being no legal limits on its powers, seldom actually does everything within its grasp'.³³ In any case, the solution to unpopular behaviour carried out by a State organ is political, not legal. Tyranny cannot be overcome by the '...intervention of the law and the invention of institutional devices... Only political control, politically exercised can supply the remedy'.³⁴ The law is merely one method used to resolve disputes; it '...is neither separate from nor superior to politics, but is itself a form of political discourse'.³⁵ Thus law is subordinate to politics; in Griffith's words 'law is politics carried on by other means'.³⁶ The foundation underlying Griffith's account of political constitutionalism is the belief that political decisions should be made by politicians.³⁷ Constitutional change is therefore a political matter that should be left to the judgement of politicians; if this change is unpopular, the remedies are political. The role of the judiciary within a political constitution is to 'support and nourish the political constitution'.³⁸ The judiciary should not subvert the democratic process by adjudicating on questions of moral and political judgement.³⁹ According to political constitutionalism, the process of Scottish independence is a purely political matter; judicial intervention in this context would be inappropriate.

However, Britain's political constitution is under a great deal of pressure from the idea that the:⁴⁰

...traditional, political manner of dealing with the problem of constitutional accountability is no longer (even if it ever was) the best method, and that a better approach would be to turn instead to the courts. Such a move would bring the British constitution into line with the legal model of constitutionalism that is common in both North America and continental Europe.

The SNP criticises the UK's uncodified constitution, which allows Westminster to do anything other than bind its successors. As an alternative, the SNP proposes that an

³² J Griffith 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1, 19.

³³ Gee & Webber 'What is a Political Constitution?' (n30) 290; See also A Tomkins *Public Law* (OUP, Oxford 2003) 17: 'the fact that everything can be changed does not mean that everything will be changed. It does not even mean that anything will be changed'.

³⁴ Griffith 'The Political Constitution' (n32) 16

³⁵ Gee & Webber 'What is a Political Constitution?' (n30) 277.

³⁶ Griffith 'The common law and the political constitution' (2001) 117(1) *Law Quarterly Review* 42, 59.

³⁷ Griffith 'The Political Constitution' (n32) 16.

³⁸ Tomkins 'The Role of the Courts in the Political Constitution' (n28) 3.

³⁹ Paraphrasing Lord Bingham in *Countryside Alliance v Attorney General* [2007] UKHL 52 [45].

⁴⁰ A Tomkins, *Our Republican Constitution* (Hart Publishing, Oxford 2005) 9.

independent Scotland should have a 'written constitution which expresses our values, embeds the rights of its citizens and sets out clearly how institutions of state interact with each other and serve the people'.⁴¹ A written constitution does not necessarily mean a legal constitution; it could provide for political forms of accountability.⁴² However, the entrenchment of rights within the written constitution proposed by the SNP suggests the courts will be called upon to ensure these rights are upheld. This would signify a move towards legal constitutionalism.

Legal constitutionalism rejects the premise that judges should not adjudicate on political issues: 'It is manifestly false that the judges do not, or should not, engage in issues which are at least concerned with political questions'.⁴³ Sir John Laws claims that although judges must 'adjudicate in cases which involve questions of acute political controversy',⁴⁴ these decisions cannot be described as political as judicial review does not 'engage the judge in a trial of the merits of the decision impugned'.⁴⁵ The court exercises a supervisory jurisdiction, reviewing the legality of a public decision, not the merits of that decision.⁴⁶ The court reviews process and policy implementation; it does not make policy. However, this distinction is difficult to maintain as 'the uncertain boundary between policy-making and implementation has become more porous'⁴⁷ and in some cases these processes could be said to be completely indistinguishable. Laws rejects political forms of accountability claiming that Parliament 'lacks sufficient systematic control over the Executive government... the Executive can bend Parliament to its will'.⁴⁸ This autocratic power 'is only indirectly vouchsafed by the elective process'.⁴⁹ As a result, legal forms of accountability are required: 'the power of democratically elected bodies must be subject to limits'.⁵⁰ These limits are imposed by the common law.

According to TRS Allan, Parliament is constrained by the judiciary because legislation is subject to the common law: 'Legislation obtains its force from the doctrine of parliamentary sovereignty, which is itself a creature of the common law and whose detailed content and limits are therefore matters of judicial law-making'.⁵¹ If Parliament passed legislation that was deemed by the courts to be

⁴¹ Scottish Government Publication 'Scotland's Future: From the Referendum to Independence and a Written Constitution' (February 2013) [1.4].

⁴² A Tomkins, *Public Law* (OUP, Oxford 2003) 12.

⁴³ J Laws 'Law and Democracy' (1995) *Public Law* 72, 74.

⁴⁴ *ibid.*

⁴⁵ *ibid* 76.

⁴⁶ G Anthony & P Leyland, *Textbook on Administrative Law* (6th edn, OUP, Oxford 2009) 205.

⁴⁷ J Sumpton 'Judicial and Political Decision-Making: The Uncertain Boundary' (FA Mann Lecture, 2011) 6.

⁴⁸ Laws 'Law and Democracy' (n43) 90-91.

⁴⁹ *ibid* 92.

⁵⁰ *ibid* 85.

⁵¹ TRS Allan, *Law, Liberty and Justice* (OUP, Oxford 1993) 10.

‘unconstitutional’ it would be struck down.⁵² Legislation is inferior to judicial precedent; a statute cannot ‘displace the common law by providing a rival vision of the constitutional order’.⁵³ This constitutional review function places the judiciary and the common law above all else. Judges cannot initiate significant constitutional change – ‘politicians may re-invent the wheel; judges may not. Law is evolutive. Politics is revolutionary’⁵⁴ – however when legislation initiates significant constitutional change, it is the duty of the judges to ensure this change is not abhorrent to fundamental rights or democratic principles protected by the common law. ‘It is a necessary part of the judge’s institutional role to reject a law that no conception of public reason could support’.⁵⁵ A law that fails to meet the basic requirements of liberal justice is merely a measure that purports to be law.⁵⁶ Therefore, according to legal constitutionalism, constitutional change is initiated by law as command but constrained by law as custom and law as right. Law provides a framework within which politics is to be conducted.

Historically, Britain’s constitution has been based on the political model.⁵⁷ However ‘support for the idea of a political constitution seems to be dwindling’.⁵⁸ Britain’s constitution is becoming more legal and less political; our ‘ad hoc political constitution... is undergoing a period of almost unprecedented formalisation’.⁵⁹ This move from a political constitution towards one which rests on a foundation of law is predicated on several recent developments including membership of the EU, devolution of government responsibilities to Scotland, Wales and Northern Ireland, the passage of the Human Rights Act 1998 and an increase in judicial review of governmental action.⁶⁰ Some argue that this move is a mistake.⁶¹ Others attempt to reconcile this development with political constitutionalism, claiming the two models are not mutually exclusive: ‘What we require if we are to move forward is an account that presents legal and political constitutions not as competitors but as partners’.⁶² However Gee and Webber believe viewing the two models as partners is an oversimplification.⁶³ For them the two models ‘ought not to be starkly presented

⁵² Laws ‘Law and Democracy’ (n44) 87; Allan ‘Law, Liberty and Justice’ (n51) 282.

⁵³ Allan, *Law, Liberty and Justice* (n51) 11.

⁵⁴ J Laws ‘The Good Constitution’ (2012) *Cambridge Law Journal* 567, 575.

⁵⁵ TRS Allan ‘In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law’ *Law, Society and Economy Working Papers* 5/2009, London School of Economics and Political Science 3.

⁵⁶ *ibid* 11.

⁵⁷ Tomkins, *Public Law* (n42) 21.

⁵⁸ Gee & Webber ‘What is a Political Constitution?’ (n30) 287.

⁵⁹ S Tierney ‘Constitutionalising the role of the judge: Scotland and the new order’ (2001) 5(1) *Edinburgh Law Review* 49, 53.

⁶⁰ Loughlin, *Sword and Scales* (n5) 4.

⁶¹ Tomkins, *Our Republican Constitution* (n40) 10.

⁶² T Hickman ‘In Defence of the Legal Constitution’ (2005) 55 *University of Toronto Law Journal* 981, 1016.

⁶³ Gee & Webber ‘What is a Political Constitution?’ (n30) 297.

as either in tension or in harmony'.⁶⁴ Britain's constitution will never conform precisely to one specific model: 'there are elements of both legal and political constitutionalism in most constitutions'.⁶⁵ Nonetheless, a model provides 'an explanatory framework within which to make sense of a real world constitution'.⁶⁶ Accordingly, when determining the constitutional future of Scotland, it is important to bear these two models in mind.

These models will now be explored in relation to the Scotland Act and the independence debate. The Scotland Act has changed the relationship between law and politics in Scotland, presenting a challenge to the orthodox doctrine of parliamentary sovereignty. For many, the Act signifies a move towards a legal constitution; the courts' constitutional role has been enhanced due to their new responsibility for determining the legality of Acts of the Scottish Parliament (ASPs). However, in the context of Scottish independence, the process adopted to instigate constitutional change could be seen as a victory for the political constitution. The dispute over the competence of the Scottish Parliament to legislate on a referendum concerning Scottish independence was resolved through political agreement, not through litigation in court. This conclusion is explored in more detail below. First, the claim that devolution has resulted in a move towards legal constitutionalism is considered. Examining these issues can shed new light on the nature of the British constitution.

4. The Scotland Act 1998

Many warned that devolution would lead to the breakup of Britain;⁶⁷ as such the Scotland Act could be seen as the first step to Scottish independence. The Scotland Act 'brings a new dynamic to the British Constitution'.⁶⁸ Establishing a devolved administration in Edinburgh has created a 'clear division between the legal sovereignty of Westminster and the political sovereignty of the Scottish people'.⁶⁹ Legal sovereignty is undoubtedly retained;⁷⁰ the Scottish Parliament is therefore

⁶⁴ *ibid.*

⁶⁵ R Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (CUP, Cambridge 2007) at 5.

⁶⁶ Gee & Webber 'What is a Political Constitution?' (n30) 291.

⁶⁷ This was the view of the Conservative Party; see Hansard HC Deb (12 January 1998) vol 304, col 21. Labour MP Tam Dalyell also expressed concern that the Scotland Bill was 'the paving Bill for the dissolution of the United Kingdom' at col 86.

⁶⁸ CMG Himmsworth & C Munro, *The Scotland Act 1998* (2nd edn, W Green/Sweet & Maxwell, Edinburgh 2000) xx.

⁶⁹ D Sharp 'Parliamentary Sovereignty: a Scottish perspective' (2010) 6(1) Cambridge Student Law Review 135, 144.

⁷⁰ Scotland Act 1998 s28(7) states: 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'

constitutionally subordinate to Westminster. However, this retention of unlimited legislative power has lost its political substance.⁷¹ Westminster no longer commands political authority over matters within the competence of the Scottish Parliament: 'Realpolitik has imposed clearly apparent practical restrictions on the technically limitless power of Parliament to legislate'.⁷² As a result, Westminster is supreme 'in constitutional theory alone'.⁷³

This division of power has enhanced the role of the courts in relation to constitutional issues: 'A constitution which divides power... requires a court to police the division'.⁷⁴ The Scotland Act introduces a judicial element into the determination of the distribution of powers under the devolution settlement.⁷⁵ Due to the limited legislative competence of the Scottish Parliament,⁷⁶ 'there is wide provision for post-enactment review by the courts'.⁷⁷ In addition, section 33 of the Scotland Act provides for pre-enactment review. Therefore 'with devolution comes an enhanced role for the courts'.⁷⁸ Ian Loveland suggests that the Scotland Act has transformed our higher courts into constitutional courts and that 'they may in consequence be drawn much more often into making ostensibly party political judgements'.⁷⁹ This has not yet convincingly happened. The courts continue to apply an orthodox Diceyan approach to parliamentary sovereignty in devolution cases⁸⁰ and have, thus far, prevented the constitutional significance of the Scotland Act from dictating their interpretation of its provisions. In *Imperial Tobacco Ltd v Lord Advocate*⁸¹ Lord Hope affords the Scotland Act no special significance, stating 'the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute'.⁸² Evidently, judicial impartiality has been maintained.

Nonetheless, the new constitutional role given to the judiciary by the Scotland Act signifies a move away from a political constitution towards a legal one. A legal remedy can now be sought for what is essentially a political question. This juridicalisation of a political conflict leads to the 'politicisation of the judiciary'.⁸³ In

⁷¹ N Walker 'Beyond the unitary conception of the United Kingdom Constitution?' (2000) Public Law 384, 397.

⁷² G Little 'Scotland and parliamentary sovereignty' (2004) 24 Legal Studies 540, 544/545.

⁷³ Bogdanor 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) Political Quarterly 185, 187.

⁷⁴ *ibid* 188.

⁷⁵ *ibid*.

⁷⁶ See Scotland Act 1998 s29.

⁷⁷ Little 'Scotland and parliamentary sovereignty' (n72) 549.

⁷⁸ A Page et al, *A Guide to the Scotland Act 1998* (Butterworths, Edinburgh 1999) 154.

⁷⁹ Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (n4) 445.

⁸⁰ Little 'Scotland and parliamentary sovereignty' (n72) 562.

⁸¹ [2012] UKSC 61.

⁸² *ibid* [15].

⁸³ A O'Neill 'The Scotland Act and the government of judges' (1999) 9 SLT 61, 62.

*Martin v Most*⁸⁴ the court recognised that 'it is not for the judges to say whether legislation on any particular issue is better made by the Scottish Parliament at Holyrood or by the UK Parliament at Westminster'.⁸⁵ This question has already been answered by the sovereign Westminster Parliament in the form of the rules enunciated in the Scotland Act. However:

...those rules, just like any other rules, have to be interpreted. That is the court's function. It is for the court to say what the rules mean and how... they must be applied in order to resolve the issue whether the measure in question was within competence.⁸⁶

There is an element of legal fiction inherent in this reasoning. The court may legitimately endorse an expansive interpretation or a restrictive interpretation. In doing so, the court is essentially adjudicating on a question of politics; namely whether legislation on a particular issue should be made at Holyrood or at Westminster. Allowing the courts to adjudicate on matters of competence indicates a move away from political constitutionalism as issues of legislative competence had hitherto been a political issue, decided by Parliament. Thus far the court has managed to avoid making 'ostensibly party political judgements'.⁸⁷ However this does not diminish the significance of judicial adjudication on what were previously political issues.⁸⁸ The Scotland Act has 'elevate[d] the role of judges at the expense of politicians to the position of pivotal constitutional actors'.⁸⁹ An increase in the involvement of the judiciary in 'what have been traditionally seen as political aspects of the constitution'⁹⁰ is described by Tierney as inevitable due to the 'open ended provisions which invite judicial elaboration'⁹¹ in the Scotland Act.

This constitutionalisation of the judiciary indicates a move towards legal constitutionalism. This process was not initiated by the Scotland Act; however judicial review of legislation has intensified this pre-existing feature of our constitution.⁹² This provided the framework for the political disagreement over the competence of the Scottish Parliament to legislate for a referendum on independence. Combined with the fragmented sovereignty prompted by devolution, the

⁸⁴ *Martin v Most* [2010] UKSC 10.

⁸⁵ *ibid* [5]. Also see *Imperial Tobacco Ltd* (n81) [13].

⁸⁶ *ibid*.

⁸⁷ Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (n4) 445.

⁸⁸ Before devolution, whether separate legislation was required for Scotland was a matter for Parliament.

⁸⁹ S Tierney 'Constitutionalising the role of the judge: Scotland and the new order' (2001) 5(1) *Edinburgh Law Review* 49, 54.

⁹⁰ *ibid* 61.

⁹¹ *ibid*.

⁹² Page A 'Constitutionalism, Judicial Review and 'the Evident Utility of the Subjects Within Scotland'' in Farmer L & Veitch S (ed), *The State of Scots Law* (Butterworths, London 2001) 11, 19.

constitutionalisation of the judiciary distorted and confused the role law and politics should play in resolving this dispute. Whether judicial involvement in the resolution of this dispute was necessary was the subject of much speculation and debate. This dispute, and the subsequent resolution thereof marked by the Edinburgh Agreement in October 2012, will now be examined in more detail.

5. The Referendum Debate

A. The political disagreement

In January 2012 the political disagreement over the Scottish Parliament's competence to hold a referendum on Scottish independence became abundantly clear through consultation papers published by the UK Government and the Scottish Government. The UK Government stated, in *Scotland's Constitutional Future*,⁹³ their view 'that it is outside the powers of the Scottish Parliament to legislate for a referendum on independence at present and that any such legislation would be declared unlawful by the courts'.⁹⁴ This is because 'legislation providing for a referendum on independence plainly relates to the Union of the Kingdoms and is therefore outside of the Scottish Parliament's legislative competence'⁹⁵ under Schedule 5 of the Scotland Act.⁹⁶ In the Scottish Government's consultation paper, *Your Scotland, Your Referendum*,⁹⁷ it is stated that 'The Scottish Government's mandate to hold a referendum is clear'.⁹⁸ The SNP conceded that they could not exceed the powers conferred by the Scotland Act; however they claimed 'a referendum question asking whether the powers of the Scottish Parliament should be extended to enable independence to be achieved'⁹⁹ would not exceed these powers.

The SNP's argument rested upon a creative interpretation of the (then) prospective Referendum Bill and the Scotland Act. An ASP is not law so far as any provision is outside the legislative competence of the Parliament.¹⁰⁰ A provision is outside that competence if it relates to a reserved matter.¹⁰¹ 'The question of whether a provision relates to a reserved matter is to be determined... by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'.¹⁰² Due to the focus on purpose in determining whether an ASP is

⁹³ Secretary of State for Scotland 'Scotland's Constitutional Future' (January 2012) Cm 8203.

⁹⁴ *ibid* 9.

⁹⁵ *ibid* 10.

⁹⁶ Scotland Act 1998, Sch 5(1), para (1)(b).

⁹⁷ Scottish Government Publication 'Your Scotland, Your Referendum' (January 2012).

⁹⁸ *ibid* [1.9].

⁹⁹ *ibid* [1.5].

¹⁰⁰ Scotland Act 1998 s29(1).

¹⁰¹ *ibid* s29(2)(b).

¹⁰² *ibid* s29(3).

within legislative competence, it could be argued that legislation providing for a referendum on independence would not change the law on reserved matters as 'it could be read literally as only intended to provide a mechanism for ascertaining what the opinion of the Scottish people upon independence is'.¹⁰³

The UK Government's interpretation is undoubtedly the orthodox view; however the alternative argument gained support from many legal academics, including the late Neil MacCormick: 'The Scottish Executive has unlimited powers to negotiate with the Westminster government about any issue which could be the subject of discussion between them, therefore it could seek an advisory referendum'.¹⁰⁴ Loveland also indicates that the question of competence is not necessarily as clear-cut as it initially appears: 'For the Scots Parliament to seek to discover if the electorate would welcome further constitutional reform does not necessarily amount to constitutional reform per se'.¹⁰⁵ In addition, a group of seven academics from the Universities of Glasgow and Edinburgh, Anderson *et al*, expressed support for this argument in a co-authored post on the Constitutional Law Blog in January 2012.¹⁰⁶ They objected to the UK Government's position, claiming it 'conflates the intention of the Scottish Government with the intention of the Scottish Parliament'.¹⁰⁷ The political aspiration of the SNP government to dissolve the Union is not necessarily the purpose of the legislation. MSPs may vote for a Referendum Bill for a variety of reasons, for instance in anticipation of a No vote, which would put the on-going independence dispute to rest. *Parliament's* intention would not necessarily be to dissolve the Union. However the court refers to a broad range of background materials when determining the purpose of an ASP. In *Martin v Most* Lord Hope states that:¹⁰⁸

Reports to and papers issued by the Scottish Ministers prior to the introduction of the Bill, explanatory notes to the Bill, the policy memorandum that accompanied it and statements by Ministers during the proceedings in the Scottish Parliament may all be taken into account [when determining the purpose of a provision under s29(3).]

¹⁰³ I Jamieson 'Playing politics with the law? Scottish Parliament's power to legislate for a referendum on independence' (2012) 11 Scots Law Times 61, 62.

¹⁰⁴ N MacCormick 'Is There a Constitutional Path to Scottish Independence?' (2000) 53 Parliamentary Affairs 72 at 72.

¹⁰⁵ Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (n4) 441.

¹⁰⁶ G Anderson, C Bell, S Craig, A McHarg, T Mullen, S Tierney & N Walker 'The Independence Referendum, Legality and the Contested Constitution: Widening the Debate' (UK Constitutional Law Blog, posted 31st January 2012) <<http://ukconstitutionallaw.org>>. Also see N Barber 'Scottish Independence and the Role of the United Kingdom' (UK Constitutional Law Blog, posted 11th January 2012) <<http://ukconstitutionallaw.org>> all accessed 7 October 2014.

¹⁰⁷ Anderson *et al* 'The Independence Referendum' (n106)

¹⁰⁸ *Martin v Most* [2010] UKSC 10 [25].

Reference to enactment history is an accepted canon of statutory interpretation.¹⁰⁹ In light of this, the House of Lords Constitutional Committee was of the view that 'the SNP's political purpose in introducing any Referendum (Scotland) Bill is... highly likely to be relevant to considering the legal purpose of that legislation'.¹¹⁰ The intention of the Scottish Government is indisputably clear: the SNP manifesto plainly states that 'a yes vote will mean Scotland becomes an independent nation'.¹¹¹ Whether advisory or legally binding,¹¹² the purpose of the referendum would unambiguously be to deliver independence and therefore it would be outwith the legislative competence of the Scottish Parliament.¹¹³ This conclusion could be seen to be at odds with section 101(2) of the Scotland Act which states that an ASP 'is to be read as narrowly as is required for it to be within competence, if such a reading is possible'.¹¹⁴ However, this section adds little substance to the SNP's argument as whether such a reading is possible depends on whether the purpose of the Referendum Bill is to consult the Scottish people or to dissolve the Union. As already stated, the latter is the more reasonable interpretation.

Despite these arguments, Dr Matt Qvortrup claims the Scottish Government's generous reading of the Scotland Act would be endorsed by the Supreme Court. In his evidence to the Scottish Affairs Committee, Qvortrup expressed the view that it '...seems rather unlikely',¹¹⁵ that the Supreme Court would strike down a decision by the Scottish Parliament to hold a referendum on Scottish independence. However, the majority of academic commentators have expressed the alternative view. Iain Jamieson argues that '...it would be difficult, realistically, for a court to take the view that the purpose of the Bill was merely to carry out a market research exercise'.¹¹⁶ In their evidence to the Scottish Affairs Committee Adam Tomkins, Alan Page and Aiden O'Neill all express a similar sentiment, arguing that the proposed Referendum Bill would be out with the competence of the Scottish Parliament.¹¹⁷ The House of Lords Select Committee on the Constitution reached the same

¹⁰⁹ F Bennion, *Statutory Interpretation: A Code* (4th edn, Butterworths, London 2002) 521.

¹¹⁰ House of Lords Select Committee on the Constitution, 'Referendum on Scottish Independence' 24th Report of Session 2010-12, 17 February 2012, HL 263 [18].

¹¹¹ SNP Manifesto 2011 at 28.

¹¹² This distinction offers little assistance as, due to parliamentary sovereignty, referendums are generally advisory in nature: 'in exercising its sovereignty Parliament could legislate so as to override the result of a referendum' - House of Lords Select Committee on the Constitution, 'Referendum on Scottish Independence' [22]; Also see Scottish Affairs Committee, 'The Referendum on Separation for Scotland: making the process legal' Session 2012-13, 7 August 2012, HC 542 [8].

¹¹³ A Tomkins 'The Scottish Parliament and the Independence Referendum' (UK Constitutional Law Blog, posted 12th January 2012) <<http://ukconstitutionallaw.org>> accessed 7 October 2014

¹¹⁴ Scotland Act 1998 s101(2).

¹¹⁵ Scottish Affairs Committee 'The Referendum on Separation for Scotland: Oral and written evidence' Session 2010-12, 8 May 2012, HC 1608 at 208.

¹¹⁶ Jamieson 'Playing politics with the law?' (n103) at 63.

¹¹⁷ Scottish Affairs Committee 'The Referendum on Separation for Scotland: Oral and written evidence' (n115); Tomkins 155 [9], Page 167 [8] and O'Neill 170 [3.5].

conclusion.¹¹⁸ Consequently, the purpose of the Referendum Bill would have almost certainly been found to be a precursor to independence. However, had the Supreme Court been invited to adjudicate on the issue, its ruling would have turned, not merely on the purpose of the Referendum Bill, but on what the court interprets as the purpose of the Scotland Act itself.

Based on the interpretation of the Northern Ireland Act 1998 in *Robinson v Secretary of State for Northern Ireland*,¹¹⁹ Anderson et al argue that devolution statutes, as constitutional measures, should be interpreted 'generously and purposively'.¹²⁰ Consequently, the phrase 'relates to a reserved matter'¹²¹ should be interpreted expansively. However this purposive approach is not peculiar to the Scotland Act:¹²² '...consideration of the purpose of an enactment is always a legitimate part of the process of interpretation'.¹²³ Therefore, the mere use of a purposive approach is unlikely to justify such an expansive interpretation of the Scotland Act. In addition, subsequent case law appears to contradict the assumption that the generous and purposive approach can be applied to the Scotland Act. *Robinson* was expressly distinguished in the Inner House in *Imperial Tobacco Ltd*;¹²⁴ the Scotland Act has no clear background purpose and so can be contrasted with the Northern Ireland Act, which was enacted with the specific purpose of implementing the Belfast Agreement. For the Scotland Act '...there is nothing in the statute or in its background which suggests that one should read the provisions... expansively or restrictively'.¹²⁵ In addition, the principle derived from *Robinson* was deemed to provide little assistance to the Court for the purpose of determining what is reserved and what is devolved.¹²⁶ This approach was endorsed by Lord Hope, with whom all the other Justices agreed, when the case was appealed to the Supreme Court.¹²⁷ More to the point, advocating a purposive interpretation of the Scotland Act does not necessarily support the Scottish Government's position. According to Lord Hope, the Scotland Act was 'intended, within carefully defined limits, to be a generous settlement of legislative authority'.¹²⁸ Its provisions must have been intended to create 'a rational and coherent scheme defining the legislative competence of the Scottish

¹¹⁸ HL Select Committee on the Constitution, 'Referendum on Scottish Independence' (n110) [30].

¹¹⁹ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

¹²⁰ *ibid* [11].

¹²¹ Scotland Act 1998 s29(2)(b).

¹²² See Lord Hope in *Imperial Tobacco Ltd v Lord Advocate* (n81) [14].

¹²³ *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272. Also see F Bennion, *Statutory Interpretation: A Code* (4th edn, Butterworths, London 2002) 809.

¹²⁴ *Imperial Tobacco Ltd* 2012 SLT 749 (Inner House).

¹²⁵ *ibid* [14].

¹²⁶ *ibid* [183].

¹²⁷ *Imperial Tobacco Ltd v Lord Advocate* (n81) [15].

¹²⁸ *ibid*.

Parliament'.¹²⁹ The purpose of the Act was to create a limited legislature; independence was arguably regarded to be out with those limits.

During passage of the Bill in 1998 Donald Dewar, the Secretary of State for Scotland, stated that '...a referendum that purported to pave the way for something that was ultra vires is itself ultra vires'.¹³⁰ This unambiguous statement of intent by the promoter of the Bill may provide assistance when determining the purpose of the Act. Following the judgement in *Pepper v Hart*,¹³¹ reference to Parliamentary material is permitted 'as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity'.¹³² The material relied upon must be a clear statement from the promoter of the Bill.¹³³ This was to ensure that where the words used in the statute are capable of more than one meaning, Parliament's true intention is 'enforced rather than thwarted'.¹³⁴ It is clear Parliament's 'true intention' when passing the Scotland Act was to reserve matters relating to the Union including a referendum on independence. The limited utility of material introduced under the *Pepper v Hart* rule was recognised in *Robinson*;¹³⁵ consequently it is unclear whether Dewar's statement would have any influence on the courts' interpretation of the Scotland Act. Nonetheless, it provides a further indication that the Scotland Act would be interpreted as excluding competence to hold a referendum on Scottish independence.

Qvortrup, writing before the Supreme Court passed judgement on the case, claims the judgement of the Inner House in *Imperial Tobacco* 'suggests that a decision to hold an advisory referendum would not be ultra vires'.¹³⁶ Qvortrup bases this claim on Lord Brodie's statement that 'The scheme whereby legislative competence is conferred on the Scottish Parliament is one where what is not specifically identified as being outside competence is devolved'.¹³⁷ An advisory referendum on independence is not expressly prohibited, therefore it is within competence.¹³⁸ However, this argument fails to recognise s29(2)(b) of the Scotland Act. Express reservation is not required; an ASP is out with competence if it *relates to* a reserved matter. In addition, Qvortrup argues that it would be inappropriate for a court to

¹²⁹ *Martin v Most* (n84) [52] per Lord Walker.

¹³⁰ Hansard HC Deb vol 312, col 257 (12 May 1998).

¹³¹ *Pepper v Hart* [1993] SC 593.

¹³² *ibid* 634.

¹³³ *ibid*.

¹³⁴ *ibid* 635.

¹³⁵ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [40] per Lord Hoffmann and [65] per Lord Hobhouse; Also see J Steyn 'Pepper v Hart; A Re-examination' (2001) 21(1) Oxford Journal of Legal Studies 59 for extra-judicial criticism of the decision in *Pepper v Hart* by Lord Steyn.

¹³⁶ Scottish Affairs Committee 'The Referendum on Separation for Scotland: Oral and written evidence' (n115) 206.

¹³⁷ *Imperial Tobacco Ltd* (Inner House) (n124) [165].

¹³⁸ Scottish Affairs Committee 'The Referendum on Separation for Scotland: Oral and written evidence' (n115) 206 (Matt Qvortrup).

rule on such a politically sensitive issue; in *R (Countryside Alliance) v Attorney General*,¹³⁹ Lord Bingham stated, 'The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'. However, the constitutionalisation of the judiciary, exacerbated by the Scotland Act, distorts this distinction between matters of legal judgement and matters of political judgement. The Scotland Act has assigned the court the role of arbiter in relation to devolution issues; it is therefore unlikely they would declare a challenge to the competence of the Scottish Parliament non-justiciable.

Nonetheless, the Supreme Court has recognised the democratic legitimacy of the Scottish Parliament; in *AXA General Insurance Ltd v HM Advocate*¹⁴⁰ Lord Hope held that:¹⁴¹

...the elected members of a legislature... are best placed to judge what is in the country's best interest as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.

For Qvortrup, Lord Hope's reference to a 'mandate' from the electorate suggests it would be unlikely for the Supreme Court to strike down an Act giving effect to the manifesto commitment that secured the SNP their majority in the Scottish Parliament. However, in the same judgement Lord Hope observes that 'the Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes'.¹⁴² This limitation is recognised every time a court addresses a challenge to the competence of an ASP.¹⁴³ As Tomkins observes, the limitations restricting the competence of the Scottish Parliament are not displaced by the SNP's landmark majority: '...winning a Scottish parliamentary election entitles a party to govern subject to the rule of law; it does not entitle a party to seek to rule in a manner that disregards the legal limits to its powers'.¹⁴⁴ Therefore, if the dispute had reached court, it is unlikely the Scottish Government would have been successful.

¹³⁹ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52.

¹⁴⁰ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46.

¹⁴¹ *ibid* [49].

¹⁴² *ibid* [46].

¹⁴³ For example, see *Whaley v Lord Watson* 2000 SC 340, 348 per Lord Rodger and 358 per Lord Prosser.

¹⁴⁴ Scottish Affairs Committee 'The Referendum on Separation for Scotland: Oral and written evidence' (n115) 155; Also see the subsequent report: Scottish Affairs Committee 'The Referendum on Separation for Scotland: making the process legal' Session 2012-13, 7 August 2012, HC 542 [14].

B. The Edinburgh Agreement

Despite this speculation over how the Supreme Court would interpret the prospective Referendum Bill and the reservation of the Union in the Scotland Act, the view that it would be 'wiser to agree on an express transfer of powers'¹⁴⁵ from Westminster to Holyrood was never disputed. Even before resolution of the dispute, both the Scottish and UK Governments agreed that it was not in Scotland's best interests to have the country's constitutional future decided in court.¹⁴⁶ Fortunately, the signing of the Edinburgh Agreement on 15th October 2012 dramatically decreased the likelihood of this. The UK Government agreed to pass an Order in Council under section 30 of the Scotland Act, amending the Act and providing a 'clear legal base'¹⁴⁷ for the Scottish Parliament to hold a referendum on Scottish independence. This Order received consent from the Scottish Parliament and both Houses of the UK Parliament and came into force on 13th February 2013.¹⁴⁸ Holyrood subsequently passed two Acts paving the way for a Referendum on Scottish Independence: the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, which came into force on 7th August 2013 and 17th December 2013 respectively. As a result of political deliberation and compromise between the Scottish and UK Governments, the law was changed and the dispute over the competence of the Scottish Parliament faded into political history.

The legal status of the Edinburgh Agreement is unclear; Alan Trench suggests the document may create legitimate expectations enforceable in court.¹⁴⁹ However, the prevailing view is that the document does not create legal obligations and has no legal standing.¹⁵⁰ The only limited legal utility the Agreement may provide would be as an aid to interpretation; it could be regarded as background material when interpreting the s30 Order.¹⁵¹ It was described in the House of Commons by Secretary of State for Scotland, Michael Moore, as 'a statement of political intent by

¹⁴⁵ Anderson *et al* 'The Independence Referendum' (n106).

¹⁴⁶ UK Government: 'Scotland's Constitutional Future' 7. Scottish Government: 'Your Scotland, Your Referendum' [1.8].

¹⁴⁷ Edinburgh Agreement 2.

¹⁴⁸ See Scotland Act 1998 Sch 5 para 5A.

¹⁴⁹ Referendum (Scotland) Bill Committee 'The Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft]' 1st Report, 2012 (Session 4), 23 November 2012, SP Paper 221 [23].

¹⁵⁰ See C Bell 'The Legal Status of the 'Edinburgh Agreement' (Scottish Constitutional Futures Forum Blog, posted 5 November 2012) <<http://www.scottishconstitutionalfutures.org>> accessed 7 October 2014, and opinion of Aileen McHarg cited in Referendum (Scotland) Bill Committee 'The Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft]' (n149) [23].

¹⁵¹ Aileen McHarg giving evidence to the Referendum (Scotland) Bill Committee, 3rd Meeting 2012, Session 4, 8 November 2012 Transcript at col 34.

Scotland's two Governments'.¹⁵² Therefore, the Agreement is undoubtedly political. This lack of legal status 'challenges ideas about the usefulness of law'¹⁵³ and highlights the importance of politics in the British constitutional order. The law cannot provide a solution to every problem.

This approach to constitutional reform is symptomatic of political constitutionalism and the notion of law as command. The remedy sought to resolve the dispute over competence to hold a referendum was political, not legal. The s30 Order was the output of this political process. Scotland's future relationship with the rest of the UK is a political issue; consequently it was dealt with by politicians, not judges. This can be contrasted with the approach taken in Canada where the Canadian Supreme Court was asked to adjudicate on the legality of a unilateral declaration of independence by Quebec;¹⁵⁴ it held that there was no right to unilateral secession under Canadian or international law.¹⁵⁵ However the court determined that there was a legal duty to negotiate:¹⁵⁶ '...if a clear majority of the people of Quebec voted in a referendum on a clear question in favour of secession, federal and other provincial governments could not remain indifferent'.¹⁵⁷ The Court's jurisdiction in this case was founded upon section 53 of the Supreme Court Act which provides that the Governor in Council may refer certain constitutional issues to the Court for consideration. With reference to Scotland, this power is similar to section 33 of the Scotland Act 1998, which provides that the Advocate General, the Lord Advocate or the Attorney General may refer to the Supreme Court the question of whether a Bill, or any provision thereof, would be within the legislative competence of the Scottish Parliament. However, despite similar legislative structures for judicial review, the UK and Canada adopted diametrically opposed approaches to the complicated constitutional question of secession. The UK adopted a political remedy through the Edinburgh Agreement. Canada, in referring the case to the Supreme Court, favoured a legal remedy.

The constitution of Canada encompasses elements of both legal and political constitutionalism. Prior to 1982, the federal and provincial legislatures '...collectively exercised the same parliamentary sovereignty enjoyed by the mother Parliament at Westminster'.¹⁵⁸ The legislature was supreme and accountability was purely political. However, over the last few decades the Canadian constitution, like the British constitution, has become less political and more legal. As such, today the Canadian

¹⁵² Hansard HC Deb vol 556, col 745 (15 January 2013).

¹⁵³ C Bell 'The Legal Status of the 'Edinburgh Agreement' (n150)

¹⁵⁴ *Quebec Secession Reference* [1998] 2 SCR 217.

¹⁵⁵ *ibid* [155].

¹⁵⁶ *ibid* [69].

¹⁵⁷ M Walters 'Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and its Lessons for the UK' (1999) 62(3) *Modern Law Review* 371, 378.

¹⁵⁸ S Gardbaum 'The New Commonwealth Model of Constitutionalism' (2001) 49 *The American Journal of Comparative Law* 707, 719

constitution does not rigidly conform to either model. Under section 52 of the Constitution Act 1982, traditional parliamentary supremacy is replaced with constitutional supremacy - any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In addition, under section 24(1) of the Canadian Charter of Rights, incorporated into the Constitution Act 1982, anyone can apply to the court for an appropriate remedy if they feel their rights have been infringed or denied. A 'constitutionalized and entrenched bill of rights with full judicial review powers'¹⁵⁹ is indicative of a legal constitution. 'Although there is no explicit provision granting the courts the power to strike down laws inconsistent with the Charter, this seems the clear intent of Section 52 of the Act'.¹⁶⁰ Thus accountability is legal - if parliament enacts an unconstitutional law, the courts will declare it of no force or effect. However, section 33 of the Charter permits the federal and provincial legislatures to declare that a statute will apply notwithstanding section 2 or sections 7 to 15 of the Charter (the substantive rights provisions). Therefore, the legislature has the final word and can override certain rights by ordinary majority. This is indicative of a political constitution. This override provision preserves the core element of parliamentary sovereignty: the legislatures rather than the courts have 'the ultimate power to determine whether or not an enactment is the law of the land'.¹⁶¹

Commentators disagree on where the Canadian constitution falls on the spectrum of constitutionalism. Scott Stevenson observes that 'the legislature's power to have the final word does not apply to all rights, expires after five years (although invocations of the power are renewable), and is phrased in a manner that is not conducive to its use as it connotes that the legislature is overriding a Charter right rather than overriding a judicial interpretation of a Charter right'.¹⁶² With these considerations in mind, Stevenson questions the distinctiveness of the Canadian constitution from a system of judicial supremacy.¹⁶³ Similarly, for Janet Hiebert the ability of the courts to nullify inconsistent legislation means that, '...short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation'.¹⁶⁴ Thus, for Stevenson and Hiebert, Canada's constitution is essentially a legal one.

¹⁵⁹ S Gardbaum 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8(2) *International Journal of Constitutional Law* 176, 178

¹⁶⁰ S Gardbaum 'The New Commonwealth Model of Constitutionalism' (n158) 723

¹⁶¹ *ibid* 724

¹⁶² S Stevenson 'Book Review: The New Commonwealth Model of Constitutionalism: Theory and Practice' (2013) 76(6) *Modern Law Review* 1156, 1158

¹⁶³ *ibid*

¹⁶⁴ J Hiebert 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *Modern Law Review* 7, 11

However, Peter Hogg and his co-authors Allison Bushell Thornton and Wade Wright, observe that 'most Charter decisions, even though they are the final word on the meaning of the Charter, leave room for a range of legislative responses and generally receive a legislative response.'¹⁶⁵ They reject the idea that the judiciary is supreme, preferring the view that judicial decisions are the beginning of a dialogue between the courts and the legislature. When a court strikes down an unconstitutional law, this is not the last word; it is the beginning of a dialogue, because legislative bodies usually enact subsequent legislation that accomplishes the main objective of the unconstitutional law. For Hogg et al, 'the last word can nearly always be (and usually is) that of the legislature'.¹⁶⁶ Viewing judicial decisions as the beginning of a dialogue suggests that Canada has a political constitution as the ultimate decision on how to further a legislative objective rests with the legislature. If politicians have the last word, then accountability is political, not legal.

Interestingly, the Canadian constitution has always left the power to decide questions of legislative competency to the courts. Even before the aforementioned move towards legal constitutionalism, Canadian courts could competently adjudicate on which jurisdiction (federal or provincial) should have the power to legislate on a particular matter.¹⁶⁷ Thus, the question of whether a subordinate legislature has the power to enact a particular law is not a new or novel issue in Canada. It is not surprising that a constitution with a federal distribution of legislative powers, express constitutional supremacy and judicial nullification of unconstitutional legislation provided a legal remedy to the issue of secession.

In contrast, up until 1998, the United Kingdom only had one legislature and so the judiciary was never called upon to adjudicate on issues of legislative competence. It is therefore equally unsurprising that the United Kingdom adopted a political approach to the issue of secession. However, for Walters, the significance of the Quebec Secession Reference for the UK is not as 'a model for the courts to follow'¹⁶⁸ but as a reminder to governments that 'unless they negotiate amongst themselves a secession framework when necessary a court may just possibly intervene to impose one'.¹⁶⁹ As a result of the Edinburgh Agreement, the sort of judicial intervention intended to address the possible secession of Quebec from Canada was not necessary to resolve the possible secession of Scotland from the UK.

C. Fundamental law argument

¹⁶⁵ A Bushell, P Hogg & W Wright 'Charter Dialogue Revisited – Or 'Much Ado About Metaphors'' (2007) 45 Osgoode Hall Law Journal 1, 53

¹⁶⁶ *ibid* 54

¹⁶⁷ P Hogg, *Constitutional Law of Canada* (The Carswell Company Limited, Toronto 1977) 43

¹⁶⁸ M Walters 'Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and its Lessons for the UK' (n157) 396.

¹⁶⁹ *ibid*.

According to legal constitutionalism, law as command is subject to law as custom. Legislation is inferior to judicial precedent; a statute cannot ‘...displace the common law by providing a rival vision of the constitutional order’.¹⁷⁰ On this view, the s30 Order passed by Westminster, the Scottish Independence Referendum (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, both passed by Holyrood, are only legitimate if they do not displace the common law constitution. According to some commentators, the common law affords a fundamental status to the 1707 Union Agreement that founded Great Britain.¹⁷¹ If the common law limits the legislature, any legislation violating this fundamental law could be struck down by the courts. Challenging legislation passed by Westminster would be problematic as Acts of Parliament cannot be judicially reviewed.¹⁷² However, ‘Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law’,¹⁷³ creating a forum for mounting a judicial challenge to Scottish independence.

The fundamental law argument asserts that certain provisions of the Union Agreement are unalterable fundamental law. One such provision is Art I which states ‘That the two Kingdoms of England and Scotland shall upon the First day of May which shall be in the year One thousand seven hundred and seven and for ever after be united into one Kingdom by the name of Great Britain’.¹⁷⁴ The fundamental status is derived from the constituent nature of the Agreement: ‘what occurred in 1707 was not the merging of one state (or part of a state) into another, as is usually the case with cession of territory: rather, two states merged together to form a new (third) state’.¹⁷⁵ Neil MacCormick and Thomas Smith argue that this constituent nature elevates the Union Agreement to the status of a written constitution.¹⁷⁶ Elizabeth Wicks rejects this conclusion, arguing that a constitution must go ‘...beyond constituting a legal order and also [determine] how that legal order will

¹⁷⁰ TRS Allan, *Law, Liberty and Justice* (n51) 11.

¹⁷¹ This agreement involves three separate documents; The Articles of Union agreed between the Commissioners appointed to negotiate the union (sometimes misleadingly referred to as the Treaty of Union; these Articles do not form a Treaty that is enforceable under international law), the Union with England Act 1707 passed by the Scottish Parliament and the Union with Scotland Act 1706 passed by the English Parliament. The inconsistent dates are due to the fact that England did not join Scotland in adopting the Gregorian calendar until 1752.

¹⁷² *Pickin v British Railways Board* [1974] AC 765, 789.

¹⁷³ *AXA General Insurance Ltd* (n140) [47].

¹⁷⁴ Union Agreement, Art I.

¹⁷⁵ E Wicks ‘A New Constitution for a New State? The 1707 Union of England and Scotland’ (2001) 117 *Law Quarterly Review* 109, 110.

¹⁷⁶ N MacCormick, *Questioning Sovereignty* (OUP, Oxford 1999) 56; TB Smith, *British justice: the Scottish contribution* (Sweet & Maxwell, London 1961) 207.

function today, tomorrow and into the future'.¹⁷⁷ Consequently, Wicks concludes the Union Agreement is merely constituent, not a constitution.¹⁷⁸

Whether constituent or constitutional, both MacCormick and Wicks agree that the Union Agreement imposed limitations on the Westminster Parliament: 'logic dictates that a legislature cannot repeal its constituent document'.¹⁷⁹ Michael Upton compares Westminster to a statutory body, declaring it to be 'bound by its constituent charters'.¹⁸⁰ This conclusion is shared by Smith who is '...quite unable to accept the view of those English constitutional lawyers who hold that the terms of Union have no more force than an ordinary Act of Parliament'.¹⁸¹ The argument has even gained extra-judicial support from Lord Hope: '... the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful'.¹⁸²

The fundamental law argument is supported by the language used in Art I, which suggests permanence; the Article essentially declares itself fundamental and unalterable: 'There seems little doubt the Union legislation was intended by its drafters to be a higher law, binding upon the legislature which it created'.¹⁸³ Even Dicey conceded that the drafters intended to give certain provisions 'more than the ordinary effect of statutes'.¹⁸⁴ However, for Dicey this intention did not change the status of the Union Agreement; he maintained that the Act of Union has no more claim to supremacy than the Dentists Act 1879.¹⁸⁵ Happold echoes this orthodox view saying, 'The Acts of Union have no higher status in UK constitutional law than any other law'.¹⁸⁶ However, in *MacCormick v Lord Advocate*,¹⁸⁷ Lord Cooper recognises the different types of clauses in the Union Agreement: some expressly allow Parliament to modify them; some declare themselves fundamental and unalterable in all time coming; and some leave the issue of modification unaddressed. Lord Cooper says he has '...never been able to understand... the

¹⁷⁷ Wicks 'A New Constitution for a New State? The 1707 Union of England and Scotland' (n175) 118.

¹⁷⁸ *ibid* 119.

¹⁷⁹ E Wicks, *The Evolution of a Constitution* (Hart Publishing, Oxford 2006) 50. For MacCormick, see MacCormick 'Is There a Constitutional Path to Scottish Independence?' (n104) 730.

¹⁸⁰ M Upton 'Marriage Vows of the Elephant: The Constitution of 1707' (1989) 105 *Law Quarterly Review* 79, 79

¹⁸¹ TB Smith 'The Union of 1707 as Fundamental Law' (1957) *Public Law* 99, 109.

¹⁸² House of Lords Committee for Privileges 'Whether the House of Lords Bill (as amended on Report) would, if enacted, breach the provisions of the Treaty of Union between England and Scotland' 2nd Report of Session 1998-99, 20 October 1999, HL 108-I, Opinions of the Committee, Lord Hope.

¹⁸³ Wicks 'A New Constitution for a New State? The 1707 Union of England and Scotland' (n175) at 118.

¹⁸⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, London 1962) 65.

¹⁸⁵ *ibid* 145.

¹⁸⁶ M Happold 'Independence: in or out of Europe? An independent Scotland and the European Union' (2000) 49(1) *International & Comparative Law Quarterly* 15, 18.

¹⁸⁷ *MacCormick v Lord Advocate* 1953 SC 396.

adoption by the English constitutional theorists of the same attitude to markedly different types of provisions'.¹⁸⁸

However, some historians contend that '...at the time the union was passed few politicians seem to have regarded it as permanent'.¹⁸⁹ The fundamentalist language was simply the legislative style used at the time.¹⁹⁰ Consider, for example, the Union with Ireland Act 1800. Despite its similar use of fundamentalist language, every Article and section of that Act has subsequently been repealed.¹⁹¹ According to Munro, 'The Anglo-Scottish Union is not so obviously in tatters. However, close examination reveals that almost all of the Article and sections of the legislation have been repealed or amended in whole or in part'.¹⁹² Thus the post-1707 Parliament has regarded itself as sovereign and so capable of amending and repealing provisions of the Union Agreement. Even so, '...the fact that Parliament has done something cannot prove that it was entitled to do it'.¹⁹³ Amendment of 'fundamental' provisions of the Union Agreement, most notably through the Universities (Scotland) Acts 1853 and 1932,¹⁹⁴ has been rationalised with the argument from consent: 'The consent of the Scottish people provides an informal mechanism of constitutional amendment, and in so doing respects the different and (at least partly) entrenched status of the fundamental provisions of the Union Agreement'.¹⁹⁵ However, Wicks rejects this argument claiming it to be '...merely an attempt to bolster an argument which has no legal basis'.¹⁹⁶ Public support cannot excuse a breach of fundamental law.¹⁹⁷

Therefore, as a matter of legal theory, the fundamental law challenge may be sustainable; according to Wicks '...any move towards independence for Scotland, or a federal arrangement for Britain, would... breach Article I of the Acts and Treaty of Union'.¹⁹⁸ As a result, there is no legal or constitutional path to independence. Upton would not subscribe to this view. He believes that, because the Union Agreement is silent on the question of amendment, '...a mechanism of reform must be inferred from the moral logic of their historical context'.¹⁹⁹ Likewise, MacCormick believes that '...both from the point of view of Scots law and from the point of view of

¹⁸⁸ *ibid* 411.

¹⁸⁹ W Ferguson, *Scotland's Relations with England: A Survey to 1707* (John Donald Publishers, Edinburgh 1977) 273.

¹⁹⁰ Stair Memorial Encyclopaedia, Constitutional Law (Reissue) 2 Fundamental Law [62]; Wicks 'A New Constitution for a New State? The 1707 Union of England and Scotland' (n175) 118.

¹⁹¹ C Munro, *Studies in Constitutional Law* (2nd edn, Butterworths, London 1999) 138.

¹⁹² *ibid*.

¹⁹³ KWB Middleton 'New Thoughts on the Union' (1954) 66 *Juridical Review* 37, 49.

¹⁹⁴ Now that the Scotland Act 1998 provides for a referendum on Scottish independence, section 37 of that Act, which states that the Union Agreement has effect subject to this Act, could also be seen as repealing fundamental provisions of the Union Agreement.

¹⁹⁵ SME Constitutional Law (Reissue) 2 Fundamental Law (n190) [63].

¹⁹⁶ Wicks 'A New Constitution for a New State? The 1707 Union of England and Scotland' (n175) 119.

¹⁹⁷ Wicks, *The Evolution of a Constitution* (n179) 50.

¹⁹⁸ *ibid* 41.

¹⁹⁹ Upton 'Marriage Vows of the Elephant: The Constitution of 1707' (n180) 97.

English law, the existence of a constitutional path to independence is clear'.²⁰⁰ In any case, as a matter of practical reality, Westminster does not consider itself bound by the terms of the Union Agreement. Wicks identifies an essential distinction '...between what Parliament can do in reality and what it can do in law'.²⁰¹ Lord Cooper was also influenced by this pragmatism: '...it is of little avail to ask whether the Parliament of Great Britain 'can' do this thing or that, without going on to inquire who can stop them if they do'.²⁰² On the other hand, Smith maintains that '...the Judiciary would be bound by their oath to pay regard to the fundamental law in preference to a mere Act of Parliament'.²⁰³

These conflicting views mirror the conflict explored earlier between the political and legal models of constitutionalism. Wicks demonstrates affinity with political constitutionalism; the fundamental law argument has little weight as, in political reality, Parliament can do anything. Accountability is political not legal, therefore reference to legal limits are of little practical value. Smith, on the other hand, demonstrates commitment to legal constitutionalism. Parliament is restricted by the common law; the judiciary must ensure Parliament does not exceed these limits. So far, the judiciary has not given preference to the Union Agreement.²⁰⁴ However, neither has any Scottish court expressly declared that certain provisions of the Union Agreement should not be regarded as fundamental law. Thus Smith's confidence in the courts is not necessarily misplaced. Nevertheless, although it could be said Britain's constitution is moving away from its roots in political constitutionalism towards a more legal constitution, this development is piecemeal. Such a significant leap into the realms of legal constitutionalism would be wholly unprecedented and is incredibly unlikely. Therefore, in the rare event that a court accepted an invitation to adjudicate on this issue, it is doubtful that such a bold interpretation of the Union Agreement, disregard for the orthodox doctrine of parliamentary sovereignty and unfettering commitment to legal constitutionalism would be endorsed.

The prevailing view of the Union Agreement is that the fundamental law argument is only sustainable in relation to Articles XVIII, XIX and XXV, which concern preservation of Scots private law, the unalterable jurisdiction of the Court of Session and the protection of the Church of Scotland respectively. In *MacCormick v Lord Advocate* Lord Cooper reserves his opinion regarding judicial interference if Westminster purported to breach Articles XVIII and XIX.²⁰⁵ This sentiment was echoed in the subsequent case *Gibson v Lord Advocate*²⁰⁶ with the addition of Article XXV.²⁰⁷ Therefore it seems²⁰⁸

²⁰⁰ MacCormick 'Is There a Constitutional Path to Scottish Independence?' (n104) 733.

²⁰¹ Wicks, *The Evolution of a Constitution* (n179) 50.

²⁰² *MacCormick v Lord Advocate* (n187) 413.

²⁰³ Smith 'The Union of 1707 as Fundamental Law' (n181) 114.

²⁰⁴ See *Gibson v Lord Advocate* 1975 SLT 134; *Stewart v Henry* 1989 SLT (Sh Ct) 34; *Pringle Petitioner* 1991 SLT 330; *Fraser v MacCorquodale* 1992 SLT 229; and *Murray v Rogers* 1992 SLT 221.

²⁰⁵ *MacCormick v Lord Advocate* (n187) 412.

²⁰⁶ *Gibson v Lord Advocate* 1975 SC 136.

²⁰⁷ *ibid* 144.

²⁰⁸ S Tierney 'Scotland and the Union State' in A McHarg & T Mullen (eds), *Public Law in Scotland* (Avizandum Publishing Ltd, Edinburgh 2006) 25, 33.

...that the only legislation which might be successfully challenged before a Scots court on the grounds of constitutionality would be an Act purporting to abolish the Court of Session or the Church of Scotland, or to substitute English law for the whole body of Scots private law.

Even this cannot be taken for granted. The precedent is relatively weak; there is nothing to compel a future court to intervene: 'A Scottish court might hold that the later Act ought not to have been passed, but equally it might very well not'.²⁰⁹ Accordingly any challenge to Scottish independence based on the fundamental law argument would be rejected as independence would not affect Scots private law, the Court of Session or the Church of Scotland.

Nonetheless, the fundamental law argument, although unlikely to form a practically justiciable challenge, suggests that the s30 Order does not necessarily solve all of the legal problems. At least in theory, the law may still have a role to play in the context of Scottish independence. An additional legal complication may have arisen in the interim period between a 'Yes' vote and independence. The Scottish Parliament would not have had the competence to actually bring about independence through negotiations with the UK Parliament and relevant international bodies. However, as Aileen McHarg observes: '... if what we're contemplating is a break with the current legal order, and the establishment of an independent state, then absence of a strict legal pedigree within the current legal order cannot and will not be allowed to stand in the way'.²¹⁰

Whether in the form of a fundamental law argument or in the form of a competency challenge under the Scotland Act, a legal challenge to Scottish independence, if there had been a 'Yes' vote, would have been unlikely to be entertained. Now that there has been a 'No' vote, the argument that the Scottish Parliament has the competence to unilaterally secede from the rest of the UK may be revived to justify a subsequent referendum at a later date. McHarg claims that this is possible based on the argument that the s30 Order '...merely clarified rather than conferred the Scottish Parliament's legal authority to authorise a referendum'.²¹¹ The passing of the s30 Order does not affect the merits of this argument; however McHarg concedes that, in practice, 'it seems likely to weigh against it were the issue ever to be tested in court'.²¹² Throughout the independence debate, the law, in the form of judicial intervention, had no role to play. This can be

²⁰⁹ A Tomkins 'The Constitutional Law in *MacCormick v Lord Advocate*' (2004) 3 *Juridical Review* 213, 219.

²¹⁰ A McHarg 'The Legal Effects of the Edinburgh Agreement – Again' (Scottish Constitutional Futures Forum Blog, posted 8 November 2012) <www.scottishconstitutionalfutures.org> accessed 7 October 2014.

²¹¹ A McHarg 'The Referendum: Memorandum of Agreement and Draft Section 30 Order' (Scottish Constitutional Futures Forum Blog, posted 16 October 2012) <www.scottishconstitutionalfutures.org> accessed 7 October 2014.

²¹² *ibid.*

seen as a victory for the political constitution. In the context of significant constitutional reform, political agreement was preferred to judicial adjudication. The law was used as the output of the political process, not as a restraint. As observed by Anderson et al, '...the legality issue remains important even if it becomes practically irrelevant... it has significance... for our understanding of the UK constitution as a whole'.²¹³ From the foregoing analysis, it is clear the issues of legality surrounding Scottish independence are now practically irrelevant. However, the limited utility of the law in this context affords an understanding of the British constitution as a whole. It demonstrates that, despite criticism, the political constitution works and that political agreement is often preferable to judicial intervention.

6. Conclusion

The independence debate highlights the importance of politics in the British constitution. In paving the way for a referendum on Scottish independence, politics played a central role. Law was utilised only as the command of political actors. The law facilitated the political process, rather than restricted it. The judiciary are yet to be called upon to adjudicate on any issue relating to Scottish independence;²¹⁴ instead the notion that such a constitutionally significant issue should be dealt with by politicians has been endorsed. Whilst certain constitutional developments over the last 25 years have signified a move towards a legal constitution, the process adopted in relation to Scotland's constitutional future signifies satisfaction with the political constitution. Even if a challenge to legislation paving the way for independence had been brought before the courts, it is unlikely that the tentative arguments relating to the fundamental status of the Union Agreement would have been entertained. Similarly, any subsequent attempt to unilaterally secede from the UK following the 'No' vote is unlikely to be looked upon favourably by the courts. The central role played by politics challenges the presumption that recourse to legal action and appeal to the judiciary are more desirable than political means of constitutional reform.

²¹³ Anderson *et al* 'The Independence Referendum' (n106)

²¹⁴ With the exception of *Moohan and Another v Lord Advocate* UKSC 2014/0183 which involved a challenge to the exclusion of convicted prisoners from voting in the Scottish Independence Referendum (Franchise) Act 2013. However this is 'better seen as part of the long-running battle over prisoner disenfranchisement than as a challenge to the legitimacy of the referendum'. – A McHarg 'The Independence Referendum, the Contested Constitution, and the Authorship of Constitutional Change' (17 April 2014) (available at SSRN: <<http://ssrn.com/abstract=2431050>> 3> accessed 7 October 2014

International Relocation of Resident Parents: A Comparative Discussion and Proposal for Future Direction

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Abstract

For the judges involved, relocation disputes present some of the most difficult and unsettling problems that they are required to resolve. In the main there is no right answer to these cases as any decision will be, to some extent, unsatisfactory. This difficult area of family law has challenged the courts; different legal systems have adopted different stances on the issue. This article intends to question what the best approach could be nationally, as well as in the pursuit of an international standard. It is suggested that in the international sphere, the Washington Declaration provides an important bench mark that should be adopted in all jurisdictions worldwide as the best process to resolve relocation cases. The Washington Declaration has the potential to become the international protocol, thereby significantly increasing the transparency of decision-making, and ensuring careful consideration of the interests and rights of all parties in relocation cases. However, creating clear and internationally accepted relocation legislation is only part of the solution. Further work is also required in order to ensure that orders relating to cross-border contact are enforced and adhered to.

1. Introduction

Cross border migration is increasingly popular and has almost doubled since 1980.¹ International travel has never been so accessible, and people are now much more able to live, work and develop relationships outside their native country.² If such couples remain in a stable relationship few issues arise. However, if their relationship breaks down the situation can become problematic, especially where children are involved. The importance of children growing up within a secure and stable environment has long been recognised. If one parent (usually the mother)³

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¹ The UN Population Division estimates that there are around 200 million international migrants each year. Bridget Anderson, Nandita Sharma, and Cynthia Wright, 'Why No Borders?' (2009) 26(2) *Refuge* 5, 5.

² Within the EU, 13% of all marriages had an international element in 2007. As a result, a large number of children could potentially be involved in some sort of international relocation dispute. Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' SEC (2011) 327 final, 8.

³ See Section 2C below; Ornella Cominetti and Rob George, 'International relocation in English law: Thorpe LJ's discipline and its application' [2013] *IFL* 149.

wishes to relocate with her child back to her home country, or simply relocate elsewhere as a result of career developments, relationship breakdown or indeed a new relationship, the issue of the child's residence can become complicated.⁴ One difficulty with relocation is that the child's relationship with the non-relocating parent can be threatened with complete severance due to factors such as distance and difficulty in maintaining contact. On occasion, agreement can be reached between the parents as to how best to manage the separation. However, in the absence of such agreement, a court order must be obtained to allow the relocating parent to take the child out of the country; otherwise they may risk facing proceedings for international child abduction. International child abduction, as a phenomenon, is therefore closely linked to international relocation.⁵ It has been correctly observed that with the '(...) unprecedented growth in immigration and international marriage the number of [relocation] cases can only increase.'⁶ The question then arises as to whether or not it is desirable to have greater international consistency in the approach to international relocation disputes. Most Western States emphasise the welfare and best interests of the child as the paramount consideration in such disputes, however the application of these principles varies widely. Each jurisdiction interprets and manages international relocation disputes differently as there are often no clear answers.

This article will discuss the issue of international child relocation as it relates to Scotland, and will offer a comparative analysis with other jurisdictions by considering case law and legislation from around the world. Section 2 will discuss the underlying principles applying to relocation cases around the globe. The third section will consider the approach adopted in the Scottish courts, focusing on the welfare principle. Taking into account the fact that criticisms have been raised against the welfare principle, this section will additionally explore whether Scots law could be usefully reformed to enhance dispute resolution. Following on from this, a fourth section will illustrate various approaches utilised in different jurisdictions. Some scholars have classified countries' approaches to international relocation disputes into categories, distinguishing between 'pro-relocation,' 'anti-relocation'

⁴ Slightly over 10% of the EU's 3.8 million immigrants in 2008 were returning to their country of birth. Commission, 'Demography Report - Older, more numerous and diverse Europeans' SEC (2011) 431 final, 43.

⁵ The link with child abduction is one of the reasons for the growing international interest in this area. There are a number of similarities between the two issues. However, whereas a body of international treaties and legislation has developed on child abduction, unfortunately there have been no similar international instruments or even international consensus on the proper way to deal with child relocation cases. Some have argued that this link between relocation and abduction may be overly simplistic. However, the question is beyond the scope of this article. For further details, see Nicola Taylor, Megan Gollop, & Mark Henaghan, 'Relocation following parental separation: The welfare and best interests of children' (Research Report to the New Zealand Law Foundation, University of Otago, Dunedin: Centre for Research on Children and Families June 2010) 38
<<http://www.otago.ac.nz/cic/pdfs/Relocation%20Research%20Report.pdf>> accessed 5 October 2014.

⁶ Georgina Vallance-Webb, 'To remove or not to remove' (Stevens & Bolton LLP, December 2008) 1
<<http://www.stevens-bolton.com/uploads/15-12-08-leave-to-remove.pdf>> accessed 5 October 2014.

and 'neutral' countries.⁷ On the basis of these categories, this section will provide a comparative analysis of the approaches adopted in Scotland, England, Canada, New Zealand and South Africa. The approaches of France, Germany and Australia will also be briefly discussed. In addition to regulation existing at a domestic level there have been attempts to draft instruments at an international level. An overview of these instruments will be provided in section 5. As a result of the difficulties inherent in developing a common, coherent international standard, this article will briefly consider whether reformers should divert their focus from developing a single common principle to other important aspects of relocation such as mediation and enforcement of contact orders. Based on this article's findings, reconsideration of the current approach to relocation in Scotland, as well as in the international sphere, will be encouraged.

In some jurisdictions relocation cases are decided differently depending on whether a proposed parental relocation is within a particular country or abroad.⁸ Although this is an important point, this article will focus solely on international relocation cases. Throughout the article the word 'child' will be used to signify an individual child or several children. The term 'relocating parent' will be used to describe the parent seeking to relocate and 'resident parent' or 'primary carer' will refer to the parent with whom the child is likely to spend the majority of their time. Conversely 'non-relocating parent', 'non-primary carer' or 'non-resident parent' will describe the parent who is not relocating and with whom the child spends less time. The relocation of non-resident parents, although raising questions regarding the child's welfare, is not restricted and therefore falls outside the scope of this article. The free movement rights and the gendered nature of international relocation law are discussed in greater detail herein.

2. Underlying Themes around the World

Around the world, child relocation cases have proven to be significantly challenging and problematic. Such disputes provoke an array of emotions and the methods adopted by the courts for dealing with them have provided a '(...) fertile source of dispute.'⁹ Despite differences around the world, there are a number of common factors underlying the decision-making process in most countries. These include: (a) common principles of welfare; (b) the growing trend of joint parenting; (c) the

⁷ See discussion in Permanent Bureau, 'Preliminary Note on International Family Relocation' (Hague Conference on Private International Law, Document No. 11 2012) para 53.

⁸ In Scotland, relocation is separated into internal and international relocation. Under the Children (Scotland) Act 1995, s2(3), removal of a child from the UK is restricted. However, the same restrictions are not placed on movement within the UK. Applications to prohibit intra-UK relocations are made under the Family Law Act 1986, s35(3). Nevertheless, even though the statutory provisions are different, the effects in practice are likely to be similar and comparable consideration will apply to both international and domestic relocation (*M v M* 2012 SLT 428, para 52 (Lord Emslie)). Similar provisions apply in England.

⁹ Sanford Braver, William Fabricius and Ira Ellman, 'Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations', (2003) 17(2) *Journal of Family Psychology* 206, 206.

gender issues that can emerge from relocation cases and (d) the sociological research conducted on the topic.

A. The Welfare of the Child¹⁰

In the Western world, the 'welfare principle' can be seen as one of the most widely accepted principles within child law and it is consistently applied in relocation cases.¹¹ In both the Scottish and English legal systems the 'welfare principle' is at the '(...) heart of the decision-making process',¹² ensuring that the legislation is child centred. The importance of child welfare was recognised in the United Nations Convention on the Rights of the Child (UNCRC) 1989, which states that '(...) the best interests of the child shall be a primary consideration.'¹³ The 'welfare principle' gives judges a significant amount of discretion, guaranteeing individualised justice pertinent to the specific case. However, there is '(...) no commonly accepted definition of the concept...on an international or even national level'.¹⁴ Interpretation of the term 'welfare' is therefore subjective. In Scots law, 'welfare' is a very broad term that can include almost anything. In determining a child's best interests courts should consider the physical¹⁵ and emotional¹⁶ welfare of the child, among other considerations. Lord MacDermott's interpretation of the 'welfare principle' in the English case of *J v C*¹⁷ ensures that:¹⁸

(...) [when] all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare.

This is very demanding and emphasises that the child's welfare trumps all other considerations. Some countries, such as England, have introduced lists of factors in order to direct judicial decisions.¹⁹ Other countries have adopted an 'all factor' approach that can encompass anything which affects the child and leaves the question to judicial discretion. This latter approach is more consistent with the position in Scotland. The 'welfare principle' has been subject to significant criticism as regards its application in different jurisdictions, some of which is discussed further in sections 3 and 4 of this article.

Not all jurisdictions consider the child's best interests to be the sole factor that courts should consider. For example, in Germany consideration is given to the constitutionally protected rights of the parents, such as freedom of movement, in

¹⁰ The terms 'welfare' and 'best interests' will be used interchangeably throughout this article as the expressions are broadly indistinguishable.

¹¹ Scotland (Children (Scotland) Act, s11(7)); England (Children Act 1989, s1); France (Arts 373-2 C Civ); Canada (Divorce Act 1985, s16(8)); New Zealand (Care of Children Act 2004, s4).

¹² Elaine Sutherland, *Child and Family Law* (2nd edn, Thomson 2008) 452.

¹³ United Nations Convention on the Rights of the Child 1989, Art 3(1).

¹⁴ Preliminary Note on International Family Relocation (n7) 14.

¹⁵ *Clayton v Clayton* 1995 GWD 18-1000.

¹⁶ *Geddes v Geddes* 1987 GWD 11-349.

¹⁷ *J v C* [1970] AC 668.

¹⁸ *ibid* at 710-11 (Lord MacDermott).

¹⁹ Children Act 1989, s1(3).

addition to the child's welfare.²⁰ The German approach assumes that parents will relocate regardless of the court's decision. The question therefore is whether the child's best interests are served by moving with the relocating parent or remaining in Germany with the non-relocating parent.²¹ The German courts have a number of factors to consider in assessing the best interests of the child. The weight attached to each factor will depend on the specific circumstances of the case.²² Ultimately, although the welfare principle is common throughout much of the world, the approach will vary depending on how different courts, in different jurisdictions, believe the child's interests are best protected.

B. Joint Parenting

In an ideal world both parents should remain involved in their child's life, providing there have been no allegations or history of abuse.²³ However, after separation, it is often the case that one parent, usually the mother, is awarded custody.²⁴ This situation, where the child lives with one parent and the other has contact with the child, can be described as 'sole residence'. There is, however, a growing international trend towards courts making decisions in favour of joint parenting.²⁵ Shared or joint parenting refers to a collaborative order issued by the court or an agreement between consenting parents whereby both maintain possession of the responsibility and right to be actively involved in raising their child. Joint parenting does not necessitate an equal split of time spent with the child, but is generally expected to afford each spouse upwards of 30% of contact time.²⁶ As a result of joint parenting there remains an emphasis on the notion of maintaining the family unit and ensuring continued contact with the child for the non-relocating parent. Relocation is obviously contrary to the idea of shared parenting and this trend '(...) could lead to a more restrictive approach to relocation.'²⁷ These ideas are discussed in greater detail in section 4.

²⁰ German Federal Republic's Constitution of 1949, Art 6(2) (parents have the right to bring up their children) and Art 11 (free movement). The Federal Court has, however, outlined that this right of free movement is only indirectly protected and the welfare of the child is still significant.

²¹ Decision of the *Bundesgerichtshof*, XII ZB 81/09 28.04.2010.

²² *ibid.*

²³ In *Re M (Minors) (Children's Welfare: Contact)* [1995] 1 FLR 274, 278, Wilson J pointed out the 'fundamental and emotional need of every child to have an enduring relationship with both of his parents'

²⁴ The case of *Brixey v Lynas* 1996 SLT 908 emphasises the maternal preference in Scots Law. However, this is not the same in all countries. Pakistan, for example, has a much more patriarchal society and, at least in the case of boys, the father has preference in terms of residence. Nevertheless, the case of *Mst Nighat Firdous v Khadim Hussain* (1998 SCMR 1593) made it clear that '(...) the right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case.' See **Tassaduq Hussain** Jillani, 'Cross-border family relocation: law and mediation in international family law' [2012] IFL 91.

²⁵ New Zealand (Care of Children Act 2004, s17); Canada (Divorce Act 1985, s16(4)); France (Articles 372-3 C civ); Australia (Family Law Act 1975, s60B); England (Children and Families Act 2014, s11(2)).

²⁶ In *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330, the child spent 42% of his time with the father.

²⁷ Preliminary Note on International Family Relocation (n7) para 27.

C. Gender Concerns

The relocating parent has so far been referred to as female. This is because the majority of primary carers, and therefore relocating parents, are women.²⁸ This emphasises another underlying theme of the relocation debate: the gender element. There are significant differences between mothers and fathers, both as regards the way in which they seek permission to relocate and how they are affected by the decision. Refusal to grant relocation can be seen as bringing about the sacrifice of parenthood, but this '(...) may underestimate the extent to which these sacrifices are not evenly shared.'²⁹ Relocation generally has a bigger impact on the resident mother's rights and freedoms than on the non-resident father's. Non-resident parents are not restricted in their movements in the same way as resident parents, meaning that fathers have much greater freedom.³⁰ In the South African case of *B v M*,³¹ the court considered the gendered nature of parental roles after divorce. As primary carers tend to be mainly female, an excessively restrictive approach to relocation may be discriminatory against a woman's freedom of movement, while the non-resident parent's ability to move is unrestricted.³² Satchwell J stated that '(...) careful consideration needs to be given to applying the best interest principle in a manner which does not create adverse effects on a discriminatory basis.'³³ In *F v F*,³⁴ another South African case, the court took into account the fact that '(...) despite constitutional commitments to equality, the division of parenting roles in South Africa remains largely gender based.'³⁵ Ultimately, the issue of relocation is inherently gendered and disproportionately affects women. However, excessive focus on the potentially discriminatory outcomes of relocation can lead '(...) quickly into dangerous waters.'³⁶ In considering a relocation dispute, it is argued that the primary focus should not be on the gendered nature of the case but on ensuring the welfare of the child is at the nucleus of the decision.

D. Sociological Research

²⁸ In a recent study by Ornella Cominetti and Rob George it was shown that 93% of applicants were mothers. As most children remain with the mother on divorce this reinforces the traditional view of women as the carers of the children. See Cominetti and George (n3) 153.

²⁹ Theresa Glennon, 'Still partners? Examining the consequences of post-dissolution parenting' (2007) 41(1) FLQ 105, 135.

³⁰ When choosing to relocate, the non-resident parent will not need a court order regardless of the distance or impact the relocation may have on the welfare of the child.

³¹ *B v M* [2006] 3 All SA 109 (W).

³² This is considered by many commentators to be a serious flaw in the system. Some argue that the reasonableness of the father relocating with the child should be considered. This matter will be looked at further in Section 4.

³³ *B v M* (n31) [162].

³⁴ *F v F* 2006 (3) SA 42 (SCA).

³⁵ *ibid* [12].

³⁶ Wesahl Domingo, "'For the Sake of the Children'" South African Family Relocation Disputes' (2011) 14(2) PER 148, 161.

The exact number of children affected by international relocation issues is unknown, although given the statistics presented in the introduction it is fair to speculate that many are involved. There is also little agreement between sociological researchers on the best approach to decision-making. Available research divides into two contrasting schools of thought. The first view argues that a child's welfare is best protected by ensuring a good relationship with the primary carer, thereby *allowing* relocation of the mother.³⁷ The converse view is that maintaining the family unit and frequent contact with both parents will ensure the child's long term welfare, resulting in more *refusals* of relocation applications.³⁸ Trends in judicial decision-making are consistent with many social studies; these will be considered in greater depth in section 5. In light of two research schools producing conflicting findings and a lack of concrete principles, judicial decisions are based on assumptions, with limited supporting evidence and this affects the degree of faith parents have in the process.³⁹

Each of the four aforementioned themes is present in the relocation legislation and case law of many countries. The most influential consideration is the welfare of the child, with gender, joint parenting and sociological factors having a lesser influence globally. As stated previously, welfare of the child is difficult to define and legislatures are hesitant to create categorical definitions which may result in an inflexible and merciless approach. Joint parenting has generated a shift in decision-making in some countries. This has been beneficial in England, encouraging judges to consider a wider range of factors rather than simply focusing on the detrimental effect of refusal on the relocating party.⁴⁰ However excessive focus on this idea in New Zealand may have led to an overly strict law that limits a parent's freedom.⁴¹ The lack of empirical evidence to support relocation decision-making is troubling. Evidence is simply not available to demonstrate whether relocation is in the best interests of the child. As a consequence, jurisdictions that base their decision-making process on such ideas could be creating serious issues for the child and their future development. There is also limited attention paid to the child's wider family, for example grandparents, by many jurisdictions.⁴² This is regrettable, as the child's wider family ties and awareness of their cultural heritage may be irredeemably lost following relocation. It is argued here that greater consideration should be afforded to the effect of the loss of relationships on the non-relocating parent and the child's extended family.

³⁷ Judith Wallerstein and Tony Tanke, 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' (1996) 30(2) FLQ 205.

³⁸ Joan B Kelly & Michael E Lamb, 'Developmental issues in relocation cases involving young children: When, whether, and how?' (2003) 17(2) Journal of Family Psychology 193.

³⁹ Hon W Dennis Duggan, 'Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation', (2007) 45(2) Fam Ct Rev 193, 193.

⁴⁰ See Section 4A below.

⁴¹ See Section 4B below.

⁴² The child's extended family is mentioned in para 4(viii) of the Washington Declaration on International Family Relocation 2010, however, no reference is made to it in Scottish or English legislation and case law only pays lip service to the effect of relocation on grandparents or other extended family members.

The Scottish approach to relocation will now be analysed, with reference to a number of these underlying themes.

3. *The Position in Scotland*

Under Scots law, parents possess numerous parental rights and responsibilities (PRR) in relation to their child by virtue of the Children (Scotland) Act 1995 (hereinafter the 1995 Act).⁴³ Upon the birth of her child, the mother automatically acquires PRR. The father, however, will only acquire such rights if he is married to the mother at the time of the birth or is named on the child's birth certificate.⁴⁴ These PRR give both parents a responsibility, and a right, to have their child reside with them or, where that is not possible due to the circumstances of the relationship, to maintain personal relations and direct contact.⁴⁵ Children thrive in a stable home environment and there is increasing focus on the importance of having both parents involved in a child's life.⁴⁶ When a residence order is in force it is not possible to remove a child permanently from the UK without the consent of all persons having PRR in relation to the child.⁴⁷ Ultimately, it is conducive to the relationship between the relocating parent, the child and the non-relocating parent if the parties can come to an effective and amicable agreement regarding any relocation and the associated degree of contact. However, this is often not forthcoming and in such situations the parties must resort to the court for permission to leave the jurisdiction. The courts generally adopt a non-interventionist approach to family life, ruling only when they consider that it is '(...) better for the child that the order be made than that none should be made at all.'⁴⁸ Continuity of care is important for any child's emotional welfare and, if the *status quo* appears satisfactory, courts will tend to be reluctant to disturb it.

Despite this non-interventionist approach, s11(2) of the 1995 Act provides Scottish courts with extensive powers to make any order they deem appropriate in the circumstances. Parties wishing to relocate can request a 'specific issue order' under s11(2)(e).⁴⁹ In this scenario, the court will consider the principles contained in s11(7).⁵⁰ This section is considerably child-centred, with three important principles: the welfare of the child; the child's views and the 'no order' principle. The overarching and most significant principle is that the welfare of the child is

⁴³ Children (Scotland) Act 1995, ss1 and 2.

⁴⁴ *ibid* ss3(1)(b) and 4(1) respectively (for births registered after 1st May 2006).

⁴⁵ *ibid* ss1(c) and 2(a) and (c). See also UNCRC (n13) Art 9.

⁴⁶ However, the case of *Sanderson v McManus* 1997 SC (HL) 55 outlines that there is no presumption in favour of contact and the child's best interests will be the influential factor.

⁴⁷ 1995 Act (n43) s2(3); Child Abduction Act 1984, s6.

⁴⁸ 1995 Act (n43), s11(7)(a). It is for the party seeking the order to discharge the dual burden imposed by the Act, showing that the move would be in the child's best interests and that it would be better for the child for an order to be made. It could be argued that, due to the burden of proof, Scotland is tilted slightly towards an anti-relocation stance as it requires the applicant to prove that the relocation is better than preserving the *status quo*. See *Osborne v Matthan (No 2)* 1998 SC 682, 704 (Lord Caplan).

⁴⁹ In addition to this, the courts can grant an order that prohibits the removal of the child from the UK. Family Law Act 1986, s35(3).

⁵⁰ The principles in s11(7B) and (7D) of the 1995 Act (n43) will also be relevant when the court is making its decision.

paramount.⁵¹ It could of course be argued that, if the proposed relocation would increase the economic well-being and opportunities of those relocating, this would ultimately be in the best interests of the child. In *Johnson v Francis*,⁵² the couple divorced and their two sons lived with their mother, who subsequently remarried to become Mrs Francis. Mr Francis, the children's stepfather, had an offer of employment in Australia and was '(...) under definite threat of redundancy in his present employment.'⁵³ In the application to relocate with the children, the court considered the delicate issue of whether the disadvantage of losing contact with their natural father was so material that the children should remain domiciled in Scotland.⁵⁴ The positive prospects of employment were influential and the court concluded that it was '(...) marginally in their interests that they should emigrate to Australia.'⁵⁵ Conversely, it is increasingly recognised that children benefit from a relationship with *both* their parents; as such, this is an important factor to take into account.⁵⁶ Nevertheless, the benefits of contact must be weighed against the benefits of the proposed relocation. In the case of *M v M*,⁵⁷ the court allowed the mother to relocate from Scotland to Arizona with her children. The mother's motive for relocating was to be closer to her own mother and to safeguard her interest in the family business, which would ultimately pass down to her children. The father would evidently lose out on regular contact with his children as a result, but, on the evidence, the court decided that it would be in the best interests of the children to go to the US. The strong views of the eldest child in favour of relocating were also held to be important.⁵⁸ The UNCRC emphasises that states should ensure that children capable of expressing their own views are given the opportunity to be heard and that their views are given due weight in accordance with their age and maturity.⁵⁹ This is incorporated into Scots law by s11(7)(b) of the 1995 Act. The child's views are sometimes given considerable weight.⁶⁰ In *Shields v Shields*,⁶¹ the decision of the lower court was overturned as the judge had failed to consider the views of the

⁵¹ 1995 Act (n43) s11(7)(a).

⁵² *Johnson v Francis* 1982 SLT 285.

⁵³ *ibid* 286. Despite the judge commenting that this was an exaggeration of Mr Francis's circumstances, he did accept that the recession had had an impact on his firm and that redundancy was a possibility..

⁵⁴ *ibid*.

⁵⁵ *ibid* 288.

⁵⁶ Great weight has been placed on the continuance of the relationship between the child and both parents. See *Cosh v Cosh* 1979 SLT (Notes) 72. In that case, Lord Jauncey considered that it was not in the best interests of the children to sever contact with their father and that the children's apparent dislike for their father came from the mother's remarriage and her attitude towards their father (see 73). It was also stressed that much of the responsibility for ensuring contact and making arrangements was on the mother, who should encourage the children to see their father and also create a climate where the father was viewed in a positive light (see 73). See also *Blance v Blance* 1978 SLT 74.

⁵⁷ *M v M (Residence Order)* 2000 Fam LR 84.

⁵⁸ *ibid* [20].

⁵⁹ UNCRC (n13) Art 12.

⁶⁰ *Mason v Mason* 1987 GWD 27-1021.

⁶¹ *Shields v Shields* 2002 SLT 579.

child.⁶² However, while the child may possess the right to be heard, it does not extend or amount to a right to decide.⁶³ Furthermore, where, as in the majority of cases, younger children are involved, less substantive weight tends to be given to their opinions.⁶⁴

A. Reconsidering the Scottish Approach

The 'welfare test' in s11(7) of the 1995 Act has been sufficiently flexible to adjust over time in line with a changing society. No one would argue that a principle protecting the welfare and interests of the child should be abandoned. However, relocation disputes highlight the tensions inherent in applying the 'welfare principle'.⁶⁵ Sutherland's view is that relocation cases are assessed by an 'out-of-touch judiciary' who are required to make predictions about an uncertain future.⁶⁶ Different courts see the various issues differently and facts which one court finds relevant may be disregarded by another.⁶⁷ As welfare decisions are based on values and opinions rather than concrete facts and scientific evidence, the judge's personal perceptions can be influential, causing problems with regards to the transparency of decisions.⁶⁸ The 'welfare principle' does not always achieve its objective of promoting the child's best interests and, furthermore, simply prioritising children's rights is not necessarily the best way of ensuring their interests are protected. Ultimately, it is open to question as to whether the Scottish courts are currently making the right decisions in relocation cases. Related questions are whether the concept of the child's welfare is ambiguous or whether the court system is too adversarial for such matters.

Such questions are important. Alternatives, such as mediation, offer much more effective dispute resolution. In contrast with the adversarial nature of the court system, with its emphasis on winners and losers serving to entrench disagreements, mediation assists in reducing conflict and is '(...) almost certainly more child focused.'⁶⁹ Mediation also improves communication, reduces bitterness and

⁶² *ibid* [10]. This case also outlines, at [11], that the duty to consult the child applies throughout the proceedings until the final decision is handed down.

⁶³ Joe Thomson, *Family Law in Scotland* (6th edn, Haywards Heath: Bloomsbury Professional 2011) para 12.56.

⁶⁴ A child over the age of 12 is presumed to be of sufficient age and maturity to give their view, but children younger than this may also be considered sufficiently mature (1995 Act (n43) s11(10)). However, there are fewer cases that involve older children; the mean age of the children in relocation cases during 2012 was 6 years old so less weight is given to their views. See Cominetti and George (n3) 153.

⁶⁵ Lisa Young, 'Resolving relocation disputes: The "interventionist" approach in Australia' (2011) 23(2) CFLQ 203, 203.

⁶⁶ Sutherland (n12) 452.

⁶⁷ The weighing of all the factors is hard and unpredictable. The case of *Brixey v Lynas* (n24), although not a relocation dispute, illustrates the problems associated with family law disputes that involve sensitive issues. These problems are only heightened in relocation situations. This case went through four courts, each of which identified and weighed the factors differently and thus arrived at a different decision from the other courts (see 909-910).

⁶⁸ The value-laden nature of the welfare principle is extremely clear from a number of cases that denied residence applications to homosexual couples. See *Early v Early* 1990 SLT 221; *Meredith v Meredith* 1994 GWD 19-1150.

⁶⁹ James Pirrie, 'Collaborative Family Law - Perspectives from Training' [2004] Fam Law 216, 216.

facilitates more meaningful relationships after relocation. As a consequence, mediation agreements are more likely to be complied with than court decisions. In resolving relocation (and many other family law) disputes, it is much better to give the parents the reins and allow them to create personalised, acceptable and cooperative solutions themselves. Duggan points out that judges can make mistakes, causing damage that is difficult to undo and perhaps even irreparable.⁷⁰ It is not truly possible for a judge to predict the child's future welfare and whatever decision they reach will be hard to modify. Parents are more likely to know what is in the best interests of their child and can take daily corrective action to ensure their child's best interests are promoted and protected. Mediation is being used increasingly widely to resolve many types of cross-border disputes. Accordingly, it should be encouraged and promoted to a greater extent as an alternative for family dispute resolution. In England, as a result of the new Children and Families Act 2014, the parties involved in a family dispute must attend a family mediation information and assessment meeting.⁷¹ This seeks to ensure that parents are informed of the different methods of dispute resolution and are able to choose the one best suited to them, rather than simply feeling that court action is the only option. Similar reforms could be introduced in Scotland.

However, mediation is not suitable for all families. Therefore some other reform of the Scottish law on relocation still needs to be considered. It has been sarcastically suggested that flipping a coin would result in an outcome that was just as predictable as Scottish court decisions and that this would reduce hostility and delay.⁷² These suggestions are clearly hyperbolic and unrealistic, not least because they would not take any account of the child's interests. Some more meaningful proposals for reform will now be explored.

B. Statutory Checklist

In the Scottish Law Commission (SLC) consultation that preceded the 1995 Act, the possibility of a statutory checklist, similar to that in England, was considered.⁷³ In England, the paramount consideration is the welfare of the child.⁷⁴ The English courts will, however, decide applications with reference to a statutory welfare checklist,⁷⁵ which has been viewed as a '(...) means of providing greater consistency and clarity in the law,'⁷⁶ reducing the degree of judicial prejudice and the scope for different interpretations. It was intended to give more guidance to parents, lawyers, social workers and judges on how cases may be resolved, thereby reducing litigation. However, the statutory checklist gives English judges a narrower margin of discretion in comparison with Scottish judges. There exists a risk that a list can become too rigid and not evolve with the times in the manner that the Scottish common law approach would. Each case is unique and no list of 'relevant factors'

⁷⁰ Duggan (n39) 193.

⁷¹ Children and Families Act 2014, s10.

⁷² Duggan (n39) 193.

⁷³ Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para 5.20.

⁷⁴ Children Act 1989, s1(1).

⁷⁵ *ibid*, s1(3).

⁷⁶ Law Commission, *Review of Child Law, Guardianship and Custody* (Law Com No 172, 1988) para 3.18.

will ever be wholly satisfactory.⁷⁷ Furthermore, a checklist could result in decisions becoming more mechanical and divert attention from important factors that may not have been included on the list.⁷⁸ Ultimately, such a mechanical and rigid list may not provide the best method for reform. In fact this approach was ultimately rejected by the SLC.⁷⁹

C. A Rights-Based Approach

Fortin claims that the 'welfare principle' stands in the way of the right to private and family life contained in Art 8 of the European Convention on Human Rights (ECHR).⁸⁰ She further suggests that it should be reformed into a qualification to that right within the meaning of Art 8(2).⁸¹ This would mean that parental rights and responsibilities would be protected under Art 8 but that, if an order such as a contact order or one made in relation to relocation was not in the child's best interests, refusal would be justified as necessary and proportionate under Art 8(2). At first sight, this seems to be an attractive approach to follow. However, it places the best interests of the child at too low a level. Children's rights would only prevail over those of adults when the action was proportionate; fulfilled a legitimate lawful interest; and was necessary.⁸² This raises the question of why the parent's rights should be afforded such protection and only interfered with in very limited circumstances. It seems to flip the current situation around so that parents' rights are treated as presumptively protected and, more importantly, that they are only being modified if children's needs require it. Eekelaar points out that this could, as with the conventional approach, result in only 'lip service' being paid to other relevant interests.⁸³ This rights-based approach can be persuasive and it attractively deals with the issue of other interests. Nonetheless, a fundamental reason for not adopting such an approach is that the 'welfare principle' sends a significant, symbolic message, recognising the importance and magnitude of the child's best interests, focusing the

⁷⁷ Sutherland (n12) 452.

⁷⁸ Scottish Law Commission (n73) para 5.23.

⁷⁹ *ibid* para 5.23.

⁸⁰ Jane Fortin, 'The HRA's impact on litigation involving children and their families' [1999] CFLQ 237, 252.

⁸¹ *ibid* 254.

⁸² Art 8(2) ECHR. This Article states that: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. The ECHR works with a system based on proportionality. In *Elsholz v Germany* [2000] 2 FLR 486, a father had contact with his child until he expressed a strong dislike for him. It was held that it was not beneficial to continue contact. The ECtHR decided that, although the father's Art 8 rights had been interfered with and that, although the interference was in accordance with the law following the legitimate aim of protecting the child's health and morals, the interference was not proportionate and so it constituted a violation of Art 8. See John Eekelaar, 'Beyond the welfare principle', (2002) 14 CFLQ 237, 241.

⁸³ John Eekelaar (n82) 241.

mind of the parents and judiciary.⁸⁴ Any other test would risk undermining the protection afforded to children.

The Scottish approach may benefit from reconsideration in order to ensure fairness in decision-making. Transparency is essential and a clearer process would be invaluable. Nevertheless, the best interests of the child should be the most important consideration. There needs to be strong sociological evidence and guidance on the best approach to reform, as restructuring relocation law in Scotland is a complex task. Neither of the approaches suggested above will completely resolve the issues inherent in the welfare test. Mediation should, without a doubt, be utilised to a greater extent. It could also be useful to look to other jurisdictions or international law when considering the best method to be adopted. Scots law can learn lessons from the approaches of other jurisdictions and current international instruments. The Washington Declaration on International Family Relocation 2010 is an 'interesting, and potentially momentous, development'; one which provides a truly acceptable model.

4. Jurisdictional Variations

The European Court of Human Rights (ECtHR) has stated that 'the consideration of what is in the best interests of the child is in every case of crucial importance.'⁸⁵ However, acknowledging the costs and effects of applying this principle on a discretionary basis, a number of jurisdictions have adopted a position akin to a presumption.⁸⁶ 'These presumptions amount to generally broad and crude rules'⁸⁷ and are ultimately 'nothing more than the judge's personal preference.'⁸⁸ Other jurisdictions adopt an 'all factor' approach and reject the idea of presumptions being helpful. These divergent approaches have resulted in inconsistency around the world regarding relocation disputes and, in some instances, within particular jurisdictions. This has led to many jurisdictions realising the importance of common international standards and working to achieve them. Although it is not realistically possible to definitively categorise the approaches of all countries, three main trends can be distinguished: pro-relocation, anti-relocation and neutral. After comparative analysis, it will be seen that, although most jurisdictions utilise the welfare and best interests approach, none addresses the question of relocation in the same way as Scotland.

A. The Pro-Relocation Approach

⁸⁴ Jonathan Herring, 'Farewell Welfare?' [2005] JSWFL 159, 168.

⁸⁵ *L v Finland*, (2001) 31 EHRR 30 [118].

⁸⁶ Such as England and New Zealand. See Nicholas Bala, 'Moving closer to international relocation advisory guidelines' [2013] IFL 47, 47.

⁸⁷ *ibid.*

⁸⁸ Duggan (n39) 199.

These jurisdictions place great emphasis on the idea that a happy mother means a happy child.⁸⁹ The welfare of the child is intrinsically linked with the welfare of the mother, as the mother will be unable to provide the emotional and psychological stability required unless she herself is emotionally and psychologically stable.⁹⁰ England has, in the past, been described as a typical example of a pro-relocation jurisdiction and has a reputation for being one of the most liberal jurisdictions in the world.⁹¹ Findings in cases such as *Payne v Payne*⁹² made it very difficult for a non-primary carer to prevent a relocation application from being granted. In that case, the mother wished to return to her country of origin (New Zealand) after the breakdown of her marriage. She was the primary carer of the child, although the father had considerable contact. Examining the case law in the preceding 30 years, the Court of Appeal concluded that decisions were made on two principles. These were, firstly, that the welfare of the child is paramount and secondly, that refusing an application is likely to have a detrimental impact on the primary carer.⁹³ This reasoning tilted the balance in judicial decision-making in favour of well-prepared and genuine relocation applications. In the decision, although Dame Elizabeth Butler-Sloss stated that no presumption existed, 'great weight' was given to the primary carer's desire to move.⁹⁴ The decision created a situation where, in reality, any non-primary caring parent challenging the relocation would have '(...) little hope of success',⁹⁵ as the primary carer has an '(...) insurmountable head start in these applications.'⁹⁶ In practice, therefore, *Payne* created a presumption in favour of relocation.

The decision has been subject to significant criticism and conflicts with the importance that has previously been placed on continued contact between children and the non-primary caring parent in England. The presumption makes cases imbalanced and it is very difficult for a non-relocating parent to successfully oppose a relocation application. However, a number of cases subsequent to *Payne* have upheld its principles and, until 2011, judges generally refused to review the guidelines.⁹⁷ Some judgments have even been overturned on appeal as insufficient

⁸⁹ Janeen Carruthers, 'International Family Relocation: Recent UK Experience' (2012) 3 Jur Rev 187, 197.

⁹⁰ *Payne v Payne* [2001] Fam 473, 485.

⁹¹ See discussion in 'Preliminary Note on International Family Relocation' (n7) para 53.

⁹² *Payne* (n90).

⁹³ *ibid* [26].

⁹⁴ *ibid* [500].

⁹⁵ Judith Bray, 'The Wisdom of Solomon: Relocation on relationship breakdown' (2012) 24 Denning Law Journal 177, 181.

⁹⁶ Vallance-Webb (n6) 2.

⁹⁷ In *Re G (Children) (Leave to Remove)* [2008] 1 FLR 1587 para 14, the Court of Appeal deflected an attack on the *Payne* guidelines and concluded that there was no social shift that would justify a reconsideration of the principles. In *Re A (Leave to Remove: Cultural and Religious Considerations)* [2006] 2 FLR 572 at [55], Justice McFarlane held that his hands were tied by the strength of the *Payne* line of cases. At [5] of *Re D (A Child)* [2010] EWCA Civ 593, Wall LJ criticised *Payne* for placing too much emphasis on the views of the mother but went on to acknowledge that, '(...) until such time as *Payne v Payne* [was] either overtaken by legislation...or [went] to the Supreme Court', the lower courts would be bound by its principles. However, *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793 took a step away from *Payne* by restricting a resident parents movement in favour of joint parenting.

attention was deemed to have been paid to the well-being of the primary carer.⁹⁸ The 'distress principle' that arose from *Payne* has meant that decisions are not truly made on the basis of the child's best interests and it is now too easy for mothers to relocate.⁹⁹ In *Payne* very little evidence was provided of the potential benefits to the child that might arise from the mother's relocation. In fact, the main evidence supporting the relocation was the mother's sense of unhappiness and dislike of London.¹⁰⁰ It was felt that the resentment and frustration she would feel if her application were rejected would impact negatively on the child's welfare. Eekelaar opines that the *Payne* judgment seems to promote the interests of others '(...) under the guise of the child's welfare.'¹⁰¹ It has been argued that the significance afforded to the emotional impact on the primary carer is '(...) inherently unfair and is easily staged by the applicant.'¹⁰² The principle surely should be that a happy child creates a happy mother, rather than the '(...) happy mother creates a happy child' approach followed in *Payne*.¹⁰³ *Payne* is outdated and runs counter to the principles of equality of contact and joint parenting. It has been judicially held that the distress principle '(...) ignores and relegates'¹⁰⁴ any damage done to the non-relocating parent. The child will lose out on contact with the non-relocating parent and this could be damaging to their relationship. Ultimately, English law has been criticised for making it too easy for a custodial parent to relocate and allowing '(...) the interests of others...to be promoted under the mask of the child's interests.'¹⁰⁵

Fortunately, however, the '(...) relocation landscape has changed considerably since the hey-day of *Payne v Payne*.¹⁰⁶ In a seminal decision in *Re AR*,¹⁰⁷ Judge Mostyn held that *Payne* had not been '(...) uncritically accepted' and that emphasis on the physiological effects on the mother paradoxically '(...) appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions.'¹⁰⁸ He further was of the opinion that the welfare checklist in s1(3) of the

⁹⁸ *Re G (Children: Removal from Jurisdiction)* [2005] 2 FLR 166.

⁹⁹ The decisions in *Re B (Children) (Removal from Jurisdiction)* [2004] EWCA 956 CA and *Re S (Child)* [2003] EWCA Civ 1149 CA also centered on the mother's well-being rather than that of the children. This seems to promote a powerful message that the mother's interests should be promoted above the child's and that they should not be 'stress-tested' (*Re B (Children)* [2004] EWCA 956 CA [13]).

¹⁰⁰ *Payne* (n90) [13].

¹⁰¹ Eekelaar (n82) 242.

¹⁰² Vallance-Webb (n6) 3.

¹⁰³ Marilyn Freeman, 'Relocation: The reunite Research' (International Child Abduction Centre July 2009) 17 <www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Relocation%20Report.pdf> Accessed 5 October 2014.

¹⁰⁴ *Re D (Children) (Relocation: Permission)* [2010] EWCA Civ 50 [33] (Wall LJ). Wall J retracted the use of the word 'ignores' in *Re W (Children) (Relocation: Permission)* [2011] EWCA Civ 345 para 129 after comments by Lord Wilson in *Re H (A Child)* [2010] EWCA Civ 915 para 23.

¹⁰⁵ Robert George, 'Practitioners' views on children's welfare in relocation disputes: comparing approaches in England and New Zealand' (2011) 23(2) CFLQ 178, 202.

¹⁰⁶ Michael Horton, 'Relocation, relocation, relocation: *Re TC & JC (Children: Relocation)* [2013] EWHC 292 (Fam)' (The Solicitors Group 2013) <[http://www.thesolicitorsgroup.co.uk/Downloads/Articles/28May2013/Relocation_relocation_relocation_ReTC_JC\(Children_Relocation\)\[2013\]EWHC292\(Fam\).pdf](http://www.thesolicitorsgroup.co.uk/Downloads/Articles/28May2013/Relocation_relocation_relocation_ReTC_JC(Children_Relocation)[2013]EWHC292(Fam).pdf)> accessed 5 October 2014.

¹⁰⁷ *Re AR* (n85).

¹⁰⁸ *ibid* [12]. Here Mostyn J outlines that this is 'the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward'.

Children Act 1989 makes no reference to the impact of the decision on the primary carer and therefore it is questionable whether Parliament ever intended such an issue to be considered. He found it doubtful that this omission was an oversight.¹⁰⁹ The judgment in *K v K*¹¹⁰ took a step away from *Payne*, outlining that the court in *Payne* had simply emphasised that the welfare of the child was paramount, observing that the remainder of the *Payne* judgement was only guidance that '(...) must not be overstated.'¹¹¹ In *Re TC & JC*,¹¹² Judge Mostyn took this even further, emphasising that presumptions should play no part in this area of child law.¹¹³ Here he provided a helpful assessment of the previous jurisprudence in this area, specifically emphasising that no presumption should be utilised.¹¹⁴ Although the older jurisprudence favours well-prepared applications by the primary carer, this is no longer the case to the same degree: '(...) there is no legal presumption, let alone some legal or evidential presumption, in favour of an application.'¹¹⁵ In *Re TC & JC*, the mother, an Australian citizen, abducted the two children after the breakdown of the relationship and took them to Australia.¹¹⁶ However, following proceedings based on the Hague Convention, the children were returned to the UK.¹¹⁷ The decision takes into account principles set out in a decision of the Supreme Court of New Zealand, namely *Kacem v Bashir*.¹¹⁸ Generally speaking, there is a significant geographical separation between the child and the non-primary carer in international relocation cases, however this case was quite unusual in that both parents had indicated that, whatever the decision, the unsuccessful parent would move to be with the children. The CAFCASS officer felt that as a result this was a '(...) very difficult – almost unprecedented' case,¹¹⁹ and he was unable to make a clear recommendation. The court's decision was based '(...) from first to last on the interests of [the] children.'¹²⁰ Judge Mostyn felt that their physical, emotional and educational needs would be met equally well in the UK or Australia. Considering the children's ages (3½ and 2), a move would not have a very disruptive effect on them. Thus, for Judge Mostyn, the decisive factor was the effect the decision would have on each parent. That was because an unfavourable decision would weigh far more heavily on the mother than on the father. The mother was a much more fragile

¹⁰⁹ *Re AR* [2010] EWHC 1346 [14] (Mostyn J).

¹¹⁰ *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793.

¹¹¹ *ibid* [168] (Black LJ).

¹¹² *Re TC & JC (Children: Relocation)* [2013] EWHC 292 (Fam).

¹¹³ *ibid* [18].

¹¹⁴ *ibid* [10]-[18].

¹¹⁵ *ibid* [11].

¹¹⁶ *ibid* [1].

¹¹⁷ *ibid* [2]. The Hague Convention on the Civil Aspects of International Child Abduction (1980) Article 1(a) tries to ensure the prompt return of children who have been abducted abroad. In this case, after the mother abducted the children to Australia, proceedings were initiated in that jurisdiction on the basis of the Hague Convention in order to ensure the safe return of the children. After an appeal and rehearing, the children returned to the UK.

¹¹⁸ *Kacem v Bashir* [2010] NZSC 112. The principles are examined further on in this article.

¹¹⁹ *Re TC & JC* (n112) [8]. An officer from the Children and Family Court Advisory and Support Service (CAFCASS) is often involved from an early stage in disputes concerning children. They provide a helpful report to the court containing the child's views and an indication of the child's best interests in order to help the court come to its decision.

¹²⁰ *ibid* [52].

character compared with the father who was highly competent and self-sufficient.¹²¹ The father would have few obstacles to obtaining work in Australia while the mother's immigration status was much less certain and there would be significant financial pressures upon her. The decision was not made on the basis of the 'distress principle.' Judge Mostyn came to his decision after weighing up all the factors and taking the route that was in the best interests of the children. This decision indicates that the court decisions are clearly moving away from the ineffective presumption in *Payne*. The father was a 'victim of his own virtues.'¹²² Ultimately, while Judge Mostyn had much sympathy for the father, he had to resist the temptation to punish the mother for her previous actions and so he granted her application to relocate.¹²³

Despite the success of the mother in this case, Judge Mostyn was very clear that there is no presumption of success. The principles in *Payne* are further undermined by the changes wrought by the Children and Families Act 2014. This Act seeks to encourage joint parenting and the continuance of relationships by introducing (through s11(2)) a presumption that, unless the contrary is demonstrated, ongoing involvement of both parents in the child's life will further the child's welfare. The Act does not require equal time to be spent with each parent, nor does it necessitate joint parenting, and it may therefore result in only limited modification of court decisions. Nevertheless, it recognises that children are generally better off when both parents work together and are involved in their child's life. The Act and the more recent case law outlined above provide significant challenges to the doctrine established in *Payne*. England, although traditionally classed as a very pro-relocation jurisdiction, seems now to be gravitating towards a more neutral stance towards relocation decision-making. With the use of mediation and changes to the justice system introduced by the Children and Families Act, decisions more neutral in nature will hopefully become the norm, consigning the reasoning adopted in *Payne* to the history books.¹²⁴

B. Protecting the Family Unit

Other jurisdictions have adopted an anti-relocation stance, taking the view that the child's best interests are protected by maintaining the family unit. Relocation in New Zealand is governed by the Care of Children Act 2004. Joint parenting is much more common in this country and so parents *must* cooperate to decide issues of relocation, only turning to the court if they are unable to agree.¹²⁵ Consistent with the approaches of most other States, the Act provides that the '(...) welfare and best interests of the child must be the first and paramount consideration.'¹²⁶ In assessing

¹²¹ *ibid* [47].

¹²² *ibid* [51].

¹²³ *ibid* [52].

¹²⁴ Jack O'Sullivan, Nicola Clark, Liz Edwards and Martin Narey, 'Children and families bill: our panel responds' *Guardian* (London 5 February 2013) <www.theguardian.com/commentisfree/2013/feb/05/children-family-bill-panel-responds> accessed 5 October 2014.

¹²⁵ Care of Children Act 2004, s5(a). If agreement cannot be reached then applications tend to be made to the court as a parenting order (s48).

¹²⁶ *ibid* s4(1).

the child's best interests the judge should pay heed to the principles set out in s5 of the Act, as well as the need to resolve cases in a reasonable time.¹²⁷ The Act also emphasises the need to ensure family relationships are '(...) preserved and strengthened' in pursuit of the child's best interests,¹²⁸ reflecting the view that when a parent moves away with their child the '(...) absent parent is rendered yet more absent.'¹²⁹ This of course can be damaging to the child's relationship with the absent parent. In New Zealand ideas of stability and continuity of relationships are emphasised. The New Zealand Court of Appeal in *Kacem v Bashir* suggested that, due to the wording of the principle in s5(e), that principle may assume priority.¹³⁰ The idea that both parents, and their extended families, should be involved in the child's care and upbringing can create a significant barrier to successfully adjudicating relocation cases. However, the New Zealand Supreme Court made it clear that the ultimate point is that one principle '(...) cannot be read as having any presumptive precedence over the other principles, or indeed any presumptive precedence of a stand-alone kind.'¹³¹ The decision in each case will depend on an individualised assessment of the issues and the '(...) key point is that there is no statutory presumption or policy pointing one way or the other.'¹³² Ultimately, although applicants do not start off facing some form of presumption, principle 5(e) will have particular factual significance.

A presumption against relocation will restrict a parent's ability to relocate following divorce. All people should be able to relocate and reside where they wish, but it is debatable whether this should be qualified and weighed against the rights and needs of the child. In Europe, EU law adds another dimension to the issue of relocation. The free movement of citizens is a central tenet of the internal market and is strongly protected in EU law.¹³³ Free movement is not, however, absolute, although restrictions thereto must be objectively justified and proportionate.¹³⁴ Despite the legitimate aim of protecting the child's welfare, a blanket rule placing restrictions on all cases of relocation is unlikely to be deemed proportionate under EU law.¹³⁵ Mothers would be compelled to remain in a country they do not want to be in only so that the father can maintain contact. Yet the free movement of the father is not restricted to the same extent.

The approach in South Africa could be seen as somewhat more neutral or pro-relocation and as such it provides a good comparison.¹³⁶ In *B v M*,¹³⁷ the court

¹²⁷ *ibid* s4(2).

¹²⁸ *ibid* s5(d).

¹²⁹ Carruthers (n89) at 190.

¹³⁰ *Bashir v Kacem* [2010] NZCA 96 [51] (Glazebrook, O'Regan and Arnold JJ).

¹³¹ *Kacem* (n118) [22].

¹³² *ibid* [24].

¹³³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47. This treaty protects the free movement of both workers (Article 45) and citizens (Article 21).

¹³⁴ Case C-413/99 *Baumgart v Secretary of State for the Home Department* [2002] ECR I-7091.

¹³⁵ On the basis of principles established in Case C-66/82 *Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA)* [1983] 3 CMLR 453, paras 7-9.

¹³⁶ This pro-relocation stance can be seen in *Jackson v Jackson* 2002 2 SA 303 (CA). At [2] it was held that '(...) the interests of the children are the first and paramount consideration.' However, '(...) a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parents is shown to be bona fide and reasonable...Indeed one can well imagine that in

pointed out that primary carers ‘(...) should be free to create their own lives, post-divorce, unfettered by the needs or demands of their former spouses’.¹³⁸ Satchwell J made the point that the primary carer is not shackled to the other parent and does not lose their independent right to freedom of movement.¹³⁹ It is argued by many commentators that the father’s mobility should inform part of the decision-making process in relocation cases, as this is the only way to ensure relocation law treats both the mother and father equally.¹⁴⁰ If the parents could move together then this would give the child the benefits of the move and of the continued relationship with both parents. However, *requiring* a non-primary carer parent to move would infringe upon their ‘right to stay’, the converse of the right to free movement. The court has no power to force a party to relocate even if this would be in the best interests of the child.¹⁴¹ The reality is that ‘(...) maternity and paternity always have an impact upon the wishes and mobility of parents.’¹⁴² Parents have the right to free movement only to the extent that this freedom does not conflict with the obligations they have to their children. In Scotland, the courts are ‘(...) naturally reluctant to interfere with a person’s right to decide where he or she resides’.¹⁴³ This seems to strike a fairer balance.

C. Neutral States

The Scottish courts have resisted any temptation to ‘(...) elevate the primacy of the parental claim into anything approaching a principle, far less a rule.’¹⁴⁴ It remains true that each case will depend on its own facts and circumstances. The dictum of *Payne* receives ‘(...) questionable prominence’¹⁴⁵ in English law and does not represent the position under Scots law, which instead ‘(...) view[s] the matter exclusively through the prism of the welfare of the child.’¹⁴⁶ In the Scottish case of *M*

many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case be decided on its own particular facts.’

¹³⁷ *B v M* [2006] 3 All SA 109 (W).

¹³⁸ Domingo (n36) 159.

¹³⁹ *B v M* (n137) 158.

¹⁴⁰ This issue was raised in *U v U* (2002) 211 CLR 238, an Australian case, and the Australian courts are now obliged to consider this point. However, the idea assumes that the relocating parent would wish for the other parent to relocate as well when this is often not the case. Furthermore, there is no guarantee that the relocating parent will remain in the new jurisdiction for a long period of time and it is not fair to require the other parent to continuously move in order to stay close to their child. In *G and A* [2007] FCWA 11, considering the mother’s previous lifestyle, the move may have been the first of a number of moves, so the case should not have been decided on the basis of the father’s mobility. See [61].

¹⁴¹ Nevertheless, it has been considered, for example in *Re S (Children) (Application for Removal from Jurisdiction)* [2004] EWCA Civ 1724 [21]. See Ruth Lamont, ‘Free movement of persons, child abduction and relocation within the European Union’ (2012) 34(2) *Journal of social welfare & family Law* 231, 240.

¹⁴² *U v U* (n140) 262.

¹⁴³ Karen Wylie, ‘Relocation, Relocation’ (2008) 53(8) *JLSS* 59, 59.

¹⁴⁴ *Osborne v Matthan (No 2)* 1998 SC 682, 704 (Lord Caplan).

¹⁴⁵ Carruthers (n89) 198.

¹⁴⁶ *ibid* 200.

v M,¹⁴⁷ the decision of the lower court was overturned on appeal by the Court of Session, which held that excessive weight had been given to the mother's wishes to relocate; more weight should have been given to the father's future contact possibilities and the fact that the children were settled in Scotland.¹⁴⁸ The Court of Session expressly held that the ratio in *Payne* '(...) forms no part of the law of Scotland.'¹⁴⁹ Had the Sheriff at first instance not placed excessive emphasis on the mother's wishes he would not have treated other factors in the case the same way.¹⁵⁰ Presumptions, such as the one in *Payne*, direct the court's attention away from the child's best interests and towards the desires of the primary carer. The earlier Scottish case of *Sanderson v McManus*¹⁵¹ also emphasises that there is no presumption in favour of contact between a child and his natural father.¹⁵² Such a presumption would be incompatible with the need for the court to consider a child's welfare as paramount. It may normally be assumed that a child would benefit from continued contact with his natural parent but this question must be assessed on the evidence.¹⁵³ As a result of the decision in *Sanderson* it can be said '(...) with confidence that the requirements contained within s11(7)...[Children (Scotland) Act 1995]...effectively preclude reliance on any presumptive rule or guideline tending to favour the wishes or interests of either parent.'¹⁵⁴

Canada, like Scotland, has also adopted a neutral stance after the leading case of *Gordon v Goetz*.¹⁵⁵ In this case the Canadian Supreme Court held that judges should be '(...) unconstrained by burdens or presumptions in favour of either party.'¹⁵⁶ However, in Canada it is felt that this approach is ambiguous and that the lack of a presumption and guidance has created inconsistencies in the case law with '(...) results [that] are totally unpredictable.'¹⁵⁷ Many have called for the Canadian Supreme Court to reconsider the issue and develop '(...) sensible and practical mobility guidelines.'¹⁵⁸ British Columbia has introduced relevant new legislation: the Family Law Act 2012. The provisions are very child focused; it creates two rebuttable presumptions depending on whether or not the parents have substantially equal parenting rights. If the parents do not have largely equal parenting then s69(4)(a) states that a good faith relocation must be considered to be in the best interests of the child if the non-relocating parent cannot provide evidence

¹⁴⁷ *M v M* 2012 SLT 428.

¹⁴⁸ *ibid* [39].

¹⁴⁹ *ibid* [52].

¹⁵⁰ *ibid* [441].

¹⁵¹ 1997 SC (HL) 55. The court in *Sanderson* approved the principle expressed in *Porchetta v Porchetta* 1986 SLT 105 that the father had no statutory right to have access to the child and that such access would only be granted if the court was satisfied that it was in the child's best interests. The onus of showing such benefit would be on the parent seeking access.

¹⁵² *ibid* [12].

¹⁵³ *ibid*.

¹⁵⁴ *M v M* (n147) [9].

¹⁵⁵ *Gordon v Goetz* [1996] 2 SCR 27.

¹⁵⁶ Robyn Diamond, 'Moving towards relocation reform in Canada' [2013] IFL 155.

¹⁵⁷ Philip Epstein in *ibid* at 156.

¹⁵⁸ Diamond (n156) 157. The British Columbian Court of Appeal suggested in *Q(RE) v K(GJ)*, 2012 BCCA 146 [59], that it may be time for the Supreme Court to reconsider whether cases should be based solely on best interests or whether further guidance should be provided.

to rebut this and there is a workable contact arrangement proposed. However, if there is substantially equal parenting then the relocating parent must satisfy the court that the proposed move is in the best interests of the child.¹⁵⁹ Thompson feels that this '(...) actually creates some law on relocation' rather than the '(...) black hole of *Gordon v Goertz*' and suggests similar principles should be adopted across Canada.¹⁶⁰ Ultimately, Canadian academics generally feel that due to the lack of specification in the best interests test, a presumption is more appropriate for relocation cases.¹⁶¹

D. The Problems with Presumptions

Greenberg *et al* point out that '(...) nothing matches the appeal of simple solutions to complex problems.'¹⁶² Presumptions are intended to simplify the cases that come before a judge. There has been much debate regarding the best presumption to be adopted in relocation cases. However, it is argued here that no presumption should be adopted at all. The advocates for presumptions base their arguments on the idea that the welfare principle on its own is too vague and uncertain, creating inconsistencies in case law and causing problems for lower courts.¹⁶³ Presumptions reduce litigation, time and costs, making decisions easier and more consistent. However, presumptions tend to be frowned upon and unhelpful in matters involving children, obstructing the proper operation of the welfare principle. Presumptions adopt a 'one size fits all' approach.¹⁶⁴ They are very crude and create broad, sweeping assertions that fail to take into account the individual circumstances and extensive differences in cases. The advantages of presumptions are essentially illusory and they will not in fact resolve problems with welfare.¹⁶⁵ The case of *Kacem v Bashir* makes some '(...) highly acute observations demonstrating the fallacy of the suggestion that there is, or should be, some kind of presumption in favour of an application to relocate.'¹⁶⁶ Due to the nature of relocation applications, anything other than an individualised assessment of the particular facts will be flawed and deficient. Pre-determined responses may reduce the number of cases before court; however this does not mean the parties are satisfied or that the child's best interests have in fact been supported.¹⁶⁷ The barriers to overcoming these presumptions are

¹⁵⁹ Family Law Act 2012, s69(5)

¹⁶⁰ Rollie Thompson, 'Where is BC Law Going? The New Mobility' (2012) 30 CFLQ 235, 264.

¹⁶¹ See for example Rollie Thompson, 'Ten years after Gordon: No Law, Nowhere' (2007) 35(6) RFL 307; Diamond (n157).

¹⁶² Lyn R Greenberg, Diana J Gould-Saltman Esq & Hon Ron Schneider, 'The problem with Presumptions – A review and Commentary' in Stahl P and Drozd L (eds), *Relocation issues in child custody cases* (The Haworth Press Inc 2006) 142.

¹⁶³ A number of cases, including the aforementioned *M v M* 2012 SLT 428, have been overturned due to their reliance on presumptions. As a result, lower courts can find it difficult to know which case to rely on in reaching their decision.

¹⁶⁴ Bala (n86) 47.

¹⁶⁵ See Greenberg (n162) 148.

¹⁶⁶ Judge Mostyn in *Re TC and JC* (n112) para 14.

¹⁶⁷ The child's best interests cannot be adequately met by a simple automatic response that does not consider the facts of the individual case. Presumptions restrict the court and leave parties feeling dissatisfied with the decision. They are told by their lawyers that there is no point raising an action in

incredibly high, creating a deck that is stacked against the respondent.¹⁶⁸ This provides a detrimental view of the fairness of our legal system by shifting the process from an individualised, fact-specific decision regarding the welfare of the child, to a specific formula that needs to be fulfilled in order to relocate.¹⁶⁹ In such situations the child's interests can easily be relegated and consideration given to other aspects, such as the mother's distress, through the prism of the child. Laws that are exceptionally restrictive in preventing relocation applications could also lead to parents taking the law into their own hands and abducting the child to another jurisdiction. Conversely, if the law is too liberal, then the non-relocating parent may end up abducting the child to prevent them from relocating and severing contact. Instead of creating defective presumptions that distort the welfare inquiry, relocation law would be better served by improved decision-making, the provision of better training and greater use of mediation. The cornerstone of family law is the independence and impartiality of the judiciary and their ability to assess the evidence and give fact-based solutions particularised to each individual case in the hope that it will be followed.¹⁷⁰ There is great sympathy for women who wish to relocate home or to a new country with their children; however, from the beginning to the end of the process, the best interests of the child should be the most important factor.

This difficult area has challenged the courts, and different legal systems have adopted different stances on the issue of relocation. The Scottish courts have adopted a non-presumptive approach that focuses on a child-centred decision. Pro-relocation countries have adopted a more liberal approach. They emphasise the right of a person to choose where they want to live. However, this creates imbalance in cases making it very difficult for a non-relocating parent to successfully oppose the relocation. Ultimately, the child will lose out on parental contact. Anti-relocation countries have perhaps gone too far the other way, by restricting relocation in favour of the family unit. At first sight this is appealing, however it unnecessarily restricts a parent's right to move and can cause increased tensions within the family. Ultimately, it is never known whether relocation is in any child's best interests. Further research is therefore essential in order to achieve greater understanding and agreement over which relocation principles should be adopted. Most countries seem to be gravitating towards a more centralised, neutral position that rejects the appropriateness of presumptions in this type of case. While this decision will undoubtedly be difficult for the judge to make, a presumption will not be of any assistance considering the individual facts of the case. Bearing in mind the varying approaches to tackling these cases, it is arguable what the best approach would be. Presumptions therefore have no part to play in these fact-based, evaluative judgements.

court as they will undoubtedly lose. This will create great distress and anger. Furthermore, parties are more likely to be happy with a decision if it is reached after consideration of all the factors and both parties have had a chance to be heard.

¹⁶⁸ *Greenberg et al* (n162) 148.

¹⁶⁹ This draws attention to the incompatibility of presumptions with Article 6 ECHR.

¹⁷⁰ *Greenberg et al* (n162) at 167.

5. Looking for an International Standard

No jurisdiction has devised wholly acceptable guidelines and rules regarding relocation. Different countries have followed different directions when trying to establish a coherent path that deals with cases effectively. This variance in approach underlines the problem that exists when States try to create a unified international standard for relocation. Nevertheless, there is still an '(...) ongoing effort to achieve greater international consistency in the approach to cross-border relocation disputes.'¹⁷¹ So far, the attempts, undertaken principally through the staging of recent international conferences, have resulted in the emergence of mainly soft law that contains largely advisory principles. In this section, it will be considered whether an International response to relocation would be appropriate and whether it would be feasible, drawing on the experience of the United States. The current international instruments applying to relocation will also be outlined and it will be considered whether the 'welfare principle' is ultimately the best unifying standard. Finally, until there is broad agreement on how any principles should be applied, it has to be accepted that complete consensus is unlikely. This paper will argue that focus should also be placed on cross-border contact and the promotion of mediation.

A. Feasibility

It is increasingly recognised that common principles adopted at an international level would be beneficial in achieving a more unified global response to relocation. However, with each jurisdiction taking a different approach to the issue it is difficult for an international standard to emerge. The experience in the US as regards the creation of greater inter-state consistency may be relevant when considering the likelihood of agreement in the international sphere. The US has a federal system of government and relocation issues are determined by the law of each State, with the consequence that approaches vary and standards differ. There have been several attempts to standardise the US approach to relocation but this has often been met with 'substantial resistance.'¹⁷² There has been a lack of overall consensus regarding the procedure or substance of principles to be adopted in the US and such proposals as were put forward were not adopted in a large number of States.¹⁷³ The approach in relocation cases is dictated to some extent by a particular State's local history and values, its legal and social traditions, religion and perceptions. The global community is a great deal more diverse than the US, with distinct languages, cultures and history, making '(...) the task of harmonising or systematizing relocation law a daunting one.'¹⁷⁴ The difficulties experienced in the US are therefore

¹⁷¹ Preliminary Note on International Family Relocation (n7) para 12.

¹⁷² Here are some examples of attempts to standardise the US approach: American Law Institute 'Principles of the Law of Family Dissolution: Analysis and Recommendations' (2002); American Academy of Matrimonial Lawyers, 'Model Relocation Act', (1998) 15 Journal of AAML 1; National Conference of Commissioners on Uniform State Laws, 'Uniform Relocation of Children Act' Vol. Atkinson Memo (10/29/2008).

¹⁷³ James Garbolino, Judith Kreeger, Peter Messitt and Mary Sheffield, 'Relocation of children: law and practice in the United States' (2013) IFL 162, 162.

¹⁷⁴ *ibid* 165.

only a microcosm of the barriers and hurdles to consistency and agreement at an international level.¹⁷⁵ The different presumptions, burdens of proof and legal traditions present in all countries suggest that '(...) despite such good faith efforts among informed experts to agree upon the most modest of recommendations...there will be substantial opposition to internationally harmonizing substantive and procedural law relating to relocation cases.'¹⁷⁶

Given the differences in approach and complexity of the cases involved, it may seem easier to say that there is no right answer and let each jurisdiction adopt its own process. However, despite the undeniably wide international diversity in approach described above, some steps have been taken and significant progress has been made. By its very nature, relocation is an international topic, creating similar problems around different world jurisdictions. Judges and practitioners are increasingly coming into contact with cases that require consideration of international issues; cases that clearly demonstrate the benefits of a uniform solution. There is constant concern that contact agreements or orders put in place by courts will not be enforced in the new jurisdiction of choice. International standardisation of the relocation issue could help resolve these problems, creating harmony, transparency and ensuring consistency in enforcement. In our increasingly mobile, ever-globalising world '(...) judicial cooperation is not only encouraged but essential.'¹⁷⁷

B. Current International Instruments

International agreements relating to child abduction have been very successful in achieving their aims. The most important of these is the Hague Convention on the Civil Aspects of International Child Abduction 1980. This is underpinned in Europe by the Brussels II Regulations and also the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children¹⁷⁸. There are, however, no treaties or conventions to establish consensus on international relocation. It is an area that is in severe need of international collaborative support, which, it is felt, would also simultaneously assist the international child abduction regime.

¹⁷⁵ *ibid* 162. Even in the EU there is limited consensus on the best model to choose. Other than in Scotland and England as described above, France and Spain can also be characterised as pro-relocation countries. Sweden adopts an anti-relocation stance and Germany is closer to a neutral position. If coherence cannot even be found in the EU even greater difficulties will emerge throughout the globe (see 162).

¹⁷⁶ *ibid* 165.

¹⁷⁷ *HSE Ireland v SF (A Minor)* [2012] EWHC 1640 (Fam) [26] (Baker J).

¹⁷⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1, repealing Regulation (EC) No 1347/2000 (hereinafter BIIR); The Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996).

In pursuit of common international standards, a number of conferences have been held.¹⁷⁹ Following one such conference in 2010, 50 judges and other experts drew up what became known as the Washington Declaration.¹⁸⁰ Even though it is not legally binding on its signatories,¹⁸¹ it has provided some common factors that should be taken into account in judicial relocation case decision-making.¹⁸² These factors were intended to bring greater unification to the international approach.¹⁸³ The Declaration ‘(...) specifically ordains a non-presumptive approach.’¹⁸⁴ Unsurprisingly, the ‘(...) best interests of the child’ principle was adopted as the most important consideration.¹⁸⁵ However, in order to promote greater uniformity internationally and help judges in reaching their decision, a list of 13 factors requiring consideration provides ‘(...) real rather than synthetic’¹⁸⁶ analysis of the impact of relocation on the child as well as others involved.¹⁸⁷ This non-exhaustive list is intended to help guide judges, ensuring that many aspects in each particular case are considered in the decision. It is noteworthy that the Declaration makes no specific reference to the effect of refusal on the primary carer. Instead, *all* family members involved in the child’s life are to be considered.¹⁸⁸ The Declaration provides a more neutral and balanced approach to questions of relocation, which is in line with the developing attitude of many jurisdictions. It is the only instrument to emerge from international conferences that actually focuses on relocation. In January 2012, a meeting of the Special Commission was held to review the Practical Operation of the 1980 Hague Abduction and 1996 Child Protection Conventions.¹⁸⁹ The likelihood and practicality of further work in the area of relocation was also considered. It was widely agreed that further research into relocation disputes would be beneficial for assessing whether there should be any international developments and, if so, in what direction these developments should go. However, there was ultimately no agreement on an instrument that would unify relocation policies internationally.¹⁹⁰

¹⁷⁹ In 2009, 42 judges attended the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions in Windsor, England. In March 2010, the International Judicial Conference on Cross-Border Family Relocation created the Washington Declaration on International Family Relocation. Also, in 2010, the Inaugural Conference on International Child Abduction, Forced Marriage and Relocation met in London.

¹⁸⁰ International Judicial Conference on Cross-Border Family Relocation, ‘Washington Declaration on International Family Relocation’, Washington D.C., United States of America, 23-25 March 2010 (hereinafter the Washington Declaration).

¹⁸¹ *ibid* para [13].

¹⁸² See *ibid* para [14].

¹⁸³ *ibid* para [13].

¹⁸⁴ *Re AR* (n109) [11].

¹⁸⁵ Washington Declaration (n180) para 3.

¹⁸⁶ *Re AR* (n109) [11] (Mostyn J).

¹⁸⁷ Washington Declaration (n180) para 4.

¹⁸⁸ *ibid* para 4(viii).

¹⁸⁹ See Report of the further work recommended by the Special Commission on the Practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection drawn up by the Permanent Bureau Preliminary Document No 12 of March 2012.

¹⁹⁰ *ibid* [83]. Relocation is still considered a matter of domestic law. Some states questioned the authority of international conferences. However, as George points out, all law is domestic law until

It is this author's view that the Washington Declaration, although not legally binding, provides a beneficial framework that should be refined and followed.¹⁹¹ Despite the text of the Declaration not being '(...) of satisfaction to any individual on the drafting committee' it is a step in the right direction.¹⁹² The balancing and consideration of other factors in paragraph 4 '(...) brings the conflict into the open' and so will resolve a number of the criticisms raised against the 'welfare principle'.¹⁹³ It significantly increases the transparency of decision-making, ensuring careful consideration of all rights and interests. Nevertheless, although the emphasis on 'best interests' is understandable, the clear disparities in the application of the current welfare principle in different jurisdictions raises questions about its utility as a principle to bring unity to the international sphere.¹⁹⁴ The States most likely to be signatories to any new international agreement already emphasise the welfare principle. It is unlikely, therefore, that its inclusion would create much more consistency for, although countries have entirely different presumptions and burdens of proof, they would not be required to change their approach to conform to a welfare-based standard. Nevertheless, it is not suggested that the 'welfare principle' should be abandoned. The Washington Declaration has handled the concept in a different way, making sure that the interests of others are included as part of the assessment, balancing the rights of the child *and* those of adults.¹⁹⁵ The approach of the Washington Declaration is to offer a choice between 'paramount' and 'primary' in the weighing of the child's best interests.¹⁹⁶ It is submitted that the child's best interests should be classified as *primary*. This type of assessment is also currently utilised in immigration law to ensure that the rights and interests of others are included in the process.¹⁹⁷ It is argued that this approach to welfare is the best standard for relocation cases and it will help ensure consistency and equality in decision-making. As a descriptive term, 'paramount' is not synonymous with protection. As discussed previously, in England, despite the child's welfare being paramount, the interests of the mother have in the past been promoted through the

states decide to regulate it at international level. Rob George 'Current developments: The international relocation debate' (2012) 34(1) JSW&FL 141, 149.

¹⁹¹ See *Re H (a Child)* [2010] EWCA Civ 915 para [25].

¹⁹² The Rt Hon Lord Justice Thorpe, 'Relocation - The Search for Common Principles' (2010) 1(2) *Journal of Family Law and Practice* 4, 9 <<http://www.frburton.com/archive/Issue%202.pdf>> accessed 5 October 2014.

¹⁹³ Jonathan Herring and Rachel Taylor, 'Relocating relocation' [2006] CFLQ 517, 537.

¹⁹⁴ George, 'Practitioners' views' (n105) 179.

¹⁹⁵ See Washington Declaration (n180) para 4(viii) and (ix).

¹⁹⁶ *ibid* para 3.

¹⁹⁷ Until November 2008, the UK had a reservation to the UNCRC, which meant that the provisions did not apply in relation to immigration matters (See Tenth Report of Session 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81 para [20]) Now, under Article 3(1) of the UNCRC (n13), the rights of the child in immigration cases will be the 'primary consideration'. In *ZH (Tanzania) v SSHD* [2011] UKSC 4, Lady Hale noted, at [22]-[25], that the duty to make the child's welfare the 'primary consideration' is not the same as the requirement under the Children Act 1989 s1(1) to make it the 'paramount consideration'. The Borders, Citizenship and Immigration Act 2009 s55 strengthens the rights and interests of the child, but the child's interests do not constitute '(...) a factor of limitless importance' ([46] (Lord Kerr)). The nationality and best interests of the child will be an important consideration, but they are not a 'trump card'; they can be outweighed by the strength of other factors.

guise of welfare.¹⁹⁸ It is the protection afforded to '(...) children's welfare that needs to be strengthened and supported, not the paramountcy.'¹⁹⁹ However, difficulty arises when contradictory, and thus incompatible, rights emerge. The Washington Declaration does not attach weight to the considerations listed in paragraph 4 and does not assist with balancing. It is submitted that there should be 'primary' and 'secondary' interests, the child's welfare being a primary consideration.²⁰⁰ Wherever a 'primary' and 'secondary' interest cannot be reconciled, the former should prevail. This would ensure that all the interests are addressed individually, removing the risk of confusing different interests and the inadequate consideration thereof that would inevitably follow.²⁰¹ This ensures that the welfare of the child is always kept uppermost in the mind of the judge, but not to the complete exclusion of other considerations and interests. Adopting such an approach across the globe would help reduce the devastating impact that relocation can have on the non-relocating parent, as parties feel happier with a decision if they know that their rights have been properly considered rather than simply disregarded. The Washington Declaration creates the most acceptable and satisfactory resolution for all concerned, ensuring that the child's interests are held in high regard; furnishing a visible framework for decisions; and making them more predictable and transparent.²⁰² Nevertheless, until some broad agreement on the interpretation of 'best interests' can be reached, differences will remain around the world. It may be beneficial for international measures to focus on ensuring cross-border contact rather than simply attempting to create concrete principles.

C. Enforcement of Contact Orders

Research from Reunite, the UK's leading charity specialising in child relocation across borders, indicates that a large number of contact arrangements break down in

¹⁹⁸ See, for example, *Payne v Payne* (n90).

¹⁹⁹ Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49(1) *Current Legal Problems* 267, 278.

²⁰⁰ The solution adopted should minimise the detrimental effect on all rights. See Andrew Bainham, 'Non-Intervention and Judicial Paternalism' in Peter Birks (ed), *Frontiers of Liability, Vol 2* (Oxford University Press 1994) 173-174.

²⁰¹ If the interests of the relocating parent, non-relocating parent etc. are separated and weighed against the child's interests, there is a much lower risk of these interests being blurred and afforded inadequate weight. Utilising this type of assessment in the decision of *Payne v Payne* (n91) the same decision would have been reached but in a more transparent way. If the damage to the mother's welfare of being unable to return to her home country was weighed against the detriment the child would suffer from losing direct contact with the father and moving away from their settled home then, on balance, the mother's interests should prevail and relocation should be granted. Rather than hiding behind the 'welfare of the child', a balancing exercise provides a more credible analysis of the decision to grant relocation than an analysis based on the 'welfare of the child'. See Eekelaar (n82) 244.

²⁰² However, assessing the child's welfare is currently a very difficult task without also having to incorporate the interests of others into the decision. As a result, it is argued that in achieving this balancing exercise the legislature or judiciary should create a set of objective indicators. This will assist judges in making their decision taking into account the interests of others but not at the risk of the welfare of the child.

the first 2 years.²⁰³ This highlights the difficulty for non-relocating parents in maintaining contact after the child has moved away. It is generally not possible for the child and the non-relocating parent to maintain the same quality of relationship after relocation as they had hitherto enjoyed.²⁰⁴ In *C v M*,²⁰⁵ Sheriff Halley recognised that indirect contact can be rare and irregular and it is naive to assume that internet or phone contact is a suitable alternative to regular face-to-face contact.²⁰⁶ It is often too easy for a relocating parent to undermine the relationship and ignore or avoid the undertakings she had previously given during proceedings. In a quest to find some certainty and try to maintain relationships across borders in the EU, Brussels II Revised Regulation (BIIR) was introduced.²⁰⁷ The lawful relocation of a child will trigger the application of Art 9, which outlines that the 'Member State of the child's former habitual residence shall...retain jurisdiction during a three-month period following the move.'²⁰⁸ This allows the courts to modify judgements in an attempt to ensure contact orders are working effectively. A certificate can be issued under Art 41 which will have the effect of making judgements that comply with the conditions enforceable in another Member State '(...) without the need for a declaration of enforceability.'²⁰⁹ Outside the EU, enforcement is achieved through the Hague Convention regime.²¹⁰ Relocation from Scotland to non-EU States such as the US and Australia is very common, something which makes the Hague regime very significant and influential.²¹¹ Recognition of judgements under Art 23 of the Hague Convention 1996 can only be refused in limited circumstances.²¹² Similarly, there is

²⁰³ It is estimated that 40-50% of fathers will lose contact with their children within 2 years. See Freeman (n103) 10.

²⁰⁴ In *DY v LY* 2012 GWD 5-89 the sheriff thought that summer holiday visits to Scotland would be sufficient to continue the child's relationship with his mother. However, in reality this would mean that the child would not see his mother in person for 11 months at a time. He noted that it is '(...) difficult to conclude other than that the relationship between the child and his mother would be adversely effected' [99].

²⁰⁵ *C v M* 2012 GWD 9-170.

²⁰⁶ *ibid* [70].

²⁰⁷ BIIR (n178) preamble [3]. . The goal of the regulation is to ensure reciprocal recognition and enforcement of orders across the EU and to establish rules regarding jurisdiction. All EU states apart from Denmark have signed up to the regulations and they are directly applicable in Member States.

²⁰⁸ *ibid* Art 9.

²⁰⁹ *ibid* Art 41. Judgements will receive an Art 41 certificate only if they comply with the requirements in paragraph 2 of Art 41. For further discussion on enforcement of contact orders abroad, see *Re H (A Child)* [2010] EWCA Civ 915 and *Re G (A Child)* [2006] EWCA Civ 1507. Judgements can also be recognised under Art 21.

²¹⁰ The Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Hague Convention on Jurisdiction (n178).

²¹¹ *Fawcett v McRoberts* 326 F 3d 491 (2003) is one example of a long-running, cross-border dispute between parents. The father granted an undertaking that he would not remove the child from the UK ([4]). Nevertheless, in breach of this promise, he subsequently took the child to the US ([5]). This initiated much litigation in the US under the 1980 Hague Convention. The federal court in Virginia indicated that a court order should be made for the child's return to Scotland on the basis of the 1980 Hague Convention and the International Child Abduction Remedies Act (ICARA), 42 USCA ss11601-11610 (West 1995) ([1]). However, the Court of Appeals reversed this decision, holding that the federal court had erred in its application of Scots law, notwithstanding the fact that the child had already returned to Scotland ([43]).

²¹² Hague Convention on Jurisdiction 1996 (n178) Art 23(2).

no appeal against the issuing of a BIIR Art 41 certificate.²¹³ This ensures that contact will be achieved as quickly as possible and cannot be frustrated by drawn out appeals. This framework for recognition can relieve some worry and dispel doubts for the non-relocating parent. However, it is still easily circumvented once the relocating parent actually moves. Under BIIR Art 9, the former jurisdiction only has the power to modify an order, not to enforce it. Enforcement of an order is carried out in accordance with the domestic laws of the new jurisdiction. The non-relocating parent will therefore have to apply to the court in the new jurisdiction if the contact order is not being adhered to by the relocating parent. This is often difficult, expensive and the cause of delay, all of which frustrate contact.²¹⁴ As such, although BIIR and the 1996 Hague Convention seem to offer reassurance regarding the enforcement of contact orders, they are unlikely to be completely effective. Those who intend to abide by the contact order will not need to rely on such regulations. Yet the regulations will only provide limited protection to non-relocating parents who suffer if the relocating parent never intended to comply with the order and utilises any available method to obstruct contact.²¹⁵ The courts cannot force parents to have good relationships with either their children or the other parent following relationship breakdown. Even in domestic cases, the courts often admit defeat even though it means the child will not see their father.²¹⁶ As a result, if the court makes a relocation order based on the assumption that the contact prescribed will actually occur, '(...) this assumption ought to be seriously questioned.'²¹⁷ More guidance is needed to ensure courts have the tools at their disposal to secure cross-border contact.²¹⁸

A number of commentators have suggested that the only practical way in which the law can deal with the significant variance of circumstances in relocation cases is to afford judges a significant degree of discretion through the broad, vague 'welfare principle'.²¹⁹ Although this again leads to inconsistency, uncertainty and difficulties for judges in coming to a decision, it is more effective and appropriate than a presumption or specific rule. Concrete rules are unable to respond swiftly, and are too blunt to deal with the difficulties and complexities of individual cases.

²¹³ BIIR (n178) Art 43(2).

²¹⁴ See *Re S (A Child) (Enforcement of Foreign Judgment)* [2009] EWCA Civ 993 [23].

²¹⁵ For example, parents can refuse to disclose their address, refuse to allow the children to fly for arranged contact meetings or not let the children see the father when he flies over. It is extremely difficult for the courts to enforce contact with a non-compliant parent.

²¹⁶ In *Re D (A Child) (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), Munby J said that the father was entitled to feel let down by the system and that there was much wrong with the courts' current approach ([2]). After a 5 year battle to obtain contact with his child, caused by substantial delays and baseless allegations by the mother, Munby J accepted that the court system had failed him [59] and that no contact could be awarded.

²¹⁷ Patrick Parkinson & Judy Cashmore, 'The need for reality testing in relocation disputes: Empirical evidence from Australia' (International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Cumberland Lodge, Windsor, England, 2009) 15.

²¹⁸ Hannah Baker, Juliane Hirsch, Nicolas Sauvage, 'International family relocation from an English, French and German perspective' [2012] IFL 97, 102.

²¹⁹ See, for example, Greenberg et al (n162) 139; Tim Carmody, 'Moving On with Relocation Law Reform' (2007) 45 Fam Ct Rev 214; Timothy Scott, 'The retreat from Payne: MK v CK' (2011) 41 FL 886.

The Washington Declaration adopts the best practices of both worlds. By utilising the discretionary 'welfare principle', it ensures that individual circumstances can be taken into account; then again, by outlining a number of factors that should be considered based on statute, common law, empirical research and social science, the Washington Declaration removes the risk of serious injustices and inconsistencies. Ultimately, it will create the situation where judicial discretion allows for individualised justice relevant to the specific facts of the case but within the limits of certain restrictions. It is argued here that the Declaration should become legally binding on signatories and applied with more force in jurisdictions around the world as the best current international standard.

Creating clear and internationally accepted relocation legislation, such as that represented by the Washington Declaration, is only part of the solution. Further work is also required in order to ensure that orders relating to cross-border contact are enforced and adhered to. The frustrating fight for contact is very difficult for all parties and the regime in place is only marginally helpful. It is often the case that relocation creates an insurmountable barrier to the continuance of parental relationships. There is a need for further research to test the reality of relocation decisions to ensure they are actually working. A system of monitoring the situation after relocation is vital to ensuring that contact rulings are enforced, that relocation has been successful and that legislation is effective. It would be helpful if a monitoring body were created that possessed the power to intervene in cases where contact orders were not working effectively or to notify an organisation, such as a supranational EU body, that could then intervene. However, in the international sphere and even the EU, this aspiration remains unrealistic. The best way to ensure improved and more acceptable solutions to relocation disputes is to utilise the process of mediation. Mediation should be promoted to a much higher extent in domestic as well as cross-border cases. The Washington Declaration makes mediation a 'major goal.'²²⁰ Contact will function most effectively when it is based on collaborative agreement; hence cooperative relationships are more likely to emerge from mediation than from court cases.

6. Conclusion

For the judges involved, relocation disputes '(...) present some of the knottiest and most disturbing problems that our courts are called upon to resolve.'²²¹ There appear to be no right answers in these cases as '(...) all practical answers are to some extent unsatisfactory and therefore to some extent wrong.'²²² No jurisdiction has effectively met the needs of all parties and no system is perfect. There is still a lot of work to be done but the efforts so far are productive steps. Rauscher points out that contact between the child and the non-relocating parent is a delicate, time-sensitive issue.²²³

²²⁰ Washington Declaration (n180) para 8.

²²¹ *Tropea v Tropea* (1996) 665 NE2d 145, 148.

²²² *G v G (Minors: Custody Appeal)* 1985 1 WLR 647, 651 (Lord Fraser).

²²³ The passage of time will work against the best interests of the child: the longer the separation, the more estranged the child will become, thus reducing the rationale for contact. See Thomas Rauscher,

As such, it is important to implement mechanisms to ensure contact is enforced and that relocating parents cannot obstruct contact taking place. Both parents are tied together by the indissolubility of parenthood.²²⁴ However, it should probably be accepted that the parent-child relationship is never going to be the same following relationship breakdown. When both parents have a loving and strong relationship with their child, yet one parent wishes to move away, the law generally cannot provide an acceptable answer.²²⁵ In many cases contact can be completely severed with the non-relocating parent, and the child is required to contend with huge and insurmountable change only rectifiable once they reach adulthood.

In the international sphere, the Washington Declaration provides an important bench mark that should be adopted in all jurisdictions worldwide as the best process to resolve relocation cases in the interim. In Scotland, adoption of the Washington Declaration would provide a more appropriate solution than that currently utilised. The Scottish approach is currently too vague and uncertain. However, a statutory checklist or a rights-based approach would not fully encompass the rights of all either. It is argued that the neutral approach adopted by the Washington Declaration is more in line with the best interests of the child. With the shift towards shared parenting it allows for consideration of all factors in the dispute and does not pre-determine any judicial decision. Mediation is also an indispensable tool that should be utilised to a much greater extent in Scotland, thus helping to create more agreement and continuing relationships.

There is no doubt that international consistency would ensure the desired gold standard. This would create better decision-making and help ensure that each jurisdiction protects the child's right to have consistent and valuable contact with the non-relocating parent. The Washington Declaration has the potential to become the international protocol, thereby significantly increasing the transparency of decision-making, and ensuring careful consideration of the interests and rights of all parties in relocation cases. However, in conjunction with the Washington Declaration there needs to be greater enforcement of contact orders, with the possibility of this being administered by a national or international body to ensure compliance. The recognition of cross-border contact orders requires confidence in the law and policy of other legal systems and it is felt that this would emerge from international consensus. Ultimately, cases involving child relocation should be dealt with by a small group of specialist and experienced judges in each jurisdiction to ensure that cases are dealt with effectively and to remove the perception of uncertainty and a lack of clarity in this area of law. There is also a need for more research into relocation disputes to assess whether, and in what direction, further international legal developments should progress and to test the reality of relocation decisions to ensure they are working effectively. Whilst significant progress is still required, there can be optimism that developments are heading in the right direction.

'Parental Responsibility Cases under the new Council Regulation "Brussels IIA"' (2005) 1 European Legal Forum 37, 44.

²²⁴ Patrick Parkinson, 'Family Law and the Indissolubility of Parenthood' (2006) 40 FLQ 237, 237.

²²⁵ When the father has only limited contact with the child, the decision is less challenging.

‘Pipe-dreams, the public and pollution’

The regulatory answers to the growing public concerns surrounding UK shale gas are crucial for the long-term future of the industry: a lesson learned from Brent Spar

ALASDAIR J. DICKSON*

Abstract

Public protest against the potential for the extraction of shale gas from within the shores of the UK has highlighted that regulatory action is required. Whilst this fledgling industry may have gained the legal licences to operate, it remains uncertain as to whether it has earned its ‘social licence’ to operate in UK communities. The reasoning behind these protests have stemmed largely from the environmental fallout of shale gas extraction in the United States, where the regulatory framework is comparatively fragmented and lax. This article highlights the similarities between our modern-day shale gas debate, and the Brent Spar debacle of the 1990’s, and how the Government must react differently in 2014 if UK shale gas is to have a future. The article contends that, whilst some of these public concerns are legitimate, the current UK onshore oil and gas framework is far more comprehensive in its application and contains decades of regulatory development. It is suggested that the Government reaction to date has been very accommodative in addressing public concern, but certain small improvements could have disproportionately large gains for society. It is finally submitted that communities and the industry must work together for their mutual benefit. Geo-political tensions throughout the world make energy security a key priority for the UK in the 21st Century: shale gas would go a long way to help curve our foreign energy dependency.

1. Introduction – ‘Boom or bust’

The overall potential for shale gas extraction in the United Kingdom remains uncertain.¹ The domestic shale gas industry exists in a fragile state, with increasing public concern over its impact upon community life, land and the environment. There have been a variety of highly publicised protests in recent months from Non-Governmental Organisations (NGO’s) such as Greenpeace and the ‘Frack-Off’

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¹ Estimates as to the volume of shale gas have been forecast (1,300tcf); however it is still uncertain as to how much of the gas can be commercially extracted.

Campaign that aim to prohibit shale gas companies from operating.² These protests are against both the principle of utilising shale gas – a fossil fuel – and the controversial method of its extraction, namely, ‘hydraulic fracturing’ or ‘fracking’. Protestors claim that fracking damages water supplies and causes earthquakes. The regulatory reaction to these situations of heightened public scrutiny is of paramount importance if the industry is to earn its ‘social licence to operate’³ and function in a mutually beneficial relationship with the public. The UK Government has hopefully learned from past regulatory reactions – or lack of such – to protests against oil and gas exploration and their ensuing consequences. These failings are no better illustrated than from the fallout of the international debacle that was Brent Spar, as will be discussed in Part 2.

The recent interest in UK shale gas has principally derived from a profound report from the British Geological Survey (BGS) which has estimated that there could be around 1,300 trillion cubic feet (tcf) of natural gas buried in shale rock beneath northern and central England.⁴ Only a percentage of this will be recoverable, but even if a tenth of this gas was recovered, the UK would have enough domestically produced gas to power the entire country for decades to come.⁵ It could also create thousands of jobs, generate millions in tax revenue and grow profits for businesses and communities. Shale gas could also have a valuable role as a transition fuel to displace carbon-heavy coal power whilst low-carbon renewable energy is being developed for the future.⁶ This would help the UK in meeting the stringent EU 2020 carbon emissions targets that are imminently approaching.⁷

Shale or ‘unconventional’ gas is a natural gas (usually methane) which can be extracted from deep within the ground using methods that are unconventional in comparison to those traditional methods used in ‘normal’ hydrocarbon fields such as

² Patrick Sawyer, ‘Fracking protests head north as activists mass on proposed Manchester shale gas exploration sites’ *The Telegraph* (London, 21 December 2013) <www.telegraph.co.uk/earth/energy/10532769/Fracking-protests-head-north-as-activists-mass-on-proposed-Manchester-shale-gas-exploration-sites.html> accessed 6 January 2014.

³ International Energy Agency, *Golden Rules for a Golden Age of Gas – World Energy Outlook Special Report on Unconventional Gas* (12 November 2012) 10.

⁴ Ian J Andrews, ‘The Carboniferous Bowland Shale gas study: geology and resource estimation’ (July 2013) *British Geological Survey* for DECC 1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226874/BGS_DECC_Bowland_ShaleGasReport_MAIN_REPORT.pdf> accessed 15 February 2014.

⁵ BP, ‘Statistical Review of World Energy’ (June 2013) 22 <www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf> accessed 14/04/2014 - 1,300 tcf is a median estimate from the BGS. If 10% was extracted (130tcf) this could power the UK gas demand (3 tcf p.a.) for around 40 years.

⁶ Department for Energy and Climate Change (DECC), *Developing Onshore Shale Gas and Oil – Facts about Fracking* (December 2013) 4 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/270980/Developing_Onshore_Shale_Gas_and_Oil_Facts_about_Fracking_140113.pdf> accessed 15 February 2014 - DECC and the Institute of Directors has estimated that the UK Shale Industry could generate up to £3.7bn of annual investment and generate up to 74,000 jobs directly and indirectly through the supply chain.

⁷ For 2020, the EU has made a unilateral commitment to reduce overall greenhouse gas emissions from its 28 Member States by 20% compared to 1990 levels.

the UK North Sea.⁸ Conventional gas or oil is found in reservoirs in sandstone or limestone, where gas and oil has migrated up from source rock becoming trapped by impermeable rock to form a reservoir. In contrast, shale gas is produced directly from the underlying source rock – usually clay shales – which are impermeable and do not allow the hydrocarbons to flow to the surface. Due to this impervious rock, a specialised technique must be used to allow the gas to flow freely to the wellhead. This technique is ‘hydraulic fracturing’. Fracking is a technique that has been used for over 50 years in the oil and gas industry and involves pumping water, sand and other additives at a very high pressure into the shale rock to create narrow fractures or ‘fissures’ to allow the gas to flow. A combination of fracking and horizontal drilling has resulted in the ability to meaningfully extract shale gas in commercially viable quantities.⁹

Shale gas extraction has had a significant effect on the US market for natural gas, with the country switching within ten years from a heavily gas-importing nation – via liquefied natural gas (LNG) – to a country that has exported its first tanker of shale gas to Norway.¹⁰ Natural gas prices have dropped dramatically, benefiting the US economy, businesses, and the retail consumer. It has also boosted the onshore oil and gas industry, creating thousands of jobs and has had a positive effect on the US balance of payments, generating significant tax revenues as a result.¹¹

However, one of the main reasons for public concern in the UK has been due to the lax regulatory regimes and extraction methods so far utilised in the USA.¹² These have caused aquifers to become polluted, seismic tremors to occur, and natural gas to enter the domestic water supply.¹³ These procedures are not operational best practice and have not been followed in the UK.

The UK Government remains in the difficult position of having to both regulate and promote investment in an industry that is extremely controversial. With a recent survey highlighting UK public support for fracking falling for a second time in six months, the Government’s regulatory reactions in managing the industry

⁸ Andrews (n 4) P1 – unconventional gas in the Bowland-Hodder shale has been estimated to be contained at depths greater than c. 9500ft (2900m). This is several thousand feet below where most conventional hydrocarbon basins would be found and is several kilometres below any aquifer or water source.

⁹ DECC, *About shale gas and hydraulic fracturing* (July 2013) 4.

¹⁰ Alistair Osborne, ‘How US shale gas could re-energise Grangemouth’ *The Telegraph* (London, 8 December 2013) <www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10504101/How-US-shale-gas-could-re-energise-Grangemouth.html> accessed 15 February 2014.

¹¹ US Department of Energy, ‘Shale Gas Research and Development’ (2014) <<http://energy.gov/fe/science-innovation/oil-gas/shale-gas-rd>> accessed 14/04/2014 – Shale gas currently contributes about 16% of U.S. natural gas production, an amount that is expected to grow significantly as this huge resource is developed.

¹² These have involved poor well-integrity regulations, low health and safety standards, and a lack of consideration for the surrounding community and their needs.

¹³ Rowena Mason, ‘Film raises shale gas pollution fears’ *The Telegraph* (London, 24 June 2010) <www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7850130/Film-raises-shale-gas-pollution-fears.html> accessed 15 February 2014.

and its operators will be fundamental to the long-term prosperity of shale gas in the UK.¹⁴ This really could be boom or bust.

The UK shale gas debate strikes a startling resemblance with the public outrage and subsequent mishandling by the UK Government of the Brent Spar incident in 1995. Here, the public backlash made it no longer socially acceptable to dispose of offshore infrastructure into the sea. 'Social acceptability' is also the crucial concept that is required by the modern-day shale gas industry.

This article will examine how the UK Government, through the Department for Energy and Climate Change (DECC), is addressing the major public concern surrounding fracking from a legal or regulatory standpoint. Part 1 will scrutinise the recent trends from a public perception survey undertaken by The University of Nottingham, highlighting the specific areas of concern. Part 2 will go on to illustrate and discuss the Governmental failings in the Brent Spar case and how the lessons learned can be applied to the promotion and regulation of the UK shale gas industry. Part 3 will study in detail the traditional regulatory framework for onshore hydrocarbon extraction that has existed in the UK for decades. Finally, Part 4 will critically analyse the recent regulatory reactions to the specific areas of public concern, as noted in Part 1, and will highlight their advantages and failings. Part 4 will end with a number of practical suggestions for future improvement.

This article will not deal in depth with how shale gas could help with: energy security, financial prosperity, increased employment, or the reduction in greenhouse gas emissions that could come into fruition as a result. These topics will, however, be mentioned in passing in order to contextualise just how important the industry could be for the United Kingdom.

Part 1 – Public sentiment and environmental concerns

Onshore exploration for oil and gas in the UK began in the late 19th century and is, consequently, decades older than the offshore developments which have since dominated. Since 1973, the Wytch Farm oilfield in Eastern Dorset is the largest onshore oil field in Europe, but the total onshore production is small compared with offshore production and contributes only 1.5% of overall UK oil and gas production.¹⁵ Over 2,100 wells have been drilled onshore with about 10% of them having been hydraulically fractured – the very process which is currently under debate.¹⁶ There are currently around 120 producing sites with around 300 operating wells producing in excess of 20,000 barrels of oil equivalent per day (boepd).¹⁷ These

¹⁴ Sarah O'Hara and Mathew Humphrey and others. 'Public perception of shale gas extraction in the UK: is the Balcombe effect taking hold?' *The University of Nottingham* (28th January 2014) <www.scribd.com/doc/131787519/public-perceptions-of-shale-gas-in-the-UK-January-2014-pdf> accessed 03/03/2014 - A survey by YouGov and the University of Nottingham highlights that after a number of high profile protests at the Cuadrilla site in Balcombe, opposition to fracking has risen from 18.8% to 27% from July 2013 to January 2014.

¹⁵ United Kingdom Onshore Operators Group (UKOOG), *The History of Onshore Oil and Gas* (Issue 1, October 2013) 2 <www.ukoog.org.uk/images/ukoog/pdfs/fact%20sheets/history.pdf> accessed 16 February 2014.

¹⁶ *ibid.*

¹⁷ *ibid.*

figures highlight that onshore oil and gas exploration is already embedded into modern-day society and is by no means a new phenomenon.

A. Current Public Sentiment

A joint survey entitled '*Public Perceptions of Shale Gas in the UK – January 2014*' by experts at The University of Nottingham and YouGov, has shown that the public perception of shale gas as an acceptable form of energy is continuing to wane, despite Government support for the industry increasing.¹⁸ The survey has tracked public perceptions of the notion of shale gas and its method of extraction from March 2012 to January 2014. The results have been very interesting indeed. Before looking further into the details surrounding the specific concerns with shale gas extraction, we should assess the overall 'all things considered' results for the question: 'Should shale gas extraction be allowed in the UK?'

As of January 2014, there is now a 26.7% differential in 'favour' of shale gas extraction; compared to a 30.2% differential in favour in September 2013, and a 39.5% differential in favour in July 2013.¹⁹ As was stated by the co-author of the report, Professor Sarah O'Hara:

This suggests that the 'turn against fracking' seen in September (in light of the Balcombe Cuadrilla protests) was not a 'blip' and may represent an increasing sense of unease with the environmental implications of fracking techniques amongst the UK public.²⁰

This downward trend is not a good sign for the industry or the Government. It should still be noted, however, that the majority of the surveyed UK population are in favour of shale gas extraction. They cite the main supportive reasons as being: employment; energy security; cheaper electricity and gas prices; lower GHG emissions; and other economic factors such as community benefits.²¹

The Government have recognised this change in public opinion with Owen Paterson, the Environment Secretary, admitting to a House of Lords Committee that anti-fracking activists were winning the public opinion battle:

There is a large problem with public opinion... Those who are opposed have made all of the running... We are behind the curve. These opponents have been getting a lot of media coverage... A lot of the stuff is misleading, but they have made the running.²²

The Government is clearly aware of the concerns and is willing to do something about it: this may be half of the problem in itself. We will come to see the issues that

¹⁸ Sarah O'Hara and Mathew Humphrey and others (n 14) 1.

¹⁹ *ibid.* see Figure 8.

²⁰ *ibid.* see 12.

²¹ *ibid.* see 1-12.

²² Select Committee on Economic Affairs, *The Impact on UK Energy Policy of Shale Gas and Oil* (HL 2013-2014, Evidence Session No. 18) 19 <www.parliament.uk/documents/lords-committees/economic-affairs/EnergyPolicy/uc%20Transcripts/ucEAC20140128Ev18.pdf> accessed 03/03/2014.

can arise when the public are not recognised or understood when we illustrate the events of the Brent Spar case in Part 2.

As is noted by Simon Moore in his recent article, it is important to keep one key aspect in mind throughout all of our analysis of public concern:

Many of the local environmental problems cited with shale gas are perhaps better understood as problems with the featherweight legislation that is prevalent in parts of the US. Future production in Europe (and the UK) will be able to learn from the US, not just about the best and safest production practices, but also about appropriate regulation.²³

This point by Moore is of paramount importance: the mineral rights and public acceptance threshold for oil and gas exploration in the US are different to that of the UK population; a comparison between the two should not be made though it may seem tempting, or indeed obvious, to do so.²⁴

We shall now study some of the individual environmental concerns with shale gas, highlighting the change in sentiment to these specific areas from the survey.

(i) Seismicity

Induced seismicity is one of the main concerns of both the NGO's and the UK public. On 1st April 2011 the Blackpool area in the north of England experienced seismicity of magnitude 2.3M shortly after Cuadrilla Resources hydraulically fractured a well at its Preese Hall site. Seismicity of magnitude 1.5M occurred on the 27th May 2011 following a renewed fracturing of the same well.²⁵ There was a moratorium placed upon hydraulic fracturing and operations were suspended. It should be understood that these tremors were not 'earthquakes' by the standard description, and 'generally recorded (on the Richter scale) but were not felt'. They were also of a strength that is experienced 20-30 times a year in the UK.²⁶ Cuadrilla commissioned a set of reports to investigate the cause of the seismicity, which concluded that they had induced the tremors.²⁷

Induced seismicity can occur in previously aseismic areas following oil and gas activities. As Simon Moore goes on to say in his article:

²³ Simon Moore, 'Gas Works? Shale gas and its policy implications' (2012) *Policy Exchange* 10 <www.policyexchange.org.uk/images/publications/gas%20works%20-%20feb%2012.pdf> accessed 03/03/2014.

²⁴ In the United States, private landowners actually own the mineral rights that lie beneath their land and so are entitled to the economic benefit of the extraction. UK landowners do not own these rights, and instead they vest in the Crown. The US public have also become used to onshore drilling and exploration due to decades of extensive production within onshore territories; this is not the case in the UK where production has principally been offshore.

²⁵ Garry White, 'Cuadrilla admits drilling caused Blackpool earthquakes' *The Telegraph* (London, 2nd November 2011). <www.telegraph.co.uk/finance/newsbysector/energy/8864669/Cuadrilla-admits-drilling-caused-Blackpool-earthquakes.html> accessed 03/03/2014.

²⁶ Simon Moore (n 23) 50-51.

²⁷ *ibid.* 51.

It is an unusual case [referring to the Cuadrilla operations] – only in two previous instances have drilling operations come near to creating the same degree of seismicity, and they were undergoing much more powerful hydraulic fracturing. The widespread expansion of hydraulic fracturing technology in the past decade has not been matched by notable incidents of seismicity before the case at Preese Hall.²⁸

According to the geologists' report following the incident, the well site had been constructed over a 'critically stressed fault' which shifted when pressure was put on it. They concluded that the likelihood of similar events of induced seismicity in the future was 'slim'.²⁹ It is difficult not to agree with this report, as industries that induce far greater power upon the earth (e.g. mining) have not caused the same kind of seismic tremors. To label the event at Preese Hall with the emotionally aggravating word 'earthquake', as many NGO's have, is simply misleading the public.

Nonetheless, the reviews from the survey indicate that the amount of people that associate shale gas with 'earthquakes' has been high throughout. However, the differential of people believing that shale gas does cause 'earthquakes' has shrunk quite dramatically from 58% in April 2012 to just 17.7% in January 2014. This indicates that perhaps the UK public have also recognised that the NGO rhetoric was over-exaggerated in its claims.³⁰

(ii) Water use, pollution and disposal

For its exploration sites in Preese Hall, Cuadrilla has anticipated using approximately 1,600m³ of water for each hydraulic fracture operation. Dr Ruth Wood at the Tyndall Centre has highlighted excessive water use for fracking as a particular issue 'given that water resources in many parts of the UK are already under pressure'.³¹ It should again be made clear that large quantities of water – much larger than the amounts used for shale gas extraction – are used every day in industries such as power generation and mining, or are even lost through leaks.³²

In a response to these claims by NGO's, the Government said at an Energy and Climate Change Select Committee in 2011 that:

²⁸ *ibid.*

²⁹ CJ De Pater and Stefan Baisch, 'Geomechanical study of Bowland shale seismicity' (2011) *Cuadrilla Resources* P4 < www.cuadrillaresources.com/wp-content/uploads/2012/02/Geomechanical-Study-of-Bowland-Shale-Seismicity_02-11-11.pdf > accessed 03/03/2014.

³⁰ Sarah O'Hara and Mathew Humphrey and others (n 14) Figure 3.

³¹ Ruth Wood and others. 'Shale gas: a provisional assessment of climate change and environmental impacts' (2011) *Tyndall Centre for Climate Change Research at Manchester University* 6-7 <www.tyndall.ac.uk/sites/default/files/tyndall-coop_shale_gas_report_final.pdf> accessed 04/03/2014.

³² Ofwat, 'How much does your water company leak?' *BBC News* (Apr 2012) <www.bbc.co.uk/news/uk-17622837> accessed 14/04/2014 - The water industry in England and Wales loses 3.36 billion litres of water a day in leaks.

Adverse effects on water resources as a result of possible expansion of the shale gas industry in the UK are not expected.³³

The Royal Society and Royal Academy of Engineering Report recommends that the minimising of use and the recycling of wastewaters and their various disposal options should be planned from commencement of the application.³⁴

There are also concerns that fracking could result in the contamination of aquifers and drinking water sources – as has occurred in the US – either by the chemical additives of the fracking fluid or by the methane that could be released. Furthermore, as was announced by the Tyndall Centre:

[T]he toxicity profile of flow-back fluid is likely to be of greater concern than that of the fracturing fluid itself.³⁵

The Energy and Climate Change Select Committee (ECCC) found that the facilities built to handle waste from the offshore industry would have ‘ample’ capacity to cope with the demands of shale gas.³⁶ They also said that the ‘liquor’ of waste produce from a fracking operation is more dilute than many other wastewater types produced by industrial activity in the UK.³⁷

With regards to the possible contamination of aquifers, a report from the Society of Petroleum Engineers has convincingly concluded that:

Down-hole environmental risks to fresh water supplies from fracturing in shale developments greater than 500ft below the water sand is literally as close to zero as can be established from engineering analysis using the... results available from at least 10,000 shale wells...³⁸

The survey, however, suggests that there is increasing concern about water and its uses since the Balcombe protests in September 2013. At this time the belief that ‘shale gas contaminates water’ stood at a differential of 10.5%. It now stands at 16.4% in January 2014, a move in the wrong direction for the industry.³⁹

(iii) Safety and Well Integrity

³³ Energy and Climate Change Select Committee, *Seventh Special Report on shale gas: Government response to the Committee's Fifth Report of the Session* (HC 2010-2012, 1449-VII).

³⁴ The Royal Society and The Royal Academy of Engineering, ‘Shale gas extraction in the UK: a review of hydraulic fracturing’ (June 2012) 22

<www.raeng.org.uk/news/publications/list/reports/Shale_Gas.pdf> accessed 04/03/2014.

³⁵ Ruth Wood and others (n 31) 58 – Fracking also occurs thousands of feet underground, and so the likelihood of any of the chemicals reaching an aquifer is highly unlikely.

³⁶ Open-air storage ponds (present in the US) are not permitted in the UK.

³⁷ ECCC (n 33) 10 – the composition of ‘frack fluid’ is 99.9% water and must be disclosed in the ‘Hydraulic Fracturing Plan’. Some of the main functions of the chemicals included in fracking are: to eliminate bacteria; to reduce friction; to thicken water; pH adjustors; or to prevent limescale in pipes and equipment. Most of the chemicals used in the fluid are common in industrial and even domestic applications.

³⁸ George E. King, ‘Thirty Years of Gas Shale Fracturing: What Have We Learned?’ *Society of Petroleum Engineers* (2010) 25 <www.onepetro.org/conference-paper/SPE-133456-MS> accessed 17/04/2014.

³⁹ Sarah O’Hara and Mathew Humphrey and others (n 14) Figure 4.

The fallout surrounding the use of cemented well casings, or the lack of them, has arisen from the lax regulatory framework present in the US. This has caused unnecessary concerns about fracking here in the UK. It is accepted that poorly constructed wells can lead to water contamination; and provocative pictures from the movie *Gasland* has apparently shown this in the US – although the sources remain disputed.⁴⁰ Robust well-integrity regulations are utilised here in the UK as we shall see in Part 3.

The ECCC have stated that ‘well integrity must be a priority for shale producers, just as it is for other oil and gas producers operating in the UK.’⁴¹ The survey did not comment on this technical aspect of the industry.

(iv) Air Pollution, Low Carbon Generation and Climate Change

It has been advocated by Cathles and others that generating electricity from natural gas is relatively clean in comparison to coal-fired generation, with one study finding it to generate about a third of the GHG emissions of coal and double the heat efficiency.⁴² It has also been said that more gas could help bridge the energy gap that the UK is experiencing in terms of diminishing North Sea production and the future move to renewables and nuclear energy.⁴³ This could also reduce the dependency on expensive LNG imports from foreign countries such as Russia and Qatar.

The Tyndall Centre Report again rejects this notion, stating:

[E]missions from a fully developed UK shale gas industry would likely be very substantial in their own right... shale gas offers no meaningful potential to reduce this, even as a transition fuel.⁴⁴

The British public also seem less convinced by the ‘clean energy’ argument, with the negative differential of those who think ‘shale gas is a clean energy’ standing at -12.7% in January 2014, down further from -9.9% in September 2013.⁴⁵

(v) Local impacts, landowner benefit and ‘NIMBY-ism’

The UK population are also concerned with the level of noise, traffic and general activity that will stem from the shale gas industry. They do not want this to impede upon their daily lives, or for it to cause a hindrance to their property.

The problem of ‘NIMBY-ism’ – ‘Not In My Back Yard’ – is a major issue for the UK, and indeed the EU in general. The main reason for this revolves around the

⁴⁰ www.gaslandthemovie.com.

⁴¹ ECCC (n 33) 7-9.

⁴² Lawrence M Cathles et al. ‘A commentary on “The greenhouse gas footprint of natural gas in shale formations” by RW Howarth et al.’ (2012) *Climatic Change* 113:525-535, 534.

⁴³ *ibid.* US carbon emissions have fallen by 9% since 2005, reversing a strong upwards trend, and the US EPA has attributed also 50% of this reduction to shale gas use.

⁴⁴ Ruth Wood and others (n 31) *Executive Summary* 7.

⁴⁵ Sarah O’Hara and Mathew Humphrey and others (n 14) Figure 5.

differences between the US and the UK in terms of population density and attitudes to onshore oil and gas, as well as land rights.⁴⁶ The problem is summed up very neatly by Paul Stevens in his article, when he highlights that:

Acceptance by local communities is likely to present the major challenge... Large scale disruptions are likely to generate huge local opposition... While some operations are beginning to face increased local opposition in the US, there is a financial incentive for local communities to suffer the inconveniences because the resource is the property of the private landowner and not the state.⁴⁷

With all of these points considered, it is clear to see that opinion is divided and there is a lot of work to be done in terms of convincing the UK public of the merits of shale gas. As Professor Matthew Humphrey, co-author of the survey, concludes at the end of the publication:

The public are getting strong messages from protest groups about the dangers of fracking and an equally strong message from the Government about the benefits it will bring in terms of secure and affordable energy. The trends seem to show that neither side has won the argument yet.⁴⁸

With the theme of 'winning arguments' strongly in our mind, we shall now go on to study the case of Brent Spar in 1995 – the last major public protest to UK oil and gas exploration. It was a classic case of the public versus 'Big Oil' and 'Big Government' – the public were victorious in this instance.

Part 2 – Brent Spar and public concern

There are compelling similarities between the protests occurring at this very moment against shale gas extraction in the UK, and those campaigns that have gone before against similar oil and gas activities and their methods; whether it be against oil exploration to the West of Shetland, or the uncovering of environmental disasters such as the Deepwater Horizon spill in the Gulf of Mexico in 2010.⁴⁹

However, the protest that resonates most with our current shale gas situation – in terms of diverging public attitude and the unexpected extent of the backlash – is

⁴⁶ The World Bank, 'World Population Density' (2013)

<<http://data.worldbank.org/indicator/EN.POP.DNST>> accessed 17/04/2014 - The population density in the UK is around 263/km²; whereas in the US, it is only around 34/km².

⁴⁷ Paul Stevens, 'The Shale Gas Revolution: Hype and Reality' (2010) *Chatham House* 16-17

<www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/r_0910stevens.pdf> accessed 04/03/2014.

⁴⁸ Sarah O'Hara and Mathew Humphrey and others (n 14) *Press Release*

<www.nottingham.ac.uk/news/pressreleases/2014/january/support-for-fracking-continues-to-decline.aspx> accessed 04/03/2014.

⁴⁹ Terry MacAlister, 'Shetland deepwater wells likely to be approved in face of Greenpeace action' *The Guardian* (London, 27 September 2010)

<www.theguardian.com/business/2010/sep/27/government-conflict-greenpeace-shetlands-drilling> accessed 1/03/2014.

the protest surrounding the Brent Spar in 1995. This, at first, may sound surprising. Why should it be unexpected to have campaigns against oil and gas exploration? Protests have occurred for years and are as predictable as clockwork – Governments should expect them. However, as pointed out previously in this article, hydraulic fracturing and onshore gas extraction have occurred in the UK for a number of decades. No such high profile protests have been launched against the hundreds of other sites around the UK. The industry, in this sense, has been a ‘shadow’ industry quietly ticking away in the background of public interest. This was also the case in the seemingly innocuous Brent Spar incident; until a particularly well focussed protest by Greenpeace brought the situation to the public’s attention, and caught both Shell and the UK Government on the back foot – they were ill-prepared for what the public had to say on the matter.

A. Brent Spar Timeline

The Brent Spar was a floating oil storage buoy that was intended as a temporary storage facility for the Brent field in the Northern North Sea. It was operated under a joint-venture between Shell (UK) and Esso, until such time as a pipeline could be built. It weighed 14,500 tonnes, was 140m tall and was composed of six huge storage tanks with a total capacity of 50,000 tonnes of oil. It was declared redundant in 1991 when the new pipeline came online.⁵⁰ Shell now required a method of disposing of the Brent Spar as it was deteriorating and was no longer re-usable within the industry. Having narrowed down the possibilities from thirteen options over a period of three years, two options were preferred. These were either: to entirely remove the structure and dispose of it in deep water; or to tow it back to shore and dismantle it there. The second option was made additionally difficult due to the fact that the degraded Spar was in such a bad state that attempting to re-float and tow it ashore risked rupturing the tanks which, although having been cleaned, still contained residual sludge that could not be pumped out.⁵¹ Furthermore, the selected option had to be by law, proportionate, cost-effective and consistent with the various international obligations, such as the London Dumping Convention 1972, OSPAR 1992 and the ‘precautionary principle’.⁵² It must also have been the Best Practicable Environmental Option (BPEO) taking into consideration: other alternatives, human safety, environmental costs, and financial costs.⁵³

⁵⁰ John Paterson, ‘Decommissioning of Offshore Oil and Gas Installations’ in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law – Current Practice and Emerging Trends* (2nd Edition, Dundee University Press 2011) Paras 10.18 - 10.20.

⁵¹ *ibid.*

⁵² London Dumping Convention 1972, Article IV and Annexe 2-3: enacted by the Food and Environmental Protection Act 1985 and the Petroleum Act 1987 – where the Operator proposed to dispose of an installation at sea away from the original site, a licence had to be obtained from the DTI (now DECC);

UN Convention on the Law of the Sea 1982 (UNCLOS) Art60(3);

International Maritime Organization (IMO) *Guidelines* 1989;

OSPAR 1992 Article 2 and Annexe 3 Article 5(3) – highlighting the ‘polluter pays’ and the ‘precautionary principle’.

⁵³ Twelfth Report of the Royal Commission on Environmental Pollution, *Best Practicable Environmental Option* (Cm 310, 1988).

Discussions between Shell and the Department for Trade and Industry (now DECC) resulted in the second 'deep-water disposal' option being chosen as the BPEO as it was said to involve significantly lower risks to personnel, was cheaper and would have only minimal environmental impact.⁵⁴ The Spar was to be disposed at the North Feni Ridge in the North Atlantic, and the DTI approved the Abandonment Plan in 1995, granting the licence to dispose.⁵⁵ In light of the International Conventions and obligations, this outcome should not have raised any concerns: it was perfectly legal and no other EU Government disapproved of its enacting. However, at no point in the proceedings were the general public consulted: a point that proved critical for the concept of offshore disposal.

The environmental NGO, Greenpeace, took the view that the dumping of such a large structure, still containing remnants of hydrocarbon deposits, was unacceptable in all circumstances and set a dangerous precedent for the future.⁵⁶ Greenpeace boarded the Brent Spar in an attempt to halt proceedings, and took samples from the storage tanks, stating that from their readings there could be as much as 5,000 tonnes of oil still on board; not the nominal amount that Shell had first stated. They filmed dramatic footage of the Spar, much along the same lines as is occurring at shale gas sites today and broadcast this to the world.⁵⁷ The case became headline news across Europe, and both Shell and the UK Government came under sustained pressure to change their decision. As Professor John Paterson notes in his writings on the matter:

[T]he Greenpeace occupation of the installation transformed the Brent Spar case from a peripheral issue of technical interest only to regulators and industry into a major international issue touching the whole question of the attitudes of Government and industry to ocean dumping specifically and environmental protection in general.⁵⁸

This international spectacle has a resounding similarity with the current EU debate surrounding fracking. Moratoria on hydraulic fracturing exist throughout the EU: there are blanket bans on fracking in France and Hungary as well as a number of other countries.

The UK Government's response to these demonstrations was extremely robust, defending Shell and the DTI's decision on the basis that a rigorous process had identified deep-water disposal as the BPEO.⁵⁹ Nevertheless, it was clear to see that although deep-water disposal was scientifically safe and acceptable, it clearly was not 'socially acceptable'. As Dr Doug Parr, Chief Scientist and Policy Director for Greenpeace UK stated at the time:

⁵⁴ John Paterson (n 50) Paras 10.21-10.22.

⁵⁵ *ibid.*

⁵⁶ *ibid.* Para 10.23.

⁵⁷ For an insight into how Greenpeace utilised the international media and its effect on international policymaking, see Lynn G. Bennie, 'Brent Spar, Atlantic Oil and Greenpeace' (1998) 51 *Parliamentary Affairs* 397.

⁵⁸ John Paterson (n 50) Paras 10.23.

⁵⁹ John Paterson (n 50) Para 10.24.

Legal is not necessarily legitimate in the eyes of the population at large – there has to be justification as well as regulatory compliance.⁶⁰

These points made by Parr strongly reverberate with the current position of UK shale gas and its 'social licence to operate'.⁶¹ After all, the shale gas industry exists within the shores of the UK, unlike the uninhabited North Sea: the industry may be 'legal' in terms of the licences and the regulations; but if it is not 'legitimate' in the eyes of the UK public, its future becomes seriously vulnerable.

Whilst the UK Government were standing strong on deep water disposal, with Michael Heseltine, the then President of the Board of Trade stating that, 'they should have kept their nerve and done what they believed was right (referring to Shell)'.⁶² Shell, on the other hand, noticed that this was affecting their bottom-line.⁶³ They announced soon after that they were abandoning the deep water disposal and were looking to enter into a Stakeholder Dialogue to come up with a more socially acceptable plan. This is again very similar to the position taken by the shale gas company Cuadrilla after their fracking operations recorded earth tremors at Preese Hall in 2011.⁶⁴ This was highlighting that corporate social responsibility (CSR) was the key to the long-term goal of convincing the public, a point that we will develop later on.

Rather shockingly, Greenpeace later admitted errors in their sampling on Brent Spar, publishing that they had got it wrong in terms of the quantities of oil that were on-board the vessel. They had stated that there had been around 5,000 tonnes of oil, while it turned out that there had been closer to 10 tonnes.⁶⁵ Whilst the integrity behind these errors is another issue in itself, it does echo the thoughts of many engineers and scientists within the shale gas industry who say that the majority of NGO protests are based on scientific misunderstanding and poor communication of the facts. Chris Faulkner, the CEO of Breitling Energy – a company considering fracking in the UK – has stated of the current fracking protests in Balcombe that:

⁶⁰ Judy Kuszewski and Yasmin Crowther, 'Brent Spar: the battle that launched modern activism' (2010) EC Newsdesk <www.ethicalcorp.com/communications-reporting/brent-spar-battle-launched-modern-activism> accessed 01/03/2014.

⁶¹ Haridimos Tsoukas, 'David and Goliath in the Risk Society: Making Sense of the conflict between Shell and Greenpeace in the North Sea' (1999) 6 *Organisation* 499 – this highlights the relative unimportance of scientific rationality in the context of public backlash and the "symbolic capital" of the key players such as Government and NGO's.

⁶² 'Shell Makes Dramatic U-turn' *BBC News* (June 1995)
<http://news.bbc.co.uk/onthisday/low/dates/stories/june/20/newsid_4509000/4509527.stm> accessed 14/04/2014.

⁶³ Thousands of British motorists boycotted the pumps and some petrol stations in the EU saw their revenue drop by as much as 50% following the Greenpeace protests on Brent Spar.

⁶⁴ CJ de Pater & S Baisch, 'Geomechanical Study of Bowland Shale seismicity' *Cuadrilla Resources* (Nov 2011) 15 <www.cuadrillaresources.com/wp-content/uploads/2012/02/Final_Report_Bowland_Seismicity_02-11-11.pdf> accessed 14/04/2014 – They voluntarily ceased operations and abided by the moratorium that was placed upon them by the UK Government.

⁶⁵ M Saunders, 'Environmental Protection: abandonment – study vindicates Shell over Brent Spar' (1995) 13(12) *Oil and Gas Taxation Review* 145-146.

The opposition to fracking is a product of scientific misunderstanding – or worse, an agenda put forward by supposed environmental advocates who stand to profit if natural gas never lives up to its full potential.⁶⁶

This ‘communication’ point will be more specifically addressed in Part 4 of this article surrounding suggestions for betterment of the industry’s reputation. However, it does illustrate that public perception can be somewhat warped by falsities and extreme NGO positions.

Shell eventually adopted a modified plan in cooperation with Det Norske Veritas (DNV)⁶⁷ and the Environment Council⁶⁸ to re-use the Brent Spar in the construction of a quay extension at Mekjarvik near Stavanger in Norway. This was reluctantly approved by the DTI and the project was completed in July 1999. The re-use option cost ten times as much and failed to achieve a positive energy balance – in this sense, it was not the BPEO.⁶⁹

The ‘closed conversation’ with the public in Brent Spar simply cannot be allowed to happen again in the case of shale gas – it is imperative that the public are addressed.⁷⁰ Communication is of even more importance in the shale gas case as we are dealing with onshore activity where people have land rights and can simply exclude the industry if they so desire. Nobody owned the North Sea in Brent Spar. The stakes are therefore higher with shale gas.

B. The Legal Fallout

The Brent Spar episode also led to changes in the international and national law surrounding offshore disposal, which primarily allowed dumping in various situations.⁷¹ Whilst this is largely out-with the ambit of this article, there is one point that should be highlighted here. In changing the law through the 1996 Protocol to the London Convention and through the OSPAR Decision 98/3, while these adopt a different and more strict approach to dumping – as they largely prohibit *all* dumping *with the exception* of wastes and other matters mentioned in the exceptions or the ‘reverse list’ – the fact that these exceptions include “vessels and platforms or other man-made structures at sea” means that the position remains largely unchanged.⁷²

⁶⁶ Adam Vaughan, ‘Community benefits no “game changer” for fracking’ *The Guardian* (London, 19 December 2013) <www.theguardian.com/environment/2013/dec/19/fracking-shale-gas-benefits> accessed 03/03/14.

⁶⁷ DNV is an independent, not-for-profit, foundation that consults on resolving various environmental disputes.

⁶⁸ The Environment Council is an independent charitable organisation that bring together stakeholders from all sectors to develop solutions to environmental problems.

⁶⁹ John Paterson (n 50) Para 10.32 – re-use option costs £43m in comparison to the £4.5m for deep-water disposal!

⁷⁰ John Paterson (n 50) Para 10.34.

⁷¹ UNCLOS, IMO Guidelines, LDC, OSPAR, PA 1987 (n44);

⁷² 1996 Protocol, Art 4(1.2);

OSPAR Decision 98/3, paras 2-3 and Annexe 1 – 3;

Petroleum Act 1998 Part 4 and DECC *Guidance Notes: Decommissioning of Offshore Installations and Pipelines under the Petroleum Act 1998* (Jan 2010).

The regulatory spirit has changed towards preferring 're-use, recycling and disposal on land' however, decommissioning by deep-water disposal remains a legal option.⁷³

This sort of 'symbolic' action may be what is required from the UK Government in terms of shale gas. Whilst the traditional system is one that is extremely thorough, as we shall see in Part 3, there may need to be some form of regulation or action which highlights to the public – or the NGO's at the very least – that the Government is taking *extra* care with shale gas extraction.

It is suggested that if the Brent Spar situation had been properly communicated in terms of the *actual* facts, and the UK Government had been more accommodative and understanding in their stance, the Brent Spar could have successfully been disposed of at sea, with public concern being reduced to a minimum.⁷⁴ This miscommunication and misjudgement of public opinion cannot be allowed to be repeated in the context of shale gas; to do so otherwise may result in shale gas becoming the pipe-dream that never was.

Having developed the context of shale gas within the UK and the public sentiment surrounding its development in Part 1, and having highlighted the similarities between this sentiment and the Brent Spar case in Part 2; it is now important to go on and analyse the current regulatory framework for onshore extraction in the UK.

Part 3 – The traditional onshore oil and gas process – 'pre-hype'

The UK Government has been very interested in supporting shale gas in the UK, seeing it as a possible lifeline in resurrecting energy independence and countering the dwindling North Sea reserves. Prime Minister, David Cameron, has stated that his Government is going 'all out for shale gas'.⁷⁵ DECC have said that:

The UK Government has been extremely active in creating the right framework to accelerate shale gas development in a responsible way... We want to ensure that regulation is fit for purpose, encourages growth whilst fully protecting the environment.⁷⁶

This clearly emphasises that the Government are well aware of the public and international concerns and are keen to communicate that they will be going 'all out', but will be doing so 'responsibly' – a strong start to the Government's attitude towards accommodating public opinion.

To put an important detail to rest before we go on: the ownership rights of hydrocarbons in the UK (and the EU in general) differ from that of the USA where

⁷³ *ibid.* OSPAR para 2.

⁷⁴ Thousands of inert wreckages exist on the seabed around the world in harmony with the surrounding sea-life and the environment: they can even benefit sea-life by creating artificial reefs within which life can flourish.

⁷⁵ Adam Withnall, 'David Cameron goes 'all out for shale' with tax boost for councils willing to approve projects' *The Independent* (London, 13 January 2013) <www.independent.co.uk/news/uk/politics/david-cameron-promises-fracking-tax-boost-for-councils-willing-to-approve-projects-9055280.html> accessed 16 February 2014.

⁷⁶ DECC, *About shale gas and hydraulic fracturing (fracking)* (30 July 2013) 5-6.

ownership rights of the minerals in the ground vest within the private landowner.⁷⁷ In the UK, due to the enacting of The Petroleum Act 1998 and its previous formulations:

Her Majesty has the exclusive right of searching and boring for and getting petroleum to which this section applies ... This section applies to petroleum (including petroleum in Crown land) which for the time being exists in its natural condition in strata in Great Britain or beneath the territorial sea adjacent to the United Kingdom.⁷⁸

These provisions clearly provide that the ownership, and hence, the financial benefit of hydrocarbons *in situ* rest with the State and not the private landowner. This equally applies to shale gas as it would to conventional oil. This will be a major issue when we come to address benefits and contributions to the community later on in this article.

With regards to the extraction of *any* onshore hydrocarbons, including shale gas, there is no one regulation or Act which governs its exploration or any one licence which is required. Instead, specific hydrocarbon fields and wells are dealt with locally on a case-by-case basis. The individual activities required during shale gas exploration are subject to various practical and regulatory requirements. In order to understand the complexity of the regulatory system for shale gas, and just how scrutinised the industry is from the moment operators begin to think about drilling, it is essential to illustrate the 'Regulatory Roadmap' that applies to shale gas.⁷⁹

A. Pre-Drilling Regulatory Process

In order for a private company to even consider fracking for shale gas, they must first have obtained a Petroleum Exploration and Development Licence (PEDL) granted through licensing rounds, the last of which was in earlier this year (13th Round).⁸⁰ The Secretary of State for Energy and Climate Change issues PEDL's under the powers granted by s.3 Petroleum Act 1998 as amended by the Petroleum (Production) (Landward Area) Regulations 1995.⁸¹ DECC will assess the Operator's competency, safety management systems, well examination scheme and financial capability. Under the licensing agreement, the Operator agrees to follow 'good oilfield practice'.⁸²

Upon being granted a PEDL, the licence holders are obliged to seek permission from DECC before they start well operations. Exploration may begin with

⁷⁷ In the USA, extraction of oil and gas is generally regulated by the individual states through statutes and common law, although Federal law will apply as well.

⁷⁸ Petroleum Act 1998 s.2(1)-(2); see also s.3(1) with regards to the Secretary of State's power to grant PEDL's.

⁷⁹ DECC, *Onshore oil and gas exploration in the UK: regulation and best practice - England* (December 2013).

⁸⁰ In 2008, 97 PEDL's were awarded for exploration in the 13th Round. A 14th Round of licensing is planned for late 2014 after the Government's 'Strategic Environmental Assessment' (SEA) concluded that up to 37,000 square miles of the UK could be put under licence.

⁸¹ Petroleum (Production) (Landward Area) Regulations 1995 Reg. 6 – see Schedule 2 & 3 for application criteria and model clauses.

⁸² *ibid.*

seismic investigations to identify prospective geological structures.⁸³ Licence holders must inform landowners and the local planning authority of plans to conduct seismic testing in the licence area.⁸⁴

Having established through seismic testing where the Operator would like to drill, they must negotiate with the private landowner for access to their land. This is simply left to private negotiation and no regulatory guidance is given on this issue: this is a key moment as to whether a venture will be successful or not. As mentioned above, the private owner does not own the minerals, but they do own the access to their land – this has a commercial value. They may choose to simply deny the Operator access to their land, but the more likely outcome is that they will demand a monetary amount to compensate them for their trouble. The Operator will usually agree a lease of the land for a rental fee or upfront premium, depending on the estimated certainty or value of the project. They may also purchase the land outright. This is a contentious area as there are currently no regulatory standards surrounding premia or the standardisation of contracts for access.⁸⁵ It is currently left purely to private negotiation; a factor that can depend heavily on the balance of powers within the negotiation.

Having gained access to the necessary well-pad area, the licensee must then compile an Environmental Risk Assessment (ERA) as a matter of good practice. The ERA will establish and analyse the risks to human health, the environment and the stakeholders covering the full cycle of the proposed operations. This will cover issues such as disposal of wastes, well abandonment and first instance risks of induced seismicity.⁸⁶

The Operator is then encouraged to undertake a pre-application consultation with the Minerals Planning Authority (MPA)⁸⁷ and other key consultees and stakeholders. This consultation will be expected to address issues such as noise, ecology, archaeology, site access and visual impact. They are also required to engage with the local community as to their actions.⁸⁸ The MPA will then ‘screen’ the well site to determine if there is a need for a full Environmental Impact Assessment (EIA).⁸⁹ An EIA is only required if the project is likely to have significant environmental effects in ‘sensitive’ areas, but this will usually be mandatory for a fracking project. The Operator who is ordered to carry out an EIA must take into consideration the effects of: noise, dust, lighting, visual impact, landscape, traffic, contamination, soil, flood risk, land stability, wildlife, protected areas or species and

⁸³ Town and Country Planning (General Permitted Development) Order 1995, Part 2 of Sch. 2.

⁸⁴ Petroleum (Production) (Landward Area) Regulations 1995 Reg 8 – A Petroleum Operation Notice (PON) form must be submitted prior to seismic testing.

⁸⁵ Planning Act 2008 Part 7 – Civil trespass laws are also obstructing horizontal drilling due to claims from landowners that underground encroachment of their land is an illegal invasion of private property.

⁸⁶ DECC (n 76) 16.

⁸⁷ The MPA is the County Council in two-tier parts of the country, the Unitary Authority, or the National Park Authority.

⁸⁸ The Town and Country Planning Act 1990 Schedule 5 Para 4;

Department for Communities and Local Government (DCLG), *National Planning Policy Framework* (March 2012) Paras 142-149.

⁸⁹ Town and Country Planning (Environmental Impact Assessment) Regulations 2011 Schedule 1 & 2 – Enacts the EU EIA Directive 2011/92/EU.

habitats.⁹⁰ Once the EIA has been carried out, it should be presented in the 'environmental statement' to the MPA to identify and assess the main affects that the development is likely to have on the environment, highlighting the methods used to mitigate these effects.⁹¹

The Operator, having successfully completed the EIA, will then make a planning application to the MPA in order to gain the right to explore for shale gas.⁹² The Operator should lay out the minimum and maximum expected extent of operations during the exploration phase to establish the limits. The focus of the planning system is on whether the development is an 'acceptable use' of the land. They will take into consideration the economic benefits of minerals extraction, and its indirect benefits. They will also take into account the cumulative effects of the application in terms of other applications or already accepted projects.⁹³ The MPA will then publicise the planning application in local media where local residents will have an opportunity to make representations on individual proposals. If planning permission is granted, the MPA will monitor and inspect operations to ensure that they comply with the 'programme of work' conditions imposed.⁹⁴

In parallel to applying to the MPA for planning permission, the Operator should also apply to the Environment Agency (EA) to begin the process of gaining the necessary environmental permits to allow drilling and fracking under the Environmental Permitting Regulations 2010 (EPRs).⁹⁵ Operators must serve a notice to the EA under s.199 Water Resources Act 1991 to 'construct... a boring for the purposes of searching for or extracting minerals'. Operators may require environmental permits for: groundwater activity⁹⁶; mining waste activity⁹⁷; industrial emissions activity⁹⁸; radioactive substances activity⁹⁹; water discharge activity¹⁰⁰; water abstraction licence¹⁰¹; and flood risk consent. If the Operator intends on fracking the well, they must also acquire fracking consent from the EA. In this respect, the developer will be required to submit to DECC a 'Hydraulic Fracturing Plan' (HFP) which should be comprehensive and progressive, illustrating all of the potential fault lines and geological paths which are going to be fracked.¹⁰² The

⁹⁰ *ibid.* see Schedule 4 Para 3.

⁹¹ *ibid.* see Part 5 Reg 16-22.

⁹² Art 6 Town and Country Planning (Development Management Procedure) (England) Order 2010 – Prospective mineral operators are required to submit the application form, accompanied by: plans and drawings; ownership certificates; agricultural land declaration; and design and access statements.

⁹³ DCLG *National Policy Framework* (n 88) Para 144.

⁹⁴ The Town and Country Planning Act 1990 Part 7.

⁹⁵ Environmental Permitting (England and Wales) Regulations 2010 s.13-19.

⁹⁶ *ibid.* Schedule 22.

⁹⁷ *ibid.* Schedule 20.

⁹⁸ *ibid.* Schedule 18.

⁹⁹ *ibid.* Schedule 23 – the Operator may require a NORM consent under the Radioactive Substances Act 1993.

¹⁰⁰ *ibid.* Schedule 21.

¹⁰¹ *ibid.* Schedule 22 – WAR may be required by the Water Resources Act 1991 if the Operator plans to abstract more than 20m³/day for own use rather than purchasing water from a public utility company.

¹⁰² Petroleum (Production) (Landward Area) Regulations 1995 (n 83).

Operator must also obtain a permit from the Coal Authority if the well will pass through a coal seam.¹⁰³

Having gained all of the necessary permits, the Health and Safety Executive (HSE) must be informed at least 21 days before drilling is planned of the established well design and operational plans to ensure that major accident hazard risks to people from the well and well-related activities are properly controlled. These designs are actually subject to the offshore well specifications as they are the most up-to-date and robust. The necessary regulations surrounding health and safety, site management and well-integrity are enacted by the Health and Safety at Work Act 1974.¹⁰⁴ HSE will also require that the well programme be examined by an independent and competent well examiner. Notification of the 'intention to drill' must be served on the EA and the British Geological Survey (BGS) prior to commencement.¹⁰⁵

The various regulatory bodies will confer with DECC as to the programme and DECC will give the final consent to drill. The Operator must then discharge all of the planning conditions and obligations and prepare the site for drilling. They must also put in place the various measures for continuous monitoring of seismicity and should report these to DECC at regular intervals as a matter of best practice.¹⁰⁶ The Operator is then allowed to proceed with drilling and fracturing in accordance with the HFP.

It is clear to see from the sheer number of hurdles that are required to be overcome prior to actual drilling that the process for hydraulic fracturing is closely regulated in the UK. The substantive regulation is untidy, and spans a number of Acts and Regulations which can lead to difficulties for Operators; however, it is incorrect to take the view that UK companies are under the same lax controls that were at large in some of the major shale gas plays in the USA. The major issue with the UK system is that these arduous controls, and their effect, are not communicated effectively to the public, who are prejudiced in their views from the NGO's and the fallout from the US incidents. It is also difficult to effectively communicate technical obligations.

The regime outlined above has proven to be extremely robust as the number of onshore incidents is very low.¹⁰⁷ It is therefore suggested that the system is irregular in terms of where the substantive law originates, reaching all the way out to offshore well-integrity laws and Town and Country Planning Acts. However, it is

¹⁰³ Coal Industry Act 1994.

¹⁰⁴ Borehole Site and Operations Regulations 1995 Reg 6 – health and safety and site management; Reporting of Injuries Diseases and Dangerous Occurrences Regulations 1995 – report to HSE all safety cases surrounding unusual events; Offshore Installations and Wells (Design and Construction) Regulations 1996 Reg 18 – deals with well integrity.

¹⁰⁵ Water Resources Act 1991 s.199; Science and Technology Act 1965.

¹⁰⁶ See next chapter - DECC have imposed a new 'traffic-light' monitoring system to ease the tensions surrounding induced seismicity.

¹⁰⁷ The Royal Society and The Royal Academy of Engineering, 'Shale gas extraction in the UK: a review of hydraulic fracturing' (June 2012)19-22 <www.royalsociety.org/policy/projects/shale-gas-extraction and raeng.org.uk/shale> accessed 27/03/2014 – The RSRAE Report concluded that there was more of chance of groundwater contamination due to activities at the surface and not during fracking.

also submitted that this lack of a single framework of 'shale gas law' actually allows the system a great deal of flexibility within which to assess hydraulic fracturing on a case-by-case basis. This is advantageous as no two sites will be the same. To formulate a new framework of shale gas legislation would create highly unnecessary duplication and would further prolong the timeframe of action with which the industry is already intolerant.¹⁰⁸

With public sentiment, the individual environmental concerns, Brent Spar and the robust traditional regulatory system having been established, we shall now study the recent regulatory reactions from the UK Government.

Part 4 – Government Response and Suggestions for betterment – 'post-hype'

A. UK Government Response

In December 2012, after a year of studies and analysis into the earth tremors at the Cuadrilla site at Preese Hall, the Energy Minister Ed Davey outlined a number of new controls and regulations surrounding shale gas extraction and monitoring.¹⁰⁹ We will study these controls in due course, however it was at this point in time that the 18-month moratorium was lifted and the industry resumed operations. Ed Davey MP stated:

Accordingly, I am satisfied that fracking for shale gas can in principle resume, and I will be prepared to consent to new proposals subject to: case-by-case scrutiny by my Department, to the new requirements to mitigate seismic hazards, and to the confirmation that all other necessary permissions and consents are in place.¹¹⁰

This action was as a result of the commissioning of a report by The Royal Society and The Royal Academy of Engineering (RSRAE) to review the hydraulic fracturing methods utilised in the UK.¹¹¹ Having reviewed the situation, the RSRAE proposed 10 recommendations for the improvement of the system, all of which were adopted by DECC. These included items such as: detection of groundwater contamination; well integrity standards; mitigation of induced seismicity; gas leakage measures; water management; risk management; and the establishment of a regulatory body.¹¹²

(i) 'Traffic-Light' System

¹⁰⁸ It can take up to 6 months to gain the permit from the MPA: this is in contrast to the very short periods that it can take in some of the most prominent US shale regions e.g. Texas (7 days), Pennsylvania (28 days).

¹⁰⁹ The Rt Hon Edward Davey MP, *Written Ministerial Statement*, (13th Dec 2012) 1-10 <www.parliament.uk/documents/commons-vote-office/December_2012/13-12-12/5-DECC-ShaleGas.pdf> accessed 27/03/2014.

¹¹⁰ *ibid.* 7

¹¹¹ The Royal Society and The Royal Academy of Engineering, 'Shale gas extraction in the UK: a review of hydraulic fracturing' (June 2012) <www.royalsociety.org/policy/projects/shale-gas-extraction-and-raeng.org.uk/shale> accessed 27/03/2014.

¹¹² *ibid.* 6-7.

Crucially, in direct reaction to the Preese Hall events, the RSRAE recommended a 'traffic-light' system in order to detect and react to induced seismicity. This involves constant monitoring of the site and imposes certain thresholds of seismicity which, if breached, will result in the ceasing of operations and a study into the causes. The thresholds are set as follows: magnitude <0ML – regular operations continue (Green light); magnitude between 0-1.7ML – continue monitoring seismicity for two days whilst reducing injection rates (Amber); magnitude >1.7ML – stop injection and employ flow-back whilst monitoring (Red).¹¹³ DECC have set an even lower 'Red light' threshold of 0.5ML as a 'precautionary approach'.¹¹⁴ None of these thresholds would be felt from the ground above, nor 'would they cause any property damage'.¹¹⁵ Some in the industry say that this threshold is so low that it is not even worth commencing operations; however, the Government have said that the level will be raised after the first few successful wells.¹¹⁶ This seems like a sensible approach to a very contentious issue: it keeps operators on high alert and promotes confidence within the surrounding public that the site is fully under control at all times.

(ii) Goal-based approach

Ed Davey also gave his support for the 'goals-based' approach to risk management and well-integrity as is already implemented by the onshore regulations.¹¹⁷ These were established through the adoption of the 'Golden Rules' as proposed by the International Energy Agency (IEA). There are six Golden Rules that relate to issues such as: measurement, disclosure and engagement; careful well selection; well integrity and leakage; responsible water use; elimination of venting; economies of scale; and high environmental targets.¹¹⁸

The UK system has been so robust and comprehensive that it has attracted the interest of the EU Commission who has been looking into whether a shale gas Directive was required to harmonise the approaches and standards throughout the region. Having consulted on the matter and debated the issue for months, the EU Commission eventually decided that a Directive was an 'inappropriate delay' and issued a Communication and an accompanying Recommendation on shale gas regulation.¹¹⁹ The Recommendation sets out the 'minimum principles' for the exploration and production of unconventional hydrocarbons in the EU.¹²⁰ These are

¹¹³ *ibid.* 44.

¹¹⁴ Ed Davey MP (n 109) 3.

¹¹⁵ Prof. M Stephenson, 'Statement at Shale Gas Environmental Summit' *British Geological Survey* (Nov 2011) <<http://www.cuadrillaresources.com/protecting-our-environment/seismicity/>> accessed 15/04/2014 - for more information on the relative size of the Tremors at Preese Hall, please see the above website.

¹¹⁶ Ed Davey MP (n 109) 3.

¹¹⁷ *ibid.* 4.

¹¹⁸ International Energy Agency, 'Golden Rules for a Golden Age of Gas: World Energy Outlook Special Report on Unconventional Gas' OECD (2012) 13-14.

¹¹⁹ Elen Stokes, 'New EU Policy on shale gas' (2014) *Environmental Law Review* 42.

¹²⁰ *ibid.*

largely based on the UK principles as set out above. The Commission held that a Recommendation would be a more appropriate format than a costly and lengthy Directive as this was 'favoured by the oil and gas industries and would provide a more secure environment for investment'.¹²¹

The RSRAE also agree that the UK approach is the best system for safety and success, stating that:

A goal based approach to offshore and onshore regulation is to be commended. Operators are forced to identify and assess risks in a way that fosters innovation and continuous improvement in risk management... An alternative would be a more prescriptive one as is adopted in the USA, setting out specific universal standards to be met... this tends to support routine practices and limit innovation in risk management.¹²²

In partnership with the Department for Communities and Local Government, Ed Davey also kick-started the process for a streamlined set of Planning Guidelines to be utilised by the industry and the local planning authorities in order to speed up the process of understanding and applying for fracking permission.¹²³

(iii) Specialised Office

DECC has also created the Office for Unconventional Gas and Oil (OUGO) as a single communication point for industry and local communities.¹²⁴ This is a very welcome development as the regulatory process can spread across many different bodies at the same time. This will also help to cure the 'communication' problems as noted above as a single point of contact 'will help play a role in dispelling some of the myths... and misinformation' as was stated by the former Chairman of the Energy and Climate Change Select Committee, Tim Yeo MP.¹²⁵

(iv) Community Benefits

The industry body, the United Kingdom Onshore Operators Group (UKOOG) have also come forward and addressed the situation with some serious proposals. Their *Community Engagement Charter* has come out with a set of Guiding Principles for community engagement and safety, stating that their aim is:

¹²¹ *ibid.* 48.

¹²² RSRAE (n 111) 48.

¹²³ Department for Communities and Local Government, *Planning Practice Guidelines for onshore oil and gas* (July 2013) 1

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/224238/Planning_practice_guidance_for_onshore_oil_and_gas.pdf> accessed 27/03/2014.

¹²⁴ Ed Davey MP (n 109) 10.

¹²⁵ Energy and Climate Change Committee, *The Impact of Shale Gas on Energy Markets* (HC 2012-2013, 7-I) 22.

To ensure open and transparent communications between industry, stakeholder groups and the communities in which we operate.¹²⁶

They also propose a series of 'Community Benefits' that will be provided by all of their members. These include: £100,000 per well site where hydraulic fracturing takes place; and to provide a share of the proceeds at the production stage of 1% of revenues, allocated approximately 2/3rd to the local community and 1/3rd at the county level.¹²⁷ However, this area is the most hotly debated topic within the entire industry, with the Local Government Association (LGA) warning that Councils could deny drillers permission unless communities are guaranteed a 10% share of revenues 'for any gas which is found in their back yards'.¹²⁸ The argument is very clearly illustrated by the statements of the opposing sides in this debate. Ken Cronin, Chief Executive of UKOOG stated that:

A 10 percent share of revenues could potentially make sites uneconomic. If it is uneconomic, then it will not happen – and nobody will get anything.¹²⁹

On the other side of the debate, the demand for higher community payments is being led by Cllr Mike Jones, who rejects Mr Cronin's views, saying:

In the absence of a generous community benefit regime that is persuasive it is going to be very difficult to get the community to support these applications through the planning system.¹³⁰

An independent study by AMEC has suggested that the 1% revenue return to communities, based on the current projections, would create a further £2.4m to £4.8m per site. This is lower than the £5m to £10m that Ministers had suggested.¹³¹ It is clear to see that mutual agreement on this critical issue is far from settled. An equilibrium percentage will need to be agreed in order to overcome another hurdle towards 'social acceptance'. This will be discussed further in the next subsection detailing possible improvements.

(v) Fiscal Regime

To ameliorate some of the concerns surrounding the distribution of revenues, the Chancellor of the Exchequer, George Osborne MP, announced in his 2013 Autumn

¹²⁶ UKOOG, *Community Engagement Charter – Oil and Gas from Unconventional Reservoirs* (2013) 1 <<http://www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf>> accessed 27/03/2014.

¹²⁷ *ibid.* 2.

¹²⁸ Emily Gosden, 'Fracking community benefits row threatens to derail shale gas exploration' *The Telegraph* (London, 20 December 2013) <<http://www.telegraph.co.uk/earth/energy/fracking/10532045/Fracking-community-benefits-row-threatens-to-derail-shale-gas-exploration.html>> accessed 27/03/2014.

¹²⁹ *ibid.* Exclusive Telegraph Interview.

¹³⁰ *ibid.*

¹³¹ AMEC, *The Environmental Effects of Onshore Oil and Gas Licensing – Two page synopsis* (2013) 1 <<file:///C:/Users/OEMUser/Downloads/Synopsis.pdf>> accessed 27/03/14.

Budget statement that Local Councils would be able to keep 100% of business rates raised from all onshore oil and gas exploration – this is double the 50% rate that Councils would have received.¹³² He also announced a series of tax breaks for initial investments to ‘kick-start’ exploration. The first taxable profits that a company makes from shale gas will be taxed at 30% instead of the previous 62%. This allowance lasts until such a time as the taxable profits equal 75% of money spent on developing the project.¹³³ These fiscal measures have the desired effect of transferring more of the money to the Community – via the business rates – without taking any extra cash away from the exploration companies. It is not a ‘subsidy’, but rather a redistribution of the proceeds that were already present. This also makes the effective UK tax rate the most competitive in Europe and lower than the rate in the US, a point to be thoroughly welcomed from both industry and local Government.¹³⁴

(vi) Simplified Application Process

Aside from the fiscal measures, the Environment Agency (EA) has made a commitment to streamline and simplify the regulation of permit applications by developing a ‘single application pack’ for waste permits that aims to issue permits within the 6-13 weeks. They are then looking to bring that timescale down further to 1-2 weeks by February 2014.¹³⁵ This change was as a result of complaints by industry – which still exist in April 2014 – that permits were taking up to 6 months to gain approval. This ‘bureaucratic muddle’ has caused inward investment to be dampened and progress to be slow.¹³⁶ This streamlining is an attempt to ensure that Operators are present on local land for as little time as possible to reduce the inconvenience caused to the local residents. The EA’s response has therefore been far from a success and more work is needed in this area to make the system more expedient.

With these regulatory responses in mind, and with the traditional onshore regulatory regime as a background standard, the RSRAE concluded that:

The health, safety and environmental risks associated with hydraulic fracturing as a means to extract shale gas can be managed effectively in the UK as long as operational best practices are implemented and enforced through regulation.¹³⁷

¹³² George Osborne MP, ‘Autumn Statement 2013’ HM Treasury (Dec 2013) 48-49 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/263942/35062_Autumn_Statement_2013.pdf> accessed 15/04/2014.

¹³³ *ibid.* 49 - For a project costing £100m, a company would be eligible for the reduced rate for their first £75m of taxable profits – saving them £24m.

¹³⁴ Wood Mackenzie ‘Upstream Insight: UK Advances Shale Gas Fiscal Incentives’ (Dec 2013) [subscribers only].

¹³⁵ Environmental Agency, ‘Commitment to streamline and simplify environmental regulation of onshore oil and gas exploratory activities’ (June 2013) 1 <www.environment-agency.gov.uk/cy/new/148476.aspx> accessed 27/03/2014.

¹³⁶ Nidaa Bakhsh, ‘Shale gas halted in UK by six-month permit wait’ *Bloomberg* (London, 20 February 2014) <www.bloomberg.com/news/2014-02-20/drill-permits-26-times-slower-than-texas-halt-u-k-shale.html> accessed 27/03/2014.

¹³⁷ RSRAE (n 111) 4.

The UK Government are hopeful that these responses to public concern will grant industry the ability to gain its 'social licence' to operate. The Government's reaction to date is certainly a better approach than that taken in Brent Spar, and many of the new controls are to be commended. However, there are certain areas that have been overlooked and still require improvement.

B. Suggestions for improvement

(i) Direct Payments

In addition to the ever-present 'community benefits' debate, Prime Minister, David Cameron, stated in January 2014 that he favours making direct payments to UK households:

I'm in favour of saying to people there's going to be a small well for drilling shale gas, and here is a cash payment to make up for the inconvenience.¹³⁸

This would result in a quasi-US-style payments system, although the payment would not be linked to the value of the underlying hydrocarbons. It could be a nominal amount, most likely determined by a statutory procedure that would increase in steps depending on the extent to which the homeowner was affected. This approach would have definite benefits in curing the 'financial incentives' imbalance for private landowners; but it would have to be very carefully enacted as this could be seen as bribery or, 'cash for inconvenience'. Another problem is where is the line drawn with this kind of payment? Would homeowners who are affected by pylons, or power plants or telecoms units also be entitled to compensation? The Government must be careful not to open this system up too broadly, risking large liabilities as a result. The payments should come from operators and not the Government to avoid any allegations of subsidisation of 'big oil' companies.

(ii) Trespass Solution

As noted in Part 1, trespass by horizontal drilling is a civil offence, whether or not the claimant has suffered any actionable damage.¹³⁹ The recent Supreme Court judgement in *Bocardo SA v Star Energy UK Onshore Ltd* held that due to the law of *cujus est solum, ejus est usque ad coelum et ad inferos* (to whom belongs the soil, his it is, even to heaven and to the middle of the earth) deep underground encroachment of another person's land (by horizontal drilling) was an actionable trespass.¹⁴⁰ Where the landowner's consent is not given, the only method around this currently is to acquire the land by compulsory purchase.¹⁴¹ This is a serious problem for the shale gas industry and is one that is going to require a better solution than compulsory

¹³⁸ Alex Morales & Sally Bakewell, 'Cameron favours payments to UK householders near shale wells' (Jan 2014) *Bloomberg* <<http://washpost.bloomberg.com/Story?docId=1376-MZELW16K51XU01-178A8QO2FF78RPGQPNDPSN5LF>> accessed 27/03/2014.

¹³⁹ WVH Rogers, *Winfield and Jolowicz on Tort* (18th Edition, Sweet & Maxwell, London 2010) 621.

¹⁴⁰ [2010] UKSC 35.

¹⁴¹ Mines (Working Facilities and Support) Act 1966 s.8(2).

purchase orders. Shale activities can cover hundreds of square kilometres underground and could affect thousands of homes. This could make certain shale plays impossible from the outset and would be extremely advantageous for fracking objectors.¹⁴² The underground encroachment would have no real effect on any residents' actual activities or land value as drilling occurs thousands of feet below the surface and requires industrial equipment.¹⁴³

One solution to this problem could be to utilise the process used in the case of *BP Petroleum Developments Ltd v Ryder* where a specific statutory procedure was available to acquire rights compulsorily, which involved applying to the Secretary of State.¹⁴⁴ Owners of a PEDL can acquire ancillary rights if: it is consistent with the PEDL terms; the exploitation would be hampered otherwise; the grant would be in the national interest; and that it was not possible to gain rights by private arrangement.¹⁴⁵ However, this is a hugely administrative and legally onerous procedure and receives 'mixed judicial treatment' from the courts and so would be a risk to undertake.

In a response to this predicament, the Government is looking to relax local planning laws in the new Infrastructure Bill so that individual notices no longer need to be served on all landowners whose land will be subject to encroachment. According to Thompson, these proposals would be 'very welcome' in light of the 'unsatisfactory set of current affairs'.¹⁴⁶ A suggested development of this option could see companies pay landowners a set nominal amount for trespass, whilst removing the landowners' right to apply for an injunction.¹⁴⁷

(iii) Community Funds

With regards to the UKOOG *Community Engagement Charter*, the percentage of revenue to be distributed to the local Community is still to be agreed. It may be required that, in order to satisfy local communities, a percentage closer to 5% will be required in order to appease tensions.¹⁴⁸ This would be similar to the payments made in other parts of the world.¹⁴⁹ It is obvious that the Industry went in particularly low (1%) in the knowledge that this would be rejected and negotiated upwards. This

¹⁴² Andrew Ryan, 'Trespass and Compulsory Acquisition' (2013) 315 Property Law Journal 8-11.

¹⁴³ *ibid.*

¹⁴⁴ [1987] 2 EGLR 233.

¹⁴⁵ David Feist and Elizabeth Shepherd, 'UK onshore shale gas and land rights: can a so called 'legal block' stop the UK shale play in its tracks?' (2014) *Eversheds* <www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Chemicals/UK_onshore_shale_gas_and_land_rights> accessed 27/03/2014.

¹⁴⁶ Melissa Thompson, 'UK government considering changes to trespass rules to make it easier for shale gas developers' *Out-Law* (3rd April 2014) <www.out-law.com/en/articles/2014/april/uk-government-considering-changes-to-trespass-rules-to-make-it-easier-for-shale-gas-developers-reports-say> accessed 13-04/2014.

¹⁴⁷ Lewis Jones, David Waldron & Adam Wallin, 'UK Government considers curtailing trespass laws in favour of fracking' (Feb 2014) *National Law Review* <www.natlawreview.com/article/uk-government-considers-curtailing-trespass-laws-favour-fracking> accessed 27/03/2014.

¹⁴⁸ UKOOG (n 126) 2 - Currently, it is at least 1% with a maximum of £10m over the life of production.

¹⁴⁹ It is closer to 10% in the USA, but the ownership rights are different and so a comparison is difficult to gauge.

issue will continue to be debated; however, a balance must be struck between 'economic viability' and 'community acceptance'. Cuadrilla have set-up a local 'Community Fund' from which various projects and organisations can directly benefit.¹⁵⁰

(iv) Effective Communication

Lastly, overlying all of these practical improvements is the reality that public knowledge is not aligned with the *actual* facts of fracking and shale gas, resulting in a distorted viewing of the industry, principally as a result of NGO exuberance.¹⁵¹ These inaccuracies could result in the halting of a legitimate industry, based solely on a rumour or misunderstanding. The OUGO will hopefully help to begin the process, but operators should also work with the Government and PR Consultants to advertise and campaign in local communities to dispel myths and rumours and deliver the scientific truths in an accessible manner. Cuadrilla is already doing this using school talks, site visits, and information days for local residents.¹⁵²

Conclusion – Communicate, Pay, and Play

The regulatory response to public concerns over shale gas and fracking is thoroughly underway; although significant obstacles still exist.¹⁵³ In this respect, the Government has learned from their mistakes of the Brent Spar years. They have understood that 'social legitimacy', gained through sound regulation and community engagement, is crucial to the long-term success of the industry.

A successful UK shale gas sector could help cure many of the UK's economic problems such as energy security, employment and the budget deficit. Paul Bowden puts this point directly into the spot-light and urges the public to view the fracking debate from a wider perspective:

Without shale gas helping the transition over the next few years, you will either have to import more energy and see costs skyrocket or, in all probability, 'switch' decommissioned sites back on – not at all as straightforward as it sounds – and miss the looming carbon reduction targets, with serious consequences.¹⁵⁴

He goes on to emphasise:

¹⁵⁰ Cuadrilla Resources, 'Part of the community' (2014) <www.cuadrillaresources.com/about-us/part-of-the-community> accessed 15/04/2014.

¹⁵¹ Bob Tippee, 'UK shale slowdown linked to flawed debate on climate' (May 2013) *Oil & Gas Journal* 111, 5b P30.

¹⁵² Cuadrilla Resources (n 150).

¹⁵³ See the section on 'Improvements'.

¹⁵⁴ Paul Bowden, 'UK fracking of shale gas does not need new legislation to be effectively regulated' (2013) *Freshfields Bruckhaus Deringer* <www.freshfields.com/en/news/UK_fracking_of_shale_gas_does_not_need_new_laws_to_be_effectively_regulated/?LangId=2057> accessed 28/03/2014.

What we need now is to apply the strong environmental laws that are already in place and not to create new ones. Doing so could risk delaying the time-critical process of ensuring that the lights don't go out.¹⁵⁵

This point is all the more emphasised by the recent crisis in Ukraine and the invasion of the Russian Federation. Considering that the EU gets around 25% of its natural gas from Russia, can we really afford not to at least try to produce shale gas?¹⁵⁶ This point has been strongly promoted by Lord Browne, the chairman of Cuadrilla, who believes that trying to utilise shale gas is a 'national imperative':

[W]hat we now need to do is figure out how much we can produce economically and how fast, which means wells need to be drilled and need to be fracked. There is no other way to do it.¹⁵⁷

Aside from the politics and economics of shale gas; from a legal perspective, the shape of the industry remains in an extremely fragile state at this point in time. The regulatory framework must remain flexible and proportionate to the investment abilities of firms.¹⁵⁸ It is essential that the industry does not suffer from 'strangulation by regulation' as highlighted by John Kemp in his recent article, where he notes that:

If all these existing laws, regulations and permits are not enough, something is seriously wrong... By making regulatory barriers and the permitting process insurmountable, environmental organisations have been able to stop fracking entirely...¹⁵⁹

A misreading by the Government in the Brent Spar case of 1995 resulted in the effective termination of offshore disposal of infrastructure – a technique independently determined to be the optimal outcome. We have seen in this article that it is crucial that another misreading should not, and indeed, has not been taken by the Government in our modern day oil and gas debate. The Government, and indeed the British people, in light of our robust regulatory regime must now allow the industry to communicate, pay, and play-on, to the benefit of us all.

¹⁵⁵ *ibid.*

¹⁵⁶ In 2009, the last time Russia locked horns with Ukraine and disrupted gas being piped to Europe, UK prices jumped 17% in just 2 weeks. In the most recent intervention in 2014, the gas price to the EU from Russia has doubled in a matter of months.

¹⁵⁷ Andrew Trotman, 'UK needs 40 fracking wells to see if shale gas is viable' *The Guardian* (London, 31 January 2014) <www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10611490/UK-needs-40-fracking-wells-to-see-if-shale-gas-is-viable-says-Lord-Browne.html> accessed 28/03/2014.

¹⁵⁸ John Kemp, 'Britain must not strangle shale gas with bureaucracy' *Reuters* (London, 13 March 2014) <<http://in.reuters.com/article/2014/03/13/britain-shalegas-idINL6N0MA2IY20140313>> accessed 28/03/2014.

¹⁵⁹ *ibid.*

Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board

AIDAN O'DWYER*

Abstract

The 2008 global financial crisis resulted in the downfall of many high profile companies, with many critics accusing the institutional investors in particular of failing to monitor their investments adequately. This article will commence by discussing the foundations of UK corporate governance in order to get an idea of why investor activism was lacking in some instances. Next, the article will discuss the developments that have come about since the 2008 crisis in an attempt to solve this problem. Finally, it will conclude by analysing these developments, and whether further improvements are required.

1. Introduction

Corporate governance relates to the way in which a company is managed, and it '...deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment.'¹ Its considerable importance was made clear during the 2008 global financial crisis. In the United Kingdom especially, the high profile demise of big corporate players such as Northern Rock served to highlight the fact that there were severe deficiencies in the way in which some companies were being governed. Indeed, it was not long until the public starting asking questions of the directors of some of these failing companies, many of whom were being rewarded with large pay packages. In 2009, on average, a director's salary in the UK's biggest corporations was 81 times greater than that of the average full time worker. This represented a 47-fold increase since 2000.² It is clear why statistics such as these resulted in public outcry, because there were many instances where pay appeared unrelated to performance.

It is however, easy to blame the board. Questions should also be asked of corporate entities' shareholders, and in particular, their institutional investors, who have garnered a reputation for being apathetic.³ Such investors include pension funds and insurance companies, who will typically have a portfolio of investments but who too often exhibit a degree of passivity when they should in fact be asking

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¹ Andrei Shleifer and Robert W. Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *The Journal of Finance* 737, 737.

² Charles Tilley, 'For fair pay, see Plato' *Guardian* (3 June 2010).

<www.theguardian.com/commentisfree/2010/jun/03/public-sector-pay-cameron-executive-bonuses> accessed 16 October 2014.

³ David Kershaw, *Company Law in Context: Text and Materials* (2nd edn, OUP 2012) 182.

probing questions and holding company managers to account. Moreover fund managers, who make the investment decisions, can also carry out governance and monitoring activities, but again appear generally not to adequately perform this job. The reasons for this will also be analysed herein. Lord Myners has described such shareholders as ‘absentee landlords,’⁴ an illustration perhaps of the fact that many do not exercise rights such as voting rights, or responsibilities such as attending meetings. This results in ‘ownerless corporation[s].’⁵ Sir David Walker highlights the importance of investor activism, noting that if this had been exercised to a greater degree in the UK banking sector, director behaviour would have been more efficiently dealt with.⁶ In view of such criticisms, there has been widespread reform in UK corporate governance. One reform objective has been to encourage shareholders, particularly institutional investors, to monitor companies they have invested in more closely. This article focuses principally on the role of institutional investors; hereafter the term ‘investor’ refers principally to them.

This article will commence by outlining the modern foundations of UK corporate governance, and the associated agency problem. Many soft law developments have been forthcoming that attempt to solve this dilemma, but their success has been questionable. ‘Comply-or-explain’ forms the basis of much of the UK’s soft law, aiming to solve the agency problem by creating dialogue between investors and directors. In practice however, it has certain disadvantages, meaning it risks failing to live up to expectations.

The article will then provide an examination of the developments that have come about in response to the financial crisis that have attempted to solve the aforementioned problem of investor apathy. One of these, the UK Stewardship Code, was introduced in 2010 and revised in 2012;⁷ however it still has many critics and perceived flaws. Another initiative, the recently enacted ‘say on pay’ legislation, aims to increase shareholder-director dialogue.⁸ This is also the aim of the UK Corporate Governance Code⁹ (formerly the Combined Code¹⁰), section E, which was

⁴ Paul Myners, ‘Record of Speech made to the Association of Investment Companies’ (April 2009) para 38

<http://webarchive.nationalarchives.gov.uk/20091207163737/http://hm-treasury.gov.uk/speech_fsst_210409.htm> accessed 16 October 2014.

⁵ BBC, ‘Leading Questions: Paul Myners’ (August 2009)

<<http://news.bbc.co.uk/1/hi/business/8179024.stm>> accessed 16 October 2014.

⁶ Sir David Walker, ‘A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations’ (November 2009) para 5.11

<http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf> accessed 14 October 2014.

⁷ Financial Reporting Council, ‘The UK Stewardship Code’ (September 2012)

<www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx> accessed 16 October 2014.

⁸ The UK Enterprise and Regulatory Reform Act (UKERR) 2013; The Large and Medium-sized Companies and Groups (Accounts and Reports)(Amendment) Regulations 2013, SI 2013/1981; Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013, SI 2013/1970.

⁹ Financial Reporting Council, ‘The UK Corporate Governance Code’ (September 2012)

<www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.pdf> accessed 16 October 2014.

similarly revised in 2012 after a 2010 introduction. The investor forum set up following the publication of the 'Kay Report' will also be examined.¹¹

The final part of this article will discuss reform. In recognition of the importance of 'comply-or-explain,' discussions will focus on this particular soft law. There are valid arguments for keeping the soft-law approach, but it is recognised that improvements would have to be introduced to make it work effectively.¹² An alternative argument exists for completely abolishing 'comply-or-explain,' and replacing it with hard law sanctions. The United States Sarbanes-Oxley Act 2002 will be examined in order to determine whether hard law would have the effect of raising corporate governance standards, and more specifically, encouraging greater investor engagement.

2. The foundations of UK corporate governance

A. The Agency problem

The issue of to whom directors are trustees is central to corporate governance. It was at the heart of the Dodd-Berle debate,¹³ where Dodd believed that directors should act for the community and Berle thought that they should act for the shareholders. Although Dodd won the debate, the Companies Act 2006, s172, while encapsulating a hybrid of both theories, is clearly shareholder-centred in that it states that there is a duty on a company director 'to promote the success of the company for the benefit of its members as a whole.'¹⁴ Regard must be had however, to other matters such as employee interests¹⁵ and the influence of the company's actions on society and the environment.¹⁶ However, the interests of shareholders (i.e. the members as a whole) are primary when promoting the success of the company. In the Companies Act 2006, a director is therefore an agent of the shareholders, and it is on their behalf that he/she must act.

Jensen and Meckling state that an agency relationship is 'a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.'¹⁷ Therefore, in a company, this would involve the

¹⁰ Financial Reporting Council, 'The Combined Code on Corporate Governance' (June 2008) <www.ecgi.org/codes/documents/combined_code_june2008_en.pdf> accessed 16 October 2014. The original version of the Combined Code was published in 1998.

¹¹ John Kay, 'The Kay Review of UK Equity Markets and Long-term Decision Making, Final Report' (July 2012) 13

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf> accessed 16 October 2014.

¹² By the Financial Reporting Council, for example.

¹³ Adolf A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049 and 'For Whom Corporate Managers Are Trustees: A Note' (1932) 45 Harvard Law Review 1365; E. Merrick Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145.

¹⁴ Companies Act 2006 s172(1).

¹⁵ *ibid* s172(1)(b).

¹⁶ *ibid* s172(1)(d).

¹⁷ Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 308.

shareholders, as principals, delegating authority to the company director as their agent to perform a service for them. However, there is a principal-agent problem that exists which can result in corporate governance issues arising. Adam Smith is credited with recognising this 'agency problem' as it was he who observed that because company directors preside over other people's money, they may be inclined to act carelessly and not look after it in the same way they would their own money.¹⁸ This is especially true nowadays with institutional investors typically holding shares in a variety of companies. It is possible that directors may see this as an opportunity to take advantage and act in their own interests rather than for shareholders because many institutional investors are rationally apathetic. The main solution of course, is to engage with the agent to ensure that he acts appropriately and to penalize him if he does not.¹⁹ Investors could therefore hold directors to account by using their votes and attending shareholder meetings, for example.

There are however reasons why some shareholders are so passive. Active engagement in governance involves time and effort and many investors prefer the benefits of 'liquidity and diversity in their portfolios' to the costs involved in engagement.²⁰ Such costs are multiplied in the case of institutional investors. In addition, the investment mandate for asset managers will not usually require that they perform monitoring activities,²¹ and because they have the duty to invest in many different companies, they too will cite time constraints as a barrier to engagement with individual companies.²²

B. UK corporate governance before the 2008 global financial crisis

Prior to the 2008 crisis, UK attempts to manage the agency problem generally avoided hard law, relying instead on soft law such as voluntary guidelines and codes of practice. One of the first initiatives was the Institutional Shareholder's Committee (ISC) statement on the 'Responsibilities of Institutional Shareholders in the UK,'²³ which provided guidelines as to institutional investor actions. Whilst somewhat brief, it did consist of good principles and represented a good, basic foundation. This was followed by the Cadbury Committee's explicit recognition of the importance of investment monitoring as a means of improving the levels of corporate governance.²⁴ This report introduced the principle of 'comply-or-explain,'²⁵ which will be examined later on in this article. Attempts to encourage shareholders

¹⁸ Adam Smith, *An Inquiry into the Nature and the Cause of the Wealth of Nations* (Ward Lock, 1838) 586.

¹⁹ Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, OUP 2009) 35-36.

²⁰ Thomas Clarke, 'Cycles of crisis and regulation: the enduring agency and stewardship problems of corporate governance' (2004) 12(2) *Corporate Governance: An International Review* 153, 154.

²¹ Investment Management Association, 'Asset Management in the UK 2009-2010' (July 2010) 75 <www.investmentfunds.org.uk/research/ima-annual-industry-survey/ams/> accessed 17 October 2014.

²² Kershaw (n3) 183.

²³ Institutional Shareholders' Committee, 'The Responsibilities of Institutional Shareholders in the UK' (London, ISC 1991).

²⁴ Adrian Cadbury, 'Report of the Committee on the Financial Aspects of Corporate Governance' (London, Gee Publishing Ltd 1992) para 6.10.

²⁵ *ibid* para 3.7.

engagement are therefore not new. This makes it all the more surprising that a lack of scrutiny of poorly managed companies was one of the principal reasons for the UK financial crisis. There was little in the way of recommendations for institutional investors within the Cadbury Report, and the recommendations it did contain largely repeated the ISC's statement. An example is the recommendation that they use their votes.²⁶ Cadbury was followed by the Greenbury Committee²⁷ and Hampel Committee²⁸ Reports, but neither of these brought about significant improvements. One useful recommendation within the Greenbury Report though was director salary, and that the connection between salary and performance should be disclosed in company reports.²⁹ This was subsequently incorporated into the Combined Code.³⁰ The idea was that it would help lower information-gathering costs for shareholders regarding pay, thereby reducing the time and effort required to engage in board monitoring. For institutional investors in particular, this should have been a useful tool.

The first Combined Code of Corporate Governance (1998) contained a Section E, wherein recommendations aimed at institutional shareholders were set out. These did little more than replicate the principles already established by the ISC and Cadbury. The Myners Report³¹ represented the next attempt to innovate in the area of the agency problem, but again it failed to really deliver. This failure is evidenced by the fact that later editions of the Combined Code never substantially changed the 1998 version of Section E. The ISC however, did change their original statement into a formal 'Code on the Responsibilities of Institutional Investors'³² in response to further criticism from Lord Myners in 2009, who pointed out the fact that the ISC had not introduced any new material since June 2008. As was typical with corporate governance developments however, their formal Code did not substantially build upon the original statement's recommendations. Lord Myners' principal criticism of the ISC in 2009 was that the issue of institutional investor apathy should have been something that they should have been looking to improve.³³ Given that Lord Myners was speaking after the crisis, his criticism may be fair. Alternatively, other developments subsequent to the ISC's original statement did not help alleviate the agency problem either and, as already stated, the ISC document at least contained good basic principles. It is arguable therefore that the issue was not so much about the content of the ISC statement, or any of the other developments for that matter, but the fact that compliance with any of the recommendations made in each of these documents was not mandatory. This meant that it remained difficult to persuade

²⁶ *ibid* paras 6.11 and 6.12.

²⁷ Richard Greenbury, 'Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury' (London, Gee Publishing Ltd 1995).

²⁸ Ronald Hampel, 'Committee on Corporate Governance: Final Report' (London, Gee Publishing Ltd 1998).

²⁹ Greenbury (n27) Section B.

³⁰ Combined Code (n10).

³¹ Paul Myners, 'Institutional Investment in the United Kingdom: A Review' (London, HM Treasury 2001).

³² Institutional Shareholders' Committee, 'Code on the Responsibilities of Institutional Investors' (London, ISC 2009).

³³ Myners (n4) para 47.

institutional investors to expend time and effort on engagement, when there was nothing *compelling* them to do so.

All the aforementioned developments have been characterised by minor changes and reaffirmations. Their overall failure is perhaps best demonstrated by the fact that the Companies Act 2006 contains various provisions to help shareholders engage in effective dialogue with company directors and hence overcome the agency problem; however the financial crisis of 2008 came about because these provisions were not used frequently enough. Companies Act engagement provisions include, the right to vote,³⁴ rights to requisition a meeting,³⁵ thereby enabling hard questions to be asked of the board, and rights to have a statement of a proposed resolution distributed to the members,³⁶ which reduces informational costs. Additionally, any long term service contract must be approved by the members,³⁷ which improves transparency and accountability, and there is, of course, the ultimate power to actually remove a director.³⁸ Many of these rights have existed since well before the introduction of the 2006 Act, but they were not utilised historically, by either ordinary or institutional shareholders, to any great degree. A consequence of this lack of scrutiny has been the ability of company boards to behave recklessly. Informational and time costs involved in engagement remain a significant deterrent to investors. An example of shareholder passivity is that company voting statistics are generally disappointing. This is mostly prevalent amongst institutional investors, even though their investments are supervised by professional fund managers.³⁹ The 2006 Act attempted to solve this problem by including a provision which allows the Treasury or Secretary of State to authorise publication of details of the voting (or lack of it) by institutional shareholders.⁴⁰ Paterson sees this as more of a scare tactic to encourage voluntary action.⁴¹ Nevertheless, the adoption of a hard law approach may be a step in the right direction, when measured against the largely ineffective array of soft law Codes and guidelines that existed previously. The Act additionally allows for civil proceedings to be brought in the event that regulations are ignored,⁴² which adds some teeth to this particular provision. The International Corporate Governance Network supplemented these provisions with a statement of principles for institutional investors, advising that '[a]s a matter of best practice... [asset managers]... should disclose an annual summary of their voting records together with their full voting records in important cases.'⁴³ This advice could be

³⁴ CA 2006 (n14) s284 contains the general rules on voting.

³⁵ *ibid* ss303-306.

³⁶ *ibid* ss314-317.

³⁷ *ibid* s188.

³⁸ *ibid* s168.

³⁹ Kershaw (n3) 100.

⁴⁰ CA 2006 (n14) s1277.

⁴¹ John Paterson, 'Corporate governance in India in the context of the Companies Bill 2009: Part 3: Proposals' (2010) 21(4) *International Company and Commercial Law Review* 131, 133.

⁴² CA 2006 (n14) s1277(4).

⁴³ International Corporate Governance Network, 'Statement of Principles on Institutional Shareholder Responsibilities' (July 2007) para 4.4.iii

<www.icgn.org/images/ICGN/files/icgn_main/Publications/best_practice/inst_share_responsibilities/2007_principles_on_institutional_shareholder_responsibilities.pdf> accessed 17 October 2014.

strengthened by requiring that voting records be disclosed in *all* cases, as opposed to just important cases.

C. 'Comply-or-explain'

Soft law developments already discussed, such as the Combined Code⁴⁴ and the ISC 'Code on the Responsibilities of Institutional Investors',⁴⁵ are voluntary. Instead of mandatory compliance, the principle of 'comply-or-explain' is used. 'Comply-or-explain' also applies to the Corporate Governance Code (a consolidation of many of these Codes and guidelines and which came into force after the crisis)⁴⁶ and the Stewardship Code.⁴⁷ 'Comply-or-explain' means that instead of setting legal rules, a company must either comply with a given Code's provisions or explain why it has not done so.⁴⁸ The main idea behind this mechanism is to create a dialogue between the investors and companies. If the company fails to adequately explain non-compliance with Code provisions, or investors are dissatisfied with the explanation given, the investors can then use their rights to ask hard questions of the board.⁴⁹ 'Comply-or-explain' therefore aims to solve the agency problem. It is a market-based approach in that, if a corporation does not abide by the principle, its share price will likely drop due to potential shareholders choosing not to invest.⁵⁰ This therefore allows a market sanction as opposed to a legal sanction and supports the soft law approach that makes up the UK corporate governance system. The main advantage of 'comply-or-explain' is that it promotes flexibility, recognising the fact that all companies are different and it is not practicable to have a 'one size fits all' approach to corporate governance codes,⁵¹ and that some companies may have good reasons for deviating where they have an alternative strategy. Having said this, the statistics for those who actually say that they are in compliance with Code provisions are very high,⁵² but, as will be seen, these figures can be misleading.

It has already been established that a significant contributory factor to the downfall of many companies during the crisis was that investors did not adequately monitor board activity. This suggests that in practice, 'comply-or-explain' is not working properly. 'Comply-or-explain' aims to encourage investor engagement, but this was clearly lacking prior to 2008. One of the principal reasons for this is because some explanations for non-compliance with Code provisions have historically been

⁴⁴ Combined Code (n10).

⁴⁵ ISC Code (n32).

⁴⁶ Corporate Governance Code (n9).

⁴⁷ Stewardship Code (n7).

⁴⁸ Corporate Governance Code (n9) 4.

⁴⁹ Financial Reporting Council, 'Corporate Governance' (June 2012) <www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance.aspx> accessed 17 October 2014.

⁵⁰ Andrew Keay, 'Comply or Explain: In Need of Greater Regulatory Oversight?' (2012) Working Paper, 4-5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144132> accessed 17 October 2014.

⁵¹ Iain MacNeil and Xiao Li, "'Comply or explain': market discipline and non-compliance with the Combined Code' (2006) 14(5) Corporate Governance: An International Review 486, 486.

⁵² Sridhar R. Arcot, Valentina G. Bruno and Antoine Faure-Grimaud, 'Corporate Governance in the UK: Is the comply or explain approach working?' (2010) 30 (2) International Review of Law and Economics 193, 194.

'brief and uninformative,'⁵³ with 'boilerplate statements' deployed,⁵⁴ meaning that shareholders may not have had sufficient information to ask the necessary hard questions and adequately hold boards to account. One study found that 17% of non-compliances are not even explained at all.⁵⁵ While the figures have improved somewhat in recent times (one study found that 15% of UK companies did not provide an explanation),⁵⁶ there is still a proportion of companies who do not explain their degree of compliance to a high enough standard.⁵⁷ MacNeil and Li argue that instead of examining these uninformative and sometimes non-existent explanations, some investors will use the financial performance of the company to decide whether non-compliance has been warranted.⁵⁸ In other words, these investors will not engage in monitoring as long as the company is doing well financially. When performance is lacking however, they may be more inclined to begin monitoring the board; i.e. 'comply-or-perform.'⁵⁹ A question arises as to whether, if explanations were of a high enough standard, would shareholders still use financial performance as a cue to monitor.

It seems to be the case that even when useful explanations are present, they are not always assessed. This is especially true of investors in widely-held corporations,⁶⁰ the reasons for which have already been discussed. This may be one of the reasons why companies provide either poor statements or no statement at all. If their shareholders are not undertaking monitoring, then the companies will be less likely to apply 'comply-or-explain' if they 'can get away with' it.⁶¹ Instead, Moore believes that institutional investors often employ a 'box-ticking' approach towards engagement.⁶² This view is reinforced by the Association of Certified Chartered Accountants in its comments on the Walker Review.⁶³ What this means is that investors may say that they are monitoring, but in practice no real effort is being made to engage and assess company disclosures.⁶⁴ Some companies are likely to be guilty of adopting a similar approach; hence there is a real fear that abiding by

⁵³ MacNeil and Li (n51) 489.

⁵⁴ Marc T. Moore, "'Whispering sweet nothings": the limitations of informal conformance in UK corporate governance' (2009) 9(1) *Journal of Corporate Law Studies* 95, 103.

⁵⁵ Sridhar R. Arcot and Valentina G. Bruno, 'In Letter but not in Spirit: An analysis of Corporate Governance in the UK' (2006) Working Paper, 3 <<http://ssrn.com/abstract=819784>> accessed 17 October 2014.

⁵⁶ David Seidl, Paul Sanderson and John Roberts, 'Applying "Comply-or-Explain": Compliance with Codes of Corporate Governance of the UK and Germany' (2009) Working Paper, 389 www.cbr.cam.ac.uk/research/programme2/project2-23output.htm accessed 17 October 2014.

⁵⁷ Financial Reporting Council, 'What Constitutes an Explanation Under 'Comply or Explain'?: Report of Discussions Between Companies and Investors' (February 2012) 1 <www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.pdf> accessed 16 October 2014.

⁵⁸ MacNeil and Li (n51) 490.

⁵⁹ *ibid* 492.

⁶⁰ Keay (n50) 19.

⁶¹ Alice Belcher, 'Regulation by the market: the case of the Cadbury code and compliance statement' [1995] *Journal of Business Law* 321, 331.

⁶² Moore (n54).

⁶³ Association of Chartered Accountants, 'Comments from ACCA' (October 2009) <www2.accaglobal.com/documents/cdr898.pdf> accessed 15 December 2013.

⁶⁴ Keay (n50) 11.

corporate governance codes will just become another compliance exercise as opposed to a concentrated effort to create a dialogue between the shareholders and their companies. An example is the former Combined Code's provisions which were quite wide-ranging and lacking in specificity. A company may therefore in theory have thought that it was complying, but may in practice actually have failed to do so. It would not have provided a disclosure for deviating.⁶⁵ This may partly explain why compliance statistics are so high.

It has been additionally suggested that another reason why decent company disclosures are not always examined is because some institutional investors do not know how to carry out their engagement responsibilities.⁶⁶ This is portrayed by the fact that a significant proportion of director engagement arises from voting at general meetings.⁶⁷ Investors may believe that this is the only way they have a good chance of having their voice heard, and that more direct means of communication with the board are not possible or are unknown to them. It is therefore important to make investors aware of other available avenues, such as attendance at meetings. Failing this, the trend of not assessing company disclosures, if provided, will most likely continue. This author believes however that most shareholders are aware of the necessary tools available to them for creating a more direct dialogue with the board, especially under the Companies Act 2006, but instead do not utilise them.

Another disadvantage of 'comply-or-explain' is the lack of accompanying enforcement. There are no penalties for those who do not abide by it, and the pitfalls associated with this were highlighted by the European Commission. They stated that voluntary law systems are often unsuccessful as a result of there being no penalties as a way of enforcement.⁶⁸ Hooghiemstra and Van Ees also notice the significance of punishment,⁶⁹ finding that self-regulatory systems may be ineffective in its absence. There may perhaps be a fear that applying legal sanctions to a company for providing a poor disclosure, for example, would be crossing into the realms of hard law. There is supposed to be a market sanction alongside 'comply-or-explain,' but there is no such thing when the mechanism fails due to uninformative company disclosures and investor apathy. Nevertheless, in terms of the Corporate Governance Code, under the United Kingdom Listing Authority (UKLA) listing rules, companies are obliged to state how they have applied the Code or explain why they have not done so.⁷⁰ Breach of this rule could lead to sanctions involving public censure or a fine,⁷¹ but as Kershaw noted, the Financial Services Authority (now replaced by the Prudential Regulation Authority and Financial Conduct Authority) had not issued

⁶⁵ Arcot, Bruno and Faure-Grimaud (n52) 198.

⁶⁶ Simon Wong, 'Why stewardship is proving elusive for institutional investors' (2010) 25(7) *Butterworths Journal of International Banking & Financial Law* 406, 406.

⁶⁷ Paolo Santella *et al*, 'Legal obstacles to institutional investor activism in the EU and in the US' (2012) 23(2) *European Business Law Review* 257, 258.

⁶⁸ European Commission, 'Green Paper: Corporate Governance in Financial Institutions and Remuneration Policies' COM (2010) 285, 6.

⁶⁹ Reggy Hooghiemstra and Hans van Ees, 'Uniformity as response to soft law: Evidence from compliance and non-compliance with the Dutch corporate governance code' (2011) 5 *Regulation and Governance* 480, 481.

⁷⁰ United Kingdom Listing Authority, 'Listing Rules' 9.8.6 R (6).

⁷¹ Financial Services and Markets Act (FSMA) 2000 s91.

any sanctions for this reason.⁷² This reinforces the criticism of ‘comply-or-explain,’ whereby those companies who do not abide by it will face no penalty. These particular UKLA Listing Rules appears to only exist as a scare tactic to encourage companies to either comply with Code provisions or provide informative explanations for deviating.

3. Developments post 2008 global financial crisis to encourage investor activism

A. The UK Stewardship Code

The post-crisis Walker Report condemned institutional investors for their passivity and also directed some blame at the fund managers.⁷³ Walker found that the ISC Code and the Combined Code contained good principles enabling effective monitoring to take place, but believed that guarantees to abide by these provisions were insufficient.⁷⁴ He recommended the renaming of the ISC Code as the UK Stewardship Code,⁷⁵ the principal aim being to encourage institutional investors⁷⁶ in particular to take their role as owners of corporations more seriously and to banish criticisms of them as ‘absentee landlords.’⁷⁷ This replicates similar soft law developments that occurred prior to the crisis. Another aim was to encourage institutional investors to make greater use of their rights and to adopt a more long-term trading approach to their investments, replacing the short term attitudes that many of these investors scrutinised in Walker had possessed. This sits well with Myners’ view that ‘a share certificate is a right and entitlement of ownership which carries with it certain responsibilities. It’s not a piece of paper to be traded, to be bought or sold. Companies are too important.’⁷⁸

The Stewardship Code purports to inspire fund managers to play a more active role in corporate governance, as well as encouraging service providers to abide by it.⁷⁹ Its scope is therefore different to that of the Corporate Governance Code, which is aimed primarily at companies.⁸⁰ It should be noted that a large proportion of UK shares are held by overseas investors.⁸¹ It is hoped that these investors will conform to the Code’s ethos in a similar manner to UK investors. This would certainly increase its influence which can only be beneficial.

After a consultation period, the Stewardship Code was published by the Financial Reporting Council (FRC) in July 2010 and was revised in September 2012.⁸²

⁷² Kershaw (n3) 253.

⁷³ Walker (n6) para 5.10.

⁷⁴ *ibid* para 5.37.

⁷⁵ *ibid* para 5.40.

⁷⁶ Stewardship Code (n7) 2.

⁷⁷ Myners (n4).

⁷⁸ Myners (n5).

⁷⁹ Stewardship Code (n7) 2.

⁸⁰ Corporate Governance Code (n9) 1.

⁸¹ Office for National Statistics, ‘Ownership of UK Quoted Shares 2012’ (September 2013) 1 <www.ons.gov.uk/ons/dcp171778_327674.pdf> accessed 16 October 2014.

⁸² It was felt that certain issues needed rectified, such as the definition and scope of stewardship and how the Code was to be implemented.

The main provisions stipulate, *inter alia*, that institutional shareholders should state how they will satisfy their stewardship responsibilities,⁸³ manage their conflicts of interest,⁸⁴ engage with their investee companies,⁸⁵ and be willing to collaborate with other investors to make the job of monitoring easier and more effective.⁸⁶

B. Critique of the UK Stewardship Code

The primary disadvantage of the Code is that 'comply-or-explain' applies. The disadvantages of this have already been highlighted. Nobody has to comply with the Code's principles (provided they supply an explanation) which lessens the likelihood that the Code will have any great effect on promoting investor engagement. For those who do decide to abide by its principles however, there are a host of inherent weaknesses. In comparison to some of the prior developments to it, the Code can actually be said to have regressed in some instances.⁸⁷ For example, Principle 4 asserts that institutional investors should have 'guidelines' on when and how they will carry out their monitoring activities.⁸⁸ Roach feels that this merely implies a 'casual set of recommendations'⁸⁹ which may provide insufficient impetus for investors to follow them. The phraseology as originally drafted remains in the 2012 version. 'Guidelines' should perhaps be changed to 'policies' in a future update; this would imply more serious regulation requiring adherence.⁹⁰

The Code also fails to address other important issues. For example, because the Code operates on a 'comply-or-explain' basis, there is a chance that some institutional investors who do not choose to monitor will benefit from the time expended and efforts of others who do engage, resulting in inequity. One potential solution to this is to offer bonuses, such as higher dividends, to those who do engage.⁹¹ Furthermore, while the Code purports to encourage institutional investors to abandon their short-term attitudes, it does not explicitly advise the taking of a long-term view on trading. This is perhaps due to the fact that investors do not want to be pressured into when they can or cannot sell their holdings.⁹²

The Code's weaknesses may be due to the fact that although there was industry consultation before its adoption in 2010, the FRC failed to consider many of the proposals. Many thought that the ISC Code, if it was to be the foundation of the Stewardship Code, would have to be significantly improved, but this clearly did not happen.⁹³ The principles remained the same and a significant proportion of the

⁸³ Stewardship Code (n7) 6.

⁸⁴ *ibid.*

⁸⁵ *ibid* 7.

⁸⁶ *ibid* 8.

⁸⁷ Simon Wong, 'The UK Stewardship Code: A missed opportunity for higher standards' (July 2010) Working Paper, 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640897> accessed 15 October 2014.

⁸⁸ Stewardship Code (n7) 8.

⁸⁹ Lee Roach, 'The UK stewardship Code' (2011) 11(2) *Journal of Corporate Law Studies* 463, 484.

⁹⁰ *ibid.*

⁹¹ Arad Resiberg, 'The notion of stewardship from a company law perspective' (2011) 18(2) *Journal of Financial Crime* 126, 132.

⁹² *ibid* 137.

⁹³ Roach (n89) 467-468.

guidance replicated the ISC Code *verbatim*. This may be attributable to a desire to maintain the impetus provided by the Walker Review by speedily implementing the Stewardship Code.⁹⁴ This lack of meaningful reform may also have ramifications internationally, in that the UK is perceived to be a world leader in corporate governance. Consequently, reforms such as the UK Stewardship Code would be expected to inspire progress in other countries.⁹⁵ Roach, for example, takes the following view:

It is unfortunate that the world's first Stewardship Code was established on the basis of expeditiousness rather than on a desire to establish a comprehensive and forward-looking set of engagement principles and must therefore be regarded as a missed opportunity to encourage greater investor engagement, not only to the UK but also around the world.⁹⁶

Despite the aforementioned critique, the FRC has demonstrated it is not completely unresponsive to criticism, as its 2012 Code edition introduces greater detail to the accompanying guidance. The fact remains however, that the seven principles in the ISC Code, the 2010 Stewardship Code and the 2012 Stewardship Code remain the same (bar a few words). Most of the accompanying guidance remains unchanged and there remain several weak provisions requiring improvement, if institutional investors are to overcome hurdles to greater engagement.⁹⁷ As matters currently stand however, the FRC has implied that it does not intend to make any substantial changes to the Code in 2014.⁹⁸

Another disadvantage of the Code is its territorial limitation. It is a fact that a large percentage of UK shares are held by foreign investors, who are therefore outside the Code's 'jurisdiction.' In 1981, shareholdings of overseas investors amounted to 3.6% of the UK market, but this figure rose to 41.5% by 2008.⁹⁹ By 2012, this figure was estimated to have become 53.2%¹⁰⁰ and it is likely to climb further in light of globalisation. Overseas investors, while not obliged to adhere to the principles of the Code, are encouraged to do so. For example, although the Walker Review recommended keeping the Code 'UK-centric',¹⁰¹ it was thought that foreign

⁹⁴ Financial Reporting Council, 'Implementation of the UK Stewardship Code' (July 2010) para 9 <www.frc.org.uk/FRC-Documents/FRC/Implementation-of-the-UK-Stewardship-Code.aspx> accessed 17 October 2014.

⁹⁵ Roach (n89) 478.

⁹⁶ *ibid* 479.

⁹⁷ For example, (in addition to what has already been discussed) the use of the word '*should*' is not as strong as '*must*' in Principle 3.

⁹⁸ Financial Reporting Council, 'Developments in Corporate Governance 2013: The impact and implementation of the UK Corporate Governance and Stewardship Codes' (December 2013) 28 <<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2013.pdf>> accessed 13 March 2014.

⁹⁹ Office for National Statistics, 'Share ownership Survey 2008' (January 2010) 1 <www.statistics.gov.uk/hub/release-calendar/index.html?newquery=&uday=0&umonth=0&uyear=0&title=Share+Ownership+-+Share+Register+Survey+Report&pagetype=calendar-entry&lday=&lmonth=&lyear=>> accessed 11 March 2014.

¹⁰⁰ Office for National Statistics (n81) 1.

¹⁰¹ Walker (n6) para 5.41.

investors might choose to comply with its provisions anyway, meaning that the Code would be more likely to be a success and that greater monitoring would be promoted. A potential disadvantage exists, of course, in the potential confusion that could result if foreign investors conformed to a UK-centred Code set against rules they were required to abide by in their own nations.¹⁰² If compelled by circumstances not to comply with the UK Code, the UK Code's influence would consequently be reduced.

Finally, enforcement of the 'comply-or-explain' principle as it relates to the Stewardship Code should be discussed. The FRC website publicises details of corporate institutions that state on their website that they have applied the principles of the Code.¹⁰³ Whilst this appears positive, Roach observes that those who do not supply adequate disclosure for non-compliance will typically not be penalized.¹⁰⁴ This is despite the fact that the Walker Review asserted that the (then) FSA should require fund managers to disclose their degree of compliance on their company website.¹⁰⁵ Moreover, this recommendation was implemented by rule 2.2.3R of the Conduct of Business Sourcebook (COBS),¹⁰⁶ with breaches of said rule sanctionable by public censure or financial penalties.¹⁰⁷ Another oddity is that rule 2.2.3R only mentions *fund managers* as being required to 'comply-or-explain,' despite the fact that they generally do not even have stewardship activities as part of their mandate.¹⁰⁸ Furthermore, they rarely possess the resources to monitor. Other institutional investors (who should be carrying out monitoring activities) and service providers, appear to escape the COBS provisions, or anything else for that matter, compelling them to 'comply-or-explain.' Roach suggests that one solution might be the imposition of a loss of voting rights on those investors who do not abide by the principle.¹⁰⁹

In assessing the effectiveness overall of the Stewardship Code, it has been reported that engagement between investors and directors in larger companies has improved, but lack of investor activism for medium-sized companies remains problematic.¹¹⁰ Moreover, restrained resources are still cited as an excuse not to monitor directors.¹¹¹ Whilst it was to a degree inevitable that introducing the Stewardship Code would produce at least *some* encouraging results, bigger changes will have to be implemented to achieve the seismic shift in investor culture required to prevent another corporate governance crisis such as that measurable in 2008.

¹⁰² Roach (n89) 471.

¹⁰³ This is where the list is found: <www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Stewardship-Code/UK-Stewardship-Code-statements.aspx> accessed 17 October 2014.

¹⁰⁴ Roach (n89) 475.

¹⁰⁵ Walker (n6) para 5.40.

¹⁰⁶ Financial Conduct Authority, 'Conduct of Business Sourcebook' 2.2.3R.

<<http://fshandbook.info/FS/html/handbook/COBS/2/2>> accessed 2 October 2014.

¹⁰⁷ FSMA 2000 (n71) ss205-206.

¹⁰⁸ Investment Management Association (n21).

¹⁰⁹ Roach (n89) 475.

¹¹⁰ FRC (n98) 22.

¹¹¹ *ibid* 23.

C. Other post-crisis developments

The most significant of these developments is perhaps the 'say on pay' legislation.¹¹² This differs from the Stewardship Code in that it is legally binding, with sanctions possible for non-compliance in appropriate circumstances. The Enterprise and Regulatory Reform Act 2013, in the UK, introduces important changes in director remuneration policy.¹¹³ Company shareholders now possess greater combined power in the form of a binding vote on director pay,¹¹⁴ and there is an obligation on shareholders to enhance the remuneration policy every three years.¹¹⁵ Director pay must either adhere to the policy or be approved by the shareholders. Shareholders therefore have a direct say on the remuneration company directors receive. These provisions aim to provide shareholders with an additional means of scrutinising their investee companies, and the binding vote in particular allows them to hold directors to account. This legislation only applies however to directors of quoted companies, and although it was companies of this size that played the greatest part in the 2008 crisis, it does not apply to overseas companies listed on the UK stock market either. It is therefore arguable that the scope of the legislation has been narrowed slightly.

The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013¹¹⁶ also represents a welcome addition to corporate governance. They outline the reporting requirements for companies' future remuneration policies and Annual Reports. They additionally state that companies should, *inter alia*, state the salary each director receives, clarify individual director performance and state how the company has decided on the remuneration level for directors.¹¹⁷ This enables investors to ensure that directors are not being rewarded for failure and are not being paid more than their performances merit, – a practice which occurred all too frequently during the crisis. Moreover, the company must make clear how the components of a director's remuneration back the company's immediate and future plans.¹¹⁸ The Regulations aim to improve transparency, thereby reducing the informational costs often borne by shareholders when attempting to engage. Although not applicable to small businesses, it is perhaps less likely directors in such companies would be rewarded for poor performances anyway, as their behaviour will most likely be under greater scrutiny as a result of director activities being more visible. A small business is one in which two of the following conditions are satisfied: Annual turnover is less than £6.5 million; the

¹¹² UKERR Act 2013; Large and Medium-sized Companies and Groups Regs 2013; CA 2006 Regs 2013 (n8).

¹¹³ UKERR Act 2013 (n8) ss79-82.

¹¹⁴ *ibid* s79.

¹¹⁵ *ibid*.

¹¹⁶ Large and Medium-sized Companies and Groups Regs 2013 (n8).

¹¹⁷ *ibid* Schedule 8.

¹¹⁸ *ibid*.

balance sheet total is less than £3.26 million; the average number of employees is less than 50.¹¹⁹

The Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013¹²⁰ provides for the publication of a strategic report by certain companies.¹²¹ This report should contain, *inter alia*, information on how the company has performed during the previous year and a description of its plans and business model.¹²² This will allow investors to gain greater insight into the governance of their chosen investee companies, and will hopefully help them assess director performance to a greater degree. As a result of this secondary legislation, investors should be better equipped to ask hard questions of the directors if the strategic report reveals that they are under-performing as regards promoting the success of the company. The Regulations do not however apply to those entitled to the small companies' exemption,¹²³ thereby reducing their scope, and the FRC have stated that the strategic report does not substantially differ from the business review it replaced.¹²⁴ The contribution to better corporate governance that these Regulations bring is therefore debatable.

The investor forum mooted following the Kay report,¹²⁵ and in operation from June 2014 represents another corporate governance initiative. The forum aspires to help control director behaviour and banish short-termism¹²⁶ through the establishment of an 'engagement action group' comprising investors from around the world.¹²⁷ This may allow investors to satisfy principle 5 of the Stewardship Code which encourages collective action.¹²⁸ The group is expected to meet regularly, and will consist of shareholders designed to be representative of other investors.¹²⁹

The final development requiring discussion is Section E of the Corporate Governance Code. The main principles in the 2012 version replicate those outlined in 2010. E.1 states that there should be engagement between investors and the directors, and that it is the duty of the directors to make sure that this happens.¹³⁰ A noticeable

¹¹⁹ Companies House, 'Companies Act 2006' (April 2008)

<www.companieshouse.gov.uk/companiesAct/implementations/apr2008ExemptionThreshold.shtm> accessed 17 October 2014.

¹²⁰ CA 2006 Regs 2013 (n8).

¹²¹ *ibid.* regs 2-5 are the main provisions on the strategic report.

¹²² *ibid.* reg 3.

¹²³ For the purpose of the legislation, regulation 3 provides that: "A company is entitled to small companies exemption in relation to the strategic report for a financial year if – a) it is entitled to prepare accounts for the year in accordance with the small companies regime, or b) it would be so entitled but for being or having been a member of an ineligible group."

¹²⁴ Financial Reporting Council, 'Staff Guidance Note: The Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013 – Key Facts' (2013) 1 <www.frc.org.uk/Our-Work/Publications/Accounting-and-Reporting-Policy/FRC-Staff-Guidance-Note-Strategic-Report-Regulation.pdf> accessed 3 October 2014.

¹²⁵ Kay (n11).

¹²⁶ David Oakley, 'Investors invited to join forces to rein in wayward governance' *Financial Times* (2 December 2013) <www.ft.com/intl/cms/s/0/3a3de368-5b42-11e3-a2ba-00144feabdc0.html#axzz2n0yZ6EjO> accessed 5 October 2014.

¹²⁷ *ibid.*

¹²⁸ Stewardship Code (n7) 8-9.

¹²⁹ Oakley (n126).

¹³⁰ Corporate Governance Code (n9) 24.

disappointment though is that there is repeated emphasis on *major* shareholders in the supporting principles that follow.¹³¹ Although major shareholders have been primarily responsible for failing to curb poor director behaviour, ignoring the contribution of smaller shareholders reduces the scope and effect of section E's provisions. Footnote 25 does state that there should be equal treatment of *all shareholders* as regards access to information, but this is clearly not the case. In addition, the fact that there '*should* be a dialogue'¹³² as opposed to '*must* be a dialogue' serves to highlight its lack of force. Future editions might wish to strengthen this provision. This would place greater pressure on those who choose not to comply with the Code provisions to make sure that an effective dialogue definitely happens. The main principle outlined in section E.2. asserts that the annual general meeting (AGM) should be used as means of engaging with investors and encouraging their participation. Whilst this is *prima facie* beneficial as regards communication and therefore governance, the use of '*should*'¹³³ is not as strong as '*must*.' It also has to be remembered that the Code is only soft law and that it is subject to '*comply-or-explain*' and its associated disadvantages previously discussed. Moreover, Section E of the Code is essentially a consolidation of many of the developments which came before the crisis. It therefore does not result in substantial improvements that solve the problem of investor apathy. The 2008 edition of the old Combined Code actually goes further in tackling such apathy than the 2012 version of the Corporate Governance Code, as it has a complete section devoted to institutional shareholders, rather than a paragraph.¹³⁴

4. Reform

A. Keep '*comply-or-explain*'?

Despite the criticisms of '*comply-or-explain*' outlined earlier, Keay feels that the framework could be conserved, but buttressed through the establishment of a monitoring body to assess company disclosures.¹³⁵ The UK currently has no such body (despite some EU Member States having one);¹³⁶ instead assessment is predominantly left to the shareholders.¹³⁷ In other EU Member States, regulating bodies possess discretionary powers to issue penalties for uninformative statements.¹³⁸ This represents a hybrid approach, which maintains '*comply-or-*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid* 25.

¹³⁴ Combined Code (n10) 21-22.

¹³⁵ Keay (n50) 22.

¹³⁶ RiskMetrics Group, 'Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States' (September 2009) 178
<http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf> accessed 12 October 2014.

¹³⁷ Financial Reporting Council, 'Regulatory Impact Assessment: Combined Code on Corporate Governance' (July 2003), 6 <www.ecgi.org/codes/documents/regulatoryimpact.pdf> accessed 12 October 2014.

¹³⁸ Keay (n50) 24.

explain,' but introduces a hard law element by having a regulator determine whether statements are of sufficient quality. This therefore has the potential to eradicate one of the biggest disadvantages of 'comply-or-explain.' Companies would retain the choice of whether or not to abide by Code provisions, but would have to provide a statement of sufficient quality to give investors enough information to enable them to engage in dialogue with the board, or risk punitive measures.

A regulator such as Keay describes would ensure that company statements are of a high enough standard, and that shareholders might feel more secure. The threat of enforcement might prevent managers from choosing not to disclose at all or providing uninformative statements.¹³⁹ Conversely however, it would involve extra costs, meaning that some of the benefits of a voluntary approach were negated.¹⁴⁰ The main problem with Keay's view is that it is meant to be the decision of the shareholders whether to accept or reject company explanations and whether or not to hold the company to account and dismiss directors.¹⁴¹ The introduction of a regulatory body is therefore viewed with a degree of negativity in some quarters as it signals a move away from the self-regulating approach.¹⁴² The FRC are concerned that this would lead to a situation where company solicitors would confirm with the regulator when preparing a disclosure that it conformed to a high enough standard, meaning that shareholders would be left out altogether.¹⁴³ They believe that if there is to be a monitor, such a body should not replace the shareholders.¹⁴⁴ The European Corporate Governance Forum shares this view.¹⁴⁵

The FRC suggests an alternative approach involving a lesser role for the monitoring body and lawyers. They propose that guidelines should be established outlining what constitutes a good disclosure statement and that once these guidelines were issued, investors could then look at their particular investee company disclosures and tell the monitoring body which explanations they felt did not reach the threshold set out in the guidelines.¹⁴⁶ The monitor could then go about securing improved disclosure from the company in question.¹⁴⁷ The FRC have produced some guidance on the content of explanations, so it would seem that there is a framework already in place for ascertaining what constitutes an appropriate explanation under 'comply-or-explain.'¹⁴⁸ The approach suggested by the FRC, although allowing investors a potentially greater role compared with the scheme suggested by Keay still fails to solve the problem of shareholders not being able to

¹³⁹ *ibid* 28.

¹⁴⁰ *ibid*.

¹⁴¹ Financial Reporting Council, 'Response to the European Commission Green Paper on the EU Corporate Governance Framework' (2011) 5 <www.frc.org.uk/FRC-Documents/FRC/FRC-response-to-the-Green-Paper-on-the-EU-corporat.aspx> accessed 12 October 2014.

¹⁴² Keay (n50) 25-26.

¹⁴³ *ibid* 6.

¹⁴⁴ FRC (n57) 3.

¹⁴⁵ European Corporate Governance Forum, 'Statement of the European Corporate Governance Forum on the Comply-or-explain Principle' (February 2006) para 3 <http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf-comply-explain_en.pdf> accessed 14 October 2014.

¹⁴⁶ Keay (n50) 27.

¹⁴⁷ FRC (n137) 6.

¹⁴⁸ FRC (n57).

assess *all* disclosures.¹⁴⁹ Moreover, it has been suggested that this process could take a long time, and that extra shareholder effort is involved in that they would have the responsibility of making any monitoring body aware of the uninformative explanations.¹⁵⁰ This might make this particular task unappealing, especially for institutional shareholders, who would be undertaking this process on behalf of many companies. The FRC's guidance as to what constitutes a good company explanation, although welcome, is arguably rather brief and generalised in its current form. More extensive guidelines may therefore be required.

Given the problems, as highlighted, that the presence of an oversight body can bring, there must be other ways of promoting improvements in explanations so that investors can engage with their investee companies more effectively. Section A of the Corporate Governance Code focuses on 'Leadership'¹⁵¹ and emphasises the role that the Chairperson can play. Perhaps as a result of this, many companies now state on their website their commitments to good corporate governance principles and include a statement from their chairperson.¹⁵² Although these introductory declarations may be general in nature, it is hoped that they will encourage companies to abide by 'comply-or-explain.' The Association of British Insurers found that companies who have published such statements tend to have more informative corporate governance explanations.¹⁵³ This demonstrates that something as simple as a chairperson statement can have a positive effect on corporate governance and, more particularly, on the quality of disclosures. The significance of this practice is recognised in the Disclosure and Transparency Rules 7.2.1 R, which states that certain companies must have a corporate governance statement in their director's report.¹⁵⁴

In addition, 'standardised [disclosure] forms' are used in specific EU countries such as Spain and Hungary.¹⁵⁵ In these nations the amount of disclosures provided is generally greater compared to other countries where this method is not used.¹⁵⁶ This is therefore clearly beneficial. It is important however to construct such forms in a way which requires each Code provision to be specifically referred to rather than just providing a plethora of general details, as this yields the positive result that more disclosures are actually given.¹⁵⁷ Not only are more explanations provided, but by providing specific information the explanations are more informative. This allows a greater degree of engagement, as investors can clearly see which exact principles are or are not being complied with. In addition, this approach

¹⁴⁹ Keay (n50) 27.

¹⁵⁰ *ibid.*

¹⁵¹ Corporate Governance Code (n9) 8-10.

¹⁵² See for example British Telecom Plc

<<http://btplc.com/Thegroup/Ourcompany/Governance/index.htm>> accessed 16 October 2014 and Marks and Spencer Plc <http://corporate.marksandspencer.com/investors/corporate_governance> accessed 16 October 2014.

¹⁵³ Association of British Insurers, 'Comply or Explain: Investor expectations and current practices' (December 2012) 29 <www.abis.co.uk/media/5923/ABI-Report-on-Comply-or-Explain-Investor-Expectations-Dec-2012.pdf> accessed 16 October 2014.

¹⁵⁴ United Kingdom Listing Authority, 'Disclosure Rules and Transparency Rules' 7.2.1 R.

¹⁵⁵ RiskMetrics Group (n136), 181.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

could help corporations in that they would only be required to make small amendments year after year, after completing the form the first time.¹⁵⁸ A potential downside to the use of such forms is that disclosure becomes a 'box-ticking' exercise.¹⁵⁹ It would be important therefore to construct them in a way that prevented this from happening.¹⁶⁰

One potential solution would be to have a web-based scorecard scheme that would recognise companies that are performing well and identify those actually abiding by Code provisions in practice. The use of 'kite marks' and 'quality rankings' has been suggested as a useful way of awarding those high performers.¹⁶¹ Given that the public would also have access to this information, this would have the consequence of 'naming and shaming' (and threatening the reputation) of those companies not exhibiting the requisite degree of participation. Moreover, especially with regards the Stewardship Code, such a system enables investors to act as stewards. They would be able to 'review and rate companies,'¹⁶² allowing them to scrutinise them very easily without having to expend time and effort in attempting to speak directly with a director or convening a board meeting. It would also publicise those investors and fund managers who are not abiding by the required principles.¹⁶³ Another benefit of the system is that it would permit non-UK investors to voice their own concerns on corporate governance issues.¹⁶⁴ Investors worldwide, and not just the UK, are affected by poorly managed UK companies, so it is important to have a forum which allows these investors to contribute.

H. Abolish 'comply-or-explain'?

During the FRC's Call for Evidence in 2009 as part of its review of the Combined Code,¹⁶⁵ one respondent said that as a result of the general public having a lack of faith in the soft law system, 'comply-or-explain' should be abolished, with the FRC taking over the job of monitoring and penalizing those who fail to abide by Code provisions.¹⁶⁶

The introduction of mandatory law is definitely understandable in light of the crisis, and with the possibility of legal sanctions and the presence of a regulator with enforcement responsibilities it would be hoped that standards of corporate governance would improve. Other advantages include the eradication of the conflict of interest currently existing under the 'comply-or-explain' regime wherein the directors decide whether or not to comply with Code provisions, resulting in

¹⁵⁸ *ibid* 182.

¹⁵⁹ *ibid* 181.

¹⁶⁰ *ibid*.

¹⁶¹ Resiberg (n91) 141.

¹⁶² Eva Micheler, 'Facilitating investor engagement and stewardship' (2013) 14(1) *European Business Organization Law Review* 29, 48.

¹⁶³ *ibid* 49-50.

¹⁶⁴ *ibid* 50.

¹⁶⁵ Financial Reporting Council, 'Review of the Effectiveness of the Combined Code: Call for Evidence' (March 2009) <www.frc.org.uk/Our-Work/Publications/FRC-Board/Review-of-the-effectiveness-of-the-Combined-Code-C.aspx> accessed 28 September 2014.

¹⁶⁶ Financial Reporting Council, 'Review of the Effectiveness of the Combined Code: Summary of the Main Points Raised in Responses to the March 2009 Call for Evidence' (July 2009) 3 <www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Summary-of-Responses-Review-of-the-effectiveness-o.pdf> accessed 28 September 2014.

decisions occasionally being made which are not always necessarily in the best interests of the company or stakeholders.¹⁶⁷ Investor assurance would also be enhanced,¹⁶⁸ as it is thought investors would rather invest in a company subject to hard law. The introduction of mandatory law would certainly have a positive effect on the problem of investor apathy. For example, fund managers and other institutional investors would be made to comply with the principles within the Stewardship Code. Similarly, companies would be made to comply with section E of the Corporate Governance Code, meaning that by law, the board would be obliged to engage in a dialogue with shareholders and the AGM would have to be used as a means to converse with shareholders.¹⁶⁹

Interestingly however, because mandatory corporate governance laws with legal sanctions would have the effect of imposing stricter conditions and obligations upon directors it could be argued that it would not consequently be necessary for investors to engage. For example, principle A.2. of the Corporate Governance Code states that there must be a division of responsibilities and that no one person should have unrestricted powers.¹⁷⁰ What is the point therefore in an investor spending time to assess whether this principle is being complied with, where the regulator is obliged to do so, and issue legal sanctions where appropriate, under a hard law regime? Moreover, under the US Sarbanes-Oxley Act 2002, which was introduced following a number of high profile company scandals and after the failures of Enron, WorldCom and many others, US shareholders now have limited rights in many major areas in their investee companies in comparison with foreign competitors.¹⁷¹ This potentially restricts their degree of effective engagement, so if mandatory law were to be introduced in the UK, it would have to ensure that the rights of shareholders were not unduly restricted. Mandatory law can have various other negative effects unrelated to investor monitoring. The destructive effect it has wrought on US markets due to the creation of disparity in legal rules between US and foreign markets¹⁷² would perhaps suggest that introducing hard corporate governance laws to the UK may not be such a good idea, especially as other EU countries use 'comply-or-explain' in their regulatory approaches. In addition, Ribstein identifies the extra costs of introducing regulation, such as firms having to spend more time and effort obtaining information and paying auditors.¹⁷³

Walker has stated that mandatory law may result in unforeseen repercussions and that positive development is 'more likely to be achieved through...non-statutory routes to implementation so that boards and their major owners feel "ownership" of

¹⁶⁷ Deirdre Ahern, 'Replacing 'Comply or Explain' with Legally Binding Corporate Governance Codes: An Appropriate Regulatory Response?' (June 2010) 13 <regulation.upf.edu/dublin-10-papers/5A3.pdf> accessed 6 October 2014.

¹⁶⁸ *ibid* 12.

¹⁶⁹ Corporate Governance Code (n9) 24-25.

¹⁷⁰ *ibid* 9.

¹⁷¹ Committee on Capital Markets Regulation, 'Interim Report of the Committee on Capital Markets Regulation' (November 2006) Introduction 7.

¹⁷² *ibid* 'Executive Summary' 5.

¹⁷³ Larry E. Ribstein, 'Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002' (2002) 28(1) *Journal of Corporation Law* 1, 45.

good corporate governance.’¹⁷⁴ There is therefore a clear preference here that the directors should have a choice of whether to comply with certain provisions and that it should be the job of the shareholders to assess whether they are correct in their decision making. This view is supported by many EU respondents.¹⁷⁵ A contributory factor to this strong opposition in the UK may perhaps be as a result of the fact that the Companies Act 2006, at nearly 700 pages only fully came into force in October 2009 following a 10 year review process that paved the way for it. This has perhaps led commentators to believe that it provides enough detail and ‘appropriate standards of duty and accountability so nothing further is required.’¹⁷⁶

5. Conclusion

The 2008 global financial crisis represented a wake-up call for many, not least the institutional investors who own a huge percentage of the shares in listed UK companies. They have been lambasted for failing to look after their investments, and were blamed in part for failing to prevent the crisis.

The root of the problem can be traced back to the agency dilemma that exists between directors and shareholders. This is mostly an issue in widely-held companies, where directors do not perform their role as agents adequately enough, and institutional investors can be apathetic due to resource constraints. This means that poor director behaviour is not scrutinised frequently enough. There have been an abundance of soft law developments aimed at encouraging institutional investors to monitor their investments more closely and thereby solve the agency problem, but many of these have failed in their objective. Moreover, the Companies Act 2006 contains rights which are available to shareholders to enable them to engage, but the crisis showed that their use was simply not forthcoming, allowing directors to continue to behave freely and negligently on occasions. ‘Comply-or-explain’ has been at the centre of many of the Codes and guidance produced and can be said to have been a stalwart of UK corporate governance since the 1992 Cadbury Report. In theory, it appears a useful tool in addressing the investor apathy problem, but in practice it fails to deliver. To be successful, explanations for deviating from Code provisions have to be enlightening and investors have to actively engage in assessing these explanations; neither has happened to a sufficient degree.

The Stewardship Code was introduced in response to the crisis, but it has many inherent disadvantages. These include the fact that its coverage is limited, compliance is voluntary and for those who do comply, there are many weak provisions, some of which actually regress on previous soft law developments. The ‘say on pay’ legislation on the other hand has more potential to promote greater engagement with companies. It compels companies to disclose details of director pay, and gives the shareholders a direct say on what they earn. This reduces informational costs for investors and promotes transparency, thereby helping eradicate some of the barriers to engagement. The investor forum is a welcome

¹⁷⁴ Walker (n6) ps 9-10.

¹⁷⁵ RiskMetrics Group (n136) 139-142.

¹⁷⁶ Brenda Hannigan, ‘Board failures in the financial crisis – tinkering with codes and the need for wider corporate governance reforms: Part 1’ (2011) 32(12) *Company Lawyer* 363, 369.

addition, as it recognises the importance of collective engagement in monitoring company boards, thereby allowing investors to pool their resources. Finally, the Corporate Governance Code was presented. Unfortunately, as with the Stewardship Code, it is soft law and involves 'comply-or-explain,' with its known disadvantages. Section E additionally fails to expand substantially on previous soft law Codes and guidelines.

It appears therefore that 'comply-or-explain,' as it is currently implemented, fails to carry out its intended job. It is therefore almost certain that if it were decided to maintain it as the regulatory approach of choice, then wholesale changes to its operation would be required. Introducing oversight by a monitoring body has been suggested as a way of assessing the adequacy of company disclosures, but some view this as eradicating the self-regulatory approach and removing the role of the shareholders. It would therefore have to be ensured that, if a monitoring body were to be present, it would have defined responsibilities and would instead operate in support of shareholders, as opposed to instead of them. Regulatory oversight aside, further promotion of the practice whereby chairpersons place introductory corporate governance statements on their company websites, and the introduction of standardised disclosure forms will improve disclosure quality. However, even if the problem of uninformative explanations was solved, another downside to 'comply-or-explain' is the fact that a box-ticking approach might be the result. To solve this, some have suggested the introduction of an internet 'scorecard' scheme which would identify those who are taking compliance seriously, and it would also have the benefit of allowing investors to act as stewards by rating companies on their performance. There are also some strong arguments for abolishing 'comply-or-explain' and introducing mandatory law instead. This would improve compliance with Code provisions and would hopefully go some way to solving the investor apathy problem by making the Stewardship and Corporate Governance Codes legally binding. However, the ill-fated US Sarbanes-Oxley Act 2002 perhaps suggests that hard law is not the answer, and indeed the UK and EU have made their opinion clear that 'comply-or-explain' is here to stay.

It is too early to gauge whether investors, and institutional investors in particular, have taken greater care over their investments since the 2008 crisis. Evidence regarding the effectiveness of the Stewardship Code has revealed that, on the whole, engagement has been more forthcoming in larger companies, but that substantial barriers still remain. The 'say on pay' legislation and the investor forum definitely have the potential to solve the problem of investor apathy, but as these are only recent developments, 'wait and see' is the most prudent course of action for change advocates at present.

An Analysis of the Efficacy of the Bribery Act 2010

GORDON BELCH*

Abstract

The UK Bribery Act (UKBA) 2010 represents the most radical revision to anti-corruption law in the UK in over one hundred years and arguably the toughest anti-bribery legislation in the world. Its practical effects however, have so far proved less exciting. Despite guidance from the Ministry of Justice and Serious Fraud Office (SFO) directors, there still remains significant uncertainty among businesses regarding interpretation, particularly relating to 'foreign public officials,' hospitality and facilitation payments, self-reporting, sentencing and fines, adequate procedures, and the meaning of 'associated person' and 'relevant commercial organisation.' It appears that the practical implications of the UKBA will turn upon how the SFO intends to apply its enforcement authority. Accordingly, in response to the these highlighted uncertainties, it will be asserted that companies have no real choice but to enforce a stringent anti-corruption regime in order to minimise their risk of incurring criminal liability for corrupt behaviours under the UKBA.

1. Introduction

Bribery blights lives¹ and is arguably the most widespread form of corruption. Corruption holds back economic development, prevents a free market operating for businesses and consumers, and further exploits already marginalised groups.² The Serious Fraud Office (SFO) defines bribery as the 'giving or receiving something of value to influence a transaction.'³ Bribery does not have to involve obtaining pecuniary advantages or actual payment of monies; it can take many other forms such as gifts, lavish hospitality or the performance of personal favours. In April 2010, the Bribery Act (UKBA) 2010⁴ came in to force purporting to demonstrate the UK's desire to take a lead in the international fight against bribery and corruption.

This article will conduct an analysis of the efficacy of this relatively new Act, based on references to guidance issued by various government bodies. Firstly, the reasons behind the Act's implementation will be considered; highlighting the inadequacies of the previous body of law. It will be argued that the complete overhaul was undoubtedly a result of the intense criticism received from the

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¹ Ministry of Justice (MoJ), 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)' (March 2011).

² Transparency International UK, 'Corruption-Why It Matters' (*Transparency International UK*) <www.transparency.org.uk/corruption/why-it-matters> accessed 2 October 2014.

³ Serious Fraud Office (SFO), 'Bribery and Corruption' <www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx> accessed 2 October 2014

⁴ Bribery Act 2010 c.23.

international community, specifically the Organisation for Economic Co-operation and Development (OECD) in light of scandals such as that involving BAE Systems Plc, which represented a 'final blow' for the Government. Secondly, the residual legal uncertainties within the new Act will be examined. These include: the uncertainty among businesses surrounding corporate hospitality and facilitation payments; the ambiguous 'adequate procedures' defence and doubts as to the meanings of 'relevant commercial organisation' and 'associated person.' This residual lack of legal certainty has imposed an onerous burden of unclear regulatory compliance upon businesses. Finally, some potential options for reform will be suggested and explored. At the time of writing, there have been no corporate convictions under the new Act, suggesting that it is possibly too early to consider review. A contrary view however, related to increased pressures upon the Government and SFO to secure their first conviction suggests that possible amendments to the UKBA 2010 might already be plausible. It is no surprise therefore, that there continues to exist a 'cry for clarity'⁵ regarding the Act within the UK business lobby.

2. Why Was the UKBA Necessary?

A. The Pre-existing UK Legal Framework

UK anti-bribery law prior to the UKBA 2010 consisted of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916⁶ and the common law offence of bribery.⁷ This body of law was described as 'inconsistent, anachronistic and inadequate'⁸ in terms of its capacity to comply with modern international anti-corruption obligations.⁹ Bribery legislation reform in the UK was undeniably driven by the conclusions in the 'Nolan Report' produced by the Committee on Standards in Public Life in 1995.¹⁰ This report confirmed the inadequacy of the UK's anti-corruption regime in force at the time, and as a result of its recommendations, the then UK Government urged the Law Commission to re-examine the regime.¹¹ In December 1997, the UK Government signed the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business

⁵ Daniel J. Gawronski, 'A Cry for Clarity: Recent Developments in Corruption Law and The Difficulties Presented by Cultural Business Practices' (2012) <<http://ssrn.com/abstract=2043916>> or <<http://dx.doi.org/10.2139/ssrn.2043916>> accessed 2 October 2014.

⁶ These were known collectively as the Prevention of Corruption Acts 1889 to 1916.

⁷ See Samer Korkor & Margaret Ryznar, 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing' (2011) 76(2) *Missouri Law Review* 415, 434.

⁸ Matt Atkins, 'Introduction to the UK Bribery Act' (2011) 6 *Financier Worldwide* 5.

⁹ Dr Karen Harrison & Dr Nicholas Ryder, *The Law Relating To Financial Crime In The UK* (2013, Ashgate Publishing) 44.

¹⁰ See, in general, the recommendations of the Committee on Standards in Public Life, 'First Report of the Committee on Standards in Public Life' (Cm 2850-I, May 1995) 7. The Committee was chaired by Lord Nolan.

¹¹ Law Commission, *Reforming Bribery* (Law Com No 313, 2008).

Transactions (OECD Convention).¹² This required signatories to enact domestic legislation that criminalised bribery relating to foreign government officials.¹³ The UK Government created the Anti-Terrorism, Crime and Security Act (ATCASA) 2001, Part Twelve and as a consequence believed that this addition to the UK's domestic anti-bribery framework satisfied the OECD Convention's requirement.¹⁴

Nevertheless, this body of law received intense criticism from the international community; largely down to its limited impact in policing bribery and corruption within British companies. For example, in 2008, an OECD Working Group produced a report condemning the UK for its appalling failure in prohibiting bribes being paid by its companies in markets abroad, reporting that '[o]verall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK.'¹⁵ This statement clearly indicates the frustration felt by the Working Group relating to the inadequacies in the incumbent UK government's approach and their ongoing delay in implementing the requirements of the Convention. The severe criticism undoubtedly was a major contributory factor towards instigating reform in this area of the law.

An example of the ineffective nature of the anti-bribery regime that prevailed in the UK prior to the UKBA, and the case that appears to have forced the UK Government to finally take definitive remedial action, was the bribery scandal that enveloped BAE Systems plc (BAE). In December 2004, a whistle-blower claimed that BAE (one of the largest defence contractors in the world) controlled and availed of a US\$120 million bribery fund to facilitate the securing of defence contracts, a practice that had allegedly been undertaken for decades. The disclosure triggered a SFO investigation.¹⁶ BAE were alleged to have been bribing Saudi Arabian royalty and other Saudi Arabian officials in relation to attempting to secure a major defence contract, in what became known as the Al Yamamah transaction.¹⁷ Despite the severity of the allegations made against BAE Systems, in December 2006 the SFO announced the termination of their investigation on the basis that the UK's national security was under threat.¹⁸ This conclusion (and the actual legality of the SFO Director's hugely controversial decision) became subject to considerable scrutiny in

¹² Organisation for Economic Co-operation and Development (OECD), *OECD Convention on Combating Bribery of Foreign Officials In International Business Transaction and Related Instruments* (2011, OECD).

¹³ OECD Convention (n12) Article 1.

¹⁴ This was the Anti-Terrorism, Crime and Security Act (ATACSA) 2001. Sections 108-110 introduced provisions required by Article 1 of the OECD Convention.

¹⁵ OECD Directorate for Financial and Enterprise Affairs, 'United Kingdom: Phase 2bis Report on the application of the convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions' (October 2008) <www.oecd.org/unitedkingdom/41515077.pdf> accessed 2 October 2014.

¹⁶ Korkor and Ryznar (n7) 436.

¹⁷ The Al Yamamah transaction extended over several decades and involved BAE supplying military aircraft, air defence and other systems to the Kingdom of Saudi Arabia. It was described as the 'biggest sale ever, of anything, to anyone.' See, in general, Bruce Bean & Emma MacGuidwin, 'Unscrewing the Inscrutable: The UK Bribery Act 2010' (2012) 22 *Indiana International and Comparative Law Review* 63.

¹⁸ Korkor and Ryznar (n7) 436. The alleged bribes were said to be in the region of \$1 billion to secure a defence contract worth \$85 billion.

the UK courts. Initially, the High Court concluded that the SFO had wrongly terminated its investigation.¹⁹ However, following recourse to the then Appellate Committee of the House of Lords,²⁰ the High Court's decision was overruled in July 2008.²¹ This decision was criticised by the OECD working group²² and triggered the Law Commission in October 2008 to once again produce a report and propose a draft law that focused on bribery.²³ The Ministry of Justice (MoJ) subsequently produced bribery draft legislation,²⁴ which passed through both Houses of Parliament without controversy, the Bribery Act 2010 receiving Royal Assent on 8th April 2010. In line with section 9 of the new Act, the Ministry of Justice published guidance for organisations to adopt in order to 'prevent persons associated with them from bribing'²⁵ and which focused on section 7,²⁶ section 1²⁷ and section 6.²⁸ This guidance was published in March 2011, with the Bribery Act finally implemented on 1st July 2011.

Bean and MacGuidwin describe this period between enactment and implementation as 'deliberate delay' and 'procrastination' from the UK Government.²⁹ It is possible to agree with this statement and suggest that on one hand the Government wanted to ensure effective, clear legislation and guidance to prohibit bribery and corruption, but at the same time were wary of the risk of losing business. Whilst it was undoubtedly a question of balancing conflicting priorities for the UK Government, they ultimately had to respond to fierce international criticism and abide by the OECD Convention.

B. A Brief Outline of the UKBA 2010

The Act creates four key offences: the general offence of bribing another person;³⁰ an offence of being bribed;³¹ bribery of foreign public officials;³² and arguably the most ambiguous new offence wherein the failure of commercial organisations to prevent bribery is criminalised.³³ Section 3 set outs the function or activity to which bribes can relate, and this now extends to the private, as well as public sectors.³⁴ Section 5

¹⁹ *R. (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin).

²⁰ Now the UK Supreme Court.

²¹ *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office (Criminal Appeal from Her Majesty's High Court of Justice)* [2008] UKHL 60.

²² OECD (n 15).

²³ Law Commission, *Reforming Bribery* (Law Com No 313, 2008).

²⁴ Ministry of Justice, *Bribery Draft Legislation* (Cm 7570, 2009).

²⁵ Ministry of Justice (n 1).

²⁶ *ibid*, relating to failure of commercial organisations to prevent bribery.

²⁷ *ibid*, 'bribing another person.'

²⁸ *ibid*, 'bribery of a foreign official.'

²⁹ Bean & MacGuidwin (n 17) 70.

³⁰ UKBA 2010, s1.

³¹ *ibid* s2.

³² *ibid* s6.

³³ *ibid* s7.

³⁴ *ibid* s3(2).

sets out the 'expectation test'.³⁵ As the Act extends extraterritorially, the enforcement language contained in its provisions may be considered controversial, as it does not take into consideration any other cultural expectations or local customs apart from those existing in the UK corporate environment. However, if the activity or function associated with a particular culture or its customs is explicitly provided for in any statute in a particular foreign jurisdiction, the expectation test can be disregarded.³⁶ The Act awards the UK courts jurisdiction over bribery committed abroad when the person committing the offence is a British national, ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.³⁷ The extraterritorial reach of the Act is further expressed in section 7, which regulates companies that 'carry on a business'³⁸ in the UK and permits unlimited fines to be levied against them if 'adequate procedures'³⁹ to prevent bribery offences are not in place. The Act is not retrospective however; therefore the previous anti-bribery regime will continue to apply to bribery offences committed or attempted prior to 1st July 2011. As regards the investigation and prosecution of corruption, the SFO is the lead agency in England, Wales and Northern Ireland, while the Crown Office and Procurator Fiscal Service (COPFS) hold primary responsibility in Scotland.⁴⁰ As both 'public authorities'⁴¹ cooperate efficiently and produce almost identical guidance, further references to guidance herein will be to that issued by the SFO.

3. Bribery of Foreign Public Officials, Corporate Hospitality, and Facilitation Payments

Atkins describes the UKBA 2010 as "the toughest anti-corruption legislation in the world."⁴² Harrison and Ryder have stated that the Act 'provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world.'⁴³ Despite the issue of MoJ guidance,⁴⁴ and the subsequent reinforcement of it by SFO directors,⁴⁵ there still remains significant uncertainty among businesses about how to interpret particular provisions and definitions within the Act. Three problematic areas are examined herein.

³⁵ UKBA, s.5(1) 'a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.'

³⁶ UKBA 2010, s5(2)-(3).

³⁷ *ibid* s12.

³⁸ *ibid* s7(5)(b) and (d).

³⁹ *ibid* s7(2).

⁴⁰ Brodies LLP, 'Bribery and anti-corruption: self-reporting in Scotland' (3 February 2012) <www.inhouselawyer.co.uk/index.php/scotland-home/9758-bribery-and-anti-corruption-self-reporting-in-scotland?format=pdf> accessed 7 October 2014.

⁴¹ Within the meaning of the Human Rights Act 1998.

⁴² Atkins (n 8) 3.

⁴³ Harrison & Ryder (n 9) 44.

⁴⁴ Ministry of Justice (n 1).

⁴⁵ The two directors who have dealt with the Bribery Act 2010 are Richard Alderman (2008 – 2012) and David Green (2012 – Present); see for example, David Green's speech reproduced at SFO 'Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference' (24 October 2013) <www.sfo.gov.uk/about-us/our-views/director-s-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference.aspx> accessed 7 October 2014.

A. 'Foreign Public Official'

Section 6 of the Act outlines the offence of bribing a foreign public official in the course of business.⁴⁶ The term 'foreign public official' is only broadly defined⁴⁷ meaning that uncertainty among UK businesses regarding interpretation of this term remains. Monteith observes that 'foreign public official' can also include the senior management of companies which function only in the private sector, but whose shares are owned primarily by foreign governments.⁴⁸ The degree of governmental control exercised will be the crucial factor in determining whether these companies are viewed as public enterprises.⁴⁹ For example, if a particular state has major control (or an active interest) over a particular bank, the board of directors of such corporations would fall to be regarded as 'foreign public officials'.⁵⁰ Confusion exists in relation to the SFO's guidance regarding foreign public officials, as it fails to provide the exact degree of control that must be exercised by the state's representatives over the company's affairs to qualify those representatives as 'foreign public officials'.⁵¹ It is submitted that the SFO should provide further guidance in order to reduce the risk of UK companies incurring criminal liability and the associated legal costs. Lim makes a valid argument, supported by this author, that in response to the continuing confusion, UK businesses should be vigilant when dealing with companies in foreign countries, and perhaps err on the side of regarding them as State-owned enterprises employing 'foreign public officials'.⁵² This would reduce the risk of limitless fines and/or imprisonment.

B. Corporate Hospitality

The UKBA provisions regarding corporate hospitality have also received a significant amount of criticism. Bean and MacGuidwin found that 'the Bribery Act's operative provisions, particularly the strict liability provisions and the treatment of facilitation and hospitality payments, are unprecedented in their jurisdictional reach and cannot reasonably be enforced'.⁵³ Lavish or disproportionate hospitality may be

⁴⁶ UKBA 2010, s6(1)-6(4).

⁴⁷ UKBA 2010, s6(5) "Foreign public official" means an individual who – (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory), (b) exercises a public function – for or on behalf of a country or territory outside the UK (or any subdivision of such a country or territory), or for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organisation.

⁴⁸ Ren-En Lim, (Legislative Comment) 'Parting the fog of the UK Bribery Act 2010: a critical discussion of what we do know about the Act and why it is in the company's interests to comply with its provisions' (2014) 25(1) *International Company and Commercial Law Review* 1.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Bean & MacGuidwin 'Unscrewing the Inscrutable' (n 17) 62.

considered as a bribe in the eyes of the SFO,⁵⁴ although a company may argue that the hospitality was provided in order to establish cordial relations.⁵⁵ Ambiguity persists surrounding the question of where the SFO and the courts will draw the line between criminal and legitimate hospitality. It seems from the examples provided in the SFO guidance that whether or not hospitality is legal depends heavily on the prevailing context.⁵⁶ Consequently, in practice, the SFO will determine whether the hospitality was 'reasonable' and 'proportionate' to a business in the particular surrounding circumstances. Former SFO director Richard Alderman believed the matter to be one of common sense.⁵⁷ It is this author's view that UK businesses merit a more thorough definition of what constitutes tolerable corporate hospitality in order to minimise their risk of criminal sanction. A contrary view however, might be that such a narrower, more technical definition might undermine the purpose of the legislation via the creation of loopholes that could be exploited by the legal profession and enable guilty companies to evade liability.

C. Facilitation Payments

Facilitation payments, or 'grease payments'⁵⁸ are another area of the UKBA giving cause for concern, as the Act makes it an offence for any payment falling within this description to be made in the UK or abroad.⁵⁹ Again however, there has been an outcry from businesses, some of whom have claimed that this was too stringent an approach, as in some countries (e.g. Brazil and China) such payments are customary and transacted on a daily basis. One lawyer has described the UKBA provisions attempting to proscribe facilitation payments as being part of 'a fascinating period of transition as both corporations and governments begin to address deeply embedded cultural practices which may not be viewed as wrong in some countries.'⁶⁰ Facilitation payments are ultimately an additional burden on British industry and should not have to be paid. The UK is therefore correct in taking a tough line and is sending a clear message to the rest of the world that it will not tolerate any form of bribery and corruption.

4. Section 7: Failure of Commercial Organisations to Prevent Bribery

A. Relevant Commercial Organisation.

⁵⁴ Serious Fraud Office (SFO), 'Business Expenditure' (9 October 2012) <www.sfo.gov.uk/bribery--corruption/the-bribery-act/business-expenditure.aspx> accessed 7 October 2014.

⁵⁵ Lim (n 48) 3.

⁵⁶ Ministry of Justice (n 1).

⁵⁷ Lim (n 48) 3.

⁵⁸ Unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They are sometimes called 'grease payments' or 'speed money.'

⁵⁹ Serious Fraud Office (SFO) 'Facilitation Payments' (9 October 2012) <www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx> accessed 7 October 2014.

⁶⁰ Timon Molloy, quoting Keith Korenchuk, partner in Arnold and Porter LLP, in 'The Back of the Brown Envelope' (*Money Laundering Bulletin*, 1 November 2010). <www.moneylaunderingbulletin.com/risksandcontrols/briberyandcorruption/the-back-of-the-brown-envelope--1.htm> accessed 7 October 2014.

The failure of commercial organisations to prevent bribery is arguably the most problematic section of the UKBA 2010.⁶¹ The definition of ‘relevant commercial organisation’⁶² (RCO) potentially includes (depending on any particular judge’s interpretation) virtually all major multinational corporations, as a majority of these operate their business from within the UK, or have at least a presence there. By way of example, a Dutch business with retail outlets in the UK, which pays bribes in France could in theory face prosecution in the UK.⁶³

B. ‘Associated Person’

Furthermore, ‘associated person’ is defined as ‘a person (A) who performs services for, or on behalf of a company.’⁶⁴ This is a very wide definition and could potentially include any other contractual counterparties such as joint venture partners, distributors, consultants and professionals advising the relevant company. Further difficulty arises as there is no guidance as to what degree of connection is sufficient to establish the necessary association for the purpose of section 7, meaning that, as regards the financial markets, considerable ambiguity is generated for investors, as the degree of investment required to trigger the investor company as being ‘associated’ with the investee company is uncertain.⁶⁵ It is suggested that thorough guidance should be produced that clearly details the degree of liability each class of shareholder is liable to become subject to. ‘Associated person’ evidently represents one of the most significant areas of vulnerability for companies. It is therefore essential that correct due diligence is initiated and complete records are kept on any ‘associated person’ engaged by the company.⁶⁶ As stressed previously however, the practical implications of this part of the UKBA will rest on how the SFO intends to interpret ‘associated person’ and apply its enforcement authority.

C. ‘Adequate Procedures’

Section 7(2) however, provides a defence if a commercial organisation (‘C’) can prove that it had in place ‘adequate procedures’ designed to prevent a person associated with ‘C’ from undertaking such conduct.⁶⁷ The section 7 offence means that a company can be prosecuted for a bribery offence even if managers were completely unaware that bribery had occurred, and even if the bribery was

⁶¹ UKBA 2010, s7.

⁶² UKBA 2010, s7(5).

⁶³ Lim (n 48) 6.

⁶⁴ UKBA 2010, s8.

⁶⁵ Financial Markets Law Committee (FMLC), *Analysis of uncertainty around the Bribery Act 2010: Ministry of Justice Consultation on guidance about commercial organisations preventing bribery* (Issue 160, 1 November 2010) [2.11].

⁶⁶ Melanie Wadsworth, ‘One year on what has the bribery act done for us?’ (*Money Laundering Bulletin*, 7 June 2012)

<www.moneylaunderingbulletin.com/risksandcontrols/briberyandcorruption/one-year-on-what-has-the-bribery-act-done-for-us-56255.htm?origin=internalSearch> accessed 7 October 2014 .

⁶⁷ Bribery Act 2010, s7(2).

committed by a third party. In essence, it formulates an additional 'direct' (rather than alternative vicarious) liability, when section 1 or section 6 of the bribery offence is activated on behalf of a corporation.⁶⁸ The risk-based processes and procedures must be viewed as an integral and vigorous part of the daily business of the corporation, and not merely a corporate policy that 'gathers dust.'⁶⁹ It is submitted that the straightforward part is writing a set of procedures. The demanding aspect however, will be for businesses to implement such procedures and make them a reality.

Moreover, the jurisdiction for this offence is very wide as it has no territorial limits.⁷⁰ If the company is incorporated in the UK, or that the organisation carries out its business or part of its business in the UK, courts will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.⁷¹

5. Enforcement

Upon conviction for offences under sections 1, 2 or 6 of the UKBA, offenders face up to ten years imprisonment and/or an unlimited fine⁷² and if found guilty for an offence under section 7, the maximum penalty is an unlimited fine.⁷³

In November 2011, the UK saw its first conviction for offences contravening the UKBA. Munir Patel,⁷⁴ a court clerk, was found guilty of taking bribes (contrary to the UKBA 2010, section 2) to alter driving offence records. Mr Patel was sentenced to six years imprisonment,⁷⁵ which was later reduced to four on appeal.⁷⁶ The second conviction involved a Mr. Mawia Mushtaq attempting to bribe a mini cab licensing officer (section 1 offence). He was sentenced to two months imprisonment, suspended for twelve months, with a two month curfew.⁷⁷ A third prosecution saw Bath University student Yang Li convicted of attempting to bribe his tutor with

⁶⁸ Harrison & Ryder (n 9) 140.

⁶⁹ Ian Trumper & Robert Barrington 'Great Expectations: the UK Bribery Act 2010' (*Money Laundering Bulletin*, 1 October 2010)

<www.moneylaunderingbulletin.com/risksandcontrols/briberyandcorruption/great-expectations-the-uk-bribery-act-2010-1.htm> accessed 7 October 2014.

⁷⁰ UKBA 2010, s12(5) 'An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere'

⁷¹ Director of the SFO and Director of Public Prosecutions, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (30 March 2011)

<www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf> accessed 7 October 2014.

⁷² Bribery Act 2010, s11, for offences tried on indictment.

⁷³ *ibid*, s7(3).

⁷⁴ *R v Patel (Munir Yakub)* [2012] EWCA Crim 1243.

⁷⁵ Three years for a single UKBA 2010, s2 offence and a further three for misconduct in public office.

⁷⁶ Neil McInnes, 'Never judge a book by its cover: Why the first 'Bribery Act' case isn't' (*thebriberyact.com*, 22 November 2011) <<http://thebriberyact.com/2011/11/22/never-judge-a-book-by-its-cover-why-the-first-bribery-act-case-isnt/>> accessed 7 October 2014.

⁷⁷ Unreported, but see Richard Hooton, 'Council uses new law to snare taxi licence cheat' (*Oldham Evening Chronicle*, 7 December 2012) <www.oldham-chronicle.co.uk/news-features/8/news/75962/council-uses-new-law-to-snare-taxi-licence-cheat> accessed 7 October 2014

£5,000 to ensure passing his course work.⁷⁸ He was sentenced to twelve months' imprisonment for his crime.⁷⁹ Evidently from these three initial cases, the attitude being adopted towards the new bribery offences is very strict, meaning that following a successful prosecution, a custodial sentence appears inevitable.

In relation to corporate offences, the SFO announced it has charged four individuals connected with Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd under the UKBA.⁸⁰ This case relates to the first corporate charge under the UKBA 2010, and will be very interesting for UK businesses and practitioners, in that they will finally be able to gauge its practical effects. The case will require the Court to consider the more controversial elements of the legislation, which should result in greater clarity. The SFO has come under significant criticism in the media for its perceived failure to achieve more convictions under the UKBA.⁸¹ However critics fail to realise the inherent difficulties in investigating bribery and corruption, where complex documentary evidence can run into thousands of pages and inflict monumental resource costs. When considering the Agroenergy prosecution, the SFO investigation commenced in November 2011 and charges were not brought until August 2013. It can be argued that investigations under the new Act are only now beginning to lead to prosecutions; emphasising the complexity and volume of evidence required to secure a conviction.

Moreover, as part of the SFO's strategy to fight bribery, they have urged businesses to self-report cases to them.⁸² Self-reporting is accompanied with an incentive, including a reduction in fines and confiscation, and a potential of a negotiated civil settlement under the Proceeds of Crime Act 2002 (POCA).⁸³ However, there has recently been a change of initiative on the part of the SFO as regards encouraging businesses to self-report. SFO Director, David Green, has stated there is no presumption that a criminal prosecution will not follow.⁸⁴

⁷⁸ Additionally, as Li was leaving the Tutor's office a pistol fell from his jacket pocket which added six months to his sentence (18 month sentence in total).

⁷⁹ BBC News Somerset, 'University of Bath student jailed over tutor bribe bid' (*BBC News Somerset*, 23 April 2013) <www.bbc.co.uk/news/uk-england-somerset-22269573> accessed 7 October 2014.

⁸⁰ Serious Fraud Office (SFO) 'Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd' (Case Update, 29 July 2014) <<http://www.sfo.gov.uk/our-work/our-cases/case-progress/sustainable-agroenergy-plc-and-sustainable-wealth-investments-uk-ltd.aspx>> accessed 7 October 2014. Their trial was scheduled to commence 6 October 2014 and all four suspects are on bail

⁸¹ William Boddy, 'Bribery Act 2010: The first three convictions' (*McGuire Woods' London Government, Regulatory and Criminal Investigations Group, Fraud Board*, 14 May 2013)

<www.thefraudboard.com/enforcement/bribery-act-2010-the-first-three-convictions/> <www.briberylibrary.com/enforcement/bribery-act-2010-the-first-three-convictions/>

accessed 7 October 2014. See also Alistair Osborne, 'Fresh reversal for SFO as £40m bribery trial collapses' *The Telegraph* (10 December 2013) <www.telegraph.co.uk/finance/financial-crime/10509552/Fresh-reversal-for-SFO-as-40m-bribery-trial-collapses.html> accessed 7 October 2014.

⁸² Serious Fraud Office (SFO) 'Corporate Self Reporting' (9 October 2012) <www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx> accessed 7 October 2014.

⁸³ *ibid.*

⁸⁴ Morgan Lewis LLP, 'UK SFO director provides guidance on the Bribery Act' (*Litigation Lawflash*, 6 November 2013)

<www.morganlewis.co.uk/pubs/LIT_LF_UKDirectorProvidesGuidanceonBriberyAct_06nov13.pdf> accessed 7 October 2014.

However, the newly created Deferred Prosecution Agreement (DPA) offers prosecutors and courts an alternative to the current choice between civil recovery orders and no criminal action.⁸⁵ However, it must be noted that DPA's are only available in England and Wales under section 45 and Schedule 17 of the Crime and Courts Act 2013. Currently, there are no plans to bring DPAs to Scotland. A DPA is a voluntary agreement between a prosecutor and a company⁸⁶ whereby, in return for complying with a number of strict conditions,⁸⁷ the prosecutor will suspend a prosecution.⁸⁸ A DPA may be appropriate where the public interest is not best served through a prosecution. Importantly, DPAs will be allowed for conduct pre-dating the implementation of the UKBA.⁸⁹ As explained by the MoJ, the objective of the DPA is that it will allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity, or length of a criminal trial.⁹⁰ It can be argued that the following the introduction of DPA's, there will be an increase in the number of cases investigated by the SFO. Enforcement of the UKBA 2010 becomes more practical, as there is an agreement between prosecutor and the relevant commercial organisation, a situation which is cheaper than that of going to trial. This is a critical and beneficial factor for the SFO, whose capability to investigate economic crime has in the past been compromised by lack of resources.

6. Review or Clearer Guidance?

A. Review

It has barely been three years since the UKBA 2010 came into force; however the current UK Government have signalled a possible extension to the controversial section 7 offence to include a failure to prevent acts of fraud by employees.⁹¹ This encompasses a reduction of the 'controlling mind test' which could prove a useful solution to the SFO to doctor their damaged reputation after the collapse of several

⁸⁵Lim (n 48) 9.

⁸⁶ DPAs only apply to organisations in cases of economic crime and not to individuals and became available on 24 February 2014.

⁸⁷ Such as paying financial penalties, paying compensation to victims of the alleged offence, donating money to charities or third parties, disgorging any profits made from the offence, implementing a compliance programme or making changes to an existing compliance programme and co-operating with future prosecutions of individuals; SFO and CPS, *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* (2013)

<www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf> accessed 7 October 2014.

⁸⁸ *ibid.*

⁸⁹ Crime and Courts Act 2013, Schedule 17 (30).

⁹⁰ Ministry of Justice, *Deferred Prosecution Agreements, Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (Cm 8463, 2012) 4

⁹¹ Serious Fraud Office (SFO) 'Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference 24 October 2013' <www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference.aspx> accessed 7 October 2014.

cases. Therefore it can be said that the SFO are already undertaking a degree of review of the Act.

Various corporate crime advisers have taken a rather unenthusiastic stance towards a review of the UKBA.⁹² Barry Vitou⁹³ has stated that, given there have been no corporate convictions under the Act so far, it seems fairly early to consider a review of it.⁹⁴ Vitou suggests that some advisers have engaged in 'scaremongering' to create work and have consequently exaggerated the issue.⁹⁵ He also mentions the confusion surrounding corporate hospitality and explains that UK companies who complain that clients cannot be taken out for lunch are 'plain silly'.⁹⁶ His views are plausible but it is suggested that he fails to consider the more complicated issues surrounding hospitality, such as where the distinction should be made between proportionate and illegitimate hospitality. Roger Best⁹⁷ is equally unimpressed with the notion of review of the law, suggesting that it is peculiar for the Government to say they will set the highest standards and impose them internationally and then only two years later, begin to re-examine them before obtaining a conviction.⁹⁸

The recent embarrassment surrounding the collapse of the £40m bribery trial against Victor Dahdaleh⁹⁹ received intense criticism from the media, and a judge even accused the SFO of 'mismanagement'.¹⁰⁰ It can be argued that the reason David Green is suggesting an extension of the corporate offence is because both he and the Government are aware of the difficulty of proving criminal corporate liability via the 'controlling mind' test. With the current government and SFO operating in an environment of austerity, pressure is mounting for the securing of a first corporate conviction under the Act. Consequently, amendments to make it easier to bring successful fraud prosecutions are more likely to be considered. Green notes that the comparable American legislation, the Foreign Corrupt Practices Act (FCPA) 1977, was similarly slow in gaining effect; prosecutions based on it did not hit their stride until well into this century.¹⁰¹ However the UK public will ultimately be disappointed with the UKBA if it takes thirty years before achieving a corporate conviction. It is submitted that the possible extension of the corporate offence will come as a relief to the overstretched and under resourced SFO and such a measure has the potential to bring more successful corporate prosecutions. It is also however,

⁹² Francesca Fanshawe, 'Smoke, mirrors and grease – government signal review of controversial Bribery Act' (*Legal Business*, 30 May 2013) <www.legalbusiness.co.uk/index.php/lb-blog-view/859-smoke-mirrors-and-grease-payments-government-signals-review-of-controversial-bribery-act> accessed 7 October 2014.

⁹³ Partner, Corporate Crime & Internal Investigations, Pinsent Masons.

⁹⁴ Out-law.com, 'Review into Bribery Act would be 'premature', says expert' (*Out-Law.com*, 29 May 2013) <www.out-law.com/en/articles/2013/may/review-into-bribery-act-would-be-premature-says-expert/> accessed 7 October 2014.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Partner, Regulatory enforcement, Clifford Chance.

⁹⁸ Fanshawe, (n 92).

⁹⁹ Alistair Osborne (n81).

¹⁰⁰ Alistair Osborne, 'Judge accuses SFO of "mismanaging" Victor Dahdaleh case,' *The Telegraph* (21 March 2014) <www.telegraph.co.uk/finance/financial-crime/10715623/Judge-accuses-SFO-of-mismanaging-Victor-Dahdaleh-case.html> accessed 7 October 2014.

¹⁰¹ David Green (n 45).

submitted that there is a need among the UK business lobby for clearer UKBA guidance.

B. Clearer Guidance

As previously mentioned, several significant uncertainties still exist within the business community as to aspects of the UKBA 2010. These uncertainties are of significant concern to not only company members, but also to investors. The government has placed particular attention on easing the compliance burden on small and medium sized enterprise (SMEs). Roger Best¹⁰² argues that for typical SMEs, compliance will not be too arduous, as there are plenty of sources of free guidance in circulation.¹⁰³ Whilst it is possible to agree with his assertion, it is suggested that such guidance falls short of being adequate as it fails to clarify the specific legal issues previously highlighted herein. At the time of writing, there have been no indications from government officials regarding the possibility of revisiting any of the current anti-bribery guidance. The residual uncertainties will therefore fall to be clarified by judges in the courtroom.

8. Conclusion

It has been shown that the radical overhaul of the law the UKBA 2010 represents was undoubtedly a result of fierce international criticism and UK Government embarrassment regarding the BAE scandal. Despite the Act's implementation, and even after the Government's issue of various pieces of guidance, significant concerns still exist within the business community regarding the lack of legal certainty surrounding the Act's interpretation of corporate hospitality, facilitation payments, the 'adequate procedures' defence, and the meaning of 'associated person' and 'relevant commercial organisation.' It has been asserted that, as regards enforcement of the new Act, UK courts are exhibiting a 'zero-tolerance' attitude, with all prosecutions to date experiencing custodial sentences. The new DPA's have been examined, and it thought that these should increase the number of cases investigated by the SFO and will provide a significantly more resource-efficient prosecution tool as compared to arguing a case at trial. Finally, review, or potential reforms to the Act were briefly examined, with the idea that an extension to section 7 could potentially increase the number of corporate prosecutions and repair the SFO's somewhat battered reputation. On the other hand, commentators such as Vitou and Best see review of the UKBA as premature. It was additionally submitted that more attention should be focused upon improving the

¹⁰² Fanshawe (n92).

¹⁰³ See for example Ministry of Justice (n 1); Serious Fraud Office SFO (n 71); Sentencing Council, 'Fraud, Bribery and Money Laundering Offences: Definitive Guidelines (2014)' <http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf> accessed 7 October 2014 and Transparency International UK, 'Adequate Procedures Guidance,' <www.transparency.org.uk/our-work/bribery-act/adequate-procedures> accessed 7 October 2014.

guidance available to reduce the financial and compliance burden upon SMEs and to increase legal certainty.

The UKBA 2010 does indeed have enormous potential, but its practical effects have yet to be exemplified. It is plainly apparent that the UK is taking rigorous action against corruption by implementing a zero-tolerance approach on white-collar crime, however Parliament's aspiration of ending bribery in the UK will take time. Without greater global harmonisation of anti-bribery law and enforcement, ambiguities will remain, as 'one man's bribe is another man's gift'.¹⁰⁴ In response to the uncertainties posed throughout this paper, companies have no real choice but to enforce a stringent anti-corruption regime in order to minimise their risk of conviction.

¹⁰⁴ Dan Hyde, 'In Practice: Practice Points: "Grease" is the word' (17 June 2013) 22 Law Society Gazette.

Case Comment: *Doogan and Wood v. NHS Greater Glasgow & Clyde Health Board* [2013] CSIH 36.

SEONAIID COCHRANE*

It is widely accepted that many people possess strong feelings relating to the subject of abortion and its legitimacy and it is without question that people are entitled to hold these views. However, the question arises as to what extent medical professionals should be allowed to manifest beliefs regarding abortion in the performance of their professional duties. In the UK the law provides, through the Abortion Act 1967, section 4, that a medical professional is under no duty to 'participate in any treatment...to which he has a conscientious objection.'¹ This clause goes beyond objection on religious grounds to include ethical as well as moral reasons for non-participation in abortion-related medical procedures. Despite this legal provision however, it is not entirely correct to claim that this freedom of conscience and objection is absolute. It is limited by the qualification contained in section 4(2) of the Act and it does not extend to emergency situations. This ensures that a woman's health is still ultimately protected regardless of practitioners' beliefs and conscience.² The recent decision *Doogan and Wood v. NHS Greater Glasgow & Clyde Health Board*³ explored this difficult area of law.

This case involved two Roman Catholic midwives practising in Glasgow, and who, after closures of relevant facilities elsewhere in the city, became involved in the delegation, supervision, and support of staff providing abortions and related services. They objected to performing these duties and wished no part in the terminations on grounds of conscience.⁴ The respondent Health Board, after considering the reclaimers' complaint via their formal internal grievance procedure, rejected it, taking the view that, simply delegating to and supporting staff who were providing care did not constitute providing direct one to one care and formed part of their responsibilities as supervisors in the department.⁵ An appeal was made on the

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¹ Abortion Act 1967, s 4. The burden of proof for such conscientious objection rests on the claimant.

² However, this is not inconsistent with person's objections to abortion as it draws on the principle of 'double effect'. Double effect is when an action has two effects, one good and an unintentional bad effect. The action will still be morally acceptable if the action which is intended is the good effect, it is not possible to achieve the good effect without the bad effect and the good effect is greater or equal to the bad effect. Anne O'Rourke, Lachlan De Crespigny, Amanda Pyman, 'Abortion and Conscientious Objection: The New Battle Ground', 2012 38(3) Monash Law Review, 87 at 99.

³ *Doogan and Wood v. NHS Greater Glasgow & Clyde Health Board* [2013] CSIH 36.

⁴ According to the Roman Catholic Church deliberately causing an abortion is a grave moral wrong. This is based on natural law and the word of God. The Church believes that human life begins at the moment of conception, when the woman's egg is fertilised by a male sperm. As such, for Roman Catholics, any involvement in the process is morally unacceptable.

⁵ *Doogan* 2013 (n3), [6]

midwives' behalf to the Outer House of the Court of Session. Therein, Lady Smith held that their role was a 'supervisory and administrative one' and they had not been asked to play any direct role in the terminations.⁶ None of their actions brought about the end of a pregnancy and as a result they had no right to conscientiously object.⁷ As in the earlier decision in *Janaway*,⁸ Lady Smith was not persuaded that the term 'participate' should include all those in the chain of causation and was opposed to a 'horse shoe nail' approach.⁹

Following the Outer House decision, the case was further appealed to the Inner House, wherein an entirely different view was adopted. It was held that, even in their role as supervisors, the reclaimers were considered part of the wider team that terminated the pregnancy.¹⁰ As a result of their validly held religious views, it would not absolve them of moral responsibility to ask another medical professional to carry out abortion-related procedures. The Inner House ultimately extended the definition of 'participate,' to include not only those involved in the actual medical or surgical termination, but to 'the whole process of treatment given for that purpose.'¹¹ The court held that the only circumstances where an objection to participate in treatment will not prevail is when the termination was necessary to save the pregnant woman's life or prevent grave permanent injury.¹²

The case of *Doogan* has created an unsatisfactory and 'worrying precedent'¹³ as it may potentially frustrate or deny access to a lawful termination. The decision has significantly extended the ambit of conscientious objection in Scotland to include not only medical professionals that are *actually* physically involved in the procedure, but also those whose role is ancillary, or whilst not being 'hands on,' are merely supervisory or supportive.¹⁴ Ultimately, a broader definition than the actual words provide in their ordinary meaning was adopted in *Doogan*. This raises the question of the nature and boundaries of the Abortion Act 1967, section 4 right and to whom it should extend. It is highly questionable whether those involved in the pre-operative or post-operative care of a patient, or administrative personnel should be included. A question arises as to whether 'participation' in this context now extends to those who clean the surgical instruments or serve patients their meals, or, more critically, to those who indirectly, unintentionally or incidentally contribute to a termination.

⁶ *Doogan v Greater Glasgow and Clyde Health Board* [2012] CSOH 32, [77] *per* Lady Smith.

⁷ *ibid* [81].

⁸ *Janaway v Salford Area Health Authority* [1989] A.C. 537, 570.

⁹ 'For the want of a nail, the shoe was lost, for the want of a shoe the horse was lost, for the want of a horse, the rider was lost, for the want of a rider, the message was lost, for the want of the message, the battle was lost, for the want of the battle, the kingdom was lost, and all for the want of a horse shoe nail' (proverb: anon.) *Doogan* 2012 (n6) [79]

¹⁰ *Doogan* 2013 (n3) [34].

¹¹ *Doogan* 2013 (n3) [37].

¹² *Doogan* 2013 (n3) [38].

¹³ Louise Finer, 'Conscientious objection in Scotland: a worrying precedent', National Secular Society 19 Jun 2013.

¹⁴ In *Doogan* 2013 (n3), allowing the nurses, in their supervisory role, to constitute part of the team responsible for the treatment ultimately restricts the ability of other medical personnel to provide abortions. This makes the definition very wide but even more significantly it suggests that an objection from one member of the team could trump the decisions of other members and the patient.

This lack of legal certainty as regards to whom the Abortion Act's provisions apply can potentially frustrate the access of those affected to treatment. It is submitted that the Inner House decision was incorrect and that the interpretation provided by Lady Smith in the Outer House was more acceptable in practice and in line with the intention of Parliament. Even though in practice section 4 may not be unduly harmful as, at least in the wider UK, other medical professionals are generally available to provide care where conscientious objection occurs, it is argued that the right currently available under section 4 should be restricted. It is not known how many medical professionals in the UK have utilised the section 4 provisions. However it seems that the numbers are continuously increasing.¹⁵ Doctors freely enter their chosen field and 'as gatekeepers to medicine...have an obligation to choose specialties that are not moral minefields for them.'¹⁶ Doctors enjoy a 'legal monopoly over the provision of medical services'¹⁷ and the effect of conscientious objection can be to frustrate access to abortions or other services and place shame on those women who chose to terminate their pregnancy. Moral, ethical and conscience ideas belong to each individual person; patients should not have to shoulder the beliefs of others. As a result of the individual possession of human rights, and the conflicting opinions that surround abortion, the right of conscientious objection is undoubtedly here to stay. However the expansion of the right seen in this case is, in the opinion of this commentator, unwarranted. Patients' interests should be put first. *Doogan* 2013 has upset the balance and section 4 should only be available to those directly involved in termination procedures rather than extending to everyone who has a supervisory or indirect role.

As at October 2014, *Doogan* has been appealed to the UK Supreme Court and a decision is imminent. It is hoped that the Supreme Court will revert to the decision of Lady Smith in the Outer House. If it affirms the decision of the Inner House then this could lead to an unacceptable situation in the future where medical professionals refuse to provide legal terminations and appropriate medical care to patients who have made the responsible decision to have an abortion.

¹⁵ The attitude of medical students was discussed by R Gleeson *et al*, 'Medical students' attitudes towards abortion: a UK study' (2008) 34 *Journal of Medical Ethics* 783 and Sophie LM Strickland, 'Conscientious objection in medical students: a questionnaire survey', (2012) 38 *Journal of Medical Ethics* 22.

¹⁶ Julie D Cantor, 'Contentious Objection Gone Awry – restoring Selfless Professionalism in Medicine', (2009) 360(15) *The New England Journal of Medicine* 397 at 399. This idea was even considered as early as *R v Bourne* (1938) 3 All E. R. 615. Here it was outlined at p618 that 'a person who holds such an opinion ought not to be a doctor practising in that branch of medicine'.

¹⁷ B M Dickens, 'Unethical Protection of Conscience: Defending the Powerful against the Weak', 2009 11(9) *American Medical Association Journal of Ethics Virtual Mentor* 725.

Aberdeen Law Project's Annual Lecture – Wed 19 February 2014

Apprentice to Supreme Court Justice – reflections on the art of lawyering

Lord Hope of Craighead

It is a very real pleasure for me to have been invited back to Aberdeen for this occasion, to join you in celebrating what the Aberdeen Project has been doing during the past year and to have the privilege of delivering this inaugural annual lecture. When I was a student at Edinburgh University long ago, lectures – for such this is – were usually occasions we would most wish to avoid. There was no power point in those days, and there were no hand-outs. The equipment for that did not exist. We went to these lectures because we had to. We had to write things down, as much of what we were told could not be found in any current legal textbook. There was no access to material on the internet, as it had not yet been invented. And we had to sign our names on attendance sheets to vouch for our attendance. It was rumoured that failure to do so could have very unwelcome consequences. We were not willing to risk finding out what they were. There were also fortnightly class exams, when we had to reproduce what the lecturer had been telling us. I do hope therefore that on this occasion you have come here as volunteers and not as conscripts, and that this series of lectures – with or without power point, which I am unable to offer you – will prove to be an interesting and enjoyable part of the Project's annual calendar.

It has been suggested that I might tell you something about my experience of life in the law at the various stages of my career, from traineeship to becoming a Justice of the UK Supreme Court. To give some structure to what could be quite a long story, I was asked to concentrate on what I learned along the way – what it takes to succeed, what makes a good lawyer and what one should always try to do. It is, of course, true that the value of any attempt I may make to answer those questions is best seen against the background of my own career. I must, however, warn you that my recollections will concentrate on advocacy, as that is the branch of the profession that I joined when I got my degree. Also, the way my career has worked out was quite unplanned by me. And the course that it took is, in the conditions of today, quite incapable of being repeated. All sorts of obstacles to progress that exist today to improve standards and public confidence in what we do were not there for me. You can look at it like a series of level crossings across a railway. I managed to get across the level crossing each time just before the gates closed or the barriers came down behind me. It will be for you to judge whether, given my background, having had that advantage time and time again and been so very fortunate, I really am in the best position to advise you on the way to make the best of your own careers.

That journey began, of course, with my course of study in the Faculty of Law at Edinburgh University which I was hinting at a moment ago. The title of "Law School" had not yet been invented, nor had the modern fashion of amalgamating law into other disciplines to form an enlarged faculty whose Dean was not necessarily a lawyer. Nor, strange to relate, had the idea of treating law as an honours degree subject. Steps were in progress for that to happen as I arrived at the

university but – to follow the level crossing analogy – I got through the system before they took effect. So mine was a three year course for the ordinary degree. As I have already indicated, much of it was taken up with learning the details by rote on which we were examined frequently to check that we were paying attention. There was almost no attempt at intellectual analysis. European law and human rights law were not taught at all, nor were things like health and safety, employment law or consumer affairs – ideas that, in their current form at least, had not yet been invented. We were still not part of the EEC, as it then was, when I took my degree in 1965. We were decades away from the incorporation into our law of the Convention rights by the Scotland Act and the Human Rights Act, not to mention the Scotland Act 1998. We had few books that we could turn to except Gloag and Henderson. Much of the teaching of Scots law at Edinburgh consisted of reading out chapters from that book, word for word. There was no diploma system, so the practical aspects of procedure and the laws of evidence and conveyancing had to be taught as part of the law degree – mostly by part-time lecturers who were in practice as advocates or solicitors.

You may well think that not having had the benefit of a full honours law degree was a disadvantage. That, however, was not how we saw it at the time. By the end of our three years we did know quite a lot of law and, more important perhaps, we knew where to look for it if we needed to remind ourselves of the detail. Furthermore, neither branch of the profession expected us to have an honours degree. A pass was all we needed. And for those of us who had already done an arts degree before starting on law as I had done, and who had had to do two years National Service too as I had done as well, the fact we had to do only three years to get an acceptable law degree was a real help to getting into practice to earn some much needed money as soon as possible. I received my law degree on a Wednesday in late July 1965, and I was admitted to the Faculty of Advocates on the Friday of the same week. I had been able to do my one year's unpaid devilling while in the third year of my law degree as the lectures in that year – on evidence and procedure and conveyancing – were at 9 am and 5 pm. I had been able to work as a trainee (also unpaid) in a solicitor's office during the holidays, there being no requirement in those days for a fixed time to be spent doing that before devilling. Traineeships of that kind were designed for those who like me had already decided to become advocates. The firms to which you went had to have a Court of Session practice if they were to be of use to you. But there were many of them, and places were not hard to find. Steps that under today's rules would take several years were completed, in my case, within a matter of months.

Of course, the result was that I was hardly in a fit state to practice when I was admitted, put my wig on and started appearing in court. You were expected to learn on the job, and by watching others perform the kind of work that you hoped might eventually come your way. It was a slow process. As you were paid only for the work you did and usually only long after you had done it, it was not easy to generate a stable source of income. But gradually bits and pieces started to come in. Divorce actions still had to go to the Court of Session in those days, and as evidence had to be led they always had to be dealt with orally. Much of that business was concentrated in a few hands, and there were only a few crumbs that went to the

beginner. But at least there was a start here, and it got you into court examining witnesses before a judge – not all of whom were easy to appear before.

If you were very lucky, and the firm which you had gone to as a trainee was kind to you, you were instructed to appear as junior to a QC in a reparation case. There was still a lot of heavy industry in Scotland when I entered practice – in the shipyards and coal mines, especially. Safety standards were not what they are today, so I am afraid that there were a lot of accidents and many of these cases went to court. Some went to civil jury trial, and in some my earliest cases I found myself on my feet opening the pursuer's case by making an address to the jury. This was because, following a practice which we adopted from England, each side was expected to make an opening statement before the evidence was led. This was a risky business, as you were tied to your pleadings and you had to assume that the pursuer would say the same thing in the witness box as he – it was almost always he in these industrial accident cases – had said when being precognosced. Defence counsel were always quick to pounce on any discrepancy. But, provided that you were not too precise in your description of what had happened, you usually got away with it. So long as any discrepancies between the pleadings and the evidence were not too fundamental, juries were usually quite sympathetic to the pursuer. For that reason, and because jury awards of damages tended to be more generous, much of the defence effort was directed to avoiding cases going to jury trial at all. This was possible if the defence could show what was called "special cause" for denying the pursuer his right to have his case heard by a jury. This was done by arguing the point before a judge at a preliminary hearing on the procedure roll, at which the pursuer's pleadings were subjected to minute scrutiny in order to expose an inconsistency or a point of doubtful relevancy. As the junior you were expected to speak first for your side in these debates, in reply to all the criticisms of your pleadings that had just been made by your opponent, of which you had had no notice other than the fact that there was a plea to the relevancy in the defences. At first this was a depressing business, as the flaws in your pleadings were exposed one by one. But it was in fact an excellent way of learning how to do your job. You soon grasped how pleadings should be framed to avoid the obvious pitfalls, and you learned quickly how to get your points across to a judge.

Pausing there just for a moment, it was now becoming clear to me that understanding and presenting the facts of the case were just as important as understanding the law. Indeed, as the law in divorce and reparation cases was rarely in doubt, the decision in each case was likely to turn almost entirely on the facts. You had to get to the bottom of the facts before you began to set out your written pleadings, and you had to keep them under review at each stage as the case was being prepared for court. Then you had to get them out in evidence in the right way by careful and accurate questioning. With juries the order of presentation of your evidence was important too – setting the scene first through the words of a reliable witness was always best, if you could do that. Careful preparation too was essential. You had to have things worked out in your head as well as on paper. Searching for details among your papers in a moment of crisis was unlikely to give you the answer quickly enough. You had to be quick on your feet – confident that you knew the facts better than the judge, who was new to the case, and hopefully

better than your opponent too. As the junior in a case that went to proof or jury trial you had the opportunity of watching the seniors as they performed the task of oral advocacy – many of whom were masters in the art. You were learning on the job all the time. And you had to keep yourself up to date on matters of law as well as of procedure. So you kept a careful watch for measures of law reform that in any healthy system go on all the time. Sometimes there was an opportunity to write an article or to help with the editing of a textbook – and excellent way of keeping oneself up to date, which was never to be turned down.

It was several months before I found myself in a criminal case. My first appearance was in the then Burgh Court in Edinburgh. I had been instructed to appear for a youth who had been caught red-handed attempting, with others, to steal lead from a roof. They had all pled guilty, including my client. My task was to say something on his behalf in mitigation of sentence. I said that he had been misled by the others, who were older and bigger than he was. “Stand up”, ordered the magistrate. It was obvious, as soon as they all stood up, that my client was the tallest of them all. That was bad preparation on my part and it was a stupid mistake not to have checked my facts beforehand. Things were not much better when I had another plea in mitigation in the sheriff court in Haddington. My client was a rather grand lady who had been caught while driving well over the speed limit – not for the first time, unfortunately. The issue was whether she should now be disqualified and, if so for how long. There was almost nothing I could say. The sheriff had, of course, heard it all before. I said that she was in hurry to get to an engagement where she was to perform some charitable work to do with the Girl Guides, and that, as she lived in the country and her husband was unable to drive – he too had been caught speeding, as it happened – there would be hardship. It was no use, of course. There really was nothing that I could have said to avoid the inevitable penalty of six months disqualification. But she wanted her day in court.

The next appearance in a criminal court was altogether a more serious affair. I was instructed to appear in the High Court of Justiciary in Glasgow for the second accused in a case of assault to severe injury. This was in an era before legal aid was generally available, when members of the bar were expected to appear on the poor’s roll for nothing. Representation can be done pro bono nowadays. But that is a voluntary system. The poor’s roll was subject to the cab rank rule – as an advocate, if you were free, you had to accept instructions. In this case there had been an almost complete lack of preparation, by the solicitor as well as myself. I had virtually no information as to my client’s defence, if indeed he had any defence at all. I was not unduly worried about this as I travelled through on the train to Glasgow, as I expected the lead in cross-examining the Crown’s witnesses to be taken by counsel for the first accused, who was more senior and more experienced than I was. But this comforting aspect of the case vanished as soon as we reached Glasgow, as we were told that the first accused had decided to plead guilty. The case was to proceed against the second accused on his own – and, of course, I was to be on my own too. I had never cross-examined anyone before, and had never addressed a jury at the end of a criminal trial either. I found it difficult to think of anything useful to say at all. The case was soon over, with a unanimous verdict of guilty. I did not feel that I had let my client down, as the evidence against him was

really overwhelming. But I had certainly let myself down. I had taken a chance, by assuming that my work would be done for me by the first accused's counsel. That was no excuse for not have prepared my own case as thoroughly as possible before setting off for Glasgow. You can never predict how things will turn out when a case goes to court. You must always be one step ahead and be prepared for the unexpected.

Gradually as time went on the standard of work that I was asked to do improved, and I began to get on top of the game. One thing I had to fight quite hard against was nerves – stage-fright, I suppose it was. It was all very well sitting at home or in the Advocate's Library preparing a summons or a set of defences or working up an opinion. But every so often you had to go into court. As a junior this was most often on what was called the motion roll in the Outer House or on the single bills in the Inner House at the start of the day's business. These were often about matters of procedure or, in family cases, about money or contact with the children before or after a divorce. You had to queue up at the door of the court to wait your turn, and then move to address the judge while those behind in the queue you looked on. I did not find this easy to do. I knew what to say, but far too often I found myself really struggling to say it as my nerves got the better of me. The simpler the point was – the less I really had to concentrate on what I was saying – the more likely this was. I used to try to combat the problem by digging the end of a pencil into my thumb – in the hope that the discomfort would act as a diversion. Not infrequently I would puncture the skin and get spots of blood on my papers, which was rather embarrassing. On the other hand the more complex the point – and the more I had to say – the less this affliction troubled me. I used to marvel at my ability to put my nerves behind when I had something really important to do, like opening an appeal in the Inner House.

I did not know whether I was the only one of my contemporaries to suffer in this way. To me it seemed that they were always supremely confident, in a way I could never hope to achieve. Gradually, however, the problem began to go away. The more senior I became the less often I had to appear on the motion roll, and I hardly ever had to do this after I had taken silk. I still found it difficult to speak in public – at meetings of the Faculty of Advocates, for example, where one was expected from time to time to present reports or make motions of one kind or another from the floor. But then two things happened to me which had the effect of driving the problem away by the sheer force of necessity. I suppose that I might have given up before I reached that stage and let my nerves get the better of me. I hope that the fact that I did not do so may offer some encouragement to those of you who may suffer – or may expect to suffer – in the same way. “Keep calm and carry on” is easy to say. But in the end it may it may well the best thing to do. It may just work for you too.

The first of the two things that helped me get over this problem was an invitation from the Lord Advocate that I should accept appointment an advocate depute. This was in 1978, just after I had taken silk. In those days the Lord Advocate was responsible for a whole range of appointments, including appointments to the bench. It was never wise to turn down his invitation. To do so might prejudice your whole career. I had received an invitation from him a few

months earlier to act as a prosecutor in the Maze Prison during the troubles in Northern Ireland. This was to involve being transported to and from the prison by helicopter to avoid being seen, and to conduct a prosecution in which the entire proceedings were to be conducted anonymously before a judge sitting without a jury: "Diplock Courts", they were called, which had been established in 1973 to deal with crimes committed in Northern Ireland which were related to terrorism. It was acknowledged to be a rather dangerous business because of the risk of reprisals if you could be traced, but – as the invitation came from the Lord Advocate – I had to say yes. I went home that evening to tell my wife, who was as alarmed I was at what I had agreed to do. But when we switched on the news on television that evening we saw that the Maze Prison was in flames. So the whole thing was off. I never went to the Maze Prison after all. I could, however, reflect on the fact that I had at least avoided blotting my copy book by saying yes. Had I said no, the much more important offer to become an advocate depute might not have come my way. The lesson I learned from this part of my career was never to turn down an opportunity. You can never tell what it may lead to, of course. But it is better to be positive rather than negative in these matters as you develop your career.

In 1978 the Crown Office was staffed by a team of 12 ADs, all of whom were members of the Faculty of Advocates. Some were juniors, but four of them were members of the senior Bar as I now was. The work was shared equally by all, but the seniors tended to appear more often in the Appeal Court. This was to prove especially helpful to me at a later stage in my career. It was supposed to be a part time job, but it was quite difficult to sustain a civil practice at the same time. Criminal work had to be given priority and the timing of work devoted to criminal trials is inherently certain. So predicting where you would be on a given date to appear in a civil case was rather difficult. Fortunately I had by now developed a substantial opinion practice, advising on matters of law which were not tied to proceedings in court – or, if they were, to hearings of a kind that could be fitted in to my life as an AD without too much difficulty. This was helpful, as it enabled me to keep in touch with developments across a wide range of issues. It also meant that when, after four years in the Crown Office, I had to return to civil practice full time I did actually have a practice that I could return to.

Working as an AD was an entirely new experience for me. I had seldom been inside a criminal court since my rather unsatisfactory experiences at the start of my career. The law itself was not too difficult. We had been well taught when I did my degree course at Edinburgh, and most of the work in the High Court was concentrated on the most serious of all crimes – murder, rape and assault to severe injury – where the law really is quite simple. What mattered were the facts. Controlled drugs of the kind that were later to lead to so many trials, the law about which is a bit more complicated, were only just starting to arrive here during my time. What was new to me was the art of presenting a case to a jury, and of course all the procedural aspects of a criminal trial. Here once again I had to learn on the job – picking it up as I went along. No rehearsals in matters of this kind are really possible. You learn by watching others and from your own mistakes. I was fortunate in having the guidance of one of my own devils – as pupils at the Bar are called, who came with me for my first very arduous four-week circuit in Glasgow.

With his help I was able at least to sit in the right place and to avoid making too many obvious mistakes. The sheer pressure of the job meant that I learned quickly how to get the best of the material that was given to me.

The standard of preparation conducted by the procurator fiscal service for cases to be presented in the High Court was very high. So one was not short of information as to what had to be proved. The unknown quantity was how the witnesses would perform once they reached the witness box. I found that careful planning was the secret. You had to work out the order of appearance of the witnesses for best effect, and where the corroboration was to come from – and keep a check on this as the case went on. You had to work out how best to approach each witness as he or she gave evidence, especially if they were likely to be reluctant to say what they knew because of fear of reprisals from a rival gang or if they were vulnerable. The manner of your questioning of the Crown witnesses was important too – not too fast, always sensitive to the needs or fears of the witness. You had to be sensitive to the feelings of the jury as well, beside whom you stood as you were putting your questions. You had to maintain their interest and you had to be sure at each stage that they understood what was going on. Some of the evidence was very unpleasant, but it had to be led. It was best taken gently. Some of the questions in rape or other sexual assault cases were necessarily of the most intimate kind. They had to be put too, but with a careful setting of the scene and a step by step approach it was possible help the witness to face up to what had to be said. I was astonished to find myself conducting an intimate conversation in public on matters of this kind with someone I had never met before – as all the precognitions were taken by others. Maintaining eye contact throughout was an essential part of winning the witness's confidence.

Cross-examination of the witnesses for the defence was part of the job too. It was usually quite a simple exercise. A defence of alibi never, in my experience, stood up to a moment's examination, and it was quite usual for the accused to decline to give evidence. The art of cross-examination in cases of this kind was to be brisk, matter of fact and, above all, not too long. A prolonged, hectoring approach would be likely to risk losing the support of the jury, most of whom had probably made their minds up by the end of the Crown case. You had, of course, to challenge the witness on the main points where there was a disagreement. But it was usually enough to put the point so that the witness had a fair opportunity to respond to it. An expert witness might require a more concentrated approach, but it was surprising how rare it was for the defence to resort to the leading of evidence of that kind.

It was far better, if the layout of the court allowed for this, for one to stand beside the jury while questioning the witnesses. You had to leave the table where most of your papers were, and you were separated from your junior if you had one. But the advantages were greater than the disadvantages. Your view of the witness was the same as that of the jury. If the witness maintained eye contact with you, this ensured that the jury had almost as much eye contact with the witness as you did. You could also hear any sotto-voce reactions, as the jury formed views about the credibility or otherwise of the witnesses. If, as sometimes happened, a Crown witness was trying to cover up or to avoid giving incriminating evidence, mutterings

of scorn or disbelief could be a boost to your morale – or a warning, depending on how the case was going. Counsel of the defence no doubt felt that it was helpful to stand beside the jury too for the same reasons. Not all courts, of course, have a layout that allows for this practice to be adopted. It was never adopted in a civil case, but these cases are almost without exception heard by a judge, or sheriff, sitting alone. The best place in cases of that kind to be is in a position where you are facing the judge and can keep an eye on what he or she is doing or how he or she is reacting to what is going on.

The second thing that helped me to get over my nervousness of speaking in public was my election as Dean of the Faculty of Advocates. I had wondered where it was wise of me to stand for election, as I doubted my ability to do the job which was bound to involve a lot of public speaking. But I was persuaded to do so by various members of the Faculty and when the vote came I was successful, albeit by a very small margin. Somehow the mantle of responsibility that then fell on me overcame my self-consciousness. I was often nervous, of course, before I had to conduct a difficult meeting or to make a speech. Nervousness of that kind is usually a good thing, as it makes you take that much more care in preparing for the occasion. But I never had the same feelings of stage fright that I had when having to appear on the motion roll. Here was another example of the benefit of the lesson I mentioned earlier, of never turning down an opportunity. I might have given in to my doubts and fears and declined to stand for election, but I did not. And in my case the election as Dean meant that I was in the right place at the right time when, three years later, Lord Emslie retired as Lord President in 1989. I was persuaded to allow my name to go forward as one of three candidates for consideration by the Prime Minister, as was the practice in those days, as to who was to succeed him and the Prime Minister – Mrs Thatcher – chose me. Then, after seven years as Lord President and Lord Justice General, I was invited to go to London where I remained for the rest of my judicial career.

My civil practice, which had developed after I ceased to be an AD, continued while I was Dean. Many of the cases I dealt with when I was in practice turned simply on their facts. But from time to time the case turned on what the law was. These cases usually came to me for an opinion, with a narrative of what the facts were understood to be – set out in what was called a memorial. My task was to find out what the law was and say how, on those facts, the question should be answered. For the most part the law was beyond challenge because it was obviously well settled. Once I had worked out what the law was, the answer was then quite simple. Of course, if the law is against you, you cannot do anything about it except to have another look at the facts to see if the settled law can be distinguished. But sometimes the law is not so certain – because the point has not arisen before, or because it seems to be out of date or because there is a conflict in the authorities. These cases were more difficult to deal with, as I had to assess what the prospects of persuading the court to make a finding in law that was in my favour. First instance judges – sheriffs and those in the Outer House of the Court of Session – tend to be rather cautious in venturing beyond what is already known and settled. That is understandable, because their judgments are open to appeal and because it is really for the appeal courts, including the UK Supreme Court since 2009, to develop the

law where it is in need of correction or improvement. From time to time, however, cases do arise where it is worth presenting an argument to the court as to how the law may be developed, revised or re-discovered, in the hope that the judges may feel able to solve the problem in your case. The legislatures have a responsibility in the area too, but it is only in the most exceptional case that legislation can operate retrospectively – which is what would need to happen if your client was to get the desired remedy.

So you need to keep an open mind when you are looking at what the law tells you. I remember one of my tutors at Edinburgh chiding me for assuming, as he thought I was doing, that what a judge said was always right. Judges are not infallible. It was once said of the House of Lords judges that they could never make a mistake, and that if it seemed that they had made a mistake this was “only a seeming”. It was our frail vision that was at fault. But those days are over, and even the UK Supreme Court may be open to persuasion that one of its own decisions may need to be corrected, or at least modified, to fit a situation that has not been encountered before. I am sure that there will be ample room for exploring points such as this in an honours course. But you should not stop thinking about the law when you leave here and go into practice. Thinking about the law should go on all the time, and of course it is a feature of the law that it keeps changing. You have to keep your ears and eyes open for that. As I look back to times when I was at the bar as well as on the bench, I can recall quite a lot of cases where the accepted law was worth challenging and where, with skilled advocacy, it was indeed developed further or even changed.

My opinion practice was not without its hazards. A few weeks after I had sent in one of my opinions to my instructing solicitors I got a polite letter back telling me, with regret, that they had lost my opinion. Would I be good enough to let them have it again, they asked. So I looked at the papers again, wrote another opinion for them and sent it in. A few weeks later another polite letter arrived from my instructing solicitors. They told me that they had found my first opinion after all, but that something appeared to have gone wrong. The opinion I gave on the second occasion had arrived a conclusion which was the reverse of what I had said on the first occasion only a few weeks earlier. “Which is right?”, they asked. It was a not unreasonable question, but for me it was rather embarrassing. I cannot remember now I got out of that one, but I do remember resolving from then on always to keep a copy of all my opinions. This may not seem a very remarkable thing to do these days, when everything can be kept on file, stored indefinitely on one’s computer and retrieved almost immediately. But when this happened to me we were still working on paper. Although audio typing was just becoming available, photocopying was in its infancy. There was nothing for it but for me to write these opinions out by hand in a notebook, from which I dictated onto a tape which I gave to my secretary. This episode taught me the lesson which had long been learned by every responsible solicitor – how important it was to keep a record of what you have said or done, and to ensure that it is filed in a way that can be accessed at any time without difficulty.

Opinion writing quite often led to a meeting with the client to discuss the advice which you had given. I had no training in how to deal with these encounters, but I soon learned that it was as important to be tactful to the solicitor who was

instructing you as it was to be intelligible by the client. You had to avoid suggesting to the client that his solicitor was not doing his or her job properly even if this was what you thought, as that was bad for business. A word in private before or after the meeting was the best way of dealing with any problems of that kind. Preparation was as necessary on these occasions as it was when going into court. You did not want your client to think that you were not on top of the facts, although you could of course ask questions to check that your information was right. Often these meetings took place after a busy day in court, and it was quite difficult to move within a matter of moments from the one environment the other. There was no time on such occasions to prepare. Any preparation for them had to be done the night before, along with the preparation you were doing for the work in court. One senior member of the Bar with whom I often shared such after-court meetings used arrive in the consultation room straight from court with his bundle of papers, as I was only too well aware, unopened. "What can I do for you today", he used to ask, with a disarming smile. This usually led to just enough of a reaction to remind him of what the point was. But it was a high risk strategy. I tried very hard to avoid being placed in that difficulty, but in what became a very busy life this was far from easy.

In 1989, after 24 years in practice, I became a judge and went onto the bench. I am not going to go over that part of my career, which I am sure is of much less interest to you than my experiences when in practice. But it is perhaps worth mentioning that there are a wide variety of part-time judicial appointments which any court practitioner, solicitor or advocate, should keep an eye on as he or she rises up the ranks of the profession. The tribunal system offers a variety of opportunities for work of this kind, and when vacancies occur they have to be filled. I sat as a legal chairman on two of them while I was still at the Bar – the medical appeal tribunals, which deals with claims for social security benefits, and the pension appeal tribunal, which deals with claims for compensation by injured servicemen. So, when you feel that you may have reached this stage, look out for the advertisements and grasp the opportunity. The obvious full-time appointments, to the sheriff court or Court of Session bench, are also advertised. In my day you had to wait to be asked. Now it is for you to make the first move. Our judicial appointments system, which seeks to develop a more diverse and representative bench at all levels, depends on people having the courage to put themselves forward. Please do not be shy if you feel that you may have something to offer, when the time comes. A great deal of effort is being put into improving diversity in the making of judicial appointments, both as to gender and as to ethnic background. But this can only be done if those parts of society which are under-represented are willing to put themselves forward.

What, then, are the lessons that I can pass on to you as look back over what happened to me? I think that I can summarise my own experience in seven simple propositions:

- a. First, know your law – or at least know where to find it.
- b. Second, facts matter. They can make all the difference to the result. So make sure that you know your facts, and that you have got them right.

- c. Third, do not assume that what the law is said to be is always right. There may be cases where it can be shown to have been wrongly stated and in need of correction, or where it is open to development and being brought up to date to meet your case.
- d. Fourth, preparation, preparation, preparation.
- e. Fifth, the golden rule of all advocacy: respect, and adapt to the needs of, your audience. That applies as much to written as to oral advocacy. Whatever you say or write should always be clear, simple and accessible. Keep your sentences short, and use short paragraphs.
- f. Sixth, do not give up just because you feel nervous.
- g. Seventh, do not turn down an opportunity.

I believe that, if you can bear all these points in mind, you are unlikely to go far wrong. Whatever stage you may have reached, I wish you every success in what lies ahead of you.

David Hope

19 February 2014