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FOREWORD BY THE HON. LORD WOOLMAN

SENATOR OF THE COLLEGE OF JUSTICE

The launch of the Aberdeen Student Law Review is very welcome. It suggests that the study and analysis of law in Scotland is in good heart. The students who have taken the initiative with this venture are to be congratulated on their enterprise.

I note that the articles in the inaugural issue cover a wide range of topics. In my experience, there is great value in adopting such an approach. An understanding of one area of law can be enhanced by looking at another area. It is surprising how often there is scope for cross-pollination of ideas and principles.

I wish all success to the Review and its founders.

Stephen Woolman
July 2010

INTRODUCTION TO INAUGURAL ISSUE

The idea to establish a student law review at the University of Aberdeen was first discussed by two members of the Editorial Board on a cold winter's night in January. The scene of this discussion was a place most suited to intellectual debate: a public house on Union Street. The following day, this half-formed idea was proposed to the Head of the Law School who gave us permission to try and make something of it. Seven months have passed since that cold winter's night and this is the fruit of our labour.

In putting this together, we have endeavoured to include articles on a broad range of subjects. Almost seventy submissions have been reviewed, from essays by students in their first year of the undergraduate degree, to papers written by Ph.D. students specifically for this journal. We hope that we have presented here a mix of different articles which will demonstrate the enormous range of subjects taught and researched at this ancient university. In any project like this, where people volunteer their intellectual work, there are bound to be disappointments. We thank all those who submitted their work but whose articles are not included in this issue. We hope that they will consider submitting for the second issue. We tried to provide constructive feedback where possible but for those who felt short-changed, we can only apologise with the promise that we will try and do better next time.

Writing about the law is as important as reading about it or discussing it. It forces us to research more extensively and, it is hoped, to broaden our legal minds. It encourages us to think about the other sides to an argument and to pursue our own case armed with increased knowledge. It is what lawyers from this university have been doing since 1495 and it is what we hope the next generation of lawyers will continue to do.

A very large number of people has assisted us from the embryonic stages of this project to the completion of this inaugural issue. In particular, we would like to thank the staff of the Law Office for helping in numerous ways. Ms Sarah Duncan provided us with accommodation where we could put this issue together in peace and quiet and helped us to remain calm in the face of deadlines. Dr Angus Campbell provided a great deal of encouragement and gave us our own web page. Ms Adelyn Wilson shared her experiences of working on a similar project at Edinburgh University and was of invaluable assistance throughout. Our peer reviewers, who must remain anonymous, were timely in their responses and helpful in their comments. Finally, Professor Margaret Ross supported us in every way conceivable from the journal's inception to its eventual publication. To the Aberdeen Law School, we are indebted.

We hope that you enjoy the inaugural issue of the Aberdeen Student Law Review.

The Editorial Board
July 2010

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Going Green at the Gill Review? The Potential Implications of the Scottish Civil Courts Review for Environmental Justice in Scotland

BEN CHRISTMAN*

Abstract

This article analyses the Scottish Civil Courts Review's recommendations on standing for judicial review and funding public interest litigation, and their potential implications for environmental justice in Scotland, if implemented.

The methodology adopted is one of firstly analysing the concept of environmental justice to obtain a working definition and highlight the importance of the civil justice system to environmental justice in Scotland. Each of the two proposals are then examined individually; analysing the current law in both areas, reflecting on the environmental justice issues created by the status quo, and then investigating the proposed reforms and their potential implications for environmental justice. In the first instance, it finds that the current law relating to the standing requirements in Scotland is restrictive, antiquated and unclear; inhibiting access to the remedy of judicial review. It is suggested that adopting the recommended test of 'sufficient standing' will have an analogous effect to that seen in England (where it is also used); liberalising and clarifying the standing test, widening access to the remedy of judicial review and improving environmental justice in Scotland.

Secondly, the Review recommends that an express power be made whereby a court may grant a 'protected costs order', protecting litigants who act in the public interest from paying the other party's expenses if they are unsuccessful. The threat of having to pay the opposing party's costs can present a major hurdle to litigants in public interest environmental cases, acting as a deterrent against accessing legal remedies to environmental problems. It is found that, if definitional and jurisprudential problems surrounding the test which a court uses when deciding whether to grant a protected costs order can be resolved, the recommendation may represent a step forward for environmental justice. However, protected costs orders will not fully solve the predicament faced by those unable to meet the costs of litigation in Scotland.

* Senior Honours Undergraduate, University of Aberdeen. I would like to thank my Mum and Stepdad for their valuable assistance in the proof reading stage, without which this article would be illegible.

1. *Introduction*

> The structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled. The Scottish civil courts provide a service to the public that is slow, inefficient and expensive. Their procedures are antiquated and the range of remedies that they can give is inadequate. In short, they are failing to deliver justice.[1]

The Report of the Scottish Civil Courts Review (Gill Review) was carried out under the auspices of a perceived need from the Scottish Government to modernise the Scottish civil justice system.[2]

The Gill Review has not pulled its punches in carrying out its remit. Within two paragraphs Lord Gill makes clear of his opinion that Scotland's civil justice system, 'is seriously failing the nation. Reform is long overdue'.[3] The review presents a wide raft of proposals to modernise the Scottish civil justice system.[4] Lord Gill himself has described the proposals as 'pragmatic', not 'revolutionary';[5] but some are of the opinion that if implemented, the Gill Review's suggestions on the delivery of civil justice in Scotland could be radical in effect.[6]

The Gill Review has some, albeit slight, foundation in seeking to augment environmental justice in Scotland. The links between civil justice reforms and promoting environmental justice were recognised by the Scottish Executive prior to the Gill Review.[7] It is of note that the aim of the review was to provide an examination into the provision of civil justice in Scotland generally; there was never an explicit environmental justice agenda behind the Gill Review.

Lack of specific motive aside, two of the recommendations of the Gill Review may have the potential to make significant contributions to environmental justice in Scotland. The proposals would see a change in the current rules on standing for judicial review, and a clarification of the

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[1] B Gill, *The Report of the Scottish Civil Courts Review* (Scottish Civil Courts Review, September 2009) at p. i, hereinafter the 'Gill Review'.

[2] The Scottish Executive's plans for review were contained in a short policy document; *Modern Laws for a Modern Scotland - A Report on Civil Justice in Scotland* (Scottish Executive, February 2007). This contained the aspirations of improving access to civil justice, delivering proportionality and deriving 'value for money' from the civil justice system.

[3] Gill Review at p. i para. 2.

[4] It proposes, *inter alia*, making fundamental changes to the structure of the civil court system (Chapter 4), altering the case management system (Chapter 5), improving the arrangements for multi-party actions (Chapter 13) and making extensive changes to the requirements for standing and availability of funding for judicial review (Chapter 12).

[5] J Forsyth, "Gill review a reminder civil justice is there to help public" *The Scotsman* (Edinburgh, May 5th 2009).

[6] *Ibid.* D Armstrong argues also that the proposals would 'represent a massive step forward for civil justice in Scotland'; D Armstrong, "Civil justice in Scotland could take giant leap with Gill report" *Legal Week* (London October 14th 2009).

[7] *Modern Laws for a Modern Scotland - A Report on Civil Justice in Scotland* (n 2) at p. 4.

Scottish Courts' power to issue 'protective cost orders' (PCOs) to litigants acting in the public interest.[8]

This article will initially explore what is meant by 'environmental justice' to provide a theoretical basis for reviewing the recommendations of the Gill Review against its criteria. The main body of the study will then examine the two parts of the Scottish civil justice system which have been targeted by recommendations for change by the Gill Review of the most significance for environmental justice in Scotland (outlined above). The current law in both areas and the respective environmental justice issues arising from the *status quo* will be discussed first, followed by the recommendations for change suggested by the Gill Review and an analysis of their potential implications for environmental justice.

2. *Environmental Justice*

A. Origins of the Concept

Environmental justice is generally recognised to have been conceived during the tail end of the struggle for civil rights in the USA in the late 1970s and 1980s, amidst recognition of the lack of distributional equity of environmental pollutants and 'locally undesirable land uses'[9] amongst different racial groups. The original term used was 'environmental racism',[10] reflecting its origins as a concern of institutionalised racism manifesting itself in the form of a higher level of environmental pollutants in ethnic communities in the USA.

Several studies recognised that poorer, black communities were being forced to bear an inequitable level of environmental burdens.[11] Accusations of institutionalised racism combined with environmental concerns when the State of North Carolina decided to dump PCB-contaminated[12] soil beside a predominantly non-white community in Warren County. This act saw the

[8] Gill Review, Vol II, Chapter 12.

[9] Such as hazardous waste facilities, solid waste disposal sites, heavy industries and contaminated industrial sites.

[10] Said to have been coined by Benjamin Chavis, former head of the United Church of Christ's Commission on Racial Justice, following his participation in the 1982 Warren County protests. This is referred to by both R Holyfield, 'Defining Environmental Justice and Environmental Racism' (2001) 22(1) Urban Geography 78, at p. 83, and C Foreman, *The Promise and Peril of Environmental Justice* (Brookings Institution Press, 1998) at p. 10.

[11] United States General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983); United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States* (1987); and Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, *The Nature and Extent of Lead Poisoning in Children in the United States: A Report to Congress* (1998).

[12] Polychlorinated biphenyls (PCBs) are highly toxic man-made chemicals used in coolants, lubricants and in electrical insulation.

local community mobilise in opposition against the perceived injustice of locating such a facility beside an ethnic community, and is regarded as the 'watershed moment' which brought the notion of environmental justice into the wider American consciousness.[13]

Environmental justice has grown in recognition from its early roots as a primarily radical issue. The movement blossomed in the late 20th century in the USA, becoming an institutionally accepted concern as Bill Clinton signed a Presidential Executive Order to federal agencies to address environmental injustice.[14]

The concept has also expanded theoretically. There has been an evolution from what began as a one-dimensional focus on 'environmental racism' to the contemporary definition of 'environmental justice'; a more neutral, multi-faceted term. Environmental justice has evolved from its ancestry as a purely reactive, distributive paradigm.[15] It was identified that there was a need to look towards the institutional and social processes which were the root of the distributional inequities, and the concept has evolved accordingly.[16]

B. Attempting a Definition

Environmental justice encompasses a wide spectrum of interests, distant from its parochial beginnings.[17] These include the human right to a healthy and safe environment, the right not to suffer disproportionately from environmental laws, policies and decisions and the right of access to information, participation and decision-making in environmental matters. The essence of the environmental justice movement is about changing institutional structures which cause inequitable patterns of distribution, by challenging the *status quo* and ensuring the empowerment and inclusion of those suffering environmental injustice. Low describes it as 'both a creative leap and a challenge to the environmental movement' in this regard.[18] Torres

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[13] R Bullard states that the Warren County protests, 'marked the first time African Americans mobilized in such broad opposition to what they defined as environmental racism'; R Bullard, 'Race and Environmental Justice in the United States', (1993) 18 Yale Journal of International Law 319.

[14] USA Presidential Executive Order 12898, 11/02/1994.

[15] S Foster argued in the 1990s that evolution from the position of the distributive hypothesis as its *sine qua non* was critical to environmental justice's survival, as a sole focus on the distribution element neglects other conditions required for justice; S Foster, 'Justice from the ground up: distributive inequities, grassroots resistance and the transformative politics of the environmental justice movement' (1998) 86 California Law Review 775.

[16] I Young, *Justice and the Politics of Difference* (University Presses of California, Columbia and Princeton, 1990).

[17] The wide range of social and environmental aspirations sought by Environmental Justice is clearly seen in the *Principles of Environmental Justice*, drafted at the First National People of Colour Environmental Leadership Summit in Washington DC, in 1991.

[18] N Low, *Global Ethics and Environment* (Routledge, 2000) at p. 3.

contends that it causes us to 'examine our normative assumptions and perhaps lead us to conceive of new forms of justice'.[19]

Dunion proposes a contemporary Scottish definition; environmental injustice exists where 'authorities fail to afford or uphold rights; where people are unable to participate in the decision-making processes which affect them and where the means of redress are inaccessible'.[20]

It is proposed that there are two key elements which underpin the concept.[21] The *distributive element* of environmental justice requires that environmental equity is secured on a local, national and international level to help ensure that everyone enjoys a clean, healthy environment regardless of where they live or their background.

Secondly, the *procedural element* of environmental justice requires *procedural equity*[22] in relation to the environment.[23] This necessitates access to the law to resolve environmental problems, uphold environmental laws and provide an opportunity for people to have a voice in relation to their environment.[24] The Environmental Justice Project describes procedural environmental justice as, 'the ability for concerned citizens and public interest groups to: access the courts and judicial advice at reasonable cost; be provided with a fair and equitable platform for the treatment of environmental issues and; obtain adequate and effective remedies (including interdictive relief) for environmental offences'.[25]

The Gill Review proposes reforms to the procedural remedies available to those seeking environmental justice. These reforms concern procedural, not distributive, issues of environmental justice. This article will

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[19] G Torres, 'Environmental Justice: The Legal Meaning of a Social Movement' (1995-1996) 15 Journal of Law and Commerce 597 at p. 622.

[20] K Dunion, *Troublemakers: The Struggle for Environmental Justice in Scotland* (Edinburgh University Press, 2003) at pp. 11-12.

[21] In keeping with the definition of environmental justice adopted in the Scottish academia: see K Dunion, *ibid*, at pp. 11-12; SNIFFER Research Specification: 'Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation' (March, 2004) at p. 16, and M Poustie, *Environmental Justice In SEPA's Environmental Protection Activities: A Report For The Scottish Environment Protection Agency* (Strathclyde Law School, 2004) at p. 17.

[22] D Schlosberg, *Environmental Justice and the New Pluralism* (OUP, 1999) at p. 13.

[23] The Aarhus Convention (Convention on Access to information, Public Participation in Decision-making and access to justice in environmental matters, held at Aarhus, Denmark, on 25 June 1998) provides a contemporary evocation of the procedural element of environmental justice. A Slater and O Pedersen cite the European Directives on public access to environmental information (Directive 2003/4/EC repealing Council Directive 90/313/ EEC) and public participation in respect of the drawing up of plans and programmes relating to the environment (Directive 2003/35/EC) as examples of attempts at institutionalising processes which aim 'to make the process of environmental decision making open and inclusive and thereby, avoiding environmental injustice'; A Slater and O Pedersen, 'Environmental justice: lessons on definition and delivery from Scotland', (2009) 52(6) Journal of Environmental Planning and Management 797 at p. 799.

[24] P Stookes, *Civil law aspects of environmental justice* (Environmental Law Foundation, 2003) at para. 7.

[25] *Environmental Justice Project Report* (Environmental Justice Project, March 2004) at p. 23 p. 18.

be purely concerned with the potential implications of its recommendations for procedural environmental justice.

C. Criticisms of Environmental Justice

Criticisms of environmental justice abound, perhaps largely due to it being an activist-created concept, avoiding academic scrutiny in its formative years.[26] Two main criticisms can be made; a lack of definition and a parochial focus on the distributive element.

Firstly, environmental justice is notoriously difficult to define.[27] The 'Principles of Environmental Justice' remain the closest which the movement has come to a definitive evocation. Foreman criticises these as 'an unwieldy list of seventeen principles cobbled together'.[28] They are vaguely worded, and wide ranging to the point of absurdity.

Szasz observes that environmental justice displays 'an untroubled eclecticism, a coexistence of multiple political symbol systems that have little in common except that they can be mobilized to legitimate a position of radical critique and activism'.[29] The absence of a robust definition leaves the concept open to interpretation, but equally it allows flexibility to combine support for a range of social and environmental aims.

Secondly, the interpretation of inequitable distribution patterns of environmental pollution amongst particular groups of society as demonstrating institutional prejudice within decision-making bodies suffers several flaws.[30] Such a pattern may instead relate to a market failure;[31] often environmental pollution will devalue land in an area, making it more likely that 'environmental injustices' are instead reflections of the fact that such land is cheaper for impoverished groups to live there.[32] Determining that uneven patterns of environmental burdens evinced amongst certain social

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[26] G Torres notes that environmental justice was 'rooted in local activism', meaning that it was 'without regard to the methodological rigour demanded by scholars'; G Torres (n 19) at p. 601.

[27] A common problem for most principles or concepts in environmental law. See N De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002).

[28] C Foreman, *The Promise and Peril of Environmental Justice* (n 10) at p. 112.

[29] A Szasz, *Ecopopulism: Toxic Waste and the Movement for Environmental Justice* (University of Minnesota Press, 1994).

[30] An analogy may be drawn with the concept of 'social justice', and the similar tendency of its proponents to reduce its meaning to the morally proper distribution of benefits and burdens amongst society's members. See I Young (n 16).

[31] W Block and R Whitehead argue that, 'in a free market, they (polluting industries) will tend to be confined to poorer, (e.g. blacker) areas'; W Block and R Whitehead, 'The unintended consequences of environmental justice' (1999) 57 Forensic Science International 100 at p 63.

[32] W Block and R Whitehead further contend that the poor bring environmental injustices upon themselves, 'When offered a choice between a cheap dwelling with few environmental amenities, and an expensive one with many, they tend to choose the former'. *ibid* at p. 65.

groups are causally synonymous with active discriminatory processes, without research into the processes which cause such patterns, is methodologically flawed.[33]

Achieving an exactly equal distribution of environmental burdens sought by the proponents of environmental justice may be extremely difficult, if not impossible. Nichols argues that a failure by proponents of environmental justice to accept that some environmental pollution is inevitable, and the subsequent reluctance to set priorities based on levels of risk can worsen the inequities experienced by minority or otherwise disadvantaged communities.[34] Foreman contends that this reliance on a 'nobody should suffer' position can have perverse effects.[35]

Can environmental justice ever be fully achieved? The aspiration of seeking equity in the distribution of environmental burdens may well prove an impossible goal. Achieving procedural environmental justice may be a more realistic aspiration than its distributional counterpart; and the procedural element may facilitate its distributive equivalent also.[36]

If it cannot be achieved, then why seek to promote environmental justice? Adherence to the concept of environmental justice can change the traditional decision-making processes which affect the environment; empowering communities so that unfair burdens are not imposed on any one area or class of society as the consequence of institutional bias or exclusion.

D. Environmental Justice in Scotland

Environmental justice has not achieved the special status within Scotland that it has been accorded within the USA; however it has received some degree of institutional recognition and strong support from environmental non-governmental organisations (NGOs).[37] In a 2002 speech, the then First Minister Jack McConnell gave Scotland's first official recognition of environmental justice, committing the Scottish Executive to its agenda: [38]

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[33] See A Weinberg, 'The Environmental Justice Debate: A Commentary on Methodological Issues and Practical Concerns' (1998) 13(1) Sociological Forum 25 at p. 31.

[34] See A Nicholls, 'Risk-Based Priorities and Environmental Justice' in A Finkel and D Golding (eds), *Worst Things First?: The Debate over Risk-Based National Environmental* Priorities (RFF Press, 1995) at p. 268.

[35] '… [H]onestly confronting the reality that no environmental amenity (with the possible exception of planetary gravity) is equally distributed may help make citizens more likely to ask hard questions about which equities matter most.'; C Foreman (n 10) at p. 119.

[36] D Schlosberg (n 22) at p. 13. A Slater and O Pedersen also note that 'Environmental justice is also regarded as a procedural mechanism that aims to make the process of environmental decision making open and inclusive and thereby, avoiding environmental injustice; A Slater and O Pedersen (n 23) at p. 799.

[37] Friends of the Earth Scotland have adopted environmental justice as one of their aims, currently manifested in the 'Access to Justice' campaign, see <http://foe-scotland.org.uk/access-to-justice-about>.

[38] Jack McConnell, "Environmental Justice" *Dynamic Earth* (Edinburgh, February 18th 2002).

> [T]he people who suffer most from a poor environment are those least able to fight back, and I believe government is about standing up for them and changing that situation. . . I believe the biggest challenge for the early 21st century is to combine economic progress with social and environmental justice.

This watershed moment for Scottish environmental justice was followed by several academic and governmental studies on the level of environmental justice within Scotland.[39] Research revealed a differing Scottish narrative from that seen in America; portraying a pattern of distributional environmental injustice based on social deprivation, not race.[40] Several policy changes were then made by the Scottish Executive to take account of this new aim.[41] However, academic opinion on the effect of the changes made has been that they are mainly cosmetic,[42] and that many of the changes

[39] *Public Attitudes and Environmental Justice in Scotland* (Scottish Executive, 2005), *Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation* (SNIFFER, 2005), *Review of Progress on Environmental Justice* (Scottish Executive, 2005).

[40] *Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation* (SNIFFER, 2005), found strong links between deprivation and exposure to industrial pollution, derelict land, river water quality and air quality in Scotland. See executive summary at p. 14. *Public Attitudes and Environmental Justice in Scotland* (Scottish Executive, 2005) found that those living in deprived areas in Scotland reported a much higher level of 'environmental than those in the least deprived areas. See p. 28, para. 3.27.

[41] Scottish Labour Party and Scottish Liberal-Democrats coalition agreement, *A Partnership for a better Scotland* (The Scottish Government, 2003), contained an explicit commitment to environmental justice at p. 5. An environmental justice fund was created by the Scottish Executive, however this operated only in 2007-2008, offering grants totalling £2 million to fund community projects tackling environmental injustice. Land use policy has been strongly affected by the concept: SPP 16 has been amended to reflect the aims of environmental justice and the Planning Act 2006 reflects an environmental justice agenda; E Scandrett argues that its mechanisms to increase greater community involvement 'provides probably the most significant opportunity for the provision of environmental justice'; E Scandrett 'Environmental justice in Scotland: policy, pedagogy and praxis' (2007) 4(2) Environmental Research Letters 045002 at p. 3. SEPA has had its statutory responsibility to environmental justice clarified by ministerial guidance: Statutory Guidance to SEPA made under s. 31 of the Environment Act 1995, (December 2004, Paper 2004/21, Scottish Executive). The Scottish Executive's sustainable development strategy, Choosing our Future, now contains a section focused on environmental justice; Scottish Executive, *Choosing our Future: Scotland's Sustainable Development Strategy* (Scottish Executive, 2005) Section 8.

[42] W Maschewsky is critical of the Scottish Executive's approach to environmental justice, stating that, 'The Scottish Executive, central and local authorities seem not to have a clear strategy - let alone "masterplan" - for EJ. See W Maschewsky, *Environmental justice in Scotland - just words? A view from outside* (Friends of the Earth Scotland, 2005) at p. 25. E Scandrett is of the opinion that the Scottish Executive displays an 'econocentric' attitude to environmental justice, asserting that a 'policy division between entrepreneurial growth and more socially equitable interpretations of environmental justice lie at the heart of its progress through policy. E Scandrett, *ibid* at p. 3.

made were due to international obligations rather than a coherent environmental justice strategy from the Scottish Executive.[43]

Most of the research on environmental justice in Scotland has focussed on distributional issues.[44] By contrast, the status of procedural environmental justice in Scotland remains poorly understood, with limited academic work on the subject.[45] McCartney comments that, 'there has been no comprehensive review of how the system of environmental regulation provides opportunities for participation'.[46]

In England and Wales, various wide-ranging academic studies have created awareness of the ways in which the legal system affects environmental justice.[47] It is submitted that a wide scale review of the legal system is imperative for the evolution of procedural environmental justice in Scotland.

E. Relationship between Civil Justice Reforms and Environmental Justice

Adebowale has proposed that the system which is adopted by a state in its provision of civil legal justice is fundamental in promoting environmental justice; as it offers 'a tool for recognising environmental citizenship. . . the ability to participate in civil, political and administrative structures',[48] but that it is only effective if universally accessible. Conditions for universal accessibility include provisions for payment of legal costs, sufficient provision of information on legal remedies for environmental issues and a lack of restrictions on standing to have a case heard.

The manner in which civil justice is delivered has wide-reaching consequences for procedural environmental justice. Ostensibly benign schemes of rules of legal practice, legal rights and procedure can serve to

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[43] A Slater and O Pedersen, state that, 'the actual translation of policy to legislative change has in fact been rather small. Those that have been implemented have, with a few exceptions, been due to international commitments rather than a grassroots approach to reform by the Scottish Executive'; A Slater and O Pedersen (n 23) at p. 809.

[44] Two reports have concluded that there is a lack of distributional environmental justice amongst the Scottish population, with those living in poverty also living in the worst quality environments. See (n 40).

[45] Notable exceptions being the work by M Poustie, *Environmental Justice in SEPA's Environmental Protection Activities: a Report for the Scottish Environment Protection Agency* (n 21); F McCartney, *The State Of Environmental Justice in Scotland* LLM Dissertation (University of Strathclyde, 2005) (unpublished) and W Maschewsky, *Environmental justice in Scotland - just words? A view from outside* (Friends of the Earth Scotland, 2005) at p. 22.

[46] F McCartney, 'Access to Environmental Justice' in D McArdle (ed), *Paths to Justice? Essays prompted by the Gill Review* (SCOLAG, 2007) at p. 12.

[47] P Castle *et al*, *The Environmental Justice Project* (2004), P Stookes, *Civil law aspects of environmental justice* (n 24) and *The Report of the Working Group on Access to Environmental Justice* (WWF-UK, 2008).

[48] M Adebowale, *Using the Law: Access to Environmental Justice* (Capacity Global, 2004) at p. 14.

justify the *status quo*, concealing oppression and domination within society whilst establishing formidable barriers to social change.[49] Identifying and addressing barriers on access to the courts for environmental matters can ensure that Scottish citizens have a means of redress to combat environmental injustices.

3. *Implications of the Recommendations of the Gill Review for Environmental Justice in Scotland*

The Gill Review's recommendations to improve the Scottish civil justice system are numerous and far reaching.[50] In the interests of brevity, only those changes of the greatest importance to environmental justice will be analysed.

Firstly, the potential effects of the recommendations to change the rules on standing for judicial review will be examined. Secondly, the possible ramifications of the proposal to clarify the power of the courts to make PCOs for 'public interest' litigants will be investigated.

A. Standing for Judicial Review

(i) Introduction to judicial review

Judicial review is a procedure whereby the exercise of a delegated discretionary power is subjected to judicial oversight, to ensure that the power has been exercised for its lawful purpose. Judicial review has evolved in Scotland based on the principle that 'every wrong must have a remedy';[51] an expression of the *nobile officium*[52] of the Court of Session.

Judicial review allows an applicant to challenge the procedural legality of an administrative act or decision, but not the substantive basis of a decision.[53] O'Neill compares the Court of Session's role to that of a 'schoolmaster who does not tell his pupils the answers to a problem but instead advises them they have got it wrong'.[54]

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[49] See A Hutchison, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 MLR 293 at pp. 295-297, para. I., A.

[50] See (n 4).

[51] Lord Clyde, "Public Law in Scotland" (Address to the Murray Stable Public Law Group, November 10th 2008).

[52] The inherent equitable power of the Court of Session to provide a remedy where no other exists.

[53] The scope of judicial review was summarised by Lord Clyde in *R v Secretary of State for Scotland* 1999 SC (HL) 17 at 41. D Hope notes that judicial review is not solely restricted to the decision making of public bodies, it extends to private bodies as well; D Hope, 'Mike Tyson comes to Glasgow - a question of standing' (2001) Public Law 294 at p. 297.

[54] A O'Neill, *Judicial Review in Scotland, A Practitioner's Guide* (Butterworths, 1999) at p.4, para. 1.09.

Democracy and Judicial Review

A fundamental unease surrounds the notion of an unelected judiciary reviewing the decisions of an elected body or its representatives. Peiris contends that the use of judicial review creates the danger of legitimising a surrogate political process.[55] Waldron argues that judicial review conflicts with democracy as it accords greater weight to individual opinions than would be afforded by electoral politics.[56] Hutchison notes the existence of a troubling paradox at the root of judicial review; the aim of judicial intervention is to avoid a monopoly of power with its tendency to corrupt and curtail individual freedom, but in so doing, judges open themselves to the criticism that they are merely fortifying their own monopolistic position and power.[57]

Proponents of judicial review argue that although the remedy does not offer a perfect democratic solution, inherent institutional democratic imbalances necessitate its use. Waldron concedes that, 'in the real world, the realization of political equality through elections, representation, and legislative process is imperfect. Electoral systems are often flawed. . . and so are legislative procedures'.[58] Lever argues that the legacy of inequality and undemocratic government will plague politics for a long time; inequalities of wealth and power taint the idealistic assumption that democratic elections provide unquestionable legitimacy.[59] Judicial review provides another route to political participation out with the traditional political sphere, circumventing the inequalities which may exist in access to the original political debate.[60]

Standing for Judicial Review

The law assumes that remedies are correlative with rights, and so only those whose own rights are at stake are eligible to be awarded legal remedies.[61] This is an assumption of constitutional significance; at its heart is the

[55] G L Peiris, 'Wednesbury Unreasonableness: The Expanding Canvas' (1987) 46(1) Cambridge Law Journal 53 at p. 53.
[56] J Waldren, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346 at p. 1395.
[57] A Hutchison, 'The Rise and Ruse of Administrative Law and Scholarship' (n 49) at p. 294.
[58] J Waldren, 'The Core of the Case Against Judicial Review' (n 56) at p. 1389.
[59] A Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) Perspectives on politics (Forthcoming) available at <http://eprints.lse.ac.uk/23097/1/Democracy_and_judicial_review%28LSERO%29.pdf>. J Denvir argues against the 'idealistic assumption' of legitimacy noted by Lever; J Denvir, 'Towards a Political Theory of Public Interest Litigation' (1975-1976) 54 North Carolina Law Review 1133 at pp. 1159-1160.
[60] C Hilson and I Cram, 'Judicial Review and Environmental law - is there a coherent law of standing?' (1996) 16 Legal Studies 1 at p. 6.
[61] W Wade and C Forsyth, *Administrative Law* (8th edn Oxford University Press, 2000) at p. 667. C Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1.

question of whether the primary function of the court's supervisory role is based on redressing individual grievances, or maintenance of the rule of law.[62]

Few jurisdictions allow citizens unrestricted access to judicial review.[63] Various types of restrictive tests are applied; Legere notes four different types of standing tests which apply in English law alone.[64] Whilst this approach may be suitable for private law, in public law it may be criticised as inadequate as it disregards the public interest. Public authorities have wider public duties, particularly in the environmental sphere such as planning, where if permission is granted improperly it does a wrong to the public interest.[65] If no-one has standing to call it to account, a public authority may disregard the law with impunity.

Harlow describes the need for restricted access to judicial remedies as one of maintaining the legitimacy of the legal system.[66] She depicts the political process as a 'freeway',[67] to which all citizens have access; whereas the legal system is different. Judicial decisions are reached by impartial arbitrators based on reasoned proof. The objective of the judicial system is the protection of legal interests, so access is restricted to those who can prove the existence of such interests.

There is also the fear that opening access to judicial review will 'open the floodgates' and swamp the courts with unmeritorious challenges. Restrictive standing rules thus conserve both administrative and judicial resources from such claims. However, Scott has argued that the notion of 'a litigant who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom.[68] Other safeguards exist which deter parties from bringing unmeritorious claims; particularly the time and effort required to litigate and the costs of doing so.

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[62] H Woolf, J Jowell and A Le Sueur, *De Smith's Judicial Review* (Sweet and Maxwell, 2007) at p. 70, para. 2-003.

[63] Unrestricted access to judicial review is known as an '*actio popularis*', or 'citizen action'. This allows unrestricted access to the courts for those purporting to act in the public interest. See De Sadeleer *et al*, *Access to Justice in Environmental Matters* (CEDRE, 2002) at p. 22. In Portugal, broad access is given to NGOs to review decisions and to claim compensation on behalf of the aggrieved party in order to preserve the environment (Art. 52(3)(a) of the Portuguese Constitution). De Sadeleer *et al* notes that this 'seemingly unrestricted right is in fact qualified in Art. 2 of the Portuguese Popular Action Law with requirements that environmental associations have to fulfil in order to be allowed to initiate proceedings before the courts'.

[64] These are the tests of 'sufficient interest' for judicial review, 'person aggrieved' for making challenges under s. 288 of the Town and Country Planning Act 1990, 'victim' for those seeking to rely on European Human Rights Convention provisions and 'direct and individual concern' for those seeking annulment of an EU legal act; E Legere, 'Locus Standi and the Public Interest: A Hotchpotch of Legal Principles' (2005) 10 Judicial Review 128 at p. 128, para. 1.

[65] *ibid*.

[66] C Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1.

[67] *ibid* at p. 2.

[68] K Scott, 'Standing in the Supreme Court - A Functional Analysis' (1973) 86 Harvard Law Review 645.

A balance must be struck between maintaining the legitimacy of the judicial system, preventing a malicious or frivolous use of litigation; and ensuring that access to justice to challenge illegal administrative acts is not unreasonably impeded.[69]

(ii) The relationship between access to judicial review and environmental justice

Judicial review allows the application of judicial oversight to administrative decisions where there is no other procedure available.[70] Access to the remedy can often be the only way to challenge an executive act or omission which may cause environmental injustice. Judicial review allows a petitioner to challenge otherwise unfettered administrative discretion to ensure that the rule of law is adhered to for the benefit of people and the environment.

De Sadeleer argues that offering wider access to judicial review in environmental matters offers two further benefits which are of significance to environmental justice.[71] Firstly, challenging administrative acts through judicial review can effect a broad change in general administrative practice. Benson *et al* cites the advantage of 'embarrassment potential' in this regard.[72] Environmental judicial review litigation can consequently ensure better enforcement of environmental law by an administration. Secondly, there are wider democratic aspects of increasing access to judicial review. High profile litigation can raise public awareness of a particular environmental injustice, having a public educational effect.

An example of the importance of access to judicial review for environmental justice may be seen in the English *Lappel Bank* case.[73] The RSPB challenged the Secretary of State for the Environment's decision to exclude an area from designation under the EU Birds Directive because this would have restricted local economic development. Although the appeal was a failure in not preventing the area concerned from being developed due to the absence of interim relief, it elicited a landmark judgement from the ECJ on the implementation of European nature conservation legislation and the strict interpretation which this was to be given. Judicial review brought a legal precedent which ensured that only ornithological criteria

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[69] H Woolf, J Jowell and A Le Sueur argue that the conflict may be resolved by developing principles which determine who is entitled to bring proceedings; if satisfactory they should prevent only those litigants with no reason for bringing proceedings from doing so; H Woolf, J Jowell and A Le Sueur (n 62) at p. 69-70, para. 2-002. See also J St Clair and N Davidson, *Judicial Review in Scotland* (Green and Son, 1986) at p. 65, para 5.03. and *I.R.C. v National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617 per Lord Fraser.

[70] T Mullen *et al* describe judicial review as the remedy available to the citizen, 'who wishes to challenge actions and decisions of government where no other procedure is available'; T Mullen *et al*, *Judicial Review in Scotland* (John Wiley and Sons, 1996) at p. 1. See also A O'Neill (n 54) ch. 1, 'The Uses of Judicial Review'.

[71] N De Sadeleer (n 63) ch. 3.

[72] W Benson *et al*, *The Effectiveness of Enforcement of Environmental Legislation* (DEFRA, 2006).

[73] *R v Secretary of State for the Environment, ex parte RSPB* (Case C-44/95).

were to be taken into account when designating protected areas under the Birds Directive.

(iii) Standing for judicial review in Scotland

To apply for judicial review in Scotland a petitioner must meet a two-part legal test; displaying both title and interest to sue.[74] Although frequently used in conjunction, title and interest are two separate legal concepts. These two tests will now be examined individually.

Title to sue

The requirement of proper title is intended to ensure that the litigant is the 'proper person' to initiate judicial review proceedings.[75] The classic formulation of the test for title to sue was given in the *D & J Nicol* case, with Lord Dunedin stating that the applicant, 'must be party (using the word in its widest sense) to some legal relation which gives some right which the person against whom he raises the action either infringes or denies'.[76]

This approach has been affirmed recently. Lord Clarke confirmed that a petitioner seeking judicial review must show that, 'having regard to the scope and purpose of the legislation, or measures, under which the act is performed, or the decision is made, he or they have had such a right conferred upon them by law, either expressly or impliedly'.[77]

Interest to Sue

The test for interest to sue is used in Scotland to ensure that judicial review is only sought by those with some form of material interest in the issue at stake, in order to prevent interference from a 'busybody'. Lord Arwall has explained that the interest test ensures that:[78]

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[74] It is of note that this does not apply for 'public interest interventions'. Rule 58.8A of the Court of Session provides that a person who is not a party to a judicial review petition to seek leave to intervene on the basis that the proceedings raise a matter of public interest, the propositions to be advanced by the applicant are relevant and likely to assist the court, and the intervention will not prejudice the rights of the parties. See S Blair and S Martin, 'Judicial Review 20 Years on - Where are we now?' (2005) 31 SLT (News) 173 at p. 176.

[75] J St Clair and N Davidson (n 69) at p. 64, para 5.01.

[76] *D & J Nicol*, 1915 SC (HL) 7, as per Lord Dunedin at 12.

[77] *Rape Crisis Centre v Secretary of State for the Home Department*, 2000 SC 527 as per Lord Clarke.

[78] *Swanson v Mason*, 1907 SC 426, as per Lord Arwell at 429. A comment may be made on the above quotation in reference to the actual current state of Scots law; the reference to a 'pecuniary right or status' is not to be regarded as a complete, or exhaustive, definition of the type of interest required. There is also the issue of the lack of distinction between whether the issue is a material one and the question of whether the petitioner has an interest to sue.

> (1) the law courts of this country are not used for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary right or his status; and (2) that no person is entitled to subject another to the trouble and expense of litigation unless he has some real interest to enforce or protect.

The courts have deemed the interest which the party is seeking to protect must be a matter of 'real or immediate concern'[79] which will be prejudiced by the decision complained of.[80] The *Independent Broadcasting Authority* case further elucidated that an economic interest was not necessary to meet the requirements of the test and that an interest may be derived from membership of a group with a relevant set of beliefs.[81]
The difficulties in defining the interest required by an applicant for judicial review were discussed in the *Scottish Old People's Welfare Council* case;[82]

> There must be a real issue. But the existence of a sufficient interest is essentially a matter depending upon the circumstances of the particular case. The variety of adjectives which are employed to describe the quality of interest required by law reflects the difficulty of defining any single criterion.

(iv) Current law on standing: perpetuating environmental injustice?

The Scottish approach to standing for judicial review may be described as a restrictive one, preserving administrative efficiency by making executive decisions difficult to challenge. It is submitted that the current Scottish law on standing has two flaws which make it overly restrictive; thereby perpetuating environmental injustice by restricting access to judicial review.

Firstly, the test for title to sue adopts a 'narrow approach' which limits access to judicial review to those who can show some infringement of a legal right.[83] This requirement is founded on an antiquated private law

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[79] *Air 2000 v Secretary of State for Transport (No. 2)*, 1990 SLT 335, as per Lord Clyde at 339.
[80] It is of note that environmental NGOs are afforded automatic interest to sue under the Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1). Regulation 46A provides that, '[A]ny non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of the Directive and rights capable of being impaired for the purposes of Article 10a(b) of the Directive', however this only applies to applications relating to environmental impact assessments. It refers to EU Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice.
[81] See *Wilson v Independent Broadcasting Authority*, 1979 SC 351. at 357.
[82] *Scottish Old People's Welfare Council v Secretary of State for the Social Security*, 1987 SLT 179 as per Lord Clyde at p. 186-187.
[83] See J St Clair, and N Davidson (n 69) at p. 66, para. 5.06. C Reid also makes this observation in several of his works: C Reid, 'Legal Standing in Scotland' in D Robinson and J Dunkley, *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995); C Reid 'Environmental Citizenship and the Courts' (2000) 2 Environmental Law Review 177 at p. 178; C Reid, *Environmental Law in Scotland* (2nd edn W Green & Son Ltd, 1997).

approach to standing; requiring that an applicant must have a personal legal interest which is being infringed to access a public legal remedy. Lord Hope has argued that this creates the, 'risk of being out of touch with the public interest in having matters of that kind, about which a section of the public has a genuine grievance, litigated in the courts'.[84]

In the absence of environmental rights, such as the acclaimed 'right to a clean environment',[85] often instances of illegality in environmental decision-making will not infringe a private legal right. This may be demonstrated by a recent, unsuccessful petition to suspend work on an area of sand dunes in Aberdeenshire so that an environmental impact assessment could be performed.[86] The public interest in ensuring that hard-fought environmental laws are applied stringently is dispensed with by the current test for title to sue. Consequently, environmental decision-makers may disregard the law with impunity; to the detriment of environmental justice.

A further corollary of the requirement for the infringement of a legal right is that environmental interest groups will often lack title to sue, as it may be difficult to have representative judicial review brought by a body which is itself not affected.[87] Often environmental interest groups will instead attempt judicial review in England where the test for standing is clearer and less restrictive.[88] Blair and Martin cite the example of Greenpeace's decision to bring proceedings in England to challenge ministerial approval of the disposal of the Brent Spar oil platform in Scottish waters, on the basis of an opinion from a Scottish QC on problems that they would have in showing that they had standing in Scotland.[89] The *status quo* risks overburdening English courts and creates an anomalous situation

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[84] D Hope (n 53) at p. 306.

[85] For a discussion of which, see A Boyle and M Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon, 1998); D Shelton, 'Human Rights, Environmental Rights and the Right to the Environment' (1991-1992) 28 Stanford Journal of International Law 103; B Hill *et al*, 'Human rights and the environment: a synopsis and some predictions' (2003-2004) 16 The Georgetown International Environmental Law Review 359; J Symonides, 'The human right to a clean and balanced environment' (1992) 20 International Journal of Legal Information 24 and N Gibson, 'The right to a clean environment' (1990) 54 Saskatchewan Law Review 5.

[86] *Forbes v Aberdeenshire Council and Trump International Golf Links* [2010] CSOH 01. The petition of Aberdeenshire resident Mary Forbes for interim orders suspending work on stabilising the sand dunes on the site of the proposed golf course was rejected due to, *inter alia*, the lack of title to sue as she was not directly affected by the works. Lady Smith states at para. 26 that 'so far as title and interest is concerned, the facts. . .do not show that she is affected in some identifiable way'. The illegality of the decision that the work did not require an EIA is not assumed; this example is merely used to show how legitimate questions of procedural legality concerning the environment are avoided due to the restrictive test of standing used in Scotland.

[87] Noted by Lord Clyde, "Public Law in Scotland", (Address to the Murray Stable Public Law Group, November 10th 2008).

[88] For a review of the English law on standing in environmental cases, see K Gledhill, 'Standing, Capacity and Unincorporated Associations' (1996) Judicial Review 67, C Hilson and I Cram (n 60) and M Beloff, 'How Green is Judicial Review' (2005) Judicial Review 93.

[89] S Blair and S Martin, 'Judicial Review 20 Years on - Where are we now?' (2005) 31 SLT (News) 173 at p. 176.

whereby a petitioner elsewhere in the UK may have less constrained access to judicial review than the petitioner in Scotland, despite their case having an identical legal and factual background.[90] Furthermore, where there is an issue of Scottish public interest at stake, it has been suggested that such cases would be better dealt with in Scotland.[91]

Secondly, the test for interest to sue is insufficiently clear to allow an applicant to determine whether or not (s)he will be determined to have standing to petition the court for judicial review. The question of standing is logically prior to any other when raising a petition for judicial review, and should be dealt with at the outset of litigation. The lack of clarity in this area of the law can act as a barrier to procedural environmental justice. Potential applicants cannot initiate an application for judicial review fully confident that they will meet the test, and are thus discouraged from accessing a legal remedy essential to challenging environmental injustices.

O'Neill observes that 'questions as to the extent of title and interest needed to give an individual sufficient standing to be able to challenge national measures on environmental law grounds have not yet been satisfactorily addressed or answered'.[92] He further argues that there has been unwillingness shown by the Scottish courts towards addressing the issue,[93] and when combined with a tactical policy by the Scottish Government not to challenge title and interest in environmental cases to avoid the possibility of an 'unwelcome precedent',[94] the result is further uncertainty in this area of law.

(v) Recommendations of the Gill Review on standing for judicial review

The Gill Review recommends a comprehensive change in the test of standing for judicial review in Scotland. It makes several criticisms of the existing Scottish law, recognising the current law on standing as being 'too restrictive'.[95]

The Gill Review makes the recommendation that the Scottish requirement for standing be replaced by a single test of 'whether the petitioner has demonstrated a *sufficient interest* in the subject matter of the

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[90] J St Clair and N Davidson note that 'to the extent that Scots law takes a restrictive view of title and interest, there is the anomaly that the petitioner elsewhere in the UK may have freer access to judicial review that the petitioner in Scotland'; St. Clair and N Davidson (n 69) at pp. 72-73, para. 5.15.

[91] D Hope argues that 'it would surely be better that serious issues of public interest should be determined in their own courts'; D Hope (n 53) at p. 304.

[92] A O'Neill (n 54) at p. 263, para. 9.60.

[93] *ibid* at p. 266, para. 9.67.

[94] Noted in 'Case comment on *Swan v Secretary of State for Scotland,* 1997 GWD 15-636', (1997) ELM 211 at p. 213.

[95] Gill Review, Vol II, at ch. 12, p. 29, para. 25. The Gill Review makes an explicit acknowledgement that the current Scottish test may breach Scotland's requirements on ensuring access to environmental justice under the Aarhus Convention, at p. 28, para. 19. See pp. 27-28 for further criticisms of the Scottish test for standing.

proceedings'.[96] The implications of this new test for environmental justice in Scotland will now be assessed.

(vi) Analysis - implications of the new test for environmental justice in Scotland

An identical test of 'sufficient interest'[97] is used in England; thus a comparative analysis is useful to understand the implications for environmental justice in Scotland if the Gill Review's proposal is adopted.

'Sufficient Interest' in England

In England, the test of sufficient interest is recognised as providing a relaxed, liberal approach to standing, regarding it as a threshold question for an applicant.[98] It has allowed applicants, despite having no legal rights being infringed by an administrative act, to draw a court's attention to an apparent misuse of public power.[99] It is thus said to be a relatively low hurdle for applicants to overcome,[100] one whose height is being continuously lowered by a liberal English judicial approach.[101]

The use of the sufficient interest test has allowed environmental interest groups such as Greenpeace,[102] the World Development

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[96] *ibid* p. 29, para. 25.

[97] s. 31(3) Supreme Court Act 1981 provides that 'the court shall not grant leave [for judicial review] . . . unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

[98] The English approach is based on Lord Diplock's rationale, in *I.R.C. v National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617. N De Sadeleer *et al*, note the existence of three different approaches to standing in a comparative study of EU member states in N De Sadeleer *et al*, *Access to Justice in Environmental Matters* (CEDRE, 2002) at pp. 21-22. J St Clair, and N Davidson comment that '[I]n England the courts have adopted a liberal approach to title and interest or *locus standi*, and it is now rare for anyone with a *bona fide* interest to be turned away'; J St Clair and N Davidson (n 69) at p. 66, para. 5.07. A O'Neill, remarks that '[I]n general the English courts have . . . interpreted the test on standing liberally'; A O'Neill (n 54) at p. 175, para. 6.05. N Sheridan, remarking on the English law of standing in environmental matters, states that '[A] number of themes can be seen in the development of the case law on standing: The general approach of the court to standing is a liberal one; Financial interest may be sufficient but will seldom if ever be necessary'; N Sheridan, *Measures on access to justice in environmental matters (Article 9(3)): Country report for United Kingdom* (Milieu Environmental Law and Policy, 2006) at p. 11, s. 2.2.2.

[99] *I.R.C. v National Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617, as per Lord Diplock. See also W Wade and C Forsyth (n 61) at p. 682; *Regina (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 1761 and; *R v Somerset County Council ex p Dickson* [1998] Env.LR 111 per Sedley J at 7.

[100] E Legere (n 64).

[101] M Beloff (n 88) at p. 96, para. 17.

[102] *R v HM Inspectorate of Pollution, ex parte Greenpeace Ltd (No. 2)* [1994] 4 All ER 329.

Movement,[103] Friends of the Earth[104] and the less familiar Buglife[105] standing for judicial review in England, allowing them to contribute to environmental justice by challenging a variety of administrative decisions which impact on the environment.

Implications of the new test for Scotland

Whilst the new test perhaps does not represent as radical a move as Joseph Sax's famous Michigan Environmental Protection Act 1970,[106] it is submitted that it could be of considerable benefit for enhancing procedural environmental justice in Scotland for two reasons.

Firstly, it would liberalise the test of standing. The requirement for 'sufficient interest' would allow a wider range of interests than at present to access judicial review. It is submitted that it would address the uncertainty surrounding whether individuals can challenge national measures on environmental law grounds by removing the need for an infringement of a legal right. It would also allow Scottish environmental interest groups access to judicial review.[107] Wider access to judicial review would allow individuals and interest groups[108] a potent weapon to ensure that the rule of law is adhered to in administrative decisions, combating environmental injustice in Scotland.

Secondly, it would bring clarity to the law. Potential litigants would be far better positioned to assess their eligibility, having no longer to face the uncertainty as to whether a court may reject their petition on grounds of a lack of standing.

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[103] *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Limited* [1995] 1 All ER 611.

[104] *R v Secretary of State for the Environment, ex parte Friends of the Earth* [1994] 2 CMLR 760 and *R v Secretary of State for the Environment, ex parte Friends of the Earth* [1996] 1 CMLR 117 CA.

[105] *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2008] EWHC 475 (Admin), [2008] EWCA Civ 1209, [2009] EWCA Civ 29.

[106] See s. 2(1) Michigan Environmental Protection Act. It was described at its inception as being 'the most revolutionary measure to have been enacted in. . . environmental law'; J Thibodeau, 'Michigan's Environmental Protection Act of 1970: Panacea or Pandora's Box' (1970-1971) 48 Journal of Urban Law 579 at p. 579.

[107] See (n 102-105).

[108] Academic concerns have been expressed over the ability of environmental interest groups to contribute to environmental justice. C Nadal argues that 'the assumption that NGOs can represent those suffering environmental injustice is somewhat questionable. The very structure and nature of NGOs pose real challenges as the predominantly white and middle-class composition of staff fails to reflect, inter alia, the socio-economic, ethnic and cultural diversity of those suffering injustice'; C Nadal, 'Pursuing substantive environmental justice: the Aarhus Convention as a "pillar" of empowerment' (2008) Environmental Law Review 28 at p. 35.

B. Expenses of Public Interest Litigation

(i) Introduction

It is suggested that there is little point in liberalising the requirements relating to standing in Scotland if costs still prevent access to judicial review. Justice Toohey has argued that:[109]

> Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a governmental instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.

The prospect of having to pay the costs of public interest environmental litigation can dissuade all but the most confident, or perhaps reckless, litigant from accessing the courts.[110] Tollefson opines that finding funding presents an 'enormous challenge for any potential public interest litigant'.[111]

The normal rule in Scottish litigation is that an unsuccessful litigant must pay their opponent's costs.[112] The uncertainty that this brings to litigants when assessing their potential liability at the outset of litigation, has been noted to have a 'chilling effect'; acting as a barrier to public interest litigation.[113] In England, costs have been recognised as being one of the largest barriers to environmental litigants seeking to access justice.[114] There is some evidence of the existence of a similar problem in Scotland,[115] but

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[109] In his address to a conference of the Australian National Environmental Law Association, 1989.

[110] This includes the fees for the litigant's legal team, court fees and potentially the fees of the other side if the litigant is unsuccessful.

[111] C Tollefson, 'When the "public interest" loses: the liability of public interest litigants for adverse costs awards' (1995) 29 University of British Columbia Law Review 303 at p. 318.

[112] Lord Penrose noted the 'general principle that expenses follow success', in *Ramm v Lothian and Borders Fire Board* 1994 SC 226 at 227. J Maclaren notes that this rule is based on the rationale that 'if any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created'; J Maclaren, *Court of Session Practice* (Edinburgh, 1916).

[113] S Chakrabarti *et al* state that 'the courts' tendency to award costs against the unsuccessful party undoubtedly serves as a formidable barrier to litigants bringing an action which is in the wider public interest'; S Chakrabarti *et al*, 'Whose cost the public interest?' (2003) Public Law 697 at p. 698; *Sonia Burkett v London Borough of Hammersmith and Fulham* [2004] WL 2295482 per Brooke LJ at 13, para. 80.

[114] P Stookes (n 24), Environmental Justice Project, *Environmental Justice Project Report* (2004), Lord Justice Brooke, 'Environmental Justice: The Cost Barrier' (2006) 18(3) JEL 341.

[115] Research by F McCartney has shown that cost is a barrier to justice in accessing legal remedies in Scotland, she concludes that cost presents the 'most obvious barrier' to access to

further research is needed to give an accurate assessment of the effect of the costs of litigation on environmental justice in Scotland.

But does public interest environmental litigation necessarily promote environmental justice? There is much debate over the merits of public interest litigation generally, and it will be asked first of all whether the two go hand in hand. In Scotland, where environmental injustice frequently manifests itself in the form of distributional inequity against impoverished communities,[116] those suffering an environmental injustice will likely be impecunious. A litigant who is unable to meet the full expense of litigation is presented with two main options;[117] apply for legal aid, or apply to the court for a PCO. The availability of these two remedies to meet the cost of litigation in environmental cases will be analysed and the potential effects of the Gill Review's recommendations for environmental justice will then be discussed.

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justice; F McCartney, *The State Of Environmental Justice in Scotland* LLM Dissertation (University of Strathclyde, 2005) (unpublished) at p. 70. However, McCartney acknowledges the limitations of her research at p. 57. The Gill Review recognises the barrier posed by costs to access to justice (although not in a purely environmental context), recognising that in the consultation for the review '[A]lmost all respondents agreed that cost is a significant factor in deciding whether or not to pursue or defend a case' at p. 74, para. 4. Anecdotal evidence shows that costs of environmental litigation in Scotland can be prohibitive. *WWF-UK Ltd and Another v Secretary of State for Scotland* [1999] Env LR 632. See also Note of Oral Submissions made by WWF-UK in respect of Communication ACCC/C/2008/33', (25/09/2009), available at <http://www.unece.org/env/pp/compliance/C2008-33/correspondence/FrWWFReC33oralsubmissions.doc>. Furthermore, a complaint which has been made to the Aarhus Convention Compliance Committee by the Scottish community group 'Road Sense' in relation to the proposed Aberdeen Western Peripheral Route states that 'the costs of seeking Judicial Review are high. Certainly the costs are beyond the means of a small environmental organisation. Moreover, in the event of failure the plaintiff is liable for the costs of the other party or parties – which will be significant in the case of a plaintiff taking on the might of both Transport Scotland and the Scottish Government, with their high internal costs. As no legal aid or support is available then these high costs effectively preclude any individual or small organisation seeking environmental justice against the Scottish Government through Judicial Review'; Communication to the Aarhus Convention's Compliance Committee from Road Sense (May 7th 2009) at p. 17.

[116] See (n 42).

[117] Conditional fee arrangements whereby a litigant may not pay any of their own legal fees unless they are successful and legal expenses insurance present other means by which litigation may be funded. Conditional fee arrangements are excluded from consideration by this dissertation due to the recognition by the Gill Review that public law issues 'are not generally undertaken on a speculative basis'; Gill Review Vol II, at ch. 14, p.74, para. 5. Legal expenses insurance is not considered as most 'before the event' or 'after the event' insurance policies either exclude judicial review cover completely, do not provide a sufficient level of cover, or are restrictively expensive. This is due to the expensive and unpredictable nature of judicial review proceedings. See *How to fund a judicial review claim when public funding is not available* (The Public Law Project, 2007), available at <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>.

(ii) Public interest environmental litigation: a help or a hindrance to environmental justice?

Proponents of public interest environmental litigation espouse its methods as a panacea for a wide range of environmental and social ills. Sax opines that litigation can encourage institutional integrity in the executive decision making process, and that the courts represent a citizen's direct access to the decision making process as the courts have a duty to respond to a complaint, with no opportunity for the 'political screening' of cases.[118] Preston argues that litigation increases media attention placing a greater public focus on environmental issues and can be useful to ensure that hard-fought environmental laws are enforced.[119] McCartney contends that 'Scottish environmental law may be under-litigated, leading to a lack of judicial precedents and certainty';[120] she cites the vague duty imposed on Scottish public bodies to 'further the conservation of biodiversity'[121] as an example of this. The threat of legal action is also advanced as being sufficient to change environmentally damaging behaviour, or it can provide sufficient time to delay such action; allowing community groups time to mobilize and demonstrate their opposition.[122]

Critics have pointed out that litigation can have a perverse effect of disempowering communities; as lawyers take decisions, set priorities and undertake responsibilities that should instead be determined by the community.[123] Cole states that paradoxically, winning a legal battle can harm communities by removing an important organising tool from the community and failing to tackle the root political and economic conditions that led to the threat in the first place.[124] The Cahns criticise public interest environmental litigation as often misanthropically eschewing social aims, and pandering to the narcissistic interests of its lawyers, rather than the clients.[125]

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[118] See J Sax, *Defending the Environment: a handbook for citizen action* (Random House, 1970) at p. 111.

[119] B Preston, "Role of Public Interest Environmental Litigation" speech given to the Environmental Defender's Office National Conference on Public Interest Environmental Law in Australia Customs House (Sydney, May 13th 2005).

[120] F McCartney, *The State of Environmental Justice in Scotland* LLM Dissertation (University of Strathclyde, 2005) (unpublished) at p. 86.

[121] s. 1(1) of the Nature Conservation (Scotland) Act 2004.

[122] See J Denvir (n 59) at p. 1136 and p. 1142 respectively.

[123] See D Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1975-1976) 85 Yale Law Journal 470 at p. 512.

[124] See L Cole, 'Empowerment as the key to protection: the need for environmental poverty law' (1992) 19 Ecology Law Quarterly 619 at p. 648 and p. 651 respectively.

[125] E and J Cahn argue that 'in the public interest field, the power to serve the public can all too readily be viewed as a personal possession-a private prerogative to play god in defining the public interest for the public' and 'the concept of ecology preached by the new conservationists and incorporated into the new public law gospel does not appear to include those two-legged animals of varied hues who are the most hard hit by urban and industrial pollution'; E and J Cahn, 'Power To the People or the Profession?- The Public

On balance, public interest environmental litigation can be of benefit to environmental justice, but must be treated with care. Litigation that is tactically used to empower those suffering environmental injustices, assisting the organisation of communities, serving as a rally point for public support and creating political leverage can be a force for environmental justice. However, legal practitioners must be careful in choosing which cases to litigate, and ensure that such litigation remains a client-focused tool, rather than a vehicle to exploit their own career ambitions.

(iii) Funding public interest litigation

Legal Aid

To be eligible for civil legal aid, an applicant must meet two tests.[126] Firstly, the applicant must show that (s)he has a *probabilis causa litigandi*.[127] Secondly, it must be reasonable in the circumstances that legal aid should be made available;[128] including means-testing to ensure that they are unable to afford litigation using their personal income or capital.[129]

The Scottish Legal Aid Board (SLAB, the administrative body for legal aid in Scotland) has issued guidance to clarify its position on supporting public interest litigation.[130] It provides that where a public interest is demonstrated by the case of an applicant, SLAB may accept this as a 'determining factor in deciding whether to grant civil legal aid'.[131] The public interest is widely defined as where 'the outcome of the case may have a direct tangible benefit to the applicant and to others'.[132] However, the mere fact that other citizens may find the proceedings interesting or of some hypothetical interest will not suffice.[133]

Interest in Public Interest Law' (1969-1970) 79 Yale Law Journal 1005 at p. 1042 and p. 1044 respectively.

[126] The Scottish Legal Aid regime is based in the Legal Aid (Scotland) Act 1986, as amended by the 2002 regulations: The Civil Legal Aid (Scotland) Regulations 2002, Scottish Statutory Instrument 2002 No. 494.

[127] Translated as an 'arguable case backed up by sufficient evidence'; s. 14(1)(a) Legal Aid (Scotland) Act 1986.

[128] *ibid*.

[129] See s. 14(1)(a Legal Aid (Scotland) Act 1986 (as amended by S.S.I. 2009 No. 143). If the applicant's disposable income is above £25,000 then (s)he will not be entitled to legal aid, (s)he may also be refused legal aid if his/her disposable capital exceeds £12,439. The Scottish Legal Aid Board's advice leaflet, *A Guide to Civil Legal Aid* (Stewarts Colour Printers, 2009) provides advice on the conditions for eligibility and the contributions which an applicant will have to make towards civil aid costs.

[130] *Guidance on Cases of a Wider Public Interest* (Scottish Legal Aid Board, August 2003). SLAB administers legal aid in Scotland.

[131] *ibid* at para. 2.

[132] *ibid* at para. 1.

[133] *ibid* at para. 3.

The guidance also states that, in deciding whether to grant legal aid SLAB will also have regard to any potential 'cost benefit'[134] of litigation. It states particularly that '[C]ivil legal aid will not be granted where there is little prospect of any worthwhile financial benefit to the applicant'.[135]

The requirement of a 'worthwhile financial benefit' can make it difficult for applicants to obtain legal aid in public interest environmental cases. One author has remarked that SLAB's approach to environmental litigants 'suggests that only cases where there is a financial interest for the individual will be funded'.[136] Some public interest environmental issues will affect financial interests, in some cases to a significant degree such as in planning cases where an applicant wishes to avoid the siting of an undesirable land use next to their property; but in many cases the pecuniary benefits to a litigant will be dissolute or even negligible.[137] SLAB uses a private interest test arguably unsuited to a public interest context, excluding litigants with genuine public interest environmental issues.

Protected Costs Orders

PCOs are instruments deployed by a court to protect a public interest litigant from the normal rule that the 'loser' pays their opponent's costs. They are issued in recognition that a litigant is acting in the public interest.[138] They are issued at the discretion of the court, and may exclude completely, or limit to a specified sum, a claimant's liability for the expenses of the defendant or any third party, regardless of the outcome of the case. Issued normally at the outset of litigation, PCOs can thus reduce the uncertainty surrounding a litigant's financial liability. To combat the potential for PCOs to be seen as a 'blank cheque' they are often accompanied by a costs capping order limiting the amount which a public interest litigant may recover from the defender if successful. Macintyre argues that PCOs can facilitate the equitable access to justice for claimants of limited means by removing financial barriers to litigation.[139]

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[134] *ibid*.

[135] *ibid*.

[136] F McCartney, 'Access to environmental justice' in D McArdle (ed) (n 46) at p. 12.

[137] See *McGinty v Scottish* Ministers [2010] CSOH 5 for an example. Note that the petitioner may not be said to have a private financial interest in the outcome of this case.

[138] For a discussion on the justifications for PCOs, see C Tollefson (n 111) and C Tollefson *et al*, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83 La Revue du Barreau Canadien 473.

[139] O Macintyre describes PCOs as 'innovative solutions to ensure that impecunious litigants are not denied the opportunity of raising questions of public law which are of general public importance'; O Macintyre, *The Role of Pre-emptive/Protective Costs Orders in Environmental Judicial Review Proceedings* (University College Cork, 2006) at p. 5. Available at <www.ucc.ie/en/lawsite/eventsandnews/previousevents/environapr2006/DocumentFile,16192,en.doc>.

The power of Scottish courts to grant PCOs was considered firstly in *McArthur*;[140] where Lord Glennie held that it was competent for Scottish courts to make PCOs.[141] He then stated that, when deciding whether or not to make a PCO, the principles developed by the court in the English *Corner House* case[142] were equally applicable in Scotland.[143]

In *Corner House* the Court of Appeal laid down the following principles for the creation of PCOs: [144]

> 1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
>
> i) The issues raised are of general public importance;
>
> ii) The public interest requires that those issues should be resolved;
>
> iii) The claimant has no private interest in the outcome of the case;
>
> iv) Having regard to the financial resources of the claimant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
>
> v) If the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> 2. If those acting for the claimant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
>
> 3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

A subsequent attempt by Friends of the Earth Scotland to obtain a PCO for litigation concerning the extension of the M74 saw a turnaround by the Scottish judiciary.[145] The Inner House made it apparent that they were not prepared to grant the order, and recommended that the issue be resolved by way of a more general review of the courts instead.

January 2010 witnessed a further jurisprudential rotation. Lady Dorrian, of the opinion that 'a protective and restricted expenses order was competent in Scotland',[146] granted a PCO to a petitioner seeking to challenge

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[140] *McArthur v. Lord Advocate and Scottish Ministers* 2006 SLT 170. Lord Glennie was invited to make a PCO on behalf of three women seeking judicial review of decisions made by the Lord Advocate and Scottish Ministers regarding the investigations into the deaths of their relatives.

[141] *ibid* per Lord Glennie at 173.

[142] *The Queen on the Application of Corner House Research v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] I WLR 2600.

[143] "…[T]he importance of *Corner House* is . . . the recommendation of the principle that in a certain category of case it may be in the public interest that there be a departure from the ordinary approach to costs. It is, to my mind, a principle which applies as much in Scotland as it does in England and in the other jurisdictions to which the Court of Appeal made reference in that case"; *McArthur v. Lord Advocate and Scottish Ministers* (n 140) as per Lord Glennie at p. 173, para. 11.

[144] *Corner House Research* at para. 74.

[145] Not reported, cited in the submission by the Environmental Law Centre Scotland to the Scottish Civil Courts Review, 23 December 2008 at p. 6; Gill Review Vol II, at ch. 12, p.39, para. 65 and F McCartney, 'Access to environmental justice' in D McArdle (ed), (n 46) at p. 13.

[146] *McGinty v Scottish* Ministers [2010] CSOH 5 at para. 1. It is of note that no mention was made by Lady Dorrian to the M74 case cited referred to above in (n 133).

the Scottish Government's decision to include a new coal power station at Hunterston in the National Planning Framework. She applied the *Corner House* criteria and granted the petitioner a PCO which limits his potential liability for the other party's expenses to a maximum of £30,000, but also caps the recovery of his own costs on success to that of a solicitor and one senior counsel acting without a junior.

(iv) Does the current law on the expenses of public interest litigation in Scotland promote environmental justice?

To assess whether the *status quo* regarding the costs of public interest environmental litigation promotes environmental justice in Scotland, it must be asked whether potential litigants unable to pay for the costs of civil litigation are assisted by the current provisions regarding legal aid and PCOs.

Legal Aid

Legal aid is only available where an applicant has a private financial interest in the outcome of his/her case. Applicants without a financial interest in a case, but with an otherwise valid public interest such as securing the protection of the environment, ensuring that public authorities adhere to the rule of law in environmental decision making or the protection of human health from potentially harmful developments are excluded from accessing legal aid. It would appear that environmental justice is not being well served by SLAB's use of a private interest test in a public interest context.

Protected Costs Orders - The Corner House Jurisprudence

The Scottish courts have had recourse to English jurisprudence on PCOs; one which may be criticised on several grounds. Firstly, the restriction on a petitioner having a private interest in a case has been argued to be based on 'a false dichotomy';[147] the assumption that public and private interests operate distinctly and to the exclusion of the other. Whilst some consideration of the degree of private interest held by a litigant is necessary to prevent the abuse of PCOs by those seeking to shelter behind their protection for a private benefit, the exclusion of all private interests is very

[147] J Mulcahy, 'Protective Costs Orders in Scotland: the significance of McArthur' in D McArdle (ed) (n 46) at p. 17. S Chakrabarti *et al*, 'Whose cost the public interest?' (2003) Public Law 697 at p. 702. M Potter also notes that 'the requirement that the applicant should have "no private interest in the outcome" a somewhat elusive concept to apply in any case in which the applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the applicant's private or personal interest should disqualify him or her from the benefit of such an order'; in *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam).

restrictive and implies that only an altruistic stranger or an environmental NGO may apply for a PCO.[148] The demanding nature of litigation, combined with the low numbers of environmental NGOs in Scotland and the limited resources of such NGOs, precludes all but a handful of public interest cases from ever being litigated by NGOs alone. The private interest restriction may also operate to the exclusion of those applying for judicial review; as the test for standing requires that an applicant have a private interest in the issue.[149]

Secondly, the influence of whether the litigant's lawyers are working *pro bono* in increasing the chances of having a PCO awarded may have dangerous implications for Scottish environmental justice.[150] It is aimed sensibly at keeping the costs of litigation within reasonable parameters to mitigate the apparent inequity inflicted upon a defendant which is created by protecting one party to litigation from the costs of the other without reciprocation; but it begs the question why lawyers should be expected to work for free in cases of important public interest. The consequence is one of harm to the economic viability of the few environmental legal specialists working in the interest of those unable to afford litigation. Potential litigants may also struggle to find an adequately qualified lawyer who will represent them *pro bono*. Stein and Beageant comment that 'reliance upon goodwill and charity can only go so far towards achieving access to justice'.[151]

Thirdly, the contestable nature of the procedure for application for a PCO means that the application itself may expose an applicant to considerable financial risk. If a litigant applies for a PCO in England and is unsuccessful, a financial liability of £5,000-£10,000 could arise from the application itself.[152] Whilst this may prevent a 'floodgates' situation and encourage only the most genuine applications, it is submitted that it may also disincentivise applicants with legitimate public interest issues from litigating.

The approach of the Scottish courts to PCOs

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[148] R Stein and J Beagent note that 'in the environmental field potential claimants are almost invariably individuals (or groups of individuals such as residents' associations and action groups) who have an interest in preventing the environmental harm that is threatened. They would therefore appear, as a class, to have a private interest in the outcome of the case whether that interest is only one of amenity or is also a financial one (i.e. the value of their property may be affected)'; R Stein and J Beagent, 'Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry' (2005) JEL 413 at p. 22.

[149] See s. 3.1.3 above.

[150] See commentary on this by R Stein and J Beagent, 'Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry' (n 148), O Macintyre, *The Role of Pre-emptive/Protective Costs Orders in Environmental Judicial Review Proceedings* (n 139) and B Jaffey, 'Protective Costs Orders in Judicial Review' (2006) Judicial Review 171.

[151] R Stein and J Beagent, 'Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry', *ibid*, at p. 443.

[152] R Stein, and J Beagent, 'Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry' (2005) JEL 413 at p. 441. Research on the costs of an application in Scotland was unavailable.

The approach of the Scottish courts to PCOs has been puzzling; firstly accepting in *McArthur* that they have the power to vary expenses, showing considerable doubt in the M74 case, and then finally issuing a PCO in *McGinty*. This is perhaps indicative of the apprehensiveness of the Scottish judiciary to issue PCOs, due to the perceived inequity created by PCOs; protecting one party to litigation from costs without reciprocation. *McGinty* should now clarify the issue and firmly establish PCOs in Scots law.

It may be questioned whether orders of the type issued in *McGinty* will be sufficient to remove the barrier to environmental justice posed by litigation costs. The petitioner in *McGinty* was unemployed, receiving Job Seekers Allowance at £128.60 per fortnight and had savings in the region of £1,000. Even with a PCO granted in his favour, the petitioner still faces a liability for costs exceeding £100,000, if unsuccessful.[153] The applicant is clearly unable to meet these costs himself and the litigation has been reliant on donated funds thus far.[154] Whilst a reduction in the uncertainty offered by the PCO as to the potential liability of a litigant for the opponent's costs is welcome, a reliance on public philanthropy is unlikely to offer a meaningful inroad to delivering procedural environmental justice in Scotland.

It is seen that the *status quo* as regards the funding of public interest environmental litigation in Scotland is failing environmental justice. Legal aid is unobtainable where no private financial interest exists, the *Corner House* jurisprudence has several deep flaws and PCOs of the type issued in *McGinty* will not provide enough assistance to impecunious persons seeking to fund litigation.

(v) Recommendations of the Gill Review for funding public interest litigation in Scotland

It is of note that the issue of the discretion of courts to award expenses in public interest cases was not mentioned in the consultation to the Gill Review, instead being raised independently by a number of respondents.[155] This perhaps demonstrates the importance of improving the law surrounding the use of PCOs.

Two suggestions are made by the Gill Review in this area. Firstly, it proposes that an express power for Scottish courts to grant a PCO be made.[156] It secondly suggests two potential forms which an express power may take.

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[153] Lady Dorian commented that '[A]s to the costs which are likely to be incurred, an assessment by a legal accountant was placed before me, indicating that the petitioner's potential liability should the Scottish ministers be successful, might be in the region of £90,000 and the petitioner's own expenses might be in the region of £80,000'; *McGinty v Scottish* Ministers [2010] CSOH 5 at. para 4.

[154] Noted by Lady Dorian, *ibid.*

[155] Gill Review Vol II, at ch. 12, p. 37, para. 59.

[156] *ibid*, p. 42, para. 73.

The Gill Review proposes two separate tests which may be adopted for use in Scotland (shown below);[157] a 'Reformulated Corner House Test' and a model based on that proposed by the Australian Law Reform Commission (ALRC).[158] The inclusion of two different recommendations is somewhat confusing, although they are not fundamentally dissimilar; perhaps indicating that they are purely hypothetical suggestions and that the criteria for PCOs would need to be formulated after extensive consultation with all interested parties.[159]

The Reformulated Corner House Test[160]

> The court may make a protective costs order at any stage of the proceedings and on such conditions as it thinks fit if it is satisfied that:
>
> — the issues raised are of general public importance;
> — the public interest requires that those issues be resolved; and
> — having regard to the financial resources of the applicant and the respondent and to the amount of expenses that are likely to be involved, it is fair and just to make the order.
> — In exercising its discretion the court may have regard to:
> — whether the applicant is likely to abandon the proceedings and will be acting reasonably in so doing if an order is not made; and
> — whether the applicant's legal representatives are acting on a pro bono basis.
> — It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

The ALRC Test[161]

> A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that
>
> — the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community.
> — the proceedings will affect the development of the law generally and may reduce the need for further litigation.
> — the proceedings otherwise have the character of public interest or test case proceedings.

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[157] *ibid*, pp. 43-44, paras. 75-77.
[158] *ibid*, pp. 43-44, paras. 75-78. The ALRC test derives from a report by the Australian Law Reform Commission; Report 75, *Costs Shifting – who pays for litigation* (Australian Law Reform Commission, 1995).
[159] The Gill Review advocates formulating a PCO test after consultation, stating that '[O]ne advantage of having an express power is that draft rules in an area which is controversial and which involves a careful balancing of the interests of claimants and public bodies could be put out for consultation so that a range of views from interested parties, not just the arguments advanced in any particular litigation, could inform the formulation of the principles to be applied'; Gill Review Vol. II, at ch. 12, p. 41, para. 71.
[160] *ibid*, at para. 74.

[161] *Ibid*, at paras. 76-77.

— A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.
— If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to
— the resources of the parties
— the likely cost of the proceedings to each party
— the ability of each party to present his or her case properly or to negotiate a fair settlement
— the extent of any private or commercial interest each party may have in the litigation.
— The orders the court or tribunal may make include an order that
— costs follow the event [i.e. expenses follow success]
— each party shall bear his or her own costs
— the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
    - not be liable for the other party's costs
    - only be liable to pay a specified proportion of the other party's costs
    - be able to recover all or part of his or her own costs from the other party
— another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders.

(vi) Analysis: implications of the Gill Review's recommendations on funding public interest litigation for environmental justice in Scotland

Recommendation 1 - Creating an Express Power for granting PCOs in Scotland

An express power to grant a PCO would bring two benefits to environmental justice. Firstly, it would further clarify this area of law in Scotland; removing any remaining judicial hesitations surrounding the use of PCOs in Scotland. Although *McGinty* now appears to have established PCOs within Scots law, judicial doubts may persist and an express power (either legislated for, or provided by the Court of Session's rules council as an act of sederunt) would further legitimise the use of PCOs.

It is submitted that an express power could also lead to an increased public awareness of the availability of PCOs and public interest environmental litigation. This could stimulate interest in environmental justice issues and in Scotland, creating greater political demand to address environmental justice. The level of benefit offered to environmental justice by this proposal depends largely on the form of the express power, discussed below.

Recommendation 2(a) - A Reformulated Corner House Test

This test makes several key departures from the original *Corner House* jurisprudence with implications for environmental justice.

Firstly, the absence of a private interest test widens the range of potential applicants who may apply for a PCO, from purely altruistic strangers and NGOs, to also include individuals with some form of private interest in the outcome of the litigation. However, the complete absence of the consideration of private interest exposes the system of PCOs to abuse by applicants whose main motivation for litigating is to protect a private interest, which could damage the credibility of such orders. It is submitted that this constitutes an oversight by the Gill Review, and that some mechanism for consideration of private interests to avoid the misuse of PCOs should be included.

Secondly, the continuing presence of the consideration of whether the applicant's lawyers are working on a *pro bono* basis is troubling for Scottish procedural environmental justice, although the reduction in its weighting from the original *Corner House* jurisprudence is a welcome inclusion. The altruism of the environmental lawyer remains of some importance to a court when deciding whether to grant a PCO.

Finally, the weighting given by the court to 'whether the applicant is likely to abandon the proceedings if a PCO is not granted and will be acting reasonably in doing so' is lowered. It is reduced from a mandatory requirement to a discretionary factor for the court's consideration.[162] This reduces the onerous nature of the *Corner House* test, enhancing procedural environmental justice.

Recommendation 2(b) - The ALRC test

The ALRC test is broadly similar to the reformulated Corner House test; however there are two distinctions which can be made.

Firstly, the ALRC test allows the court to make a PCO for a party, 'notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter', however the court may consider 'the extent of any private or commercial interest each party may have in the proceedings'. This is not as restrictive as the original *Corner House* principles which exclude any element of private interest completely, but it allows a court to consider the private interest of an applicant. This prevents abuse of the PCO system by litigants whose main interest in litigating is a private one, and therefore deals adequately with the above criticism made of the reformulated *Corner House* test.[163] It is submitted that the ALRC criteria

[162] A distinction may be made between mandatory and discretionary criteria in the Corner House rules. Mandatory criteria are those which must exist for a court to issue a PCO; discretionary criteria require the court to apply discretion to determine whether applying the criteria is 'fair and just' in the other circumstances.

[163] See above at s. 3.2.4, para. 2.

represents the fairest way to deal with the issue of an applicant's private interest when a court decides whether or not to grant a PCO.

Secondly, the test used by the ALRC is more prescribed in its definition of the 'public interest' and what types of orders relating to costs a court may make. This more prescriptive approach may increase certainty for the parties, but reduces the flexibility of the court in deciding which cases merit a PCO. The definition of the 'public interest' given by the ALRC test includes the test that 'proceedings otherwise have the character of public interest or test case proceedings'. This somewhat vague caveat could afford considerable discretion to Scottish courts when making PCOs, lessening the constricting effect of the ALRC's generally prescribed approach.

Other Considerations on the Implications of PCOs for Environmental Justice

There are two further issues which may hinder the ability of a Scottish PCO system to offer a significant contribution to Scottish environmental justice.

Firstly, the discretion afforded to judges granting PCOs.[164] In England, considerable research has been undertaken on the judiciary's understanding of environmental issues, with concerning results. The *UK Environmental Justice Project* raised significant concerns about the lack of expertise of English judges in handling environmental cases, and the deficiency in judicial comprehension of key tenets of environmental law.[165] Lord Woolf has also voiced his disquiet about judicial 'myopia'[166] in England. De Prez has echoed these misgivings with research revealing the susceptibility of English judges in environmental criminal cases to 'ritual trivialisation' of breaches of environmental law[167] and various commentators have expressed their disquiet at the British judiciary's apparent adjudicatory bias towards protecting private property rights at the expense of the public interest, particularly in planning litigation.[168] This lack of environmental understanding displayed by the English judiciary seems to stem from the lack of specialist environmental legal training and expertise amongst these judges.[169] It is submitted that the position in Scotland may not be much

[164] See above at s. 3.2.3, para. 1 on the discretionary nature of PCOs.
[165] The Environmental Justice Project (n 25) at p. 33, para. 53.
[166] H Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 Journal of Environmental Law 1.
[167] P De Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions' (2000) 12(1) Journal of Environmental Law 65.
[168] M Grant, *Urban Planning Law* (Sweet & Maxwell, 1982) at p. 334; M Adebowale (n 48) at p. 44. H Fenwick and G Phillipson also note the predilection of the English judiciary towards protecting property rights in a human rights context; H Fenwick and G Phillipson, 'Public protest, the Human Rights Act and judicial responses to political expression' (2000) Public Law 627.
[169] 'Participants in the JR working group recommend the Bar Council and the Law Society incorporate environmental law into the training for all practitioners. The group also recommends the judiciary be subject to environmental and sustainability training and that, generally, awareness about the impacts and effects of economic and other decisions taken on the environment should be raised. There was also a general view that the judiciary

different, with a concurrent lack of specialist environmental expertise and training. However this assertion must be a qualified one; further research on the level of environmental awareness amongst the Scottish judiciary would be needed to expound this proposition.

If it were to exist, a lack of judicial environmental comprehension could considerably constrict the number of environmental cases which could be granted PCOs. The wide discretion afforded to judges to decide whether an applicant raises a public interest issue means that a low level of judicial environmental understanding could make it less likely that a case of environmental concern would be deemed a public interest issue; (arguably) some appreciation of environmental science or ecology is needed to fully appreciate the public importance of environmental issues. A low level of judicial environmental awareness could restrict the impact of any reforms made on PCOs for environmental justice in Scotland.

Secondly, there is the issue of defining the public interest. Defining the public interest is a difficult task,[170] and the solution lies perhaps in putting the issue out for consultation to allow a pluralistic approach to definition. Concerns have been voiced over whether the public interest should be defined at all; it is questionable that the inherently varied nature of potential public interest cases would suit a prescriptive approach.[171]

The interpretation given to public interest is critical if PCOs are to play more than a minor role in funding public interest environmental litigation. If the public interest is to be interpreted as only including cases which decide a new point of law, or be of wide scale importance, then this could preclude all litigation but that surrounding major infrastructure developments or major legal issues from qualifying for a PCO.[172]

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would benefit from the presence of independent environmental assessors and advisors in Court where appropriate'; in The Environmental Justice Project (n 25) at p. 36, para. 63.

[170] See S Chakrabarti *et al* (n 113) and The Working Group on Facilitating Public Interest Litigation, *Litigating the Public Interest* (Liberty, 2006).

[171] The Working Group on Facilitating Public Interest Litigation, *Litigating the Public Interest* (Liberty, 2006) at p. 27, para. 69.

[172] Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (Working Group on Access to Environmental Justice, May 2008) at p. 20, para. 45. A potential solution to increase the ability of PCOs to improve procedural environmental justice in Scotland could be for environmental cases falling within the ambit of the Aarhus Convention to automatically qualify as issues of public interest, as suggested by the Coalition for Access to Justice for the Environment. See Coalition for Access to Justice for the Environment Briefing, *Access to Environmental Justice* (Coalition for Access to Justice for the Environment, 2004) at p. 3.

4. *Conclusion*

A. Standing for Judicial Review

The current test of standing in Scotland is antiquated, restrictive and unclear. There is currently uncertainty as to whether an individual will meet the tests of standing for environmental judicial review and environmental NGOs are almost certainly excluded.

The Gill Review recommends that the test for standing is changed to require that an applicant need only have demonstrated a 'sufficient interest'. It is submitted that this new approach to standing for judicial review would allow a wider range of potential applicants to access the remedy of judicial review, and bring a crucial element of clarity to Scots law. This could be revolutionary in offering Scottish individuals and environmental interest groups the opportunity to challenge illegal executive action through the courts; confronting environmental injustices and ensuring that environmental laws are enforced.

B. Costs of Public Interest Litigation

Where a potential litigant in Scotland does not have the requisite funds to support a legal challenge in an environmental case, they are presented with a potentially insurmountable obstacle to access justice.

Civil legal aid is denied to those public interest litigants without a private financial interest in the case. This use of a private interest test excludes genuine public interest litigants from accessing justice.

The Scottish courts' approach to the use of PCOs has been uncertain, but now appears to be clarified with the advent of the *McGinty* case. However, the current jurisprudence on PCOs in Scotland follows the English principles from *Corner House*, which has been shown to be flawed in its ability to provide environmental justice. Furthermore, the PCO issued in *McGinty*, whilst reducing uncertainty as to financial liability over the costs of the respondent, still presents a financial liability sufficient enough to dissuade those without recourse to personal funds. It remains to be seen if Marco McGinty will proceed with his case.

The Gill Review proposes the creation of an express power to grant PCOs in Scotland, offering the examples of the reformulated *Corner House* approach, or the test adopted by the ALRC. It is submitted that the formulation of the test will need to go to consultation due to the difficult nature of the task of defining the 'public interest'. If an express set of rules for Scottish courts to grant PCOs is adopted, and the flaws of the *Corner House* jurisprudence are addressed, this could help to ameliorate the barrier of exorbitant costs from environmental litigants, advancing procedural environmental justice in Scotland. However, even where a PCO is granted as

seen in *McGinty*, the litigant remains faced with a considerable financial liability for legal expenses.

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In conclusion, the potential implications of the Gill Review's recommendations for environmental justice in Scotland are mixed.

The suggested change on standing in judicial review could be radical in its effect; ensuring wider access to legal remedy which is essential for providing environmental justice.

The recommendation on funding public interest litigation can reduce the barrier to environmental justice posed by the costs of litigation, addressing some of the current weaknesses and ensuring the firm establishment of PCOs in Scots law; but it is not a final solution to the predicament faced by impecunious public interest environmental litigants who remain dependant on charity for funding. The expenses incurred by public interest environmental litigation will remain a barrier to environmental justice in Scotland even if the Gill Review's recommendations are implemented. This casts a shadow over the ability of the Gill Review's recommendation on standing to provide greater environmental justice in Scotland, as 'there is little point in opening the doors to the courts if litigants cannot afford to come in'.[173]

[173] See Toohey (n 109).

The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women

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Abstract

The Archbishop of Canterbury's recent suggestion that Sharia Councils be formalised within the British legal system received strong criticism on the basis that such an institution would oppress Muslim women. An examination of the separation of religion and the secular state suggests that women would in fact be better protected where there is state regulation of religious arbitration. International Human Rights law provides a hierarchy of values allowing provisions regarding gender equality to prevail over the right to freedom of religion. While concerns were expressed that Muslim women were not free to make their own choices due to pressures from within their communities, it is possible that such concerns could be addressed by educating women as to their rights and options within the secular state. There is room for Islamic family law provisions, which currently create a disparity between the rights of women and men within Muslim communities, to be interpreted in a way which is more consistent with human rights legislation within the UK. Strong comparisons can be made between the Headscarf Debate in France and the current debate in Britain. A better alternative to the French method of prohibiting practices which may oppress women is to protect the autonomy of women to choose, while ensuring that their choice is autonomous.

It is outwith the scope of this article to fully discuss issues of private international law which may be relevant, and therefore only the situation in the UK will be explored.

1. *Introduction*

The Lecture by the Archbishop of Canterbury at the Royal Courts of Justice on 7th February 2008[1] sparked what can only be described as a 'modern-day "moral panic"' directed against Islam, British Muslims, and the Archbishop himself.[2] The idea that Sharia law could be accommodated within the British legal system resulted in a tabloid outrage, with hysterical claims that Muslims living in the West were threatening the very basis of Western

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[1] See R Williams, 'Civil and religious law in England: a religious perspective' (2008) 10(3) Ecclesiastical Law Journal 262.

[2] See S Bano, 'In pursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the "Sharia debate" in Britain' (2008) 10(3) Ecclesiastical Law Journal 283.

civilisation.[3] Behind what can only be described as sensationalist journalism, lay a valid suggestion by the Archbishop that Sharia Councils could be formally recognised under British law as a forum for family law arbitration. The UK now hosts a Muslim population of approximately 1.35-1.5 million: 2.7% of the UK population identified themselves as Muslim in the 2001 census,[4] with large concentrations of Muslims in urban areas.[5] The Archbishop's comment that 'Muslim communities in this country seek the freedom to live under Sharia law'[6] may not be as controversial as was initially suggested by the British press. In fact his comments were nothing new; in 2001 Yilmaz stated that 'Muslims do not only wish to be regulated by the principles of Islamic law when they are living in a non-Muslim state; they also seek to formalize such an arrangement within the state's own legal system.'[7] There has already been a substantial accommodation of Muslim religious requirements in the UK in the form of school uniform, burials and banking and financial systems so it is difficult to see why the suggestion of incorporating further Islamic legal principles into the British legal system caused such controversy.[8]

One issue which recurred frequently in the media coverage surrounding the Archbishop's lecture was that of the oppression of Muslim women under Islamic legal systems.[9] The demands of some Muslim leaders for the establishment of a single Sharia Council, with state recognised jurisdiction in areas of Islamic family law, were met by criticisms that such an institution would subordinate women through gender-biased norms.[10] In almost all Western Islamic communities, sensitive issues arise regarding women's rights. Elisabeth Badinter considered religion to be a major impediment to women's rights.[11] Ramadan described the problems inherent in Islamic society as being far from the ideal of equality before God.[12] He highlighted that although many scholars believe that there is nothing in the *Qur'an* to justify discrimination against women, such discrimination still occurs within Islamic culture. Further, in the minds of many Muslims in

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[3] See A Lester and P Uccellari, 'Extending the equality duty to religion, conscience and belief: Proceed with caution' (2008) 5 EHRLR 567.

[4] 2001 Census available at <http://www.statistics.gov.uk/census2001/census2001.asp>. See appendix 1 for results.

[5] D McGoldrick, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Hart, Oxford 2006) at p. 173.

[6] Williams (n1) at p. 263.

[7] I Yilmaz, 'The challenge of post-modern legality and Muslim legal pluralism in England' (2002) 28 Journal of Ethnic and Migration Studies 343.

[8] See McGoldrick (n 5).

[9] See, for example, M Parris , "Allowing British Muslims recourse to Islamic law would be a charter for male dominance and peer-group bullying" *The Times* (London) available at <http://www.timesonline.co.uk/tol/comment/columnists/matthew_parris/article427241.ece>.

[10] A Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (CUP, Cambridge 2001) at p. 50.

[11] E Badinter, *Fausse Route* (Jacob, Paris 2003).

[12] T Ramadan, *Western Muslims and the Future of Islam* (OUP, Oxford 2004) at pp. 138-143.

western societies, doing that which is customary in their countries of origin is synonymous with faithfulness to Islamic teachings.

Particular concern after the Archbishop's lecture was raised that Islamic law is unreasonable and patriarchal with a subordinating effect on Muslim women, which is inconsistent with secular and egalitarian Western law.[13] Bano recognised that problems arose when affording rights to minority groups who persistently seek to challenge and violate equality and human rights notions.[14] Where conservative interpretations of women's rights within Islam prevail, women would be at risk of treatment under faith-based arbitration which may be inconsistent with human rights law.[15] The Archbishop himself recognised that providing supplementary Islamic jurisdiction in some areas could reinforce repressive or retrograde elements in minority groups, with serious consequences for the liberties and rights of women.[16] He described this dilemma as a 'paradox of multicultural vulnerability...which arises when an identity group member's rights as a citizen are violated by her identity group's family law practices.'[17]

Sharia Councils are made up of representatives of different schools of thought in Islam.[18] Currently they are unofficial legal bodies which provide advice and assistance on Muslim family law matters; their main functions being mediation and reconciliation, issuing Muslim divorce certificates and providing expert opinion reports on issues of family law or custom.[19] Currently Sharia Councils 'have appropriated for themselves the role and position of parallel quasijudicial institutions'.[20] Khaliq considers that a parallel but, as yet, unrecognised legal system is now in operation within Muslim communities in the UK.[21] This has led to confusion as to the power, authority and jurisdiction of Sharia Councils, especially in relation to British Courts.[22] Many Muslims advocate that British family law and legal principles cannot genuinely resolve family disputes for Muslims living in Britain. They therefore seek out Sharia Councils in order to uphold 'the moral authority of the Muslim community'[23] regardless of the fact that Council verdicts are not legally binding.

While the law of the land should protect an individual's right to religious identity and secure their freedom to fulfil religious duties,

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[13] Bano (n 2).
[14] *ibid.*
[15] SH Razack, 'The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture' (2007) 15 Feminist Legal Studies 3.
[16] Williams (n 1).
[17] *ibid* at p. 271.
[18] NJ Coulson, *The History of Islamic Law* (EUP, Edinburgh 1964).
[19] Bano (n 2).
[20] S Warraich, *Migrant South Asian Muslims and family laws in England: an unending conflict*, unpublished MA thesis, University of Warwick, 2001.
[21] U Khaliq, 'The accommodation and regulation of Islam and Muslim practices in English law' (2002) 6(31) Ecclesiastical Law Journal 332.
[22] Bano (n 2).
[23] Dr Masim, Chair of Birmingham Muslim Family Support Service and Shariah Council.

including those required by religious law, special consideration is required where such fulfilment would result in the limitation of human rights for some parties. The Archbishop expressed concern that recognising the authority of religious courts would deprive some members of the Islamic community of the rights and liberties granted to them as citizens, and recognised that the secular state could not license practices which would extinguish or limit valid rights.[24] It is therefore evident that Sharia Councils could only be recognised as official arbitration bodies insofar as they are consistent with British law, human rights and gender equality.[25] There are particular problems associated with the protection of women's rights as perceptions of women under Islamic law are often inconsistent with gender equality and human rights provisions. However, Muslims in the UK are evolving independent infrastructures better suited to their religious requirements,[26] and therefore it is likely that Muslim communities will continue to apply Islamic legal principles regardless.[27] If the picture of a British Muslim woman painted by the media is to be believed, allowing this unofficial arbitration to continue could seriously limit their rights and liberties. This article will not dwell on the accuracy of this perception, but rather will discuss the role of the legal system in preventing discrimination against Muslim women.

It is possible that better protection for women within minority communities could be achieved through inclusion of their religious laws within the British system, in order that the secular state can regulate what is currently an informal community institution to ensure better consistency with the workings of these groups and human rights legislation.

2. *Religion and the Secular State*

There is no doubt that the relationship between religion and the secular state can be highly controversial and law makers must proceed with great caution when dealing with issues concerning religion and belief.[28] The current debate in Britain represents the increasingly insistent demands from religious groups that religion and belief should have more weight in the public sphere. These demands must be balanced with the complex political and legal issues that arise when considering the discrimination of women associated with religion. Such issues have been well described by Sherene Razack in relation to the Sharia Law Debate in Ontario, Canada.[29] Razack

[24] Williams (n 1).
[25] Mudood, "Multicultural citizenship and the anti-sharia storm" available at <http://www.opendemocracy.net/article/faith_ideas/europe_islam/anti_sharia_storm.>.
[26] See Lester and Uccellari (n 3).
[27] Razack (n 15).
[28] Lester and Uccellari (n 3).
[29] Razack (n 15).

describes the 'Canadian feminist triangle', where discussions surrounding the protection of women from religion feature an 'imperilled Muslim woman', 'dangerous Muslim man' and a 'civilised European'. Feminist stereotyping seeks to justify stigmatising measures against Muslims as necessary to ensure women's rights – the notion of the 'imperilled Muslim women' can be very powerful. Western states are culturally committed to human rights and gender equality and this commitment, when enacted through the three characters of the triangle, can portray an ideal of Western citizens as a modern people with a duty to bring pre-modern people up to speed.[30] Under this approach, the Islamic community can be seen as preventing Muslim women from entering modernity, thus justifying civilised Europeans to 'discipline' minority communities in order to secure a modern state. Razack describes the modernity/pre-modernity distinction as a particularly dangerous view in justifying the limitation of citizenship rights for certain groups in society in the name of progress. Canadian feminists consider the 'imperilled Muslim woman' to be best protected by the state – achieved through the absolute separation of religion and law.[31] The Islamic community and family unit are dangerous places, in their view, for a Muslim woman and the secular state is considered a women's best protector and advocator of equality.[32] However, Liisa Hajjar considers that a more complex assessment of women's lives within their communities is required, as well as a move away from 'cultural stereotypes that Muslim women are uniquely or exceptionally vulnerable'.[33] Asad, too, calls for an abandonment of the romantic idea that the secular state represents progress from the pre-modern to modern. [34]

Muslims in the UK have a dual identity both as a citizen of the United Kingdom and as a member of the community of the faithful within Islam (*umma*). The Archbishop considers it imperative that membership of one group does not restrict one's freedom to live as a member of the other, overlapping group: religious groups of serious and profound conviction should not face stark alternatives of religious loyalty or state loyalty.[35] To

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[30] I Grewal, 'Women's Rights as Human Rights: Feminist Practices, Global Feminism and Human Rights Regimes in Transnationality' (1999) 3 Citizenship Studies 337.

[31] Canadian Council for Muslim Women, "An Open Letter to Premier Dalton McGuinty and Attorney General Michael Bryant" available at <http://www.ccmw.com/shariaincanada/Letter%20to%20Ontario%20Premier%20Attorny%20General.htm>.

[32] Women Living Under Muslim Laws, "Call for Action: Support Canadian Women's Struggle Against Sharia Courts" (7 April 2005) available at <http://www.wluml.org/english/actionsfulltxt.shtml?cmd[156]=i-156-180177>.

[33] L Hajjar in M Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (2004) available at <http://www.attorneygeneral.jus.gov.in.ca/english/about/pubs.boyd/executivesummary.pdf> at p. 100.

[34] T Asad, "Reflections on Laicite and the Public Sphere" Keynote address at Beirut Conference on Public Spheres, 22-24 October 2004 available at <http://www.islamamerica.org/articles.cfm/article_id/94>.

[35] Williams (n 1) 265.

achieve this, the Archbishop calls for a 'deconstruction of crude oppositions'. Such a view does not sit easily with feminist calls for segregation of religion and state. For the majority of Muslims, Sharia law applies within the community; for those living in a predominantly non-Muslim setting this can create double standards and tension between the private and public spheres.[36] It is difficult to see how Muslim women could be best protected by a system that forces them to choose between the secular state and their religious community, especially when their freedom to choose may be limited by social pressures, discussed further below. Therefore, better protection could be achieved by state regulation of religious and cultural practices, including Islamic arbitration.[37]

While there are arguments against formalising the Sharia Council in Britain in order to limit the power of oppressive institutions, it is likely that the Sharia Council will continue to function as it is now without state regulation. Currently, women are forced to choose between religious loyalty and state loyalty, between secular law and Islamic law. Further, such a choice may be limited by constraints from within their communities. Islamic institutions are imbued with traditions of male dominance and women's rights are interpreted differently under this regime, possibly in a way which conflicts with the secular law. By formalising the Sharia Council the state would have an opportunity to regulate the administering of Islamic law in order to ensure that institutions were complying with nationally acceptable policies on human rights and gender equality. This provides a compromise to the complete separation of law and religion. However, conflicts remain between human rights provisions on gender equality and traditional interpretations of Islamic law, therefore forcing Sharia Councils to abide by rules of gender equality could be considered an unjustifiable limitation of the right to religious freedom.

3. *Freedom of Religion versus Gender Equality*

The interplay of the right to religious autonomy and that of gender equality can only be described as a 'clash', resulting in religious groups being viewed as potential sources of human rights breaches across Europe.[38] This has been most evident in the claims of religious bodies for immunity from gender equality provisions on grounds of religious freedom.[39] Western societies have abandoned centuries of patriarchy to adopt an ethic of gender

[36] G Bunt, 'Decision-making concerns in British Islamic Environments' (1998) 9(1) Islam and Christian-Muslim Relation 103.
[37] See R Dimano, "Sharia Solution a fair one, and not racist" *Toronto Star* (Toronto, 16 September 2003) A19 available at <http://www.thestar.com>.
[38] J Rivers, 'Law, religion and gender equality' (2007) 9(1) Ecclesiastical Law Journal 24.
[39] F Raday, 'Culture, religion and gender' (2003) 1(4) International Journal of Constitutional Law 663.

equality;[40] therefore religious institutions with their authority rooted in century old texts and traditions have found themselves at odds with this relatively recent change in policy.

One perception of religious groups is that they provide 'a haven against social and cultural change; they preserve ethnic loyalties, the authority of the family and act as a barrier against rationalized education and scientific explanation.'[41] In many traditionalist religions, women are subjected to the patriarchal power within the family and systematically dominated by men. Member practices defended in the name of religion are gender specific, and therefore impinge upon women's rights to equality. Cultural practices defended in the name of Islam can preserve patriarchy within Islamic communities, at the expense of women's rights: evident in the case of compulsory restrictive dress codes as discussed below. In this way, religion forms a core of cultural resistance to human rights and gender equality.[42] The Human Rights Committee commented that:[43]

> Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights... The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any state, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

It is clear that the role of the law in this context is to balance two rights of equal constitutional importance.[44] International Human Rights law provides a theoretical hierarchy of values to resolve such issues within a constitutional framework. The Universal Declaration of Human Rights provides that freedom of religion includes protection of all behaviours implicated,[45] and a right to enjoy one's culture is primarily concerned with the protection of ethnic, religious and linguistic minorities.[46] Rights in the European Convention of Human Rights have to be secured without discrimination.[47] The European Union Charter of Fundamental Rights

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[40] See Rivers (n 38).
[41] R Fenn, 'Toward a Theory of Secularization' 1978 Society for the Scientific Study of Religion 36 available at <http://www.sssrweb.org>.
[42] See Raday (n 39).
[43] Human Rights Committee General Comment 28, CCPR/C/21/Rev1/Add.10, 5, at p. 32.
[44] I Leigh, 'Clashing rights, exemptions and opt-outs: religious liberty and homophobia', in R O'Dair and A Lewis (eds.) *Law and Religion* (OUP, Oxford 2001).
[45] Universal Declaration of Human Rights 1948, Article 18.
[46] International Covenant on Economic, Social and Cultural Rights, Dec 16, 1966, Article 27.
[47] European Convention on Human Rights 1950, Article 14.

secures equality,[48] non-discrimination,[49] and equality between men and women.[50]

The Convention on the Elimination of All Forms of Discrimination against Women was ratified by the UK in April 1986. Article 5(a) places an obligation on states to modify social and cultural practices in the case of a clash between such practices and gender equality.[51] Article 2(f) of the Convention obligates states to modify or abolish customs and practices that discriminate against women.[52] It is clear from such provisions that gender equality and non-discrimination of women must be protected over and above the right to religious and cultural freedom. This exception to the right of freedom of religion is further highlighted in Article 18(3) of the International Covenant on Civil and Political Rights which provides that:[53]

> [t]he right to manifest one's religion or beliefs...may be subject only to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

The right of women to equal treatment as compared to their male counterparts would clearly justify a limitation of the right to religious freedom. The Convention on the Elimination of All Forms of Discrimination against Women Committee have recommended making cultural practices which discriminate against women illegal, including religious practices that are prejudicial to women.[54]

In this international environment where equality prevails over religious freedom, it is difficult to see how the formalising of an institution which restricts the rights of women as compared to men can be justified. Arguments that minority communities should be permitted to preserve their traditions[55] cannot be supported where the imposition of traditionalist values would result in women's voices being silenced.[56] There is a new priority to equality which must take precedence over freedom of religion. Equality has not been accepted at normative institutional levels within Islamic communities,[57] and where the position adopted by religious bodies

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[48] European Union Charter of Fundamental Rights 2000, Article 20.
[49] Above (n 48) Article 21.
[50] Above (n 48) Article 23.
[51] Article 5(a) states: 'The Parties shall take all appropriate measures:...To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.'
[52] Under article 2(f), state parties agree: 'to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'
[53] International Covenant on Civil and Political Rights, December 19, 1966.
[54] See, for example, *Re Guinea*, 25th Session, Off Rep 1/56/38/rev1, 122 at p. 123.
[55] As advocated by A MacIntyre, *Whose Justice? Which Rationality?* (NDUP, Paris 1988).
[56] P Winch, 'Nature and Convention' in R Beehler and A Drengson (eds), *The Philosophy of Society* (Methuen, 1978) 15 at p. 16.
[57] Raday (n 39).

is in-egalitarian it can at best be tolerated, but preferably constrained. Currently, Sharia Councils are embedded in traditional patriarchal values and it is difficult to see how the formalising of such bodies would do anything other than provide greater power to patriarchal institutions and thus increase the likelihood of the oppression of Muslim women. Maintaining the *status quo*, however, does not make Islamic communities within the UK any more equitable, and it is insufficient if the best the state can offer Muslim women who are dissatisfied with their unequal treatment under the current regime is a right of exit from their religious communities.[58] A preferable course of action would be to encourage reform of religious and cultural traditions and ideas in accordance with equality, and such a reform of Islam within the UK would not be impossible. The *Qur'an* appears to be in favour of equality for both sexes, with women being considered equal to men in matters of rights: 'And women shall have rights similar to the rights (men have) over them, according to well-known rules of equity'.[59] Further, the Prophet Muhammad in his final sermon stated:

> Fear God in matters concerning women. Verily women have rights against you. Just as you have rights against them.

The interpretation of religious texts depends very much on one's viewpoint and the meaning attached to *Qur'anic* verses changes with time, with symbolic language interpreted creatively to suit a particular context.[60] Future generations of British Muslim scholars are increasingly likely to have been born in the UK[61] and their experience as citizens will greatly influence their interpretation of the sources. Further, Shachar's theory of 'transformative accommodation' could come in to play.[62] Where individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain matters, the interplay between jurisdictions with differing rules may result in both evolving over time. Thus the stark alternatives of religious and secular law would gradually soften to accommodate principles of each system and both could be improved by the experience. In this way, if the Islamic community were allowed to settle disputes, such as matrimonial disputes, within the Sharia Council as a forum for arbitration under the Arbitration Act 1996, it is likely that the application of Islamic principles which may discriminate against women would gradually alter over time to recognise national principles of gender equality. The role of the British legal system in this context would be to catalyze such an accommodation through the regulation of religious arbitration and the implementation of gender equality obligations. Thus, formalising Sharia Councils under the regulation

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[58] Raday (n 39).
[59] *The Qur'an* 2:228.
[60] AA Engineer, *The Rights of Women in Islam* (2nd Edition, New Dawn, Berkshire 2004).
[61] 60% of Muslims in Britain in 2001 were born in the UK: see M Anwar, "Muslim in Britain: Demographic and Socio-Economic Position" available at <http://www.primarycareonline.co.uk/humaneffect/muslim/chaplagain.htm>.
[62] Shakar (n 10).

of the secular state could speed up the process of reform by constraining practices which are in-egalitarian, especially where immunity from human rights legislation is sought to maintain gender specific practices. A potential result of such co-operation between the Islamic arbitrators and the secular state is that future Islamic scholars will gradually interpret Islamic provisions in a way which is more consistent with gender equality concepts. While the rights of women to exit Muslim communities should be maintained where they do not feel their rights are being adequately recognised by Islamic institutions, it would be insufficient if this were all the state could offer. While some view the formalising of Sharia Councils as an empowerment of groups which do not always respect the rights of women, it is possible that formalisation could lead to better regulation, and thus egalitarian practices could be better restrained.

4. *The Autonomy of Muslim Women*

One issue that recurs frequently in the literature surrounding the Sharia debate in Britain is that of the autonomy of Muslim women. If a well-educated woman of sound mind makes an informed decision to use the services of the Sharia Council, is it right that the law steps in and limits her choice in order to protect her from discrimination? The Archbishop considered this as part of his lecture and recognised a reluctance on the part of the dominant right-based philosophy that underlies British law to recognise the right of an individual to refuse to act upon the legal recognition of a right.[63] Thus, if Muslim women are legally recognised as having a right to equal treatment with men, the law will enforce this right regardless of the wishes of the women themselves. This concept is especially difficult to understand where the refusal of a Muslim woman to act upon the legal recognition of a right will not deny anyone else protection of their rights. The Archbishop comments:[64]

> It would be a great pity if the immense advances in the recognition of human rights led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties, and the law's function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups that concretely compose a plural modern society.

The feminist rejection of religious arbitration does not take into account those women who seek to live a faith-based life according to the rules of Islam, regardless of the fact it may limit their human rights, and who wish to use the services of the Sharia Council as they see it as more applicable to

[63] Williams (n 1) at p. 273.
[64] *ibid* at pp. 273-4.

their family issues than the secular law.[65] Raday advocates that genuine consent to accept certain religious practices should be accepted as valid even if it is to the disadvantage of the party accepting such practices.[66] The liberty to choose is an essential part of the freedom of religion and the right to equal autonomy of an individual.[67] Muslim citizens in the UK have demanded respect for their religion in society, and there has been strong participation of women in this process.[68]

However, the critical question regarding the autonomy of Muslim women is whether their apparent consent can be considered valid where they are under pressure from patriarchal communities to subject themselves to unequal treatment: '[f]amily, in the theory of liberal democratic politics, threatens the freedom and purity of individual judgment and decision. Under the influence of family, the citizen instead of voting according to his or her beliefs may vote for those whom he or she finds personally unworthy.'[69]

Consent of Muslim women cannot be assumed from their silence, so the state must increase the possibility of genuine consent and verify its existence. Hirschmann suggested that male pressure may have become so prevalent in religious communities that it has become a way of life, and has resulted in women becoming instruments of their own oppression.[70] Further, consent cannot be recognised where the choice of members of the oppressed group to exercise an autonomous choice to dissent is limited, or where any dissenters face pervasive oppression or discrimination. McGoldrick has suggested that evidence of pervasive oppression should be sought first, rather than assuming that there will be a problem with women's consent in a patriarchal society.[71]

Bano's survey of Muslim women found that women expressed the desire to choose whether or not they used the services of the Sharia Council rather than secular courts.[72] Concerns exist that women could be pressured into accepting faith-based arbitration. Canadian feminists in Ontario called for safeguards to be built into the Arbitration Act in order to protect women from being coerced into arbitration by their families and communities. The Canadian government refused to build in such safeguards, and therefore they sought for the government to prohibit the use of Islamic law under the Arbitration Act altogether.[73]

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[65] See Razack (n 15).
[66] Raday (n 39).
[67] See N Duclos, 'Lessons of Difference: Feminist Theory on Cultural Diversity' (1990) 38 Buff L Rev 325.
[68] Ramadan (n 12) at p. 105.
[69] J Kurczewski, '"Family" in politics and law: in search of theory' in J Kurczewski and M MacLean (eds), *Family Law and Family Policy in New Europe* (Aldershot, 1997) at p. 6.
[70] NJ Hirschmann, 'Western Feminism, Eastern Veiling, and the Question of Free Agency' (1998) 5(3) Constellation 345 at pp. 357-9.
[71] McGoldrick (n 5).
[72] Bano (n 2).
[73] Women's Legal Education and Actin Fund, "Submission to Marion Boyd in Relation to her Review of the *Arbitration Act*" (17 September 2004) <http://www.leaf.ca/legal-

However, consent cannot be considered valid where there are very limited or non-existent alternatives for women within their communities. It is imperative that the state take measures to give women greater power to dissent, and one way of achieving this is through educating women of their rights. Consent should be informed by mandatory disclosing of all options available so that decisions can be based on full information. The state must ensure high levels of women's literacy and the education curriculum should expose all children to information regarding human rights, including gender equality.[74] Further, women dissenters must have feasible economic options, and better education would allow women some independence from patriarchal family support. Although it is suggested by some groups that women are restricted in their ability to object to their unequal treatment within Islamic society, there is widespread existence of dissent among women in traditionalist cultures and religious communities,[75] suggesting that this picture may not be entirely accurate. Therefore, if adequate opportunity to dissent exists for Muslim women, it would be unjust to ignore their voice in this debate by considering that their consent is not valid: if alternative options are available and women are still choosing to use Sharia Councils, it is not the duty of the secular state to prevent them on the grounds of unequal treatment on the basis of gender. It is likely that women who do choose to use Sharia Councils do so because they wish to live a faith based life in accordance with Islamic tradition, and they consider an Islamic arbitration to be more applicable to their circumstances, especially in matters of family law. Therefore, where the secular state can ensure that consent is genuine, (by educating Muslim women about their rights and the options available to them and by providing protection to dissenters) preventing Muslim communities from settling disputes within Sharia Councils would be an unjustified limitation on their religious autonomy. Thus, formalising Sharia Councils would better serve Muslim women as it would allow them to settle disputes under Islamic law when that is their wish, whilst ensuring that they are protected from being coerced into religious arbitration by state regulation ensuring genuine consent.

5. *In-equal Islamic Legal Provisions: The Case of Inheritance*

There are several examples of Islamic family law which are perceived by Western societies to treat women unfairly, one of which will be discussed below. When compared with Western legal ideas, these rules can seem to be disadvantageous to women, failing to respect their right to equality.

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pdfs/Ontario%20Arbitration%20Act%20-%20Submission%20to%20Ontario%20Government.pdf>.

[74] Duclos (n 67).

[75] MC Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP, Cambridge 2000) at p. 105.

However, these rules must be examined with consideration of the entire Islamic regime as, in their proper context, the perception that they are unequal may be a misconception.[76]

The Archbishop considered that strict application of Sharia rules of inheritance would be perceived as disadvantaging women in a way which was unacceptable in the eyes of the majority community.[77] The *Qur'an* provides that: 'God directs you as regards your children's inheritance to the male a portion equal to that of two females.'[78] At first glance, the idea that daughters are given half the share in inheritance compared to their brothers would suggest that they are being disadvantaged as they are considered inferior to men in their worth.[79] However, inheritance must be viewed as complementary to other branches of Islamic family law, in which case the inheritance of females must be considered in light of their right to dower and maintenance as a wife, and their right to maintenance as a mother and daughter. The true equality of the provisions regarding inheritance can be seen when understood within the structure of the Muslim family and when social values and responsibilities are taken into account.[80] Inequality in the distribution of an estate is not due to gender or inferiority,[81] but rather to reflect the financial obligations of male family members to maintain females. Thus any apparent inequality in the Islamic law is actually inherent wisdom of the requirements of society.[82]

Women had a different role in Arabian society when the *Qur'an* was revealed. The *Qur'an* ensured that women inherited in their capacity as wives, mothers and daughters and therefore rules which may have been equitable under traditional family arrangements may be difficult to apply in modern society and ensure equitable results. For example, Muslim women in the UK may choose not to marry or have family. Some schools of thought within the Islamic community have relaxed the strict interpretation of provisions of Sharia law regarding inheritance to allow the deceased to make a will:[83]

> Many countries have reformed classical inheritance law so as to protect and even enhance the rights of women and to provide greater freedom for the testator to bequeath certain portions as he or she wishes.[84]

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[76] N Goolam, 'Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings' (2001) 12 Stellenbosch L. Rev. 199 at p. 199.
[77] Williams (n1) at p. 268.
[78] *The Qur'an* 4:11.
[79] See Engineer (n 60).
[80] NJ Coulson, *Succession in the Muslim Family* (CUP, Cambridge 1971) at p. 1.
[81] M Iqbal, *The Reconstruction of Religious Thought in Islam* (Kazil, 1981) at pp. 169-179.
[82] T Mahmood, 'The Grandeur of Womanhood in Islam' (1986) 1 Islamic and Comparative Law Quartery 12.
[83] Parvez, *Matalib al-Furqan* (Lahore, 1981) Vol.IV, at p. 279.
[84] JL Esposito and NJ Delong-Bas, *Women in Muslim Family Law* (2nd Edition, NYP, New York 2001) at p. 109.

The Islamic rules of inheritance, when viewed in the context of Islamic family law in general, are equitable only insofar as traditional family arrangements exist. However, in modern day Britain, different arrangements may exist as compared with society at the time of the revelation of the *Qur'an*. While some freedom is provided for the testator to take account of such differences, this may not go far enough to ensure that women inherit fairly. Again, if women consent to this disparity, their autonomy should be respected, provided that their consent can be verified as genuine. Where Muslim women object to their unfair treatment, reasonable alternatives should be available, such as those provided by the rules of intestate succession in English and Scottish law. Formalising of the Sharia Council in this context would require an understanding that women had a right of appeal to the secular courts, and that secular law would be considered to prevail over religious rules where women were not treated equally. Shachar's notion of 'transformative accommodation' could once again apply in this context, aiding growth of Islamic law to better recognise human rights.[85]

6. *The Headscarf*[86] *Debate and The Sharia Debate – a comparison*

> [T]he truth about the *hijab* is far from simple. It presents a serious challenge to the West. It challenges our ideas of what's most important in our own culture and the points at which we draw the line of tolerance. One such point is the equality of women with men. The sight in this country of women, and particularly of young girls, heavily swathed and covered up as if there were not capable of going about as freely as a man, as if there were something about them which needed hiding, is genuinely offensive both to the informed and to the uninformed. ... It immediately suggests a belief system in which women are inferior to men, which is intolerable here.[87]

The above statement represents a general feeling among Western citizens regarding the incorporation of Muslim communities into European society. The questions raised by the debate surrounding headscarves and veils are pertinent when applied to the discussions regarding formalising Sharia Councils. It appears that British multi-cultural society draws the line at allowing practices which oppress women to be incorporated into the British system in whatever form.

McGoldrick considered that the custom of veiling is inherently unequal as Muslim women are recognisably Muslim, while Muslim men are

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[85] Shackar (n 10).

[86] The term 'headscarf' in the context of this debate refers to three different types of garment, the *burqa* (a top to toe covering with a veiled window), the veil (a top to toe covering with an open slit) and the *hijab* (a scarf over the head tied under the chin). These terms are used interchangeably in the section below.

[87] M Marrin, "Cry Freedom and Accept the Muslim Headscarf" *The Times* (London, 1st February 2004).

not.[88] There is a strong patriarchal element in societies where women veil, and it is likely that male dominance within communities means that women veil because men tell them to: 'the veil has been a key symbol used by patriarchy to mark and identify women's bodies and identities'.[89] Veiling may limit a woman's 'basic capabilities' according to Nussbaum;[90] in that it undermines their right to self-respect and non-humiliation, it prevents them being treated on a par with others, and it violates protection from discrimination on the basis of gender. Women have the right not to suffer discrimination by the imposition of forms of veiling that impose asymmetrical requirements of modesty on men as compared with women and that reinforce patriarchal aspects of Islamic communities.[91] Roald describes Muslim women wearing veils in the West as a symbol of the oppression of women, and fears that they are likely to be considered to be making a political statement by their non-Muslim neighbours.[92] She considers that veiled women 'may evoke anger from non-Muslim Westerners because they believe her to be betraying the struggle for women's rights by submitting to her own oppression while wearing the veil.'[93] The wearing of the veil implies that women accept a second-class role in society, 'in the shadow, downgraded and submitting to men. The fact that some women demand it does not change its meaning. We know that dominated people are the most fervent supporters of their domination.'[94] Therefore the fight against the veil is not aimed at restricting the choice of Muslim women as to what they can wear, rather it is a fight for the liberty of women and to secure their human right to equality. While some believe that the veil marks women as a second-class citizen, an alternative view is that uncovered women are seen as sexual objects while covering makes people look at a woman as a human being rather than simply a female.[95] Further, the elimination of such temptation leads to a sound society with stable family relations, which benefits the community as a whole.[96] Ramadan recognises that many women in the West now wear the headscarf as an indication of their right to respect their religious customs and to give a visible sign of the modesty in which they wish to be approached.[97] While it is wrong that Muslim women may be forced into wearing the veil or face persecution by their communities if they refuse, restricting the autonomy of women by denying them the right to wear the veil cannot be considered a valid solution: 'we should take a stand against those who force women to

[88] McGoldrick (n 5).
[89] Hirschmann (n 70) at p. 354.
[90] Nussbaum (n 75) at p. 79.
[91] Raday (n 39).
[92] AS Roald, *Women in Islam – The Western Experience* (Routledge, London 2001).
[93] *ibid* at p. 259.
[94] JR Bowen, *Why the French Don't Like Headscarves* (OUP, Oxford 2007) at p. 228.
[95] Roald (n 92).
[96] *ibid.*
[97] Ramadan (n 12).

wear the headscarf – and those who would force them not to wear it.'[98] Ramadan considers that the promotion of an 'Islamic feminism' should not mean the uncritical acceptance of Western behaviour and culture,[99] and therefore that women should remain free to choose to wear traditional Islamic dress and that it should be a matter of individual consent, although such consent can be highly suspect in patriarchal communities.[100]

Such issues sparked a massive debate in France, where Muslim feminists launched scathing attacks against the practice of veiling and provided enthusiastic support for the French government banning the *hijab* in schools. It was felt that problems arose as schoolgirls were pressured by males within their communities to wear the veil (or *voile*) and that the veil was intrinsically attached to the dignity and equal status of women.[101] The Family Planning Movement justified banning headscarves in schools, thus: 'women wearing the *voile* are a sign of sexist discrimination incompatible with a secularist and egalitarian education.'[102] Such groups believe that Muslim societies seek to make women ashamed of their bodies and that this shame lies behind the wearing of a headscarf. Some believe that this concept must be fought even at the cost of the well-being of schoolgirls, for example by providing mixed toilet facilities even where there is a genuine risk of attack by male pupils.[103] State intervention regarding Islamic clothing was justified as a method 'to liberate those who collude in fundamentalism by failing to sign up to gender-equality'.[104]

Muslim religious dress is widely worn in public in the UK, including within secular schools.[105] Headscarves are a common sight, although the *burqa* is rarer,[106] except in London where a third of the population are from ethnic minorities.[107] While the UK has adopted a more multicultural and tolerant attitude to Muslim dress than that expressed in France,[108] and has not enacted legislation to prohibit the wearing of headscarves in British schools, Muslim dress has still been an issue of conflict within the education system.[109] The *Shabina Begum* case sparked a nationwide debate regarding

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[98] N Walter, "When the Veil Mean Freedom – Respect Women's Choices that are Not Our Own, Even if they Include Wearing the Hijab" *The Guardian* (London, 20th January 2004).
[99] Ramadan (n 12).
[100] Raday (n 39).
[101] JR Bowen (n 94).
[102] "Family Planning Movement", *Le Monde* (Paris, 25th October 1989).
[103] Bowen (n 101) at p. 209.
[104] Rivers (n 38).
[105] McGoldrick (n 5) at p. 173.
[106] Y Alibhai-Brown, "Revealed: the Truth that Hides Inside the Burqa", *The Evening Standard,* (London, 30th November 2005).
[107] S Knight, 'Religious Symbols in the School: Freedom of Religions, Minorities and Education' (2005) European Human Rights Law Review 499 at p. 501.
[108] McGoldrick (n 5) at p. 204.
[109] SM Poulter, *English Law and Ethnic Minority Customs* (Butterworths, London 1986), paras 7.21-7.26.

issues of Islamic dress.[110] Such debate centred on the pressure women and girls face from within their communities to wear the headscarf.[111] Baroness Hale considered that an adult woman can wear whatever she wants, even if this is perceived by some as her colluding in 'fundamentalist' oppression. However, she stated that schools have a duty to support female pupils who wish to distance themselves from their communities, and also those who wish to adopt their dominant culture.[112]

The *Qur'anic* provisions regarding the veiling of women are ambiguous,[113] leading many feminists to reject the suggestion that the veil is a religious requirement: rather they consider it as nothing more than a cultural tradition. If headscarves are not worn as religious clothing, this may imply support for the view that they are a political manifestation or a sign of obedience to the patriarchal authority of Muslim communities and families, and as such a ban upon headscarves within the UK could be argued as not infringing religious freedom. However, in accordance with the commitments of British society to tolerance, inclusion and multiculturalism, a better solution would be to respect a woman's autonomy to wear what she pleases, and to ensure that her choice is well-informed and not subject to community pressure. Therefore the secular state must protect those who choose not to wear Islamic dress, as well as the rights of those who chose to veil.

Critical issues raised in the discussions surrounding the Headscarf Debate can provide valuable insight when applied to the current debate in Britain. It is clear that British society, while encouraging inclusion and multiculturalism, will not permit the inclusion of measures or systems which do not respect human rights and particularly gender equality. Such discrimination is seen as incompatible within the secular society, however it is difficult to justify measures to alleviate this issue which come at the expense of a woman's right to personal choice. The public perception of women who consent to unequal treatment under Islamic regimes is that they are betraying the fight for women's rights. Ironically it is because of, and not in spite of, these rights that women should remain free to choose both to wear a headscarf and to seek Islamic arbitration. It is the duty of the secular law to ensure that a woman's right to choose is respected, that such a choice can be made autonomously, and that instances of inequality in Islamic law are gradually reformed through regulation of the Sharia Councils.

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[110] *R (on the application of Begum (Shabina)) v The Headteacher and Governors of Denbigh High School* [2004] EWHC 1989 (Admin).

[111] A Blair, '*R(SB) v Headteacher and Governors of Denbigh High School* – Human Rights and Religious Dress in Schools' (2005) 17 Child and Family Law Quarterly 399 at p. 414.

[112] *R(SB) v Governors of Denbigh High School* [2006] 2 All ER 487 at pp. 516-518.

[113] F Mernissi, *Women and Islam: An Historical and Theological Enquiry* (OUP, Oxford 1987) at pp. 85-101.

7. *Conclusion - How best to protect Muslim women*

Arguments against formalising Sharia Councils within Britain in order to limit the power of oppressive institutions must be met with evidence that Muslim women are better protected by state regulation of these institutions. Failure to formally recognise Islamic legal institutions operating in Britain would force these institutions to continue operating in the private sphere, where women are at the mercy of their communities. In some areas, women have little choice but to seek arbitration within the Sharia Council, as, for example, when the Islamic community does not recognise a secular divorce, and therefore maintaining the *status quo* would not result in protection of women's rights. By formalising the Sharia Council and subjecting Islamic legal institutions to secular state regulation, arbitrators could be encouraged to comply with national human rights and gender equality legislation.

While the right of Muslim women to exit their communities where they feel they are being treated unfairly should be maintained, it would be inconsistent with human rights legislation if this was the best the state could offer. In order to properly protect the autonomy of individuals with regards to religious freedom, states should ensure that individuals are not limited in their choice to practice religion by possible limitations of their right to gender equality. It is therefore imperative that states work with religious groups to improve recognition of human rights, rather than limiting the choice of those seeking to live a faith based life.

Islamic communities within Western societies in particular are well suited to 'transformative accommodation'.[114] *Qur'anic* interpretations are imbued with cultural undertones based on the interpreter's personal experience. Thus interpretation of religious texts within patriarchal societies may create a disparity between the rights of males and females, rather than the texts themselves providing for such a disparity. The increasing percentage of Muslims living in the UK which were born here increases the likelihood that interpretation of the *Qur'anic* text by future generations will better reflect the values of British society. The role of the secular state in this context is to catalyze re-interpretation of the texts achieved through co-operation between secular institutions and religious communities. State regulation of a formalised Sharia Council could seek to constrain in-egalitarian practices and ensure greater conformity with human rights legislation. Such co-operation could provide precedent for recognition of gender equality within Islamic communities.

While it is hoped that co-operation between the secular state and religious communities will lead to better recognition of women's rights over time, it is clear that alternatives should be available where Muslim women object to unfair treatment. Formalising of the Sharia Council should be undertaken on the understanding that women have a right of appeal to secular courts, and that secular law will prevail over religious rules where the secular law would provide better protection of human rights.

[114] Shachar (n 10).

The role of the state should not be to limit a women's choice by prohibiting religious practices which may be unequal between the sexes, such as Islamic arbitration and Islamic dress. It is true that women may be pressured into consenting to unequal treatment within their communities, but the risk of such coercion should not be used to justify measures which would limit the autonomy of Muslim women. Rather, the state should provide better opportunity for women to dissent by ensuring that alternative options are available. Further, women must be educated as to their rights so that all decisions can be based on full information: the state must ensure high women's literacy rates and education regarding human and gender equality rights within Islamic communities. By ensuring genuine consent of Muslim women to traditional practices, rather than seeking to prohibit such practices, the state can fulfil their obligations with regards to gender equality legislation, whilst not restricting those who wish to live a faith based life in accordance with Islamic traditions. Thus, formalising the Sharia Council could ensure that women have a forum in which to settle disputes using Islamic law, while protecting them from being coerced into accepting inferior treatment. While British society struggles with the notion of allowing systems which do not respect human rights to function within the UK, legislative regulation of these systems should not come at the expense of a woman's right to personal choice. Rather, the secular law should ensure that a woman's right to choose is respected, and should provide frameworks within the formalising of the Sharia Council to ensure that such a choice can be made autonomously.

Appendix: 2001 Census Result

Available at <http://www.statistics.gov.uk/cci/nugget.asp?id=293>

	Thousands	**%**
Christian	42079	71.6
Buddhist	152	0.3
Hindu	559	1.0
Jewish	267	0.5
Muslim	1591	2.7
Sikh	336	0.6
Other religion	179	0.3
All religions	*45163*	*76.8*
No religion	9104	15.5
Not stated	4289	7.3
All no religion/not stated	*13626*	*23.2*
Base	*58789*	*100*

The Limits of Free Speech, Pornography and the Law

STEVEN BALMER, JR.*

Pornography is the attempt to insult sex, to do dirt on it.

- D.H. Lawrence, *Pornography and Obscenity* (1929)

1. *Introduction*

Derived from the ancient Greek *porné* and *graphos*, pornography literally translates as 'writing about whores,'[1] although in a modern context the word has taken on new meaning encompassing a class of publications that, as understood, are not gender specific, or exclusive to prostitutes. Defining pornography in a legal sense is oddly problematic: authors of *Black's Law Dictionary* exemplify this when they collapse the terms 'pornography' and 'obscenity' into their definition of the pornographic: 'that which is of or pertaining to obscene literature; obscene; licentious.'[2] Obscenity, however, is not protected speech. Pornography by contrast is, or at least can be. The current laws on obscenity and indecency,[3] and in addition, the findings of the Williams report,[4] concern themselves more with 'offensiveness' rather than the actual physical and social harms of pornography.[5] They tackle the affront to public aesthetic posed by pornographic materials and as such

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[1] A Dworkin, *Pornography – Men Possessing Women*, (Women's Press Ltd., London 1981), at p. 199; DA Frytak Esq. 'Influence of Pornography on Rape & Violence against Women: A Social Science Approach' (2000) 9 Buffalo Women's Law Journal 263 at p. 266.

[2] HC Black, *Black's Law Dictionary,* (6th ed. West Publishing Co., St. Paul, Minn. 1990) at p. 1160; Dworkin-MacKinnon scholars would define such as 'the sexually explicit subordination of women, whether through pictures or words.' CA MacKinnon, 'Pornography, Civil Rights and Speech' (1985) 20 Harvard Civil Rights-Civil Liberties Law Review 1 at p. 1.

[3] Indecent Displays (Control) Act 1981; Civic Government (Scotland) Act 1982; Video Recordings Act 1985; Cinemas Act 1985.

[4] B Williams, Home Office 'Report of the Committee on Obscenity and Film Censorship' (Cmnd. 7772, 1979).

[5] *ibid* at pp.113-116.

cleverly circumvent the more contentious issues of the underlying damage pornography poses to the moral fabric of society and also to the physical well-being of what are predominantly its most vulnerable groups. The Williams Report similarly denounces the use of the 'tendency to deprave and corrupt'[6] test, and the words 'obscene' and 'indecent' as useless due to their inherently subjective nature,[7] which leaves them vulnerable to interpretation and uncertainty. The current laws on obscenity as they stand do nothing to protect the public from pornography's real harm: they merely move the problem from public view so as to mitigate offensiveness and to diffuse the problem of 'public nuisance.'[8] Private consumption is scarcely touched. As Professor Catherine MacKinnon told one reporter: 'the obscenity approach in Britain and Commonwealth countries cares more about whether men blush than whether women bleed.'[9]

2. *Free Speech and Harm*

The freedom of expression is assumed as a basic right, both here and abroad.[10] It is consequently a formidable obstacle for those seeking to regulate or prohibit pornography in a western society. The right to free expression is, however, not absolute. Article 10 is qualified by a provision that restrictions, necessary in a democratic society, are permissible in the interests of, specifically: the protection of the reputation and rights of others, the prevention of crime and the protection of morals.[11] The exceptions to this rule are, again, open to interpretation by the courts and there is the obvious reluctance to class pornography under such an exception due to the implications it may have for other bodies of work.[12] The US Supreme Court has outlined specific instances where speech is not protected: libel,[13] fighting

[6] *R v Hicklin* (1868) LR 3 QB 360; where obscenity was defined per Lord Cockburn as: 'a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.' A definition repeated in s. 1 Obscene Publications Act 1959.
[7] Williams (n 4) at p. 119.
[8] Williams (n 4), at p.112; the Indecent Displays (Control) Act 1981, similarly this only sees public exposure to such material as problematic; s.51 Civic Government (Scotland) Act 1982, only appears to cover public offence also.
[9] Stuart Jefferies, 'Are Women Human – An Interview with Catherine MacKinnon' *The Guardian* (London, April 12th 2006).
[10] Human Rights Act 1998, Sch. 1, Article 10; US Constitution Amendment 1: 'Congress shall make no law… abridging the freedom of speech, or of the press.'
[11] *ibid*, Art. 10.
[12] Discussed below.
[13] *New York Times Co. v Sullivan*, 376 U.S. 254 (1964).

words[14] and obscenity.[15] The US Court explicitly stated that the prohibition of pornography or the imposition of state laws that have the effect of restricting this kind of publication are unconstitutional.[16]

In his essay *On Liberty*, John Stuart Mill aimed to chart 'the nature and limits of the power which can be legitimately exercised… over the individual.'[17] Millian arguments tend to dominate debates concerning restrictions of liberty and they can be expressed as follows: firstly, the individual is not accountable to society for his actions affecting only his or her own interests; secondly, the individual is accountable to others for actions which prejudice their interests and may justifiably be punished through legal or social means.[18] Ultimately, the Millian philosophy on this matter is simple: if no evidence of harm can be presented, there will be no grounds for punishing or restricting private indulgence.[19] In the interests of maintaining personal liberty, the law should not be used as a censor, no matter how degrading or depraved an activity is, on the proviso that no-one else is affected by it.[20]

Confronted with Mill's harm principle, the feminist critic of pornography appears to be in a somewhat dubious position. The provisions for civil remedies proposed by Catherine MacKinnon and Andrea Dworkin in their ordinances in Indianapolis[21] and Minneapolis seem unjustifiable interventions, given that sexuality is the most private area of self-expression and self-realisation.[22] Any attempt to control pornography would be resisted by liberal theorists, who would emphasise the right to consume pornography, in the absence of a proven harm.[23]

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[14] *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).
[15] *Roth v United States*, 354 U.S. 467 (1957).
[16] *American Booksellers Association v Hudnut*, 598 F. Supp. 1316 (1984).
[17] JS Mill, 'On Liberty' in M. Warnock (ed.), *Utilitarianism,* (Blackwell Publishing Ltd., Oxford 2003) at p. 135.
[18] SM Easton, *The Problem of Pornography: Regulation and the Right to Free Speech,* (Routledge, Florence 1994) at p. 1; Pornography and the Internet in the United States, 'General arguments for and against the censorship of pornography' (1999) available at: www.slias.ubc.ca/COURSES/libr500/fall1999/WWW_presentations/C_Hogg (accessed April 2008).
[19] However, Ronald Dworkin posits an interesting hypothetical whereby consumption of excessive amounts of pornography lead to absenteeism, which would justify state intervention and restriction. R. Dworkin, 'Is there a Right to Pornography?' (1981) 1 OJLS 177, at p. 195; Easton (n 18), at p. 3.
[20] Mill exempts from his doctrine immature individuals, mentally impaired so children and the incapacitated are excluded, Mill (n 17) at p. 145.
[21] Indianapolis and Marion County, Ind., Code, ch. 16, § 16-3 (1984).
[22] Easton (n 18) at p. 2.
[23] J Feinberg, *Harm to Others,* (1987), as cited in Easton (n 18) at p. 3; see also: Dworkin (n 1) and Williams (n 4).

Critics of pornography have sought to condemn pornography as entitled to only a lower level of solicitude;[24] that pornography has as its effect and intent, the desire to produce sexual arousal, rather than any real commutative expression and as such should not be accorded such protection. Exception should be taken with this statement, as it is not society's place to tell the individual what he or she can read.[25] While it is easy to accept that pornography may not have as influential an effect as political speech or artistic works, a government cannot invoke restrictions, simply on the reasoning that it is a 'lower' form of speech. There is nothing which ought to distinguish pornography from other constitutionally protected speech.[26] *Das Kapital*, for example, is indeed different from *Playboy*, however there is no reason why simply because one appeals to the rawest of human emotions, rather than intellect, that it should be afforded less protection. Barry Lynn offers an interesting insight on this point in stating: [27]

> If someone wishes to argue the merits of oral sex, he or she should not be accorded lesser constitutional protection if the 'argument' is made in the form of an X-rated video than in the prose of an academic psychological journal.

Perhaps pornographic speech is lower in the 'hierarchy' than political speech, but its place on the ladder, with respect to liberty, is largely irrelevant. The position of pornography as 'low-value' speech is contestable. One may, however, argue that it is not in fact 'low value' but rather it *can* be 'high harm' speech, a ground which would erode some of the constitutional protection that pornographic speech enjoys.

Ultimately, in a pluralistic democracy which purports to be a defender of our individual rights and liberties in lieu of a demonstrable harm, one must accept the role of pornography in today's society and defend the rights of those who wish to consume it, however reprehensible or repugnant that may be.

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[24] CR Sunstien, *Pornography, sex, discrimination and free speech,* in L Gostin (ed), *Civil Liberties in Conflict,* (Routledge, London 1988) at p. .

[25] MacKinnon comments on the 'quaint assumption that consuming pornography is reading.' CA MacKinnon, 'Pornography as Defamation and Discrimination' (1991) 71 Boston University Law Review 793 at p. 793.

[26] B Lynn, 'Pornography and free speech: the civil rights approach' in Gostin (n 24).

[27] *ibid* at p. 173.

3. *Finding the Causal Link*

Naturally, the protection of pornography as free speech rests on the presumption that such material causes no harm. The descriptions of pornography as 'harmless fun' perhaps serve to trivialise the harms that pornography causes, both in the production of and in the impact they have on consumers, particularly the increased propensity to commit acts of sexual aggression.

If it could be established that pornography was a cause of sexual violence then it would fall out-with the scope of the classic harm principle of JS Mill and it would come under the exceptions outlined in Article 10. The problem, it would appear, is one of causation. Pro-pornography and feminist author Nadine Strossen states: [28]

> No credible evidence substantiates a clear causal connection between any type of sexually explicit material and any sexist material.

This epitomises the position of the pro-pornography camp, who at the very best would suggest that any link would be tenuous, and causation unable to be proved.[29] The other extreme we have is pornography critics insisting that 'pornography is the theory, and rape is the practice.'[30] Such critics are adamant that there is a link between acts of sexual violence and the consumption of pornography; one which satisfies a causal test. Catherine MacKinnon talks of women being commonly 'raped, battered, sexually harassed, sexually abused, forced into motherhood, prostitution, depersonalised, dehumanised, denigrated and objectified' as a product of pornography.[31] One must question how sustainable these claims are. Nobody doubts that they occur, and it is undoubtedly a tragedy that they do, but what role does pornography actually play in these crimes and social harms? MacKinnon herself offers little evidence in support of her affirmation, besides the constant assertion that such acts are commonplace and they are a result of pornography coupled with brief anecdotal accounts, which, despite Professor Mackinnon's insistence, does not establish a tenable

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[28] N Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights,* (NYU Press, New York 1995) at p.75; TM Bruce, 'Pornophobia, Pornophilia, and the Need for a Middle Path' (1997) 5 American University Journal of Gender**,** Social Policy & the Law 393 at p. 399.

[29] M Wesson, 'Sex Lies and Videotape: The Pornographer as Censor' (1991) 66 Washington Law Review 913 at p. 917.

[30] R Morgan, *Theory and Practice*, *Pornography and Rape*, in L Lederer (ed.) *Take Back the Night: Women on Pornography,* (William Morrow, New York 1980) at p. 131.

[31] MacKinnon (n 25) at p. 796.

link between the two. Not one which could prove that pornography causes such widespread harms.[32]

There are obvious cases where pornography has played some role in gruesome sexual offences. Infamous serial killer Ted Bundy detailed an obsession with violent pornography and stated that it at least partially motivated some of the brutal killings he committed.[33] Closer to home, a pertinent example of this is found in *R v Taylor*.[34] It would be contentious to say that pornography did not play a significant role in these crimes. There are scholars who have documented cases where prostitutes frequently encounter demands from clients to imitate particular scenarios derived from pornographic films and that pornography is used to 'train' young girls for a life in prostitution.[35]

A commonly held view among social scientists is that sexual images meshed with overt violence have a tendency to negatively affect the observer in certain situations.[36] The Messe Report, [37] the US equivalent of the William's Report which dismissed the link between pornography and violence, found that 'exposure to violent sexual imagery materialised to more aggressive attitudes towards women and thus sexual violence.'[38] Such findings should not come as a surprise. Logically, given an increased exposure to sexually violent materials over time, one would likely require a greater level of sexual violence in real settings to become aroused, the consequence of which is a greater propensity towards sexual violence.

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[32] While one can respect the work of Catherine Mackinnon and her counterpart Andrea Dworkin, some of their work published on pornography is often too hyperbolic and polemic to be of use in an objective assessment of the issue, this is not to dismiss their arguments entirely however. For example, only 0.06% of the imagery in men's magazines was taken to portray violence, force or weaponry of any kind. This figure was included in a study by US Surgeon General C. Everett Koop, as cited in A Carol 'The Harm of Porn: Just Another Excuse to Censor' (1995), at pp. 5-6, available at <www.fiawol.demon.co.uk/FAC/harm.htm> (accessed April 2008). The amount of pornographic violence in the public domain is realistically immeasurable, given the technological advance of the internet and the rise in 'home-made' pornographic videos.

[33] P Marksteiner, 'The Ongoing Pornography Debate' (1994) 34 Washburn Law Journal 49 at p. 56.

[34] *R v Taylor* (1987) 9 Cr App R (S) 198: the case involved a rapist who lost his appeal against conviction in which his psychiatrist testified that the circumstances (glue sniffing and sexual assault) of the case mirrored that of those in a pornographic magazine he had been given to read.

[35] Wesson, (n 29) at p. 918.

[36] Frytak (n 1) at p. 282.

[37] Attorney General Edwin Messe, U.S. Department of Justice, *U.S. Attorney General's Commission on Pornography Final Report* (Washington 20530, 1986).

[38] *ibid* at p. 322.

In contrast to this Feinberg states: [39]

> It is not likely that non-rapists are converted into rapists *simply* by reading or viewing pornography. If pornography has a serious causal bearing on the occurrence of rape, as opposed to the trivial copy-cat effect, it must be by virtue of a role (still to be established) in implanting the appropriate cruel disposition in the first place.

It is interesting that Feinberg classes the imitative harm of pornography as trivial; one doubts the victims of such attacks would share his view. Ultimately, what Feinberg is suggesting is that pornography *may* have, at most, a catalysing effect, however it is more likely that sexual aggression is part of an individual's pathology. It is likely an impulse that already resides within the individual, rather than a form of deviance elicited in a person by virtue of pornographic viewing. Understandably, it will depend on the particular individual; however the desensitisation of the individual to violence, in this case sexual violence, can leave those who already have an existing predisposition towards violent or sexist behaviour with a markedly increased desire, tolerance and acceptance of sexual aggression.

Exposure to this type of violent pornography can lead to a desensitisation towards violence and a reinforcement of 'rape myths:' that women somehow enjoy, or derive pleasure from being raped.[40] It is apparent that some pornographic material features, either explicitly or implicitly, rape as a fundamental theme.[41] Though it has become popular among feminists to label pornography as a 'how to' manual for sexual assault, it is argued by some commentators that it is merely a 'recipe book for masturbatory fantasy.'[42] Sarah J. McCarthy indicates that as a result of the reinforcement of a 'rape myth' in pornography, she expects a 'skyrocketing' of rape statistics, as opposed to the cathartic effect the

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[39] J Feinberg, *Offence to Others,* (OUP, Oxford 1987), as cited in Easton (n 18) at p. 18.
[40] VM Mather, 'No Harm, No Foul: Pornography (Violent and Otherwise), (2001) 14 University of Arkansas Little Rock Law Journal 455 at p. 479; C Jacobs, 'Patterns of Violence: A Feminist Perspective on the Regulation of Pornography' (1984) 7 Harvard Women's Law Journal 5 at p. 9, as cited in SA Rubin & LB Alexander, 'Regulating Pornography: The Feminist Influence' (1996) 18 Communications and the Law 73 at p. 75.
[41] This would include instances where sexual intercourse is compelled by force, where the victim is incapacitated, asleep, or in the case of statutory rape, underage. See CA Sunstein, 'Pornography and the First Amendment' (1986) Duke Law Journal 589 at p. 592.
[42] Lynn (n26) at p. 177.

industry claims pornography provides.[43] In support of this Donnerstein, Linz and Pernod write: [44]

> [V]iolent pornography influences attitudes and behaviours… Viewers come to cognitively associate sexuality with violence, to endorse the idea that women want to be raped, and to trivialise the injuries suffered by rape victims. As a result of attitudinal changes, men may be more willing to abuse women physically.

A study by Baron and Strauss indicated a correlation between circulation of pornographic magazines, which may or may not contain portrayals of sexual violence, and rates of sexual assault.[45] One could argue that the introduction of several factors in the equation would statistically invalidate such a relationship, and that pornography may not be the reason for the correlation. Take, for instance, Japan; the availability of 'hardcore' material is widely acknowledged,[46] however the rates of sexual assault, particularly rape, remain low despite the juxtaposition of sexuality and aggression being evident in several forms of Japanese sexual material, including cartoons and films. Similarly in Denmark the decriminalisation of pornography in the 1960s led to a fall in reports of sexual assaults.[47] Nevertheless, as a general proposition there is nothing to demonstrate that any increase in the aggregate level of sexual violence is due to the presence of pornography.[48]

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[43] SJ McCarthy, 'Pornography, Rape and the Cult of Macho' (1980) 11 The Humanist 19, as cited in Rubin & Alexander (n 40) at p. 76.

[44] E Donnerstein, D Linz & S Pernod, *The Question of Pornography: Research Findings and Policy Implications*, (3rd edn Free Press, New York 1987), as cited in Wesson (n 18) at p. 928.

[45] L Baron and M Straus, 'Sexual stratification, pornography, and rape in the United States,' in N Malamuth and E Donnerstien (eds.) *Pornography and Sexual Aggression*, (Academic Press Ink, London 1984) at p. 185; Lynn (n 26) at p. 176.

[46] P Abrahmson and H Hayashi, 'Pornography in Japan: Cross-Cultural and Theoretical Considerations' in Malamuth & Donnerstein (n 45), at p. 178: 'Japan is a country with little instance of rape, yet with a trend towards an increases in violent forms of pornography,' *ibid* at p. 140.

[47] J Court, 'Sex and Violence, A Ripple Effect, in Malamuth & Donnerstein' (n 45) at p. 146; B Kutchinsky, 'The effect of easily available pornography on the incidence of sex crimes: the Danish experience' (1973) 3 The Journal of Social Issues 29 at pp. 182-183: Denmark provides the 'prototypical' social experiment on the influence of pornography: the gradual legalisation of pornography began in 1967 when pornographic fiction was decriminalised, and in 1969 they proceeded to decriminalise pornographic photographs, as the accessibility of pornography increased there was a parallel drop in the number of reported sexual crimes, particularly exhibitionism, statutory rape, child molestation, and verbal indecency. It was suggested by Kutchinsky that pornographic novels served as a safety valve for the more intelligent sex offender, whereas pictures served a similar function for the less imaginative sexual deviant.

[48] Lynn (n 26) at p. 177.

As any statistician will tell you, correlation is not causation, and it is in fact usually the result of some other variable.[49]

Advocates of pornography have stated that not only does pornography *not* cause harm, but it has positive benefits in educating and liberating citizens in the enhancement of sexual pleasure.[50] In a similar line to that of Kutchinsky and the Danish experience, rather than being a cause of sexual violence, pornography may by contrast, be an outlet for it and thus lower the aggregate level of sexual violence towards women by channelling it through pornographic escapism.

Given the proliferation of pornographic materials depicting violence in the market currently and the demand there seemingly is for such materials, there are enormous profits to be potentially gained from the production of violent pornography. From a capitalist perspective, this will only fuel investment for producing such materials and result in the expansion of such a market. The logical end-point of the continuum would be the production of the 'snuff' movie, where the actor is actually killed following or during a sexual act.[51] The existence of such material is contestable: Andrea Dworkin asserts that 'snuff' does exist. Others find such claims dubious.[52]

The problem with this argument is different authors are making diametrically opposing claims based on what is essentially the same evidence. Violent pornography is likely to have some criminological effect on some members of society, and the causal link is more tenable than with pornography that offers no depiction of violence. If there exists little merit in pornography itself then violent pornography offers none. Any pornography that depicts an illegal act, whether, rape, assault or child abuse should not be subject to protection offered to 'regular' pornography under freedom of expression and thus should be open to excessive legal restriction and even prohibition. What violent pornography does is rebrand these crimes simply as sex, which veils the inherent wrongs portrayed in these materials, leading to an unconscious acceptance of these practices. Such material may not

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[49] On this matter Susan Easton states: 'There are also gaps in our knowledge of the relevant variables: for example, not enough is known about the attitudes which may encourage sexual attacks or the role of pornography in psychosexual development.' Easton, (n 18) at p. 11.

[50] *ibid* at p. 14.

[51] The term 'Snuff' actually comes from a pornographic film of the same name, whereby the woman was *apparently* stabbed to death and dismembered.

[52] Mather (n 40) at p. 478; Carol (n 32) at p.6: 'In more than 20 years of reviewing pornography for my research, I have never found a photographic or motion picture image of a woman bleeding in any porn shop in the US or in Britain… No police authority in the world has ever been able to document the existence of a so-called 'snuff' movie, where the actress is purportedly murdered to produce pornography'.

necessarily fulfil a 'clear and present danger' test[53] or even be regarded as incitement to violence or sexual hatred that would make it subject to restriction. However, under Article 10, the suppression of violent pornography, in light of some of the evidence and arguments above regarding the direct and indirect effects of such material, may be necessary for the prevention of crime and the protection of the rights of others.

4. *Sexualising Social Inequality*

Other than the portrayal of violence in pornography, the other predominant argument from critics of pornography is that it 'represents the embodiment of an insidious lie about women;'[54] and that it 'eroticises hierarchy, sexualises inequality.'[55] It is contended that pornography is a political practice and a concrete manifestation of the reality of sexual inequality and in turn helps perpetuate such an inequality.[56] When we look specifically at the pornography industry, it is often the weakest groups in society that are being continually exploited: children, women from poorer countries, victims of sexual abuse, prostitutes and those forced into pornography through poverty.[57] In these cases, the presumption of choice may not exist and the claim of volantariness in participation negated.

The extent to which coercion into pornography exists is debatable. Prostitution understandably contains an element of coercion but the pornography industry does not necessarily have the same problem. Of course there are instances where an individual participates in a pornographic shoot against her will, although it is possible these instances are isolated. As William Margold, a 'talent' manager based in Hollywood explains: 'this is an industry where only 100-125 models are needed, there is such an abundance of willing participants, coercion, or even undue encouragement is unnecessary.'[58] Coercion in the industry appears non-existent, however this does not discount so-called 'amateur' productions, whereby an element of coercion is perhaps more conceivable. Such productions, due to their covert nature, are often impossible to impose restrictions on, given that they exist 'underground' and on the internet.

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[53] Example of which is found in *Schenck v United States*, 24 U.S. 47 (1919).
[54] Wesson (n 29) at p. 926.
[55] MacKinnon, 1985at p. 18.
[56] Mather (n 40) at p. 472.
[57] Easton (n 18) at p. 8.
[58] Lynn (n 26); 'The models pose willingly.. for every one who posed, there's another 10,000 ready to take her place.' Larry Flynt as quoted in J Juffer, *At Home with Pornography: Women, Sex and Everyday Life*, (NYU Press. New York 1998) at p. 1.

The argument that pornography is responsible for promulgating a misogynistic agenda,[59] is one which feminist lawyers place considerable weight. Spaulding states: '[m]isogyny often expresses itself most powerfully in sexual terms.'[60] Additionally, pornography sexualises racism, anti-Semitism, age, disability and other inequalities, but gender is never irrelevant - it is the overarching inequality that is so apparent in so much pornography. When pornography which depicts an evident sexual or racial inequality and enters the public domain, it ceases to be a representation of that individual, but rather becomes a depreciatory portrayal of the entire gender or race. Catherine MacKinnon insists that: 'pornography is a political, not a moral issue.'[61] The theory is that it is an ideology of male domination, resulting in female subordination. Gender inequality is a result of men's perception of women in society, and the message that pornography sends is one of male supremacy which manifests itself in the patriarchal society we live in. In spite of living in a supposedly patriarchal society, the emphasis placed on equality, particularly gender equality, is great. That being said, in pornography we have one of the last remaining bastions for sexism and sex discrimination not proscribed by law. As Victoria Mikesell Mather surmises: 'pornography violates the civil rights of all women, since it promotes a harmful view of women.'[62] In the context of pornography it appears that the inequality is what makes the material 'sexy' – the greater the inequality, the sexier it becomes.[63]

With respect to Catherine MacKinnon's view, Barry Lynn finds her position that pornography plays a major role in sex discriminations untenable: [64]

> The status of women in places like Saudi Arabia, where there is virtually no pornography, cannot be considered to be superior to the position of women in the United States, where there is possibly an $8bn industry in the material.

Diana Russell, in her book *Making Violence Sexy*, compares the position of women in the West with that of the Jews in Germany during the Third

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[59] Mather (n 40) at p. 475.
[60] C Spaulding, 'Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community' (1988) 4 Berkley Women's Law Journal 128 at p. 150.
[61] MacKinnon (n 2) at p. 43; Mather (n 40) at p. 466.
[62] *ibid.*
[63] A similar, although not entirely equivalent view is espoused by Catherine MacKinnon, MacKinnon (n 25) at p. 802.
[64] Lynn (n 26) at p. 179; Carol (n 32) at p. 7: 'Women's rights to freedom do not flourish in those nations, nor in any others which pornography is banned. We would do well to ask if we truly wish to emulate them.'

Reich.[65] MacKinnon also tells us that pornography 'censors' women and those women's voices in the public discourse have been silenced by it.[66] Such positions are, again, both hyperbolic and unsustainable. Adopting such a position at a time where women are more visible, more vocal and more able to claim public recognition for their achievements than ever before flirts with the ludicrous.

It is ironic that certain feminist positions on pornography incorporate and rely on several of the 'myths' about female sexuality that feminism as a movement has sought to debunk, particularly the notion of the woman as a 'victim' and their role in heterosexual intercourse as passive. Those who seek to blame pornography for the existing sexual inequality may wish to cast their net a little further: the mainstream media, for example, offers exposure to far more sexist material, something that reaches a larger audience, and reaches them far more comprehensively than pornography ever could. Pornography constitutes only a small subset of the sexist and violent imagery that permeates our culture and media. Professor Carlin Meyer concludes: [67]

> Today mainstream television, film, advertising, music, art and popular (including religious) literature are the primary propagators of western views of sexuality and sex roles. Not only do we read see and experience their language and imagery more often and at earlier ages than we do most explicit sexual representations, but precisely because mainstream imagery is ordinary and everyday, it more powerfully convinces us that it depicts the world as it ought to be.

The regulation of pornography based on the proposition that it breeds a sexual and social inequality is indefensible. Were we to impose restrictions on free speech on this basis, the implications for all sources of media would be catastrophic. If our right to free expression is impinged based on an implicit notion of a sexual inequality stemming from some speech, our entire system of free speech and free press would need a radical overhaul to comply with such standards.

There is one final irony in the feminist opposition to pornography. As Catherine MacKinnon and several other feminists testify, it is not a moral battle they are fighting, but a political one.[68] Yet the more they continue this line of argument the more they categorise pornography as a form of political

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[65] DEH Russell, *Making Violence Sexy,* (Open University Press, Buckingham 1993) at p. 171.
[66] MacKinnon, (n 25) at p. 801; A Dworkin, *Letters from a Warzone,* (Secker & Wardurn, London 1988) at p. 61.
[67] C Meyer, 'Sex Censorship and Women's Liberation' (1994) 72 Texas Law Review 1097 at p. 1103.
[68] MacKinnon (n 25) at p. 802.

speech, which ultimately makes it worthy of the highest constitutional protection. Precisely the kind of speech that Article 10 and the First Amendment are designed to protect.

5. *Solving the Problems Caused by Pornography*

The solution to the problem of pornography offered in the Indianapolis and Minneapolis ordinances authored by Catherine MacKinnon and Andrea Dworkin was not to criminalise the activity but to offer civil remedies in the form of damages to those harmed. These damages could be sought from the creators, distributors and exhibitors. The material encompassed was that which was deemed 'demeaning or degrading to women,' although not necessarily depicting sexual violence.[69] They were immediately challenged on First Amendment grounds and the ordinances were declared unconstitutional by the Supreme Court.[70] It would follow that were a similar initiative to be proposed in the UK that both the domestic courts and the European Court of Human Rights would also declare such legislation incompatible with Article 10. This is ultimately the right decision as the fear of an award in damages in a civil action may have the subsidiary effect of inhibiting free expression across the board. Additionally, it is patently wrong for groups to use the courts to support their own view on correct sexuality. One similarly has reservations about the remoteness and the proximity of the harm. Such legislation would be akin to holding Tesco liable for the sale of kitchen knives to someone who then uses it as a weapon.

Violent pornography on the other hand *can* be defined and can be controlled and, if necessary, prohibited. It is acknowledged that certain types of speech pose dangers to society: pornography that portrays violence, either real or simulated, should be subject to censorship as it falls out-with any protection afforded to free expression given that it is reasonably foreseeable that exposure to such material can lead the viewer to commit similar acts of violence.[71] To analogise this with another area of law Deana Pollard states:[72]

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[69] Indianapolis and Marion County, Ind., Code, ch. 16, § 16-3(g)(8) (1984); Wesson (n 29) at p. 920.

[70] *American Booksellers Association v Hudnut,* 598 F. Supp. 1316 (1984); The bill in Minneapolis was vetoed by the Mayor.

[71] The Canadian case of *R v Butler* held: 'While a direct link between obscenity (used here in reference to pornography) and harm to society may be difficult, if not at times impossible to establish, it is reasonable to presume that exposure to pornography bears a causal

> Violent pornography, like speeding, is intrinsically dangerous, and legislatures may regulate it on the basis of its known propensity for harm without showing a particular harm.

The glorification and celebration of sexual violence as free speech is not something which we should be obliged to protect irrespective of the link such material has to an increased propensity towards sexual violence. It would be reasonable to class such materials as incitement to sexual hatred, and legislation in a similar vein to incitement to racial hatred could conceivably be enacted.[73] One will acknowledge the argument that such censorship could force such materials 'underground' creating a black market.[74] Fischer argues that it is important we leave 'gaps in the law' regulating pornography to allow harmful materials to exist, simply to avoid black markets.[75] Yet in spite of the potential for this to occur, it is important that a message is sent out clearly and unequivocally that sexual violence should not be glorified in our society through the medium of pornography and as such state intervention to restrict the material is necessary.

A general ban on (non-violent) pornography however is not one which should receive support.[76] Not only is it not justified on grounds of lack of demonstrable harm, but for those who oppose pornography in general, the solutions lie out with legislation. Banning general 'soft' pornography on the grounds of harm will lead to (for want of a better expression) somewhat of a slippery slope. More blood has been shed over the Bible, the Qur'an and several other religious texts than any other, but there is no petition to ban them.[77] Surely if the criterion is harm, then no amount of literary merit should save it, for who is to say what is of merit? Should something be

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relationship to changes in attitudes and beliefs.' Sopinka J. at p. 438. *R v Butler* (1992) 89 Dominion Law Reports 449.

[72] D Pollard, 'Regulating Violent Pornography' (1990) 43 Vanderbilt Law Review 125 at p. 141.

[73] Easton (n 18) at p. 178.

[74] Frytak (n 1) at p.278, describing the 'forbidden fruit' effect; and JD Fischer on the analogy with 1920s prohibition law, JD Fischer, 'Minding the Gaps in Pornography' (2005) 10 Nexus 31 at p.33.

[75] *ibid* at p.33.

[76] Such a petition was filed with the Scottish Parliament by the group Scottish Women Against Pornography, who wished to define all pornography as incitement to sexual hatred; not, as I have stated above, only pornography depicting real or simulated violence. "MSPs back pornography ban calls" *BBC News Online*, available at: <http://news.bbc.co.uk/1/hi/world/europe/4529574.stm> (accessed April 2008).

[77] Ronald Dworkin offers a hypothetical if it was found there was a link between Shakespeare and various harms, the government would consequently have a case for banning it. He makes a similar argument regarding the Bible also. R Dworkin, (n 19) at p. 195.

accorded a lesser protection because it produces sexual rather than intellectual stimulation? Even if the test for prohibiting work is instead something along the lines of 'a tendency to deprave or corrupt' we risk, in the words of Justice Felix Frankfurter, 'reducing the adult population to reading only what is fit for children.'[78] This kind of moral entrepreneurship (to coin a phrase used by JS Mill) is unacceptable in a pluralistic democracy. An interesting expansion on the above dictum is found in *Paris Adult Theatres v Slaton*:[79]

> If a state may, in an effort to maintain or create a moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow, in pursuit of that same objective a state could decree that its citizens must read certain books or watch certain films.

If the courts can tell us what is wrong and what is incorrect, why not tell us precisely what is right and what is correct as well? [80] Obscenity law originally imposed restrictions on works such as *Ulysses* by James Joyce[81] due to its sexually explicit passages. It would be a mistake to slip back down that path.

Freedom of expression, whilst allowing materials like pornography, also allows criticism of it. The remedy for speech that one may find offensive is simple: more speech. In a democratic society, the best way of mitigating any of the perceived harms general pornography may cause (e.g. sexual inequality) is to engage in speech to inform, rebuff and replace the speech and images they find harmful.[82] Ultimately, this approach is essentially intellectual Darwinism; bad ideas (those we may consider morally reprehensible, if not necessarily illegal), unable to sustain themselves or compete with opposing arguments, will eventually lose popular support and the traction to make an impact socially leading to them dying out. However, where enough see merit in the idea it will persist, and on that basis it is correct that it should. This non-legislative remedy, in addition to the restrictions on violent pornography proposed above, will go a long way to alleviating the social problems caused by pornography, while at the same time maintaining the principle of individual liberty and preventing freedom

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[78] *Butler v Michigan,* 352 U.S. 380 (1957).
[79] Justice William Brennan (dissenting), *Paris Adult Theatres v Slaton,* 413 U.S. 49 (1973).
[80] Lynn (n 26) at p. 181.
[81] *United States v One Book Called 'Ulysses'* 72 F.2d 705 (2d Cir. 1934); the book was allowed to be imported based on the notion that it was 'A serious literary endeavour,' Woolsey J., however one surely must find it inconceivable that such a decision could be left up to a judge today.
[82] Fischer (n 74) at p. 34.

of speech from being held hostage by those who wish to impose their own sexual moralism on others.

6. *Conclusion*

There is powerful rhetoric behind the idea that pornography represents an insidious lie about women. On closer inspection on that basis it is no more regulable than *The Witches of Eastwick* by John Updike is due to its portrayal of a false stereotype about witches. One may even go as far as to say it is no more regulable than *Winnie the Pooh* based on its inaccurate representation of bears. Simply because pornography achieves its communication through what are primarily non-cognitive means should not distinguish it constitutionally.[83] The restriction of pornography violates Mill's harm principle and infringes our right to free speech and personal liberty. There is no law that should be passed to curtail the right in this respect, regardless of personal distaste for the material in question.

By contrast, the current laws on obscenity and indecency are not adequate enough to address the harm that *violent* pornography possesses. Several studies indicate there is no correlation between violent pornography and violent crime, yet there are several suggesting the opposite. The studies suggesting a correlation exists are just as credible as those who find no causal relationship. It would be easy to argue that I have read *Das Kapital*, I am not a Marxist, I have read the Bible, I am not religious, I have read *Mein Kampf* and BNP literature, I am not a 'Nazi,' I have seen violent films, both sexual and otherwise, I am yet to commit an assault and I am not a sexual deviant. Personally, I have not experienced any attitudinal changes from exposure to such material, but what one can accept is that people have become Marxists following reading *Das Kapital,* converted having read the Bible, joined the BNP after reading their literature, it is surely then plausible that sexually violent images tend certain individuals towards sexual violence. The point is different material elicits different responses in different individuals. For some it prompts a complete attitudinal change, in others it merely catalyses an existing predisposition and for some it has no effect. Whilst one can claim no conclusive link as to the causal relationship between the two, the question surely is who should bear the burden of this uncertainty? Uncertainty about the nature of a causal link hardly counsels

[83] Lynn (n 26) at p. 173.

inaction.[84] This material is not speech worthy of protection, it is simply a form of hate speech. Were we to produce media depicting the ritualistic humiliation and beating of a black or Jewish person for entertainment, we would be called racist and anti-Semitic but, because it is a woman and the violence is pornography, we turn it into a multi-million pound industry. The logic appears indefensible. The removal of this 'speech' from our society, narrowly defined, would not seriously threaten a well functioning system of free expression. On that sentiment the only wisdom I can impart is, regrettably, not my own:

> The defining characteristic of liberty is freedom from the violence of others.
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> - John Locke, *The Second Treatise of Government* (1690)

[84] Sunstein (n 41) at p. 158; consider in the context of carcinogens in food and the environment, regulatory action is taken even in the absence of a precise causal relationship between a substance and cancer. One assumes similar logic could apply to violent pornography.

The Lisbon Treaty: A Constitutional Document, Not a Constitution–A British Perspective

PHILIP BREMNER*

1. *Introduction*

The European Union[1] has undergone a constitutional transformation in the past half century. It has evolved from its origins as the European Economic Community, promoting economic integration, into a supranational polity that has come to be perceived in constitutional and even federal terms. This paper will explore the extent to which the modern-day EU can be said to possess some sort of constitution. In doing this, it will be necessary to decouple such a constitution from the notion of state constitutionalism and instead define it as a unique transnational constitution. Despite this, useful comparisons can be drawn between state constitutions and that of the EU, in order to ascertain the form the latter may take. Particularly useful in this regard is the analogy between the British constitutional model and the EU constitution. This paper concludes that the EU possesses a composite[2] constitution more akin to that of the United Kingdom rather than a formal written text, as is typical in continental Europe. As such, in the present writer's view, the Lisbon Treaty would feature, along with the other treaties, as a constitutional document within the constitutional arrangements of the EU, without it becoming a formal constitution itself.

1. *The Nature of a Constitution*

Firstly, it is important to define what is meant by a constitution within the specific context of the EU. The dictionary defines a constitution as being 'a body of fundamental principles or established precedents according to which a state or organization is governed.'[3] However, a constitution is more than this rather formalistic definition suggests. As well as being a legal concept, constitutionalism also has a certain political impact.[4] Paine suggests

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[1] Henceforth known as the EU.

[2] Composed of both written and unwritten sources.

[3] *Shorter Oxford English Dictionary* (5th Edition OUP, Oxford 2002).

[4] R Bellamy and D Castiglione, 'Introduction: Constitutions and Politics' in R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives*, (Blackwell Publishers, Oxford 1996).

that a constitution is a written document, which both displays certain formal characteristics and is publicly recognisable.[5] This positivist conception of a constitution seems overly formalistic and ignores the fundamental place a constitution holds in society as distinct from other laws. The constitutional principles that a state represents must be distinguished from the constitutional text or individual constitutional documents which embody them.[6]

The constitutional text accords with the dictionary definition of a constitution and that advanced by Paine. It is the constitutional text that must be formally valid and regulate the exercise of public power in a positivistic manner. This finds support in the instrumental view of a constitution as a superstructure for the maintenance of an independent normative order.[7]

This, however, is merely the legal manifestation of a more fundamental legal/political concept. Normative conceptions consider the constitution as a fundamental norm upon which the whole organisation of socio-political life must ultimately depend.[8] Therefore, two distinct elements can be identified that must be present in order to classify a given set of laws as a constitution. Firstly, the rules must regulate the exercise of political power in a given political entity and secondly they must be seen as embodying the fundamental basis of society within the polity. The validity of the former is assessed on the basis of Kelsen's positivist explanation of the basic norm in terms of formal legitimacy.[9] The validity of the latter, on the other hand, is assessed with reference to social or substantive legitimacy.[10]

2. *The Existence of Supranational Constitutionalism*

Our current understanding of the nature of a constitution is very much influenced by nineteenth-century constitutionalism and the liberalist view of

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[5] T Paine, *Political Writings,* (CUP, Cambridge 1989) at p. 81.
[6] C Schmitt, *Verfassungslehre,* (Duncker u. Humblot GmbH, Berlin 2002) ch. 1, para. 2.
[7] FA Hayek, *Law, Legislation and Liberty*, *volume 1: Rules and Order,* (University of Chicago Press, Chicago 1973).
[8] D Castiglione, 'The Political Theory of the Constitution' in R Bellamy and D Castiglione (n 4).
[9] M Hartney (tr), H Kelsen, *General Theory of Norms,* (Clarendon Press, Oxford 1991) at pp.116-117.
[10] Essentially this is where the members of society accept the laws of that society as binding and comply with them. Weiler suggests that substantive legitimacy, at least at the level of the state, is where 'a minority will/should accept the legitimacy of a majority decision because both majority and minority are part of the same *Volk*...,' JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) European Law Journal 219 at p.228; see also Hurrelmann who argues that 'a number of *social preconditions* [such as social integration] can thus be defined that have to be met in order to secure the normative legitimacy [or substantive legitimacy] and empirical acceptance of democratic institutions. A Hurrelmann, 'European Democracy, the 'Permissive Consensus' and the collapse of the EU Constitution' (2007) European Law Journal 343 at p. 348.

the nation state.[11] The essence of this liberal constitutionalism is of government grounded in, limited by, and devoted to the protection of individual rights.[12] The Peace of Westphalia of 1648 announced the dawn of the European (nation) state and a new system of spatial organisation that was founded in the naturalness of state sovereignty.[13] It is on this basis that our ideas about what constitutes a constitution have evolved. It is, however, important to note that any discussion of constitutionalism beyond the state should not merely be an attempt to define transnational constitutionalism with reference to state constitutionalism. Instead, the constitutional discourse about post-state spaces needs to be attuned to the idiosyncrasies of such orders.[14]

As a result of globalization and the increasing inter-dependence of global economies, states, more and more, need to devise ways to regulate their mutual interactions on the international level. This allows for the possible existence of a positivist type constitution as described above, namely a formally valid set of rules that governs the exercise of power within the organisation. Whilst this may be all that exists on the broader international plane, it does not preclude a more intense type of constitutionalism on a post-state, sub-global level. The existence of a *demos*[15] is seen as a prerequisite of the existence of a state constitution.[16] Therefore, the lack of a *demos* at the international level is seen as precluding the existence of a transnational constitution.[17] This, however, is not necessarily the case because transnational constitutionalism may be more about normative neutrality and accommodation of differences than about projection of a common value system.[18]

3. *The Constitution of the European Union*

It is important to distinguish the European Union both from a state and a classical intergovernmental organisation. In terms of its constitution, the European Union is distinct from both of these entities.[19] The EU is an entity within the international legal order, created by states which inhabit that legal order. However, these states share common principles such as peace, human rights, democracy and the rule of law. It is these principles that

[11] D Castiglione (n 8).
[12] Hesse and Johnson (eds), *Constitutional Policy and Change in Europe,* (OUP, Oxford 1995) at p.34.
[13] Curtin, *Post national democracy: The European Union in Search of a Political Philosophy,* (Kluwer Law International, The Hague 1997) at p.2.
[14] N Tsagourias, 'Constitutionalism: a Theoretical Roadmap' in N Tsagourias (ed), *Transnational Constitutionalism,* (CUP, Cambridge 2007) at p.5.
[15] A *demos* is a people united by a common culture and heritage.
[16] *Brunner* [1994] 1 CMLR 57 (German Maastricht Decision).
[17] Grimm, 'Does Europe Need a Constitution' (1995) 1 European Law Journal 282.
[18] N Tsagourias (n 14) at p.6.
[19] N Tsagourias, 'The Constitutional Role of General Principles of Law in International and European Jurisprudence', in N Tsagourias (ed), *Transnational Constitutionalism,* at p. 87.

define the EU as a distinct legal order within the international legal order; attribute legitimacy; ensure legal coherence; foster unity; and provide orientation.[20] Unlike international law, the European legal order affects individuals directly, rather than through their states.[21] There is also a mutual interaction between the national and European legal orders which leads to a Europeanization of national law and a domestication of European law.[22] All of the above has allowed the European Union to grow an indigenous constitution and claim constitutional autonomy.[23] In this context, 'constitution' does not mean a formally valid written document, but rather a set of fundamental principles that govern the exercise of power within the EU and regulate the interaction between EU institutions and member states.

4. *The British Constitution*

Having already demonstrated that the EU possesses a constitution, it is now appropriate to define the nature of this constitution. Whilst it is true that the legitimacy of such a constitution must be conceived of in non-statal terms, it is useful to draw analogies with existing state constitutions to inform our conceptions of the structure of the EU's constitution. Particularly helpful in this regard is the analogy between the partially written but uncodified British constitution and that of the EU. In order to create an analytical framework for EU constitutionalism that is based on British constitutionalism it is necessary to study the latter in some depth. This will then form the basis of the discussion that follows on how the British constitutional model can be applied to the EU.

Unlike the civil law jurisdictions of Europe, the United Kingdom does not have a formal, written text as its constitution. Instead the United Kingdom has a common-law constitution with parliamentary supremacy as its 'keystone'.[24] In orthodox theory of parliamentary supremacy,[25] parliament is seen as having legal sovereignty to pass any law,[26] with

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[20] *ibid* p. 82.

[21] Case 26/62, *Van Gend en Loos,* [1963] ECR 1; E. Stein, 'Lawyers, Judges and the making of a Transnational Constitution', (1981) 75 America Journal of Comparative Law 1.

[22] F Snyder, *The Europeanization of Law,* (European Law Series, Hart Publishing, Oxford 2000) pp. 1-11; M Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 International Journal of Constitutional Law 332 at pp. 338-9.

[23] N Tsagourias (n 19) at p. 83.

[24] W Blackstone, *Commentaries on the Laws of England,* (Portland 1807); A V Dicey, *Introduction to the Study of the Laws of the Constitution,* (10th ed, Macmillan, London 1965) at p. 70.

[25] G Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 Law Q. Rev. 591 at p. 597: 'nowhere is the development of this doctrine [of parliamentary supremacy] demonstrated more clearly than in the writings of Blackstone and Dicey'.

[26] W Blackstone (n 24) at p. 156: '[Parliament's authority is] so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds…. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament'.

political sovereignty resting with the electorate.[27] It is on this basis that parliament can be said to derive its moral legitimacy from democratic principles.[28] Dicey, the pre-eminent authority on British constitutional law, considered that these democratic principles could act as internal checks on the exercise of legislative power because parliament is unlikely to legislate contrary to fundamental ideals that are central to its belief system.[29] Such fundamental ideals in the British context would seem to be respect for representative government, democratic accountability and the rule of law.[30] However, despite these internal checks, nobody is legally competent, in the view of exponents of orthodox constitutional theory,[31] to curtail the authority of parliament, not even the judiciary.

Prima facie, this notion of absolute parliamentary supremacy does not seem to accord with the modern view of constitutionalism, as outlined above, which seeks to limit the exercise of legislative power. Furthermore, the lack of possibility of judicial review of primary legislation passed by the British parliament[32] does not seem to fully accord with the rule of law, which is said to be a fundamental principle of British constitutional law.[33] Orthodox constitutional theory is, however, only one interpretation of British constitutional law. The early colonists in America, for example, took a different view. They based the restraints on the exercise of parliamentary authority that emerged after the American Revolution on a different interpretation of the British common law.[34] This forms the basis of the strong power of judicial review that is vested in the American Supreme Court.[35]

Many modern British constitutionalists[36] believe that the common law power of the courts to strike down executive acts that are *ultra vires*[37] could

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[27] AV Dicey (n 24) at p. 73: 'The sovereign power under the English constitution is clearly 'Parliament.' But the word 'sovereignty' is sometimes employed in a political rather than strictly legal sense. That body is 'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested'.

[28] Lord Irvine of Lairg, 'Sovereignty in Comparative Perspective: Constitutionalism in Britain and America' (2001) 76 New York University Law Review 1 at p. 13-14.

[29] AV Dicey (n 24) at p. 80.

[30] DW Vick, 'The Human Rights Act and the British Constitution' (2002) 37 Texas International Law Journal 329 at p. 330.

[31] W Blackstone (n 24) at p. 91: '[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it'.

[32] AW Bradley, 'The United Kingdom, the European Court of Human Rights, and Constitutional Review' (1995) 17 Carodozo Law Review 233 at pp. 233-34.

[33] DW Vick (n 30).

[34] B Bailyn, *The Ideological Origins of the American Revolution,* (OUP, Oxford 1967) at pp.30-31. These restraints on parliament were found in the common law principles that protected Englishmen from arbitrary or unchecked government authority.

[35] *Marbury v Madison*, 5 U.S. 137 (1803).

[36] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism,* (Clarendon Press, Oxford 1993) at pp. 269-70; C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' 1996 Cambridge

be used as the basis for arguing the existence of a common law power of judicial review of primary legislative acts. As one writer puts it:[38]

> The ultra vires doctrine...is an independent common-law judicial power. This common-law position enhances the judiciary as an independent branch of government inherently capable of substantively scrutinizing executive acts, as well as the authorizing statute

Furthermore, this power of judicial review is not inconsistent with the doctrine of parliamentary sovereignty because parliament is theoretically capable of expressly revoking the court's power as it is with any common-law principle.[39] Similarly this extension of the court's inherent power of judicial review is in conformity with the natural law and rule of law limitations on parliament found in orthodox constitutional theory, as articulated by Blackstone and Dicey.[40] In a constitutional democracy, judicial review of both primary and secondary legislation, whilst not being a pre-requisite,[41] is the most suitable means of ensuring legislative and executive compliance with constitutional limits.[42] Therefore, this alternative view of British Constitutionalism, whilst firmly anchored in British common law,[43] is more in line with the constitutional arrangements of other EU member states in continental Europe.

In continental Europe, as in the United States of America, reference is made in the first instance to the text of a written constitution in order to determine the constitutional principles of a given country. Conversely, in Britain, constitutional principles were traditionally derived directly from the unwritten common-law.[44] However, written and unwritten elements are not mutually exclusive and both may be present in a constitutional system.[45] This is particularly evident in Britain where the lack of a formal constitution has not precluded reference to certain written documents which have a

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Law Journal 122 at pp. 122-23; S De Smith et al., *Principles of Judicial Review,* (Sweet and Maxwell, London 1999) at p. 112-13; J Laws, 'Law and Democracy' 1995 Public Law 72 at p. 79.

[37] S De Smith et al. *ibid.*

[38] D Jenkins, 'From Unwritten to Written: Transformation in the British Common-Law Constitution' (2003) 36 Vanderbilt Journal of Transnational Law 863 at p. 879.

[39] A Halpin, 'The Theoretical Controversy Concerning Judicial Review' (2001) 64 MLR 500 at p. 501.

[40] P Craig, 'Competing Models of Judicial Review' 1999 Public Law 428 at p. 445.

[41] D Grimm, 'Constitutional Adjudication and Democracy' in D W Jackson and C N Tate (eds) *Comparative Judicial Review and Public Policy Volume 77,* (Greenwood Press, Westport 1992) at p. 103.

[42] A Stone, 'Abstract Constitutional Review and Policy Making in Western Europe' in D W Jackson and CN Tate *ibid.* at p. 41.

[43] D Jenkins, (n 38) at p. 880: 'This version of common-law review, compatible as it is with Coke, Blackstone, and Dicey, represents the resurgence of a theory of judicial review that has long roots in British legal history'.

[44] DA Strauss, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877 at p. 885.

[45] RH Fallon, *Implementing the Constitution,* (Harvard University Press, Cambridge MA 2001) at p. 111.

special constitutional status. Examples of such documents are the Parliament Act 1911,[46] the European Communities Act 1972,[47] the Scotland Act 1998[48] and the Human Rights Act 1998.[49] Presumably, any law instituting fixed-term parliaments, as the current UK coalition Government are proposing, would have a similar constitutional status. The importance of these statutes is not their legally binding force, because parliament can repeal them at any time, but rather their impact on UK Constitutionalism, due to their political entrenchment.[50]

5. *A British Model of EU Constitutionalism*

The above account of UK constitutional law may seem somewhat tangential and out of place in this discussion of EU constitutionalism. However, this essay is an attempt to extend, by analogy, the principles of the British common-law constitution to that of the European Union. Therefore, it is essential to understand the core elements of the British constitution as a framework for this comparison.

It is quite striking, when examined in this manner, how many similarities there are between the constitutional arrangements of these two polities. Firstly, it is interesting to note that neither Britain nor the EU have a single text from which constitutional principles may be derived. However, both systems have several texts which have a special status and embody fundamental principles upon which each entity is founded.[51] In addition to this, many of the constitutional principles which characterise the EU have been judge-made rather than being expressly referred to in the founding treaties.

In this analogy, there appears to be several direct comparisons that can be made between concepts of British constitutional law and practices within the European Union. The first striking example of this is the similarity between the notion of parliamentary supremacy, on the one hand, and the member states as 'masters of the treaties'[52] on the other. As regards the former, legal supremacy is vested in the British Parliament in

[46] This statute set limits on the powers of the House of Lords in regard to legislation.
[47] This statute incorporated the Treaty Establishing the European Community (Treaty of Rome) and in so doing placed limitations on the principle of parliamentary sovereignty.
[48] This along with the Government of Wales Act 1998 and the Northern Ireland Act 1998 set out the principles for devolution.
[49] This acts almost like a bill of rights as it incorporates the ECHR directly into British domestic law.
[50] The nature of constitutional statutes was commented on by Lord Justice Laws in *Thoburn v Sunderland City Council* [2003] 3 WLR 247 and is discussed in R Hazell, 'Reinventing the Constitution: Can the State Survive?' 1999 Public Law 84 at pp. 84-87.
[51] As regards the EU, such texts would include The Treaty on the functioning of the European Union and The Treaty on European Union.
[52] *Brunner* (n 16).

Westminster,[53] and in the latter case, legal supremacy is vested in the member states acting collectively at an inter-governmental conference and through subsequent ratification.[54] Both bodies (Parliament and the IGC) have absolute legal sovereignty and are capable of passing any law they see fit.

In addition to this, there is a certain similarity between the evolution of constitutional principles in the British common-law and the teleological interpretation of the treaties by the European Court of Justice.[55] As Weiler demonstrates,[56] many of the main fundamental principles that define the European Union as a constitutional legal order were established by the ECJ. These include the doctrines of direct effect,[57] supremacy,[58] implied powers[59] and fundamental rights.[60] In Weiler's opinion: [61]

> The measure of creative interpretation of the Treaty was so great as to be consonant with a self-image of a constitutional court in a 'constitutional' polity.

In the present author's opinion, this is a strong example of how the European Court of Justice derives constitutional principles directly from the *acquis communautaire*, which encompasses ECJ case-law and general principles as well as the treaties, rather than from any specific textual source. This seems to bear more similarity with the British common-law approach to constitutionalism than it does to the rigid textual approach of many continental European legal systems.

These judicially created, constitutional doctrines only have full effect, however, as a result of the Community's strong system of judicial review.[62]

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[53] Henceforth referred to simply as Parliament. This is short hand for the procedure whereby an act is approved not only by the House of Commons but also by the House of Lords and then receives Royal assent.

[54] Henceforth referred to simply as IGC. The procedure whereby treaties must be ratified by national parliaments after being signed at an IGC can be seen as somewhat analogous to the procedure in the British Parliament *ibid*.

[55] Henceforth referred to as the ECJ.

[56] JHH Weiler 'The Transformation of Europe' in JHH Weiler (ed) *The Constitution of Europe* (CUP, Cambridge 1999).

[57] Established in the landmark case 26/62 *Van Gend en Loos* [1963] ECR 1; As Weiler puts it: 'Community legal norms that are clear, precise and self-sufficient...must be regarded as the law of the land in the sphere of application of community law', JHH Weiler *ibid.* at p. 19.

[58] Established in Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; According to Weiler 'The combination of these two doctrines, [supremacy and direct effect], means that Community norms that produce direct effects are not merely the law of the land but the 'higher law' of the land'. JHH Weiler (n 56) at p. 22.

[59] It was recognised in Case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263 (ERTA) that the existence of an internal competence implies an external, treaty-making power on the part of the Community.

[60] This doctrine was fully elaborated on in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle fur Getreide und Futtermittel* [1970] ECR 1125.

[61] Weiler (n. 56) at p. 24.

[62] Weiler (n 56) at p. 25: 'The constitutionalisation claim regarding the Treaties establishing the European Community can only be sustained by adding one more layer of analysis: the system of judicial remedies and enforcement'.

As mentioned previously,[63] judicial review is a key means of upholding constitutional principles. Similar to the above discussion about parliamentary supremacy, the lack of judicial review of the founding Treaties of the EU could be seen as undermining its constitutional nature. A solution to this problem can be found by looking to British constitutional theory. It is here that the in-depth discussion above, about the possibility of judicial review of primary legislation in the UK, is particularly relevant.

A central feature of the EC treaty is its strong system of judicial review of secondary legislation.[64] This seems very similar to the common-law power of the British courts to review *ultra vires* secondary legislation, which, as argued above, can be extended to justify the review of primary legislation. In the present writer's submission, the ECJ's power of judicial review of secondary legislation could be extended to allow judicial review of the treaties. This is, however, a controversial view and is not a power that the ECJ has claimed. Indeed, it would not be politically feasible for the ECJ to do so, given the opposition this would meet with from EU member states. Despite this, there is an argument to be made, based in constitutional theory, for the possible existence of such a power.

It is important to note that the Treaties of the EU neither expressly allow nor prohibit judicial review of primary legislation. Therefore, it would be very difficult to infer such a power based on textual references. However, as argued above, the treaties are not the definitive source of constitutional powers and principles but rather the embodiment of some of them. In this way, limitations exist on the supremacy of the will of the treaty makers, similar to those that exist on parliamentary sovereignty in Britain. One such limitation is the rule of law, on which the EU is said to be founded,[65] and central to which is some sort of power of judicial review of primary legislation.[66] An example of this in the British context is the ability of individuals whose rights are infringed (victims) to challenge primary legislative acts of the Scottish Parliament before the Court of Session and for that court to strike down those acts for violating the Human Rights Act 1998.[67] Whilst this is not the case with primary legislation of the Westminster parliament,[68] such a power is theoretically possible, as argued above. The

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[63] A Stone (n 42).

[64] Article 230 EC provides that: 'The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission...and acts of the Parliament intended to produce legal effects vis-a-vis third parties'.

[65] Article 6 TEU; Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1984] ECR 3325.

[66] Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *UPA* [2002] ECR I-6677: The Advocate General notes that Member States do not generally exclude individuals from challenging primary legislation which violates constitutionally enshrined rights or fundamental principles of law.

[67] Scotland Act 1998 s.29.

[68] The House of Lords only has the express statutory power to declare primary legislation of the Westminster Parliament incompatible with the Human Rights Act 1998 but not to invalidate it.

theoretical power of the ECJ to invalidate treaty provisions based on general principles of EU law gives weight to the submission that the EU is a constitutional polity with various constitutional documents, which give only partial expression to an underlying, unwritten constitutionalism rather than one possessing a formal written constitution.

6. *The Lisbon Treaty: Another Constitutional Document*

On an examination of the text of both documents, it seems that the substance of the Lisbon Treaty[69] is largely similar to that of, the now defunct, Treaty Establishing a Constitution for Europe (TECE),[70] in terms of the reforms it institutes.[71] However, much of the symbolism of the TECE has not been reproduced in the Lisbon Treaty.[72] More significant perhaps, is the fact that the term 'Constitution' appears nowhere in the text of the Lisbon Treaty. This seems indicative of the intention of the drafters of the treaty that it should not be perceived as a constitution after the failure of the TECE.[73]

The Lisbon Treaty possesses several distinct features which are highly indicative of the fact that it is not a formal constitution as such. In addition to its lack of symbolism, the Lisbon treaty was not designed to stand alone but rather, merely, to amend the existing treaties. The net effect of these amendments may be very similar to that achieved by the TECE in substantive terms but the Lisbon Treaty does not create a single new constitutional document as the TECE would have done.

Furthermore, not only does the form of the Lisbon Treaty suggest that it is not a Constitution but also the manner in which it was adopted. In the vast majority[74] of member states, this treaty was adopted by the normal means of ratifying any other international treaty, namely parliamentary ratification. It is particularly noteworthy that those member states, whose referenda halted the ratification of the TECE,[75] also opted for parliamentary ratification of the Lisbon Treaty. This suggests that the Lisbon Treaty is no different from any other international treaty and certainly not a formal constitution.

A useful illustration of this point is a brief comparison between the respective constitutional amendment procedures in the United States of

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[69] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[70] Treaty Establishing a Constitution for Europe [2004] OJ C316/1.

[71] N Moussis, 'The Lisbon Treaty: A Constitution Without the Name', (2008) 3 Revue du Marche Commun et de l'Union Europeenne Issue 516 at pp. 161-168.

[72] For example, there is no longer any reference to the symbols of unification such as the flag, the anthem and the day of Europe.

[73] G DeBúrca, 'Reflections on the EU's Path from the Constitutional Treaty to the Lisbon Treaty' Available at SSRN: <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1148448_code339387.pdf?abstractid=1124586&mirid=3> (accessed 13 July 2010).

[74] Ireland is constitutionally mandated to hold a referendum

[75] Namely France and the Netherlands.

America and in the United Kingdom. The U.S. Constitution is a formal written text and can only be amended through a special procedure distinct from the ordinary legislative procedure.[76] An analogous procedure in the context of the EU might be the adoption of a text resulting from a convention and its subsequent domestic ratification by referenda held in the various member states.

This contrasts starkly with the situation in the UK, where constitutional amendment has been effected through the passing, in the usual manner,[77] of ordinary legislative acts, which have nevertheless taken on a special constitutional and political significance.[78] The distinction between these two ways of amending a constitution is explained by Dicey:[79]

> When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing.... Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution.

Here Dicey is commenting specifically on the British Constitution. However, in the present writer's view, this can be extended to cover the EU too. Dicey seems to suggest an inversely proportional relationship between the flexibility of the amendment procedure of a constitution and the likelihood of the existence of a formal written constitution. This lends credibility to the assertion that the use of the ordinary adoption procedure for international treaties in the EU, when combined with other indicators outlined above, is indicative that the Lisbon Treaty is not a formal written constitution.

This, however, does not preclude the Lisbon Treaty from being a constitutionally and politically significant document. The reforms that the Lisbon Treaty introduces are wide ranging and will have a significant impact on the workings of the European Union. One of the most significant areas of reform is the powers of the institutions of the EU. Both the European Parliament and the ECJ have been given significantly more power. As regards the former, the ordinary legislative procedure[80] has been extended to cover more areas, giving the European Parliament a greater role to play in the adoption of legislation. This seems to come at the expense of

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[76] Article V of the U.S. Constitution states that: 'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress...'.

[77] See (n 53).

[78] See (n 46 – 49) for examples.

[79] Dicey (n 24) at p. 90.

[80] Formerly known as the co decision procedure.

the member states acting in the Council because the extension of qualified majority voting to more areas allows the express wishes of the member states to be overridden to a greater extent. However, national parliaments have been given a more active role to play in the EU, for example through the use of the yellow and orange card procedure.[81] The ECJ also gains greater influence through the extension of its jurisdiction into the area of justice and home affairs due to the merger of the third pillar with the first.

In addition to reforming the institutional balance within the EU, the Lisbon Treaty also enhances the protection of human rights. Firstly, the Lisbon Treaty makes the Charter of Fundamental Rights of the EU legally binding.[82] Whilst this may not have the effect of creating any new rights it codifies and raises the profile of existing rights.[83] Furthermore, accession to the ECHR,[84] provided for in the Lisbon Treaty,[85] would ensure consistency between these two human rights regimes in Europe by subjecting the EU institutions to the jurisdiction of the European Court of Human Rights.[86] Altering the institutional balance and increasing the protection of human rights within the EU are merely prominent examples of the constitutional and political significance of the Lisbon Treaty. Other significant aspects include the express enunciation of the principle of conferred powers,[87] the granting of legal personality to the EU[88] and the restatement of the democratic principles that form the foundation of the EU.[89]

Despite these far-reaching reforms of a constitutional nature, the Lisbon Treaty need not be considered a constitution as such but can still remain a constitutionally significant document, as recent reforms in the UK illustrate. Examples of such documents in the British context are the Constitutional Reform Act 2005 and the Human Rights Act 1998. Both these acts were passed under the normal legislative procedure in the UK; however both bear a high degree of constitutional significance. The former, introduces institutional reforms that have a fundamental impact on the separation of powers in the UK, as the Lisbon treaty does for the EU. The latter, whilst it may not introduce rights that were unavailable under the common-law, codifies them and makes ECHR rights justiciable before the UK courts, in a similar way that the Charter of Fundamental Rights and accession to the ECHR does for the EU. Therefore, by extension of British

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[81] These give national parliaments the right to express concerns on subsidiarity directly to the institution which initiated the proposed legislation.

[82] Article 6 TEU (as amended by the Lisbon Treaty)

[83] K Lenaerts & E De Smijter, 'A 'Bill of Rights' for the European Union' 2001 Common Market Law Review at pp. 273-300.

[84] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

[85] Article 6 TEU (as amended by the Lisbon Treaty).

[86] S Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis' [2006] CMLR 43 629-665.

[87] Article 3(6) and 4(1) TEU (as amended by the Lisbon Treaty).

[88] Article 47 TEU (As inserted by the Lisbon Treaty).

[89] Article 2 TEU (as amended by the Lisbon Treaty).

common-law principles, the Lisbon Treaty can be seen as constitutionally significant whilst not being a constitution *per se*.

7. *Conclusion*

The institutions of the EU pass binding laws which have too fundamental an impact on the lives of individuals for this supranational entity not to have a constitution. The perceived lack of the ethno-cultural markers of a state constitution, such as a common language, heritage and culture, prove no bar to the existence of a transnational constitution for the EU. Such a constitution is novel and unique and not dependent on the precepts of state constitutionalism. Nevertheless, age-old constitutions, such as the British common-law constitution, can be helpful in determining how this new constitutional system ought to be perceived and interpreted. Due to its largely unwritten and uncodified form, the constitutional arrangements of the UK are sufficiently flexible to be capable of being adapted to serve as a model for the EU's constitution. On this reading, the EU neither needs nor has a written constitution. Instead, the EU has a composite constitution derived directly from the *acquis communautaire* of which the treaties merely form part. Therefore, despite its highly significant institutional and constitutional reforms, the Lisbon Treaty ranks as just another constitutional document, not a formal constitution.

The Failures of 'Shield Legislation': Sexual History Evidence, Feminism and the Law

LEANNE M. BAIN *

1. *Introduction*

Over three centuries ago Sir Matthew Hale opined; [1]

> Rape is an accusation easily to be made and hard to be proved, and harder still to be defended by the party accused, tho' never so innocent.

The Hale warning directed juries to the deep mistrust of female accusers embedded in the common law tradition and reflected a dominating male perspective in sexual offence crimes.[2] Similar judicial reactions towards victims have continued to taint rape trials from Hale's time to the present day and have 'included breathtaking illustrations of traditional patriarchal attitudes.'[3] As a result, the rape trial has traditionally been a place for 'fair game'[4] character attacks on female complainants in a way which is inconsistent with the law's general approach to victims and defendants in all other crimes.[5] Where sexual offences are involved 'the rules of the game are simply different'.[6]

The incentive for reform came in the 1970s, coinciding with the growth of the Women's Movement and changing attitudes towards sexual

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[1] M Hale, *History of the Pleas of the Crown* (1st edn, London 1736) at p. 634.

[2] H Kennedy QC, *Eve was Framed: Women and British Justice* (Vintage Books, London 1993) at p. 139.

[3] H Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing, London 1998) at p. 278. Note examples such as: 'Playing with sex is like playing with fire' - judge's summing up in relation to the killing of Mary Bristow in H Kennedy QC, *Eve was Framed: Women and British Justice* (n 2) at p. 109; 'It is well known that women in particular and small boys are liable to be untruthful and invent stories' Judge Sutcliffe 117 *ibid* ; 'A nice girl who gets raped is different than a bad girl who gets raped' - an Ohio judge's bold assertion on national television - S Murthy 'Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent' (1991) 79 California Law Review 541at p. 550.

[4] S Murthy 'Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent' (n 3) at p. 550.

[5] *ibid* at p. 546.

[6] V Berger 'Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom' (1977) 77 Columbia Law Review 1 at p. 10.

autonomy.[7] Many jurisdictions enacted the first 'rape shield' laws[8] with the intent to 'curb the use' of sexual history and sexual character evidence in rape trials.[9] In 1986 Scotland followed suit, enacting new statutory rules of evidence to inhibit such questioning.[10] These proved to be of limited success. After several decades of research and debate, the current 'shield legislation' came into effect in 2002 and aimed to address the failures of the previous laws. However, despite the legislative efforts 'legal change has yet to be demonstrably effective.'[11] The aim of this paper, therefore, is to chart the legal development, address the reasons for the on-going inadequacies, and question if there is a viable solution for future reform. In doing so, it will suggest that it is not the rules of evidence in themselves, but rather the attitudes towards the evidence which are at the root of the current failures. Simply, the problem is not with the rules of the game, but with the players.

2. *From Past to Present: Historical Development and the Current Law*

Historically, at common law, it was permissible to attack the moral character and reputation of a complainer in cases of rape.[12] It 'represented the only exception to the general rule forbidding character evidence' on the grounds that 'there is so great a risk of her story having been concocted…'[13] However, in recent years it has emerged that the inferences which were brought by sexual history evidence 'were not based on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief.'[14] As a result, there was much pressure for legislation to prohibit its use.[15] The fact that there had already

[7] S Brownmiller, *In Our Time: Memoir of a Revolution* (Dell Publishing, New York 2000) at p. 194.

[8] Examples were seen in Canada, New Zealand, England, Australia and US. See Scottish Office Central Research Unit (Brown, Burman & Jamieson), *Sexual History and Sexual Character in Scottish Sexual Offence Trials* (Edinburgh, 1992) and also J Temkin, 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) Modern Law Review 625 at p. 637.

[9] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Edinburgh, 2007) at p. 8.

[10] Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 s36.

[11] J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford & Portland, Oregon 2009) at p. 1.

[12] *Dickie* v *HM Advocate* (1897) 5 SLT 120.

[13] Dickson, *Evidence*, para. 1622 cited by F Raitt, *Evidence: Principles, Policy and Practice* (W. Green & Sons Ltd, Edinburgh 2008) at p. 241.

[14] Known as the idea of 'twin myths' - *R* v *Seaboyer* [1991] 2 SCR 577 as quoted in N Kibble 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence Under s41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot: Part 2' (2005) Criminal Law Review 263 at p. 268. Also *MM* v *HM Advocate* 2004 SCCR 658 at 682.

[15] Scottish Office Central Research Unit (Brown, Burman & Jamieson), *Sexual History and Sexual Character in Scottish Sexual Offence Trials* (Edinburgh, 1992) at p. 2.

been shield legislation enacted in many jurisdictions, including England, fuelled the Scottish reform movement.

In 1983 the Scottish Law Commission (SLC) published Report No. 78.[16] It proposed that legislation should be introduced to exclude certain types of questioning or evidence.[17] The Report noted that '*any* evidence concerning negative aspects of sexual character may divert a jury from the proper issues in a case'.[18] However, in order to achieve the 'balancing aims' of the reform this exclusion was then qualified by four exceptions, the last being extremely wide and allowing a judge to admit evidence if it was in the interests of justice to do so. With minor changes the SLC's proposals were then implemented in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 s36.[19]

Despite the aims of the legislation, it did not properly achieve its objectives.[20] Research carried out after the introduction concluded sexual history evidence was 'still being introduced in the Scottish courts.'[21] The main failures identified were that the legislation was being ignored or manipulated,[22] and that it did nothing to prohibit subtle character attacks. As a result, the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002[23] introduced a new regime for evidence and procedure in sexual offence trials, by amending ss274-275 of the Criminal Procedure (Scotland) Act 1995.[24]

The 2002 Act provides stricter rules for discouraging the use of sexual history evidence. It applies a prohibition for both the defence and the

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[16] Scottish Law Commission, *Report on Evidence in Cases of Rape and Other Sexual Offences* (Scot Law Com No. 78, Edinburgh, 1983).

[17] *ibid.* See also; J Temkin 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) Modern Law Review 625 at p. 631. This exclusion would relate to evidence which showed or tended to show that the complainer was not of good character, (later restricted to only 'sexual character') was a prostitute or associated with prostitutes, or had engaged in sexual behaviour not forming part of the subject matter of the charge.

[18] Scottish Law Commission, *Report on Evidence in Cases of Rape and Other Sexual Offences* (Scot Law Com No. 78, Edinburgh, 1983), emphasis added.

[19] *ibid.* This legislation added sections to the Criminal Procedure (Scotland) Act 1975, which then became s274 and s275 of the Criminal Procedure (Scotland) Act 1995 in the consolidation, with some minor extension of the provisions of the 1986 Act.

[20] Note that it is interesting to see that Temkin identified these failures long before the 1992 review. Before the enactment of the 1986 legislation Temkin warned that the SLC proposals would mark 'no major improvement' mainly due to the wide judicial discretion which the proposals retained. See J Temkin 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (n 17).

[21] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Edinburgh, 2007) at p. 8.

[22] B Brown, M Burman & L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (Edinburgh University Press, Edinburgh, 1993) ch. 12.

[23] Herein the '2002 Act'.

[24] Herein the '1995 Act'. The 2002 Act also changed the provisions on conducting a defence for the accused, however this issue is beyond the scope of this paper and shall not be addressed.

Crown,[25] and extends this prohibition to general character attacks.[26] Section 275 then provides only one ground of exception.[27] In order to satisfy this exception the evidence must be relevant to establishing guilt; be of significant probative value; and outweigh any prejudicial effect to the proper administration of justice.[28] In assessing this, the court should consider the protection of the complainer's dignity and privacy.[29] The legislation also introduces a unique concept of reciprocality to rape shield laws. Where the defence is successful in satisfying a s275 application, any previous convictions of the accused should also be disclosed to the court.[30] Simply, if the shield is to be lowered, it is to be lowered for both parties.

It is fair to conclude that, *prima facie,* the 2002 rape shield law goes significantly further than any of its predecessors in restricting the use of sexual history evidence. The tests which the evidence must satisfy are relatively strong.[31] In addition, Lord Hodge has affirmed that the tests sit on top of the rules of admissibility at common law.[32] The evidential restrictions are then supplemented by procedural limitations which aim to provide a greater degree of focus on relevance.[33] It is somewhat surprising, therefore, that recent research has highlighted that more sexual history evidence is being introduced in rape trials now than prior to the 2002 Act.[34] Given that seven out of ten complainers are now virtually guaranteed to be questioned on sexual history and character,[35] it is clear that the legislation has failed to achieve its goals.

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[25] *MM* v *HM Advocate* 2004 SCCR 658 at 688 and s274 Criminal Procedure (Scotland) Act 1995 c. 46.

[26] S274(1)(a) Criminal Procedure (Scotland) Act 1995 c. 46.

[27] That it entitles the court to admit questions or evidence of the kind prohibited by section 274(1) only in relation to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating the complainer's character or any condition or predisposition to which the complainer is or has been subject. S275(1)(a) Criminal Procedure (Scotland) Act 1995 c. 46.

[28] s275(1)(b)-(c) Criminal Procedure (Scotland) Act 1995 c. 46.

[29] s275(2)(b)(i) Criminal Procedure (Scotland) Act 1995 c. 46 .

[30] s275A Criminal Procedure (Scotland) Act 1995 c. 46.

[31] This is given that there is only one ground on which evidence is admissible. On top of this there is a three tier test to establish its relevance, of which all three conditions must be satisfied. The provisions are cumulative. (*HM Advocate* v *Ronald* 2007 SLT 1170). The present author is aware that Temkin considers the conditions of the 2002 Act to be 'weak conditions', however cannot agree with this contention. (J Temkin 'Sexual History Evidence - Beware the Backlash' (2003) Criminal Law Review 217). Certainly, the application of the conditions may be weak, but this is with regards to the practical implementation of the law and not with the black letter of the law itself. As far as the written statutory conditions are concerned the present author submits that the requirements are as strong as they could be without infringing Article 6 ECHR.

[32] *HM Advocate* v *Ronald* 2007 SLT 1170.

[33] s275(3). Also, Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Edinburgh, 2007) at p. 19.

[34] Recent research has also highlighted that rape myths still prevail in our society - see J. Temkin & B. Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11).

[35] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33).

3. '*One Step Forward, Two Steps Back': The Failures of the 2002 Act*

> The law's failure has challenged our optimistic belief that legal reform would relegate injustice to the past.[36]

The policy objective of the 2002 legislation was to strengthen the existing provisions restricting the extent to which evidence could be led regarding sexual history. Despite this aim the amount of sexual history and character evidence has 'increased markedly' under the 2002 Act.[37] Research has demonstrated that s275 applications are almost always granted.[38] In addition, questioning often deviates beyond the agreed boundaries, and character evidence is still introduced in absence of any application at all.[39] Notwithstanding the minimum procedural requirements for s275, applications which do not meet the required standard may still be allowed if rejecting it on procedural grounds would be contrary to Article 6 of the European Convention of Human Rights (ECHR).[40] Furthermore, the aims and unique concept of s275A have been largely overlooked or undermined.[41] As a result, it is clear that the legislation has little practical impact. In fact, 'legal practice has weakened the reform intent.'[42]

The 2007 Scottish Government study into the 2002 Act concludes the legislation has had 'unintended consequences'.[43] Formalisation of the procedures was intended to focus the trial judge on the true relevance of the evidence, and make it more difficult for the defence by requiring a soundly-argued basis for the proposed line of questioning.[44] In this vein it is submitted that the success of the legislation is also its downfall. The procedural requirements are necessary to ensure that surprise lines of questioning are not sprung upon the complainer during the trial,[45] and that

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[36] D Nicolson & L Bibbings, *Feminist Perspectives on Criminal Law* (Cavendish Publishing, London 2000) Foreword by H Kennedy QC.
[37] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 6
[38] *ibid* at p. 131.
[39] *ibid.*
[40] *HM Advocate* v *MA* 2008 SCCR 84.
[41] The 2007 research indicates that the Crown has a substantial role in undermining this section, and that the Defence are thus not deterred from making s275 applications by s275A in the way the legislators had intended. Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 95.
[42] *ibid* at p. 134.
[43] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 134.
[44] R Shiels, I Bradley, P Ferguson & A Brown, *Criminal Procedure (Scotland) Act 1995: Green's Annotated Acts* (8th edn, W. Green & Sons Ltd, Edinburgh 2009) Section 275 Commentary, and Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 19.
[45] *MM* v *HM Advocate* 2004 SCCR 658 affirms that there is no human right to spring a surprise line of questioning on a complainer.

information is not leaked to the jury without having been properly granted. However, the more formalised procedure means that evidence sought is 'far more detailed and extensive' than under verbal procedures, and 'greater emphasis on early preparation' means that the defence has become even more skilled at ensuring its introduction, often through the use of multiple applications.[46] In addition, whilst the policy aim of these procedural requirements was that advance notification would be given to the complainer, this 'is also clearly not being met.'[47] The idea that the complainer is 'forewarned, and thus forearmed'[48] has not been implemented, and victims are still left feeling inadequately prepared for giving evidence.[49]

The task of applying legislation is a delicate one which requires judges to take cognisance of the intentions of Parliament when hearing the unpredictable cases before them. The present author contends that in applying the 2002 Act this intricate task has been overlooked. The letter of the law is largely being followed, however, in doing so, the spirit of the legislation has been undermined.[50] Whilst the legislation aimed to achieve a balance between the rights of the complainer and the rights of the accused, greater weight has been placed on the latter due to 'fair trial' concerns.[51] This 'is in apparent tension with the legislative intent.'[52]

It is submitted, therefore, that changing the letter of the law alone cannot have the necessary practical impact in this contentious area. It is expecting too much of the rules of evidence to alter the norms and beliefs of the people who are applying them. The area of sexual history evidence is one where legal reform itself is 'unlikely to have any direct impact'.[53] The solution for rape shield laws must lie in a 'change of priorities at every stage of the criminal justice system'[54] and more widely in society itself.

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[46] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at pp. 51, 132 and 134.
[47] *ibid* at p. 135.
[48] *MM* v *HM Advocate* 2004 SCCR 658 per Lord MacFayden.
[49] Fawcett Society Commission, *Report on Women and the Criminal Justice System* (London, 2004). 29: 'Very few women understand the trial process in any depth, and find the process – especially the fact that they never get to "their story" – confusing and alienating.'
[50] B Brown, M Burman & L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (n 22) at p. 197.
[51] Article 6 of the European Convention of Human Rights provides that the accused his a right to a fair trial. This includes the right to question those giving evidence against him. (Article 6(3)). There have been fears amongst the legal profession that restricting lines of questioning is incompatible with this right, despite there being no authority in the European jurisprudence that this would be the case. For example; see *SN* v *Sweden* (2004) 39 EHRR 13 and *Doorson* v *Netherlands* (1996) 22 EHRR 330.
[52] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 135.
[53] J Chalmers 'Acquaintance Rape: A Reply' 2000 SLT (News) 163 at p. 167. His comment is in relation to redefining rape itself, however the same principle applies.
[54] H Barnett, *Introduction to Feminist Jurisprudence* (n 3) at p. 278.

4. *Who Broke the Shield?: Apportioning Blame in the Adversarial System*

It is often said that the adversarial trial system 'is a terrifying process'.[55] The 'ritual and mystique' of the procedure is out of date, though it is not unintentional; 'the participants are supposed to feel in awe of the process for its magic to work.'[56] In rape cases, however, the trial system conjures up a whole 'moral universe' where women are divided into 'good' and 'bad'.[57] Justice is compromised as complainers are judged on the prevalent sexist attitudes of our society, which have nothing to do with the facts of the case.

It is important to note, however, that blame for the rape and sexual history crisis cannot be placed at the door of one particular group.[58] The 'justice gap'[59] and the failures of the 'rape shield' are due to a number of factors. This encompasses not only legislative wordings, but also: [60]

> ...societal attitudes to and misperceptions of the crime; police and prosecution practices; the rules of evidence and procedure and the divergence between their theoretical meaning and practical application.

An accumulation of failures from within the system means that 'the institution itself has to change.'[61] In addition, a long term solution needs to be addressed so that there is no place for sexist attitudes and rape myth in society as a whole.

A. 'What the law giveth, it also taketh away'[62]: Problems with Judicial Discretion

In 2000, the Sheriffs' Association proposed that 'judicial discretion … is a strength rather than a weakness in a criminal justice system, as it enables appropriate steps to be taken in the peculiar circumstances of particular cases'.[63] Whilst this assertion is certainly true in most contexts, it has been traditionally problematic in the area of rape shield law.[64] Many

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[55] H Kennedy QC, *Eve was Framed: Women and British Justice* (n 2) at p. 13

[56] *ibid* at p. 14.

[57] B Brown, M Burman & L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (n 22) at p. 207.

[58] H Kennedy QC, *Eve was Framed: Women and British Justice* (n 22) at p. 16.

[59] That is the 'dramatic gap between the number of offences recorded by the police and the number of convictions' in rape and sexual offence cases. J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11) at p. 9.

[60] J Chalmers 'Acquaintance Rape: A Reply' (n 50) at p. 167.

[61] H Kennedy QC, *Eve was Framed: Women and British Justice* (n 2) at p. 16.

[62] D Nicolson & L Bibbings, *Feminist Perspectives on Criminal Law* (n 36) ch. 9, at p. 159.

[63] Scottish Office, *Redressing the Balance: Cross Examination in Rape and Sexual Offence Trials Report on Responses to Consultation* (Edinburgh, 2001) para. 14.

[64] Throughout the world jurisdictions have troubled with the idea of judicial discretion; the amount of discretion to admit, or whether to allow any discretion at all. Rejecting a

commentators have highlighted judicial discretion 'as the core of the problem', and demand that as far as possible discretion be eliminated.[65] Barnett notes that: [66]

> The continuing dominance of the profession by middle-class, middle aged white males… ensures a continuance of the traditional stereotypical attitudes to women.

In cases involving sexual offences this has only served to sustain an ongoing cynicism towards judicial discretion.

The criticisms of judicial discretion are not simply linked to a historical distrust of our judges and law officers. The biggest drawback of the 2002 Act is that, despite the aim of the three-tier test, the overwhelming majority of s275 applications are successful.[67] It is clear, that despite the legislative limits, the judiciary considers that it has a wide discretion to allow any evidence to be heard. In a recent study Temkin notes: [68]

> [S]everal judges considered themselves to be the ultimate arbiters of relevance and custodians of justice. Neither of these roles could or would be taken from them.

Of course, the downfall of the 2002 Act cannot solely be attributed to wide judicial interpretations. Whilst some judges may be tainted by rape myths, it must be acknowledged that the judiciary is undertaking a difficult task in interpreting the sections with little guidance from the legislator.[69] This is particularly so where there are fears that rejecting a s275 application will result in an Article 6 appeal. The present author proposes that the Scottish drafters should have followed the Canadian legislation more closely when

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discretionary system became very difficult following the decision in *R* v *Seaboyer* [1991] 2 S.C.R. 577 which rendered the earlier Canadian law incompatible with the fundamental right to a fair trial.

[65] N Kibble 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence Under s41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot: Part 2' (2005) Criminal Law Review 263

[66] H Barnett, *Introduction to Feminist Jurisprudence* (n 2) at p. 265.

[67] The Scottish Government survey of 2007 gives a figure of 97% successful applications, either allowed in full or partially. Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 51.

[68] J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford & Portland, Oregon 2009) at p. 149. It is important to note that this study was undertaken in relation to English law; however given the similarities between the Scottish and English legislation and their respective problems, the same principles can apply.

[69] Several judges have commented that the drafting of the legislation is 'unnecessarily complicated and detailed'. Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Edinburgh: 2007) 87

enacting the 2002 Bill.[70] Section 276 of the Canadian Criminal Code specifies several factors that judges shall take into account in exercising their discretion.[71] These factors can act as guiding principles for judges who must determine what 'the proper administration of justice' means.[72] After-all, it is somewhat unfair to criticise judges for exercising fully their judicial discretion on the basis of their own assumptions, when they are given no guidance to exercise it otherwise.[73]

B. 'Defence Counsel Behaving Badly'[74]: Getting Round the Rules

A combination of defence techniques also attribute to the failures of shield legislation. The cross examination strategies used by defence counsel need to be addressed in order for the aims of the legislation to be attainable. Whilst there are those who still defend 'who simply want to destroy a complainant'[75] the legislative objectives can never be achieved. Discrediting the complainant is often 'the central strategy in the defence armoury.'[76] As a result, many complainants have described the task of appearing in court to be 'worse than the rape itself'.[77] Bad defence practice should be stamped out

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[70] Scottish Office, *Redressing the Balance: Cross Examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document* (Edinburgh: 2000) showed that the legislators were influenced by this legislation and *DS* v *HM Advocate* [2007] UKPC 36 states that the 2002 Act was loosely modelled on it.

[71] These include: the interests of justice, the right of the accused to make a full answer and defence, the need to remove from the fact-finding process any discriminatory belief or bias, the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury, the potential prejudice to the complainant's personal dignity and right of privacy, and the right of the complainant and every individual to personal security and to the full protection and benefit of the law.

[72] s275(1)(c) Criminal Procedure (Scotland) Act 1995 c. 46

[73] *B* v *HM Advocate* 2009 SLT 284 cites *Dunnigan* which emphasises the discretionary natures of the exercise that the trial judge has to conduct, but offers no help on what test is to be applied. *B* was concluded without having to give full consideration to the exercise of the judge's discretion and hence no help on this matter was given. This is unfortunate as the case opened up the question of how the judge should exercise this discretion in making a s275 decision.

[74] J. Temkin & B. Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11) at p. 129

[75] *ibid.*

[76] J Temkin 'Prosecuting and Defending Rape: Perspectives From the Bar' (2000) 27(2) Journal of Law and Society 219 at p. 231. For example some defence counsel stated that 'there are lots of women who make complaints of rape who would sleep with the local donkey' and conclude that 'if the complainant could be portrayed as a 'slut'' this is highly likely to secure an acquittal (at p. 234). In addition another stated that 'if you live in a squat or are a single mother it does have an impact on juries….they think that you are more likely to have got what you deserved.' (at p. 225).

[77] J Temkin, *Rape and the Legal Process* (2nd edn, OUP, Oxford 2002) at p. 10.

to ensure that the courtroom provides a fair trial, not simply for the accused, but also for victims.[78]

In addition, defence counsel have changed their approach when making s275 applications to encompass a 'belt and braces' or 'scattergun'[79] technique. This is intended to avoid an 'Anderson appeals' situation.[80] They note they are 'covering' themselves and 'avoiding any comeback' where an appeal could be raised on the ground of defective representation.[81] This culture change, combined with the rules on Crown disclosure,[82] means the defence now have the scope to make very wide applications, and do so to protect their own interests as well as their client's. It should, however, be recognised that such defence tactics are being used, and applications should be scrutinised much more closely as a result.

C. 'Playing the Victim': The Failures of the Prosecution

In assessing the downfalls of sexual history provisions the prosecution has generally taken little blame.[83] However, from the earliest stages in the police room, to the presentation of the case in the courtroom the prosecuting of rape is generally far from satisfactory.[84] There is significant evidence that in these stages of the system, perhaps more than any other, sexist attitudes towards women and prejudicial beliefs remain.[85] McColgan notes that there is a deep 'mistrust' of rape complainants which is prevalent throughout the

[78] Of course, it is important to note that bad defence practice is not prevalent amongst the faculty as a whole. The judiciary will also aim to ensure that defence lines of questioning is relevant and without objection. However, whilst there are still some bad techniques that do continue to exist amongst a few, then the courtroom remains a place where justice cannot properly be done.

[79] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33).

[80] The case of *Anderson* v *HM Advocate* 1996 JC 29 was the first case where it was acknowledged that the defence counsel could be held accountable for not conducting a defence properly under the ground of defective representation. However, it must be noted that securing an 'Anderson appeal' is far from easy, and successful appeals are certainly not common practice. For consideration of the case and some commentary see; M Strachan 'Case Comment: Is Anderson Finally Dead?' (2006) SLT (News) 203.

[81] Scottish Government Social Research, Crime and Justice, (n 33).

[82] *ibid*

[83] For the purposes of the present section 'prosecution' shall be taken to encompass the whole prosecuting team, including the police.

[84] This attributed to the need for the COPFS review in 2006. Crown Office and Procurator Fiscal Service, *Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report and Recommendations* (Edinburgh 2006).

[85] J Temkin 'Prosecuting and Defending Rape: Perspectives From the Bar' (2000) 27(2) Journal of Law and Society 219; Fawcett Society Commission, *Report on Women and the Criminal Justice System* (London 2004) at p. 19; J Jordan 'World's Apart? Women, Rape and the Police Reporting Process' (2001) 41 British Journal of Criminology 679.

whole trial process.[86] This is despite the fact that there is no evidence of more false allegations in rape cases than in any other crime.[87]

In addition, it is submitted that the failures of prosecuting counsel is a major contributor to the failures of ss274-275. Prosecutors need to be 'up to the job'[88] of challenging rape myths and prejudicial evidence. However, in both *Kinnin*[89] and *Cumming*[90] the prosecutors' failures in raising objections to the applications or appeals was a significant factor in the success of the appeals.[91] 'All too often prosecuting counsel fail to make points which could or should be made'.[92] In addition, the introduction of s275A has had little positive impact given that the prosecution do not insist on its use. On the contrary, in some cases the prosecution has put forward s275 applications which the defence would have otherwise made, in order to circumvent the effects of s275A.[93] Whilst it is acknowledged that the prosecuting counsel act on behalf of the Crown and not on behalf of the victim, public confidence in the system of prosecution as a whole is dependant on successful prosecution advocacy. If the inexperience or incompetence of the prosecutors is leading to perpetrators evading justice the whole system itself is at risk.[94]

D. 'Only Herself to Blame' Jury Judgement, Myths and Prejudices

Public perceptions of rape remain a massive problem in the enforcement of rape shield laws. Sexual history evidence is successfully manipulated because sexist attitudes remain prevalent in our society.[95] When sexual history evidence is admitted, even where it is relevant, juries will place considerable weight upon it and become 'desperately moralistic'.[96] Rape complainants are judged by a notion of 'appropriate femininity'; simply that

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[86] A McColgan 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 Oxford Journal of Legal Studies 275 at p. 227.
[87] *ibid* at p. 281.
[88] *ibid.*
[89] *HM Advocate* v *Kinnin* 2003 SCCR 295.
[90] *Cumming* v *HM Advocate* 2003 SCCR 261.
[91] See; F Raitt, *Evidence: Principles, Policy and Practice* (W. Green & Sons Ltd, Edinburgh 2008) at pp. 246-247 and R Shiels, I Bradley, P Ferguson & A Brown, *Criminal Procedure (Scotland) Act 1995: Green's Annotated Acts* (n 44) s275 Commentary.
[92] J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11) at p. 130.
[93] Scottish Government Social Research, Crime and Justice, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (n 33) at p. 94. It is unclear if the prosecution do so because of fears that the section is inconsistent with Article 6, but given the number of cases which now hold there is no incompatibility, this could no longer be a reasonable explanation. See in particular, *DS* v *HM Advocate* [2007] UKPC 36.
[94] B Brown, M Burman & L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (n 22).
[95] *ibid.*
[96] J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11) at p. 134.

women should be adhering to certain standards.[97] Women who are not appropriately feminine offend against society, and these women are, to some extent, 'beyond the scope of the law's protection.'[98] This is combined with perceptions of 'real rape' and 'non serious' rape,[99] where people believe that 'if somebody has been having a sexual relationship…it's not really a terrible offence.'[100]

In addition, juries will often not realise the different conclusions which can be drawn from sexual history evidence. Rape prejudices mean that a complainer who has had many sexual partners will be judged as being more likely to consent to intercourse on the occasion in question. However, Redmayne notes the correlation between sexual history and vulnerability to rape, where women become a legitimate target.[101] In addition, sexual history may be a weaker indicator of consent as 'it makes it less likely she would lie about it.'[102] Juries are largely unaware of such parallels and generally construct sexual history evidence as a negative aspect of the complainer's case. As a result of the myths which exist in our society, sexual history evidence is being wrongly interpreted by those who are judging its effect.

5.*Culture Shock?: Proposals for Wider Reform*

In order to improve the situation regarding sexual history evidence it is clear that a wider reform agenda is needed. Three legislative reforms have been undertaken in the past two decades; all have proved to be of limited success. It is proposed, therefore, that more radical change is needed. The question arises as to what form this radical amendment should take. The present author proposes that there are two options; either the legislation needs to provide for a complete prohibition on the use of sexual history evidence, or the whole attitude of society to these forms of evidence needs to change. Both options shall thus be considered.

Given that rape shield laws which retain judicial discretion and allow for flexible application have largely failed to achieve their goals, it must be questioned whether such flexibility should be allowed. The Women's

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[97] A Worral, *Offending Women: Female Lawbreakers and the Criminal Justice System*, (Routledge, London: New York 1990)

[98] J Temkin 'Prosecuting and Defending Rape: Perspectives From the Bar' (2000) 27(2) Journal of Law and Society 219 at p. 246.

[99] For a further analysis of this distinction see: S McCall, 'Acquaintance Rape: Time for Reform?' (2000) SLT (News) 123 and J Chalmers 'Acquaintance Rape: A Reply' (n 50).

[100] *ibid* at p. 226. One prosecution barrister was noted to have said that 'it is a great waste of public money to prosecute the ex-husband or the ex-boyfriend rape unless there is extreme violence involved…' Given that Rape Crisis Scotland report that only 8% of rapes will involve a complete stranger, it is worrying to speculate as to the number of rapes which are 'worth' prosecuting.

[101] M Redmayne 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7(2) International Journal of Evidence and Proof 75 at 80

[102] *ibid.*

Movement has maintained that a complete prohibition should be introduced as sexual history evidence is (almost) never relevant.[103] McColgan too takes this stance and argues that 'sexual history evidence will be irrelevant in all but the most exceptional cases'.[104] However, at the other end of the spectrum there are many who feel the legislation at present goes too far against the rights of the accused; the measures are 'draconian'[105] and amount to 'legislative overkill'.[106] Given the complete lack of consensus on the issue, it could perhaps be concluded that the current legislative wording strikes the prohibition just about right.

The present author submits that a complete prohibition on sexual history evidence would never be viable in Scots law due to Article 6. In *MM*[107] it was held that if s274 had imposed an absolute prohibition there would have been a violation of Article 6.[108] The only measures which are permissible to restrict the rights of the defence are those which are strictly necessary,[109] and a provision which 'categorically excludes evidence' runs the risk of over breadth.[110] Whilst the rights in Article 6 are not absolute[111] the least restrictive measure should be applied.[112] The Canadian case of *Seaboyer*[113] concludes that a complete prohibition, or a system which retains no judicial discretion, is inconsistent with the fundamental rights of an accused to a fair trial.

As a radical overhaul of the legislation is not a satisfactory solution, a change in attitudes across society as a whole is the potential – though perhaps most unattainable - answer to this problem. A culture change which would challenge traditional rape myths, through public and jury education,[114] is necessary for the improvement of the rape shield provisions. If all the players in the justice system were no longer influenced by rape stereotypes, undeserved acquittals based on sexual history evidence would simply not exist.

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[103] This would be except for where forensic/medical issues were involved. Scottish Office Central Research Unit (Brown, Burman & Jamieson), *Sexual History and Sexual Character in Scottish Sexual Offence Trials* (Edinburgh, 1992) at p. 7.

[104] A McColgan, 'Common Law and the Relevance of Sexual History Evidence' (n 84) at p. 302. McColgan seems to praise the old Canadian provisions which allowed for no judicial discretion at all.

[105] D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' (2002) Criminal Law Review 531.

[106] *ibid.*

[107] *MM v HM Advocate* 2004 SCCR 658.

[108] *ibid* at 660. Similar comments were made in *Moir v HM Advocate* 2005 J.C. 102 where it was concluded that the discretion to allow applications meant that the provisions were not unfair.

[109] *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

[110] *MM v HM Advocate* 2004 SCCR 658 at 667 citing *Seaboyer*.

[111] *Stott v Brown* 2001 SCCR 62.

[112] *Van Mechelen* v *Netherlands* (1997) 25 EHRR 647.

[113] *R* v *Seaboyer* [1991] 2 SCR 577.

[114] B Brown, M Burman & L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (n 22) concludes this necessary as does J Temkin & B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (n 11) ch. 10.

It is the belief of the author that the scene has already been set for public reform, and tentative steps have been taken in the right direction. The enactment of vulnerable witness provisions in 2004 has had a positive effect in protecting rape victims.[115] In addition, the COPFS review into the prosecution and investigation of rape in 2006[116] made 50 recommendations for improving this aspect of the justice system.[117] As the recommendations only fully came into force in recent months it is not possible to assess their full effects, however, it is anticipated that they will work towards narrowing the justice gap.[118] Much change has been initiated under the present Lord Advocate, and her determination remains a driving force behind many long term improvements.[119] She notes that 'a solid foundation for change' has been built and concludes; [120]

> ...we are now better placed than ever not only to deliver the change which we have identified as necessary, but to ensure that for all time coming our response to rape and other serious sexual offences continues to evolve.

This long term evolution will be the key to the success of the current rape shield laws.

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As a concluding note it should be acknowledged that 'rape is an experience which shakes the foundations of the lives of its victims'[121] and therefore the foundations of our society. Embarrassment of a complainer at a rape trial is a 'genuine social problem'[122] and steps must be taken to protect her from further victimisation after experiencing 'the most humiliating, distressing

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[115] Vulnerable Witnesses (Scotland) Act 2004. See L Sharp & M Ross, *The Vulnerable Witnesses (Scotland) Act 2004: Text and Commentary* (Dundee University Press, Dundee 2008).
[116] Crown Office and Procurator Fiscal Service, *Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report and Recommendations* (n 82).
[117] These include; proper training for prosecution staff on the nature of rape and sexual offending, raising awareness to dispel myths within communities, publication of conviction rates, a comprehensive guidance manual on rape including the Lord Advocate's guidelines to the Police on reporting of rape, a presumption in favour of prosecution, appropriate liaison with Victim Information and Advice about sexual history evidence. See Crown Office and Procurator Fiscal Service, *Progress on the Recommendations of the Review of Sexual Offences* (Online Report: 2008).
[118] Crown Office and Procurator Fiscal Service, *Progress on the Recommendations of the Review of Sexual Offences* (Online Report: 2008).
<http://www.crownoffice.gov.uk/Resource/Doc/13547/0000581.pdf>.
[119] Crown Office and Procurator Fiscal Service: Lord Advocate Writes on Society's Attitudes to Rape <http://www.copfs.gov.uk/Victims/RevSexOff2/SOCRAPE> (Accessed 15.11.09).
[120] Crown Office and Procurator Fiscal Service: Lord Advocate's Rape Crisis Speech<http://www.copfs.gov.uk/Publications/2008/03/LASPEECH> (Accessed 03.11.09).
[121] J Temkin, *Rape and the Legal Process* (n 76) at p. 2.
[122] *MM* v *HM Advocate* 2004 SCCR 658.

and cynical of crimes'.[123] There exists a positive obligation under Article 8 ECHR to protect the physical and moral integrity of any individual, including his or her sexual life, and 'a legal system that allows extensive examination might one day be contrary to Article 8.'[124] In applying the rape shield legislation of s274-275 this is certainly something the judiciary should bear in mind. To return to Sir Hale's initial warning, it is fair to conclude that perhaps the opposite is true.[125] In modern times, rape is an accusation hard to be brought, and easily defended, due to the prevalence of stereotypes, myths and prejudices against women. If real change is to be achieved a much greater culture shift is needed.

[123] *R* v *A* [2001] UKHL 25 per Lord Hope of Craighead.
[124] *DS* v *HM Advocate* [2007] UKPC 36 per Baroness Hale of Richmond.
[125] H Kennedy QC, *Eve was Framed: Women and British Justice* (n 2) at p. 139.

The Union of 1707 and its Impact on Scots Law

DOMINIC SCULLION*

1. *Introduction*

Prior to the Union, Scotland was an independent political country with a legal system based on Roman Law. The supreme court for matters both criminal and civil sat in Edinburgh. The Treaty and Act of Union preserved the Scottish legal system but, it was subsequently discovered, gave the House of Lords jurisdiction to hear Scottish civil appeals. This article will detail in brief the years immediately before and after the political union. It will also, it is hoped, increase awareness of the direct and long-lasting effects the Union had on Scottish jurisprudence, with attention paid to the *lex mercatoria* and the criminal law; and dispel the belief that the Union weakened Scots law. The author will propose that Scots' lawyers had started looking at English law for legal comparisons prior to the Union and point out those areas in which the Union could be said to have benefited the law in, and of, Scotland.

2. *The Treaty and Act of Union*

Before the political Union, the Crowns of Scotland and England had been joined in 1603 under James VI of Scotland and I of England.[1] Upon his succession to the English throne, James insisted on a policy the aim of which was to foster closer working relations between the two countries. This policy was to encourage a 'convergence between the two nations in all key areas of the polity'.[2] These 'key areas' included matters political, religious, commercial, economic and legal. In effect, the Union of the Crowns saw the long journey towards political unity begin, with James as the main supporter of the pro-Union party. However, the king underestimated the political and cultural opposition which met his vision for a union. Whilst there were supporters in both Scotland and England for a political union, few endorsed a union of laws. James over-simplified the predicted outcomes that this legal

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[1] Hereinafter referred to as James.

[2] A Wijffels, 'A British *ius commune*? A debate on the union of the laws of Scotland and England during the first years of James VI/I's English reign' (2002) 6 Edin LR 315 and TB Smith, 'British Law: a Jacobean Phantasma' (1982) SLT (News) 157.

union would create. He failed to fully consider the practical side of unifying the English common law system with the Scottish civil law system, instead directing his focus on the more ideological vision he had of an united Britain; a 'union of hearts'.[3] David Hume only considered the possibility of a legal union in a long-term perspective but qualified this by adding that a union of laws is not a necessary component of a political union.[4]

James, although successful in starting real debate on a unified country, never saw a politically united Scotland and England. The 17th century was yet another of discord between Scotland and England, particularly during the Restoration period of 1660 onward.[5] The possibility of a commercial union between the two countries in 1668 proved unsuccessful and a string of monarchs (Charles II, James VII(II) and William & Mary) oversaw relations worsen between Scotland and England. Furthermore, the death of William sparked a succession crisis which saw the Scottish Parliament reluctant to accept the Hanoverian succession.[6] In 1705, however, the Scots reluctantly agreed to treat for a Union with England. The English Parliament had passed an act which allowed Queen Anne to appoint commissioners to treat for a Union. The Scots complied after being informed that they would be regarded as aliens in England and that trade between the countries would cease. The Scottish Parliament, with this 'gun at its head'[7] conceded the idea of a union with England.

In July 1706 the 25 Articles of Union were presented to Queen Anne. Article XVIII provided for the application in Scotland of the same laws on trade, customs and excise as in England; but:

> all other Laws in use within the Kingdom of Scotland doe after the Union and notwithstanding thereof remain in the same force as before…but alterable, by the Parliament of Great Britain.

Article XIX preserved the Courts of Session and Justiciary[8] but was silent on whether an appeal from the Scottish courts could be heard by the House of Lords. This silence was quickly interrupted, and the House of Lords upheld its own jurisdiction to hear civil appeals from Scotland.[9]

This was to have important consequences for the future of Scots law. The House of Lords, at this time, was English in composition resulting in cases of Scottish origin being decided by English judges trained in English law. Thus, the judicial organ of the British Parliament was to become a mechanism for English law to seep into the law of Scotland and members of

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[3] *ibid* (Wijffels) at p. 322.
[4] Hume, *Tractatus II*, cap 10, tit9, f 13r.
[5] JW Cairns, 'Historical Introduction' in Reid and Zimmermann (eds), *A History of Private Law in Scotland*, vol I (OUP, Oxford 2000) at p. 112.
[6] This set the scene for the later uprising by the two Stuart pretenders against the Hanoverian Kings.
[7] See Cairns (n 5) at p. 115.
[8] However they were subject to 'such regulations for the better administration of Justice' as the British Parliament saw fit (Treaty and Act of Union 1706 Art XIX).
[9] *Rosebery v Inglis* [1708].

the Scottish Bar would soon be corresponding with English counsel for legal advice.[10]

3. *A Mixed Legal System*

Before the 17th century poor relations between Scotland and England prevented either country looking to their closest neighbour for legal comparisons. Scots lawyers looked to the continental systems, particularly those of the Netherlands and to some extent France. In 1495 Bishop Elphinstone founded King's College, Aberdeen, in order to teach law according to the practices of the universities of Paris and Orleans. The Roman age of Scots law would begin in the 16th century and would last until the 18th century.

Although it is impossible to accurately predict what would have happened to Scots law were it not for the Union, academics have tried. Sir Thomas Broun Smith[11] proposed that it is not unlikely that Scots law, or more specifically the civil law, would have been codified.[12] Prior to the Union, Roman law superseded English law as the main source of comparative legal principles. But codification would have become impractical during the 19th century when legal situations common to Scotland and England resulted in a considerable amount of what could be called 'British law'.[13] This 'Anglicisation' of Scots law was, however, a gradual process even after the Union. Political, social and economic situations in Scotland did not help the people of Britain achieve the 'union of hearts' that James had wanted a century earlier. Scots law 'could more than hold its own in competition against the narrow and formalistic English law of that time'.[14] In the second half of the 18th century relations between the two countries improved and saw a shift towards Scots jurists accepting English influences when appropriate. This shift can be readily seen by examining the *lex mercatoria*.

A. The Law Merchant (Commercial Law)

Smith, although a good source for information about the influences of English law in Scotland, 'was reluctant to concede too important a place for it in the eighteenth century'.[15] Smith was of the view that Roman law was

[10] Below, Section 4.
[11] Quondam Professor of Scots Law, University of Aberdeen.
[12] This is a route which countries of a close legal affinity to Scotland took.
[13] See TB Smith, 'English Influences on the Law of Scotland' (1954) 3 Am J Comp L 522 for further analysis.
[14] *ibid* at p. 524.
[15] ADM Forte, '"Calculated to our meridian"? The *ius commune*, *lex mercatoria* and Scots commercial law in the seventeenth and eighteenth centuries' in DL Carey Miller and E Reid

still the number one authority for judges in the 18th century and that this period was still the 'classical age' of Scots law.[16] But by examining the law reports from the 18th century, one can see that the Court of Session was willing to consider English cases cited before it.[17] In *Stewart v Morrison*[18] the Court held insurance contracts to be a contract *uberrimae fidei,*[19] which was first noted by Lord Mansfield in an English case[20] in 1766. In *Stevens & Co. v Douglas*[21] the Court, in determining the sufficiency of a deviation to avoid a policy, was moved 'chiefly by London practice'.[22] *Buchanans v Hunter – Blair,*[23] *David Elliot v John Bell*[24] and *Wilson & Co. v Elliott*[25] are all 18th century commercial cases in which English authority is referred to. Smith was determined to stress the prevalence of the Civilian tradition in 18th century Scotland. He not only passed over the evidence present in law reports, but seemed to overlook the philosophy of the *lex mercatoria*. Smith was of the view that 'our commercial law was to be seen as an emanation of the *lex mercatoria* or law merchant and as a system of principles which transcended national jurisdictions'.[26] This view was not unique to Smith. Writers from the 18th century, like William Forbes (a pre-union writer) and John Millar Jnr,[27] also viewed the law merchant as legal principles shared by many countries. The difference is, however, that Forbes and Millar did not shy away from acknowledging the importance of English writers on the subject. In fact, they readily employed works from English academics who viewed the *lex mercatoria* as being based on the *ius gentium* and European mercantile customs. Forte points to John Marius' *Advice Concerning Bills of Exchange* (1651) and John Scarlet's *The Stile of Exchanges* (1682) as works Forbes and Millar referred to who look at bills from the Civilian perspective of exchange contracts.[28] This is particularly significant when it is considered that Forbes was writing before the Union.

It is hard to reconcile with Smith's view as it seems to ignore the evidence available to him, almost to the point of being in denial of the facts. Having said that, Sir Thomas was accurate in his assertion that by the 19th century English cases were commonly cited in the Scottish Court. But, his

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(eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, Edinburgh 2005) at pp.120-137.

[16] TB Smith, *Studies Critical and Comparative* (W Green& Son, Edinburgh 1962) at p. 74.

[17] See Forte (n 15) at p. 121.

[18] (1779) Mor. 7080.

[19] Of the utmost good faith.

[20] *Carter v Boehm* (1766) 3 Burr. 1905 at 1909.

[21] (1774) Mor. 7096.

[22] ADM Forte, 'Marine Insurance and Risk Distribution in Scotland Before 1800' (1987) 5 Law & Hist Rev 393.

[23] (1774) Mor. 7096.

[24] (1781) Mor. 1606.

[25] (1766) Mor. 7096.

[26] *ibid* at p. 121.

[27] W Forbes, *A Methodical Treatise Concerning Bills of Exchange* (Edinburgh, 1703) & J Millar *Elements of the Law Relating to Insurances* (Edinburgh, 1787).

[28] ADM Forte (n 15) at p. 127.

failure to give credit to the English writers before this time is misleading. During the course of research for this paper, the author did not come across a single piece of scholarly work which suggested that the Union was an immediate success for Scots law. However, having due regard to the work by Forbes it is not far-fetched to suggest that, at least in some legal circles, there was more of a willingness to consider the views of English writers than is perhaps commonly thought. Furthermore, this could lead to another conclusion: that the inclusion of English cases in the Court of Session decisions was not through a sudden decision of Scottish acceptance but, more likely, through a gradual process of inclusion beginning long before the evidence in law reports suggests. If this view is to be taken as accurate, it could also be deduced that, at least as far as the *lex mercatoria* was concerned, there would have been English authority cited regardless of whether a Union had been achieved or not.[29] The fact remains that when one considers the many centuries of war and tension between Scotland and England, it took a comparatively short period of time (*circa* seventy years) after the Union for English cases to be considered as authority on matters of commercial law and for their citation to be considered the norm.

The 17th and 18th centuries saw a marked increase in the use of insuring marine risks. This was given momentum by Scottish trade links around the world, itself a product of the Union. During this time Scottish trade was gathering pace and shifting from traditional European trading partners to those of the Americas and West Indies. As Scots law was relatively inexperienced in matters of insurance, Scots advocates and judges were anxious to seek the opinions of English writers.

The Union certainly improved relations between Scotland and England but, although English legal sources begin to be seen in Scottish decisions in the century after the Union, it is inconclusive to suggest that this is only because of the Union. Indeed, it may be interesting to consider whether the citation of English authorities would have been as prevalent if Scottish trade had increased of its accord, without the help of the Union. It may have simply been the natural course of jurisprudence in Scotland.[30]

B. Scots Criminal Law

Professor Christopher Gane has written one of the few articles on the English influences on Scottish Criminal Law.[31] Gane, writing in response to

[29] For example, see the work of Forbes, a pre-union writer. For examples of English writers being employed post-Union, see G J Bell's, *Commentaries* (4th Edition, Edinburgh 1821) and an analysis of which can be found in Forte (n 15) at pp. 133-135.

[30] Indeed, for an example of the opinions of English merchants and banking houses being referenced in a Scottish case prior to the Union see *[Blank] v Maxwell* (1675).

[31] CHW Gane, 'Civilian and English influences on Scots criminal law' in DL Carey Miller and E Reid (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, Edinburgh 2005) at pp.218-238.

T.B. Smith's own research on the subject, analyses the sources of criminal law in Scotland. He concludes that although it was not until after the Union that it became common to find English authorities cited in the High Court, that evidence of English influence on Scots Criminal Law was to be found as far back as the 14th century through the *Regiam Majestatem*. Mackenzie accepted the authority of *Regiam* in criminal matters[32] and in *HM Advocate and John Hoom of Eccles v Archibald Douglas of Spott*[33] the court debated and upheld the authority of the work. Delivering a lecture to the Stair Institute, WDH Sellar discussed the influence of English law on Scots law noting that 'the model for the emerging Scottish common law was undoubtedly the common law of England, to such a degree that it is legitimate, I believe, to speak of a Reception.'[34] Sellar, speaking of English influences on Scots criminal law between 1500 and 1700 points to an English Act of Parliament of 1572[35] which set out the appropriate punishment for vagabonds of over fourteen years old. This legislation was mirrored in Scotland only two years later.[36]

Gane notes that although it was very rare to find 'explicit' reference to English law in the court reports[37] prior to the Union, and that English law was not treated in the same way as Civilian law sources, there were still references to it as illustrations or examples.[38] He further acknowledges that in the years immediately after the Union, one is able to find references to English writers and judgments in Scottish court reports[39] but it was not until the later decades of the 20th century that the High Court becomes influenced by English decisions.[40] Therefore, while the Union may have allowed for more 'explicit' comparisons to be made with English criminal law the Union itself could not be credited for judicial importation of foreign rules of law. As the House of Lords had little authority on matters criminal,[41] the supreme court still sat in Edinburgh after 1707. Therefore judicial importations were made by Scottish judges, not by unavoidable consequence of our union with England. This should not necessarily be regarded as a problem. It allows just laws to be developed based on

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[32] G Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678).
[33] 9 May 1667; 48 SHS, 200.
[34] WDH Sellar, 'Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions' (2000) 4(1) Edin LR 3.
[35] 14 Eliz c 5.
[36] Acts of the Scottish Parliament, vol 3, 87a.
[37] With the exception of the debate aforementioned on the *Regiam Majestatem* and, as an example, the case of *Agnes Finnie,* 18 Dec 1644, Stair Society, *Selected Justiciary Cases, 1624-1650,* vol 3(Stair Society vol 28(1974)).
[38] Mackenzie (n 32) at p. 191.
[39] For example, *Hay v Hay*, 5 June 1710, Maclaurin No 22, 31 or *HM Advocate v Alexander Livingston*, Dec 1749, Maclaurin No 55, 100.
[40] See *Meek v HM Advocate* 1983 SLT 280; *Jamieson v HM Advocate* 1994 SLT 537; and *Lord Advocate's Reference (No.1 of 2001)* 2002 SLT 466 for examples.
[41] See Gane (n 32) at p. 231. It should be noted that it was not until 1876 that the House of Lords' jurisdiction on criminal mattes was denied. However, its former jurisdiction seemed to have little impact.

comparisons with other legal systems. Gane concludes by opining that these comparisons should not be limited to England and that if Scots law is to develop through the courts 'rather than by a democratically elected…legislature, then at least let us [Scots] borrow on the basis of fitness for purpose, rather than geographical or historical origin'.[42]

4. *The House of Lords*

As noted above, Article XIX of the Treaty of Union preserved the Court of Session but it was subsequently deemed (through the silence of the text) that Scottish appeals could be heard at the House of Lords at Westminster-hall. This had particular consequences for private law in Scotland. If the loser in a civil action felt that his case was not fairly decided in Edinburgh, he had the right to take the case to London. Before the Appellate Jurisdiction Act 1876, the Lords of Appeal in Ordinary at Westminster were English judges. Therefore when deciding an appeal from Scotland, it was very often English law applied. The cynic could view this as 'unwanted intrusions imposed by a malign House of Lords'[43] but if looked at objectively and dispassionately a different opinion could be formed. It is true to assert that there was an unjust make-up in the House of Lords after the Union and that it was not in Scotland's best interests. It is also true that this could be, and was, seen as a problem. However, when studied with the knowledge that Scottish Advocates sought opinions from 'eminent English counsel'[44] and that this was common at the outset of legal proceedings and not just before an English appeal was mounted, one sees a willingness on the part of the Scottish Bar to put its clients' interests ahead of resentment of England. When seen alongside the fact that a large proportion of these cases were commercial cases, and that England, as already noted, was viewed even in Scotland as an authority on the *lex mercatoria*, one is less sympathetic to cries of 'unwanted intrusions'. The make-up of the House of Lords was certainly pro-English, but this should not be seen as necessarily anti-Scottish.

5. *Conclusion*

It would be impossible to conclude that Scots law did not change after the Union with England. However, it is possible to conclude that the law in, and of, Scotland changed, and generally for the better. Instead of a system of insular laws, we have a system which does not find wrong in drawing legal comparisons. As demonstrated by the work of Forbes and, as discussed by Gane and Sellar, English law was being considered and applied before the

[42] *ibid* at p. 238.
[43] See ADM Forte, 'Opinions by "Eminent English Counsel": Their Use in Insurance Cases Before the Court of Session in the Late Eighteenth and Early Nineteenth Centuries' (1995) Juridical Review 345 for further discussion.
[44] *ibid.*

Union with England. What the Union achieved was for Scots jurists to be able to openly acknowledge the work of their English colleagues in the law, yet maintain a separate and distinct legal identity and for a Chair in Law at Edinburgh to be established, the 'intellectual significance' of which 'cannot be overestimated'.[45] This in itself ensured the status of Scots law.

However, it is difficult to write on legal history without bias. We are burdened with knowledge and, therefore, while it is interesting and desirable to discuss what Scots lawyers of the 18th century felt and feared about the Union, it is impossible to do so with any degree of accuracy. The effects of the Union are now known to us. The conclusion which is presented here is one taking this into account. Scots law has changed over the last 300 years to a mixed legal system. It is suggested here, however, that much of the changes seen in our law happened through natural discovery as oppose to purely political interventions. The fallacy *post hoc ergo propter hoc* should be considered : just because one event followed another does not necessarily mean it was caused by the other.

[45] JW Cairns, 'The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair' (2007)11 Edin LR 300.

Boundaries: Determination, Disputes, Structures and Law Reform

MACIEJ TOMSZAK*

1. *Introduction*

Issues relating to land boundaries are a potent source of legal dispute. Land is usually the most valuable asset one can have, and an asset worth litigating over, unlike many forms of moveable property.[1] Disputes over boundaries usually arise in the context of an alleged encroachment by one neighbour over another neighbour's property. They may also arise during sale and purchase of land where the parties come to establish what exactly is being transferred. Problems sometimes crop up at first registration in the Land Register, the whole of Scotland now being operational for it, when the Keeper decides on the exact extent of land as registered and on the issue of indemnity in respect of it. Disputes as to boundaries often concern residential land but may also arise in commercial contexts. In the latter case, however, matters rarely reach the courts and are settled by means of a cash payment, whereas in the former case they often turn into personal disputes. Good knowledge of this area of law and practice is indispensable to any conveyancer given the great variety of contexts in which such issues may arise.

2. *Determination of Boundaries*

In the Sasine system, determination of the boundaries of a piece of land necessarily involves the interpretation of a deed. The dispositive clause of every deed contains a description of the land being conveyed as a matter of validity for recording.[2] A distinction must be made between general

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[1] Whilst moveable property quickly depreciates, land appreciates over time.

[2] *Macdonald v Keeper of the Register of Sasines* 1914 SC 854. The First Division upheld the Keeper's decision not to record a deed which was a general testamentary settlement on the grounds that the subjects were not sufficiently identified. They were described by reference to a tenement building without specifying which tenement flat exactly was the subject of the

descriptions and particular or bounding descriptions. A general description identifies the subjects only by name, for example 'the lands of X', without specifying the extent. This was invariably the case with older titles and is virtually unknown in modern practice. Determination of boundaries sometimes involved an examination of natural features such as burns, marshes or hills that were considered in the common opinion to be boundaries.[3] The best evidence, however, is that of possession. It could consist of artificial features on the ground such as boundary stones or fences, or even of witness statements as to carrying out of certain activities on the particular piece of ground, such as; leasing it out,[4] shooting or even dumping rubbish.[5] Although any indication of possession could explain the boundaries,[6] possession which meets certain standards and subsists for the prescriptive period of ten years can fix the boundaries beyond challenge.[7]

On the other hand, a particular description is one that attempts to specify boundaries in one way or another.[8] It could be a verbal description combining reference to physical features such as walls or fences with measurements of at least some of the boundaries. There are interesting nuances of drafting to be noted: 'bounded by' is construed to exclude the

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deed. In any case, general dispositions, such as wills or trust deeds, are not registrable and may only serve as links in title.

[3] Erskine, *An Institute of the Law of Scotland* (8th edn Butterworths, Edinburgh 1989), II.6.2: 'Where a charter, without referring to any boundary, describes the lands or baronies by special names or designations, it can only be known by the common opinion of the country which lands fall under the designations expressed in the charter, and by what limits those lands are circumscribed'; *Whitsun v Ramsay* (1813) 5 Pat App 664, where the boundary was held to be a line of marshes in circumstances of contradictory statements as to possession of the disputed area; *Lumsden v Gordon* (1870) 42 Sc Jur 530, where the boundaries were held to rest on a few streams while possession was uncertain.

[4] *Buchanan & Geils v Lord Advocate* (1882) 9 R 1218. This case concerned operation of prescriptive possession to explain the extent of the possessor's title.

[5] *Hamilton v McIntosh Donald Ltd* 1994 SLT 793. This case, on the other hand, concerned a separate concept of prescriptive possession operating to establish a new title in the possessor rather than to explain an existing one.

[6] *Baird v Fortune* (1861) 4 Macq 127 at 149 per Lord Wensleydale.

[7] The Prescription and Limitation (Scotland) Act 1973, s. 1. Possession must be open, peaceable and without judicial interruption.

[8] Lord President McNeill in *Beneficial Bank plc v McConnachie* 1996 SC 119 at 126 and Halliday, *Conveyancing Law and Practice in Scotland* (2nd edn Sweet & Maxwell, London 1997), para. 33-05, advocate the view that a particular description is one that identifies the boundaries without a need to refer to any extraneous material. However, as has been observed by Brand, Steven and Wortley, *Professor McDonald's Conveyancing Manual* (7th edn Tottel Publishing, Edinburgh 2004), para, 8.14, and Gordon, *Scottish Land Law* (W. Green & Son, Edinburgh 1999), para. 4-04, the *McConnachie* case was concerned with a general description by address and, in any case, this is too stringent a requirement and a particular description could equally refer to extraneous material such as physical features on the ground or boundaries of neighbouring land.

feature by which the property is bounded;[9] 'enclosed with' is understood to mean the opposite;[10] 'bounded by a public road Y' purports to convey to *medium filum* (middle line);[11] and 'bounded by a non-tidal river or stream Z' is thought to do the same;[12] while 'or thereby' appended after measurements means certain latitude is to be given to these measurements.[13] A particular description could also include a plan, which is not a part of the deed itself but is adopted by reference in the description. Often a verbal description is dispensed with and the plan is the only particular description of the deed. When there are both and there is a discrepancy it does not invalidate the deed and it is dealt with in the following manner: if the verbal description contains measurements it will prevail over a plan.;[14] if it does not contain measurements the plan will prevail; if the verbal description contains measurements that cannot be reconciled with the physical features on the ground they will be adjusted.[15] It is not uncommon for a particular description to identify only some boundaries leaving the remaining ones obscure. In such cases, it is, in fact, a part-general description and rules as to general descriptions apply to the non-identified boundaries. It is possible, both at common law and under statute,[16] to refer to a description in a previous deed concerning the property rather than to repeat it. This is a third type of description to be found in a deed: by reference.

A. Land Registration

Much of what is said above has been swept away by the introduction of the land registration system. Because it is based on registration of interest in land and not on recording of deeds, the boundaries of a piece of land are

[9] *Smyth v Allan* (1813) 5 Pat App 669. This case concerned a wall.
[10] *McDonald's Conveyancing,* (n 8) para. 8.16.
[11] *Magistrates of Hamilton v Bent Colliery* 1929 SC 686. Halliday, *Conveyancing*, (n 8) para. 33-11, maintains this is only the case where there is a disposition of two pieces of ground on both sides of the road. He argues that in a normal case 'bounded by a public road Y' would exclude the road: *Logie v Reid's Trs.* (1903) 5 F 859.
[12] *Gibson v Bonnington Sugar Refining Co Ltd* (1869) 7 M 394. But 'bounded by a tidal, navigable body of water Z' only carries to the low-water mark: *Todd v Clyde Trs.* (1840) 2 D 357. Bounded by 'sea' or 'seashore', however, would only carry to the high-water mark: *Cadell v Allan* (1905) 7 F 606.
[13] *Hetherington v Galt* (1905) 7 F 706. Such latitude means the description is not strictly bounding and permits explanation by prescriptive possession to a certain extent. A detailed account of these and other rules as to drafting of descriptions can be found in Halliday, *Conveyancing*, (n 8) para 33-11.
[14] *Ure v Anderson* (1834) 12 S 494.
[15] *McDonald's Conveyancing*, (n 8) para 8.18.
[16] The Conveyancing (Scotland) Act 1874, s. 61; The Conveyancing (Scotland) Act 1924, s. 8 & sch. D.

determined by its title sheet. The Land Register is map-based and upon first registration the Keeper requires to be provided with sufficient information about the piece of land to enable him to identify it on the Ordnance Survey Map.[17] Such information could take the form of a previous deed containing a particular description. If there is only a general description this will be insufficient and a new plan will have to be prepared. Whatever is submitted to the Keeper will be thoroughly checked against neighbouring titles and the Ordnance Map before the Keeper accepts the application for registration and issues indemnity. To avoid difficulty it is advisable at an early stage to obtain a P16 report from the Keeper. This will compare the legal boundaries in the titles and any plans submitted with the occupational boundaries on the Ordnance Map. If the boundaries correspond the applicant should get a title with full indemnity covering the whole land. If there is a discrepancy the first step should be an on-site comparison between the occupational boundaries on the Ordnance Map and those on site. There is always a possibility that the Map is out-of-date and the area actually occupied corresponds to the area as described in the titles.[18]. The application for registration should contain information on this. If the legal boundaries are larger than the occupied area the applicant has a choice between relinquishing the unoccupied area or claiming it, usually with exclusion of indemnity given that someone else may have a title *habile* to include that area fortified by prescription.[19] If the applicant is a purchaser under missives the title may not, depending on its terms, be good and marketable.[20] If this is the case the purchaser can demand that the seller secures his title to the unoccupied part, or pull out of the deal by rescinding the contract.

There is also a possibility that the legal boundaries are smaller than the area actually occupied. In such a case the applicant will get no title to the additional area given that he has no right to it, and prescription cannot operate contrary to title. If the applicant is a purchaser under missives it is

[17] The Land Registration (Scotland) Act 1979, s. 4(2)(a). One standard exception made by the Keeper is tenement flats, which require only a verbal description, usually by address. The title sheet of the flat will depict only the ground on which the tenement building is standing and a verbal description will state which flat it is.

[18] The Ordnance Survey Map is regularly updated for the Keeper but the face of the ground is in constant change. With walls, hedges, fences and buildings appearing and disappearing, it is impossible to keep the Map fully up-to-date.

[19] The Keeper will probably not inquire as to the strength of another party's claim but will exclude indemnity as a rule of thumb. If the applicant wishes to regain possession he must seek judicial consideration which will assess the competing claim. Should the applicant regain possession and maintain it for the prescriptive period of ten years he may then apply to have the exclusion of indemnity removed.

[20] Missives may provide for a material discrepancy, in which case the title is still good and marketable if the discrepancy is within such latitude.

unlikely that he will have any claim against the seller, as he is trying to get something which is not due to him under missives.[21] His only viable option is to get a third party to grant him an *a non domino* disposition of the area in question. It is likely the Keeper will not refuse to register such a disposition but will exclude indemnity.[22] If the applicant then maintains his possession for a further ten years he can apply to have the exclusion removed owing to operation of positive prescription.

After registration, the title to a piece of land is bounding and the boundaries are easily ascertainable from the title sheet. Any subsequent dispositions of registered land need only include the relevant title sheet number as its description.[23] On the Ordnance Map, boundaries resting on a structure or other feature such as a fence or wall are depicted by a black line. Arrows across the black line indicate the boundary is to *medium filum* of the structure. Arrows pointing at one side of the black line mean the boundary is on that side of the structure. Boundaries resting on no visible physical features are depicted by a dotted line.

3. *Disputes*

An encroachment is a permanent or quasi-permanent intrusion into land owned or lawfully possessed by another person without his consent.[24] It is always an intrusion by property of another, typically buildings or walls, and not by a person which would constitute trespass. Encroachment may take various forms such as: building of a wall wholly or partially on another person's land;[25] attaching signposts on another person's wall;[26] leaving

[21] The purchaser could have a claim under missives if they were drafted so as to include the area occupied to which there was no title, for example, by attaching a plan to the missives. Most missives would, however, be framed in terms of the legal boundaries.

[22] I Davis & A Rennie (eds), *Registration of Title Practice Book* (2nd ed. 2000) para. 6.4, indicates that the Keeper will do so if satisfied that the scheme is not 'speculative'. The applicant will need to demonstrate good reasons for the application. *Aberdeen College Board of Management v Youngson* 2005 1 SC 335, is an example of an unsuccessful attempt to do this. In 1993 the defender granted himself an *a non domino* disposition of land belonging to the pursuer. The deed was accepted by the Keeper for recording in the Sasine Register. In 2005 the pursuer raised an action for reduction of the disposition. They were successful on the grounds that the deed was *ex facie* invalid for the purposes of positive prescription because the disponer and the disponee were the same person. Had it not been for this apparent defect, the deed would have been *ex facie* valid and prescriptive possession would have fortified the title beyond challenge.

[23] S15(1) Land Registration (Scotland) Act 1979.

[24] Reid, *The Law of Property in Scotland* (Butterworths, Edinburgh 1996), para. 175.

[25] *Macnair v Cathcart* (1802) Mor 12832.

[26] Reid (n 24) at para. 175.

goods on another's land;[27] having a tree growing on one's land that has branches extending over to another's land;[28] or having such a tree that has roots extending to another person's land.[29] Encroachments almost invariably involve a dispute as to boundaries. If an encroachment is about to take place or building works have already started an interdict is available to the aggrieved proprietor, even if demolition of what has already been built is to follow. However, when the encroaching structure is completed and it is either impossible to remove it or such removal would cause a loss disproportionate to any benefit the court may use its equitable power to allow the structure to remain and award damages instead.[30] It is, perhaps, worth to have a look at some important cases on the subject.

In *Griffin v Watson*,[31] back gardens of two properties were separated by a wall built entirely on one side of the boundary, which formed part of a garage of the proprietor on the other side of the boundary. This wall had been built under a verbal agreement between the defender and the pursuer's predecessor in title. The defender argued the pursuer was bound by this agreement and, in any case, the encroachment was minimal. The pursuer sought to have the wall removed. The court found in favour of the pursuer. It is notable in this case that the argument of a binding agreement had no force as it was considered personal to the pursuer's predecessor in title. Further, the court did not consider that the loss to the defender would be disproportionate to the benefit for the pursuer and did not to use its equitable power to allow the wall to remain.

The later case of *Craig v Powrie*[32] also involved an encroachment by building of an extension to the rear of a semi-detached house and a dispute as to the location of boundaries. Before deciding on the question of the extension, the court heard conflicting evidence from two expert witnesses acting as architects for the pursuer and the defender respectively. The sheriff preferred the opinion of the architect for the pursuers. He had been involved in preparing the original break-off dispositions of both properties and based

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[27] Hume, *Baron David Hume's Lectures 1786-1822* (Stair Society, Edinburgh 1958), III, p. 204.
[28] *Halkerston v Wedderburn* (1781) Mor 10495.
[29] Erskine, *Institute*, II.9.9.
[30] *Jack v Begg* (1875) 3 R 35. In that case, a proprietor erected a four-storey gable wall in the place of a demolished dwarf wall on the boundary line, following unsuccessful negotiations with the other proprietor, and proceeded with building floors supported by the gable wall. The Court held he was encroaching upon his neighbour's land but refused to order demolition of a largely completed building on equitable grounds and granted damages instead.
[31] 1962 SLT (Sh Ct) 74.
[32] Unreported, Perth Sheriff Court, 18th September 1985, Sheriff Wheatley. Available in Paisley and Cuisine, *Unreported Property Cases from the Sheriff Courts* (Green, Edinburgh 2000).

his view on the location of a fence that had been erected on the boundary line at the time of these dispositions. As a result the court awarded damages based on an agreement between the parties that removal of the structure would be unreasonable. The reality of this case emphasises that exact boundaries may be difficult to ascertain even from detailed titles or the Ordnance Map. Professional advice should be taken before any building works on the boundary line are started,[33] and photographic evidence should be taken beforehand and preserved.[34]

A significant case for the issue of encroachments specifically is *Anderson v Brattisanni*'s.[35] It concerned a dispute between tenants running a fish and chip restaurant in the basement of a tenement building and the proprietor of the top-floor flat. An intrusion occurred when a pipe, extracting smells and fumes from the basement, was attached to the back, blind wall of the tenement, the upper part of which was owned by the pursuer. The First Division decided to use its equitable remedy and permitted the structure to remain as it was necessary for the basement business to operate. It was held that the pipe caused the pursuer no detriment to the enjoyment of his property as neither smells nor fumes got into the pursuer's flat nor did it obstruct any view. The wall upon which it was attached was blind and the pursuer did not indicate that he wished to develop it. The unresolved question remains, however, as to the ownership of the encroaching structure. On one hand, it should accede to the *solum* and become the property of the proprietor encroached upon. If so he should have the right to remove it. On the other hand, he obviously cannot do so by virtue of the Court decree. Further, it is equally uncertain what the position is as regards successors of either party concerned. The rules of property law and the decision in this case seem somewhat irreconcilable, highlighting the exact difficulty inherent in the nature of such disputes.

A final case for consideration is *Hetherington v Galt*.[36] Two plots of land with particular descriptions in their titles supplemented by plans and measurement, but qualified with the words 'or thereby', were divided by a line of trees planted under agreement by both proprietors at their mutual expense. They did not precisely correspond to the boundaries in the titles. A singular successor of one of these proprietors challenged the arrangement

[33] It could be noted that, in the case of Land Register titles, the most detailed scaling of the Ordnance Map, 1:1,250, used for urban areas, leaves a latitude of nine inches, in respect of which there is no indemnity: s 12(3)(d) Land Registration (Scotland) Act 1979. In the *Craig* case the parties were litigating over between two and six inches of ground.
[34] Paisley and Cuisine (n 32) at p. 19.
[35] 1978 SLT (Notes) 42.
[36] (1905) 7 F 706.

given that the titles gave him more land. The Second Division held that, whilst normally an agreement such as this could not bind singular successors if unequivocally contrary to titles, in this case the arrangement could not be said to be contrary to titles. Given that the titles were qualified by the words 'or thereby', the arrangement simply explained the titles further, and the exact route was fixed by operation of positive prescription.

If a concise conclusion is to be drawn from these cases, it would be that before any building works are to be started near or on the boundary line a meticulous check of titles to both properties and features on the ground should be carried out, coupled, if possible, with written consent to the proposed construction of the neighbouring proprietor, especially if titles disclose any ambiguity. Otherwise, there is a risk of encroachment.

A. Boundary Agreements

If titles disclose a discrepancy as to the common boundary and there is sufficient good will on part of the proprietors, they may make an agreement as to the boundary and, along with a plan, register it either in the Sasine Register or the Land Register.[37] Strictly speaking, 'discrepancy' means a discrepancy of legal boundaries as specified in the titles, usually an overlap of claims to a strip of land. On one view, this provision would also cover a discrepancy between legal boundaries and occupational boundaries disclosed in an on-site inspection or on the Ordnance Map,[38] but this has been doubted.[39] A discrepancy of legal boundaries usually arises when at least one of the titles is a Sasine title. It has been said that this may also be the case with two Land Register titles[40] and, because such titles are bounding and depicted on the Ordnance Map, it seems that may arise only when at least one of the titles has indemnity excluded in respect of the discrepancy. In such a case it is less likely that an agreement can be reached because the proprietors are in active competition over the area of ground in question. The broad definition of 'land' in the *Land Registration (Scotland) Act* 1979,[41] also means that an agreement could regulate boundaries of tenement flats, bodies of water or even minerals. As soon as an agreement is registered it is

[37] The Land Registration (Scotland) Act 1979, s. 19(1). If both titles are Sasine titles the agreement must be registered in the Register of Sasines: s. 19(2). If both titles are Land Register titles the agreements must be registered there: s. 19(3). If the titles are of both types registration must proceed in both registers.
[38] Reid (n 24) paras. 219 & 220.
[39] Paisley, *Land Law* (Green, Edinburgh 2000), para 4.23.
[40] *ibid*.
[41] s28(1) Land Registration (Scotland) Act 1979. Herein 1979 Act.

binding on all parties having an interest in the properties and their successors. Questions remain about the impact of such agreements on persons having subordinate real right in the lands such as tenants or servitude holders, though on strict reading of the relevant provision it would appear their consent is not necessary. It has been suggested, however, that their consent would be prudent.[42]

An alternative to the boundary fixing agreement found in the 1979 Act can be found in the March Dykes Act 1669. It permits an owner of rural land to alter a boundary where there is no present enclosure and a wall or fence is to be erected and the existing boundary is uneven or unsuitable for the new enclosure. This is done by an application to a Sheriff who must make a visit to the site, unless that is dispensed with by both parties. He then issues a decree altering the boundary, which can be registered in either of the registers, followed by an award of damages if there is an imbalance in value. As a general observation, it should also be noted that there may be a lot of difficulty in selling land tainted with a boundary ambiguity or involved in a boundary dispute. Lenders will also be unwilling to lend money on security over such land.

4. *Structures*

The last aspect of the law on boundaries for consideration is the problems associated with boundary structures.[43]. When a wall or fence is to be constructed entirely within one's own property then he has absolute freedom to do so[44] and must bear the full expense of the work.[45] An exception to this is provided by the March Dykes Act 1661. It permits an

[42] Paisley (n 39) para. 4.23. The author also points out that tenants under short leases may not be bound by the agreement as their real right in the subjects is not included in the definition of 'interest in land' in s. 28(1).

[43] The law on common gables (common walls between two buildings) is not included here because it is a development of the Victorian era made for the purposes of building practices then prevalent. It has little significance today. A good account can be found in Reid (n 24) para. 218.

[44] *Dunlop v Robertson* (1803) Hume 515, where the defender erected a sixteen-feet-high boundary wall on his own ground but merely three feet from the pursuer's house, thus blocking the supply of daylight to two floors. He was held entitled to do so. This position could, however, be altered by real burdens prohibiting building. Such burdens are often imposed by a developer to preserve the overall character of the development or by a proprietor wishing to preserve his view or the amount of sunlight received by his property. *Bachoo v George Wimpy & Co Ltd* 1977 SLT (Lands Tr.) 2, is an example of an unsuccessful challenge to such a burden in the Lands Tribunal.

[45] *Ord v Wright* (1738) Mor 10479.

owner of rural land[46] to construct a boundary structure on his own land[47] and recover half of the cost from the neighbouring proprietor. This is done by obtaining consent from the other proprietor or by application to either the Sheriff Court or the Court of Session. The grounds of refusal may be that the project is 'visionary or absurd'[48] or that the cost of it is disproportionate to any benefit.[49]

When a wall or fence is to be constructed on the boundary line the consent of both proprietors is necessary to prevent the structure being considered an encroachment. In some cases, such as housing developments, the position will be governed by reciprocal real burdens obliging the proprietors to erect and maintain walls or fences on the boundary line at mutual expense.[50] Even if consent as to erection of a structure is given by the adjoining proprietor it does not mean he is obliged to contribute to the cost unless he consents to that too. A wall or fence construed on the boundary line was once thought to be common property,[51] but now it is regarded as having acceded to both pieces of land and is owned by both proprietors to *medium filum*.[52] This rule cannot be altered by contract as the rules of accession are not open to control by agreement.[53] A wall or fence owned to *medium filum* is subject to the rules of common interest, obliging each proprietor to maintain it and preserve its overall stability.[54] Each proprietor must maintain his side of the wall and is solely responsible for the cost. If the other proprietor neglects his side and endangers the stability of the wall he may be required by the first proprietor to carry out repairs. The first proprietor may not, however, carry out these repairs himself. When it comes to alterations, similarly each proprietor may carry out such alterations to his

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[46] The land must also be at least five acres in superficial area: *Penman v Douglas and Cochrane* (1739) Mor 10481.

[47] The Act does not sanction encroachments: *Graham v Irving* (1899) 2 F 29 at 34 per Lord M'Laren.

[48] Hume, *Lectures*, III, p. 415.

[49] *Earl of Peterborough v Garioch* (1784) Mor 10497, where the defender successfully argued that the land she owned was mountainous and yielded little income and the burden of contributing half of the cost of enclosure would be too heavy for her.

[50] E.g. *Thom v Hetherington* 1988 SLT 724. Reid (n 24) para 217, expresses doubt as to validity of such burdens, permitting one to build on another's land and to recover half of the cost.

[51] *Law v Monteith* (1855) 18 D 125.

[52] *Robertson v Scott* (1886) 13 R 1127. Reid (n 24) para 223, notes that the concept of a boundary wall being common property was inconsistent with the doctrine of accession and some rights of common owners such as the right of veto or of division and sale were unsuitable for such a structure.

[53] *Shetland Island Council v BP Petroleum Developments Ltd* 1990 SCLR 48.

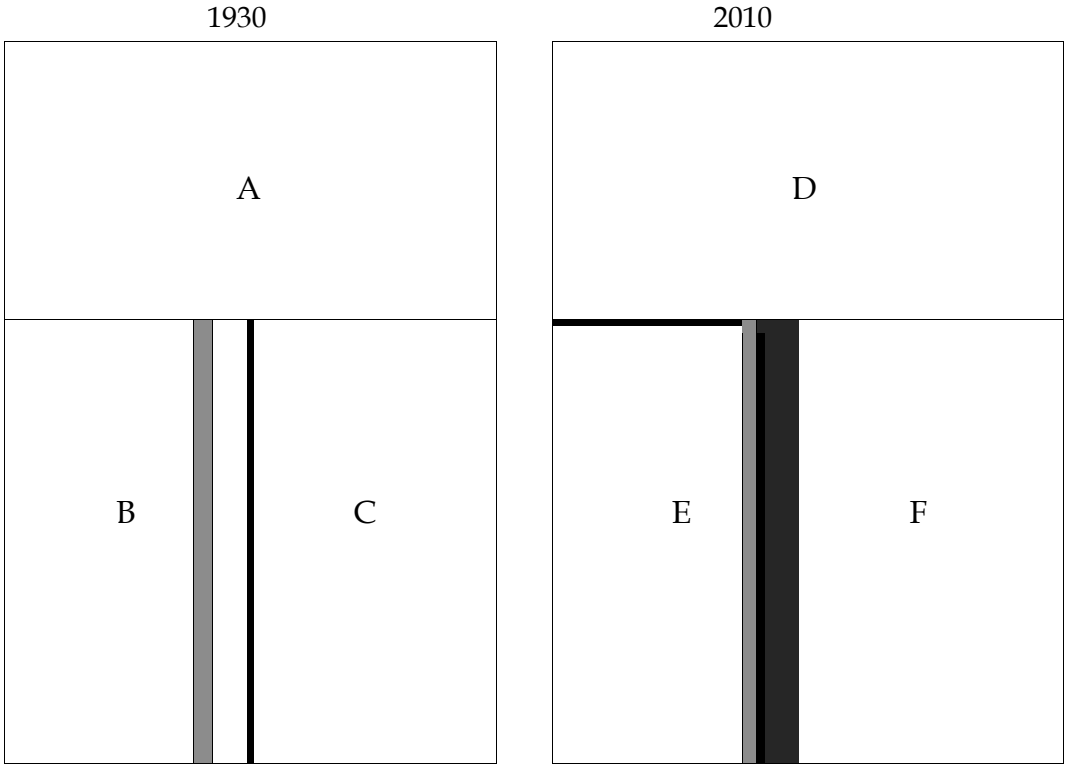
[54] *Cochran's Trustees v Caledonian Rly Co* (1898) 25 R 572 at 597 per Lord M'Laren.

side of the wall as he pleases provided the stability of the wall is not impaired.[55]

A wall or fence constructed on one's own land is one's own property and accedes to the land.[56] The proprietor is also solely responsible for maintenance of the structure and may alter it as he pleases, subject to any agreement with the adjoining proprietor.

5. *Summary*

Let us now consider a hypothetical scenario.



In 1930 A, an Aberdeenshire laird, divided up his land. He retained the northern slice as his family residence and sold the south-western part to B, a farmer, and the south-eastern part to C, also a farmer. The disposition to B was prior in time. The description therein contained measurements, a plan and a title condition obliging B to erect and maintain a four feet, stone wall on the eastern boundary of his property. This disposition also provided for a servitude of vehicular access through B's land in favour of A, on the route of

[55] *Thom v Hetherington* 1988 SLT 724, where one of the proprietors of a wall owned to *medium filum* erected a fence along the wall that interfered with the foundations of the wall but otherwise did not impair its stability. He was held entitled to do so.
[56] *Strang v Steuart* (1864) 2 M 1015.

a road used by A before the sale (light grey). The description in the disposition to C did not contain measurements or a plan but only a sketch and a proviso that the western boundary of C's land would rest on the stone wall erected by B. Not long after, A died leaving his estate to his son D. B proved a successful farmer and on his death his son E took up the land and his father's occupation. C's land however, proved infertile and in 1970 he sold it to F, who would keep horses and open a horse riding school. B and then E failed in their obligation to maintain the stone wall. By 1970 the condition of the stone wall had deteriorated and it collapsed and the remains were covered by soil and grass. F, wishing to use the western part of his property as graze land for his horses, erected a six feet fence by the road running through E's land, one hundred feet further west. This intrusion went unopposed as E did not use this strip of land at all. In 2010 E wishes to retire and sell his land in order to move to Spain and buy a house there. He entered into missives with a purchaser offering the whole of his interest in the land. Aberdeenshire became operational for land registration on 1st April 1996 and the purchaser will need to present his disposition for first registration. E obtained a P16 report from the Keeper which disclosed that the stone wall no longer exists and a fence has been erected one hundred feet into E's land. An on-site comparison confirmed the position. E's title is not good and marketable because a third party, F, may have a claim to the disputed area between the road and the place of the former stone wall (dark grey). This claim is probably valid because F's title is no longer bounding as the stone wall has disappeared and F has possessed the area by grazing horses for more than ten years thus fortifying his claim by positive prescription. The Keeper will not refuse to register the disputed area in favour of the purchaser but will exclude indemnity. The purchaser threatens to get out of the deal unless E puts matters right. E has the option of negotiating with F a return of the disputed area and reconstruction of the wall or making a revised offer to the purchaser, excluding the disputed area. On learning that E sold his land to the purchaser, who is in fact a property developer, D decides to build his own stone wall on his side of the boundary between his land and the developer's. The wall takes three months and £10,000 to complete. However, D miscalculates the exact position of the boundary line and the developer's surveyors state that D has build three feet into the developer's land, the wall lying entirely within the latter's property. The developer may try to remove the wall himself[57] or seek a court order to have D remove the wall, but that is likely to be refused due to the cost and

[57] This self-help remedy would mean that D has to seek an interdict against removal of the wall.

effort involved in its construction, unless the developer can show that the encroachment is a material impediment to his plans for development. Otherwise damages will be awarded.[58] Instead, the developer could negotiate with D an agreement to alter the boundaries and register it, along with a plan, in the Land Register (if one takes the view that a boundary agreement is competent to solve only a discrepancy of legal boundaries an ordinary conveyance will be appropriate here). If negotiations are unsuccessful and the wall remains even after a court decision, the three feet wide strip of land will not positively prescribe after ten years to become part of D's land. His title is probably bounding in respect of the boundary with the developer on the basis of the break-off disposition by A to B which contained detailed measurements and a plan.[59] Should D wish to register his

[58] There is also the question as to the ownership of the encroaching wall. Rules of accession would dictate that the wall accedes to the developer's land but it may not be removed if the court uses its equitable power to allow the structure to remain. The power will not be lightly exercised but if it is, an odd position follows. The developer may not remove the wall built three feet into his land but may prevent D from gaining possession of the three feet wide strip of land beyond the wall by other means, such as by constructing a fence on the actual boundary. If the developer's solicitor thinks that it is possible that the special equitable power will be used, he should advise the developer to remove the wall himself as quickly as possible.

[59] The position of D's title may be complex. On A's death, whether testate or intestate, his executor transferred A's land to D. He could have done this by means of an ordinary disposition, in which case D will be registered as proprietor in the Sasine Register. That disposition, by the executor to D, will use, as link in title, the executor's confirmation to A's estate. Another way to effect the transfer could have been for the executor to endorse on the confirmation a docket entitling D to A's land and to give a copy of it to D: s15(2) Succession (Scotland) Act 1964. Yet another way, applicable only to testate succession, a method which should be strongly discouraged, would be for the executor merely to hand over A's testamentary disposition, *ie* the will, to D, which would then act as a title deed: 'Opinion of the Professors of Conveyancing' (1965) 10 JLS. In the latter two cases, A remains the registered proprietor, not D, who holds on the basis of the docket or the will, which are what may be termed 'general dispositions', title deeds not in themselves registerable. It would have been advisable for D however, to convert his personal right against the executor into a real right by either a notarial instrument, a document executed by a notary public, setting out the terms of the unregisterable deed presented to him, which is then recorded in the Sasine Register: *Sutherland v Garrity* 1941 SC 196, or, more likely, by means of a notice of title, a statutory procedure to the same effect: s4 Conveyancing (Scotland) Act 1924. What is the relevance of all this? It becomes apparent when one realises that the answer to the question of whether D's title is bounding in respect of the boundary with the developer depends on what basis D holds the land, or more specifically, what description does the title deed contain. Ideally, the title deed would contain a description of A's land minus the land conveyed to B, possibly by referring to the disposition by A to B. It would be easy to expect the ordinary disposition, the confirmation (along with the inventory) and the docket on it, to contain such a proper conveyancing description. Not so readily with the will, or a notarial instrument or a notice of title proceeding on the will. In the latter case, the deed could refer to the deed upon which A held the land initially, ignoring that part of it had been broken off in favour of B. D's title would then not be bounding in respect of the boundary in question and he could benefit from this fact as far as positive prescription is concerned. If A and D had been seller and purchaser, D would ensure that the description

interest in the Land Register or sell his land so that a purchaser registers, that strip of land will not be registered by the Keeper as there is no title to it. The only option is to get a third party, perhaps a secretary at D's solicitor's office, to grant to D an *a non domino* disposition of the ground in question. The Keeper will not refuse registration of this deed but will exclude indemnity. After ten years D may apply to have the exclusion removed which will also have the effect of altering the developer's (or his successors') title sheet to remove the strip of land from his title.

6. Law Reform

The Scottish Law Commission has recently published a report on land registration,[60] which proposes a major overhaul of the whole system. Two topics discussed there have a special significance to the issues relating to boundaries: mapping and *a non domino* dispositions.[61]

A. Mapping

Under the present system, each registered interest in land has a title sheet which contains a detailed plan of the property based on the Ordnance Survey Map. The 1979 scheme envisaged that there would be a separate micro-map for each title sheet and a master map, the Index Map, of all title plans. As the Report points out, that would give for the present moment nearly two million micro-maps as there are close to two million title sheets. In reality, the Keeper never kept two million separate sheets of paper with micro-maps but worked with existing paper Ordnance Map prints by drawing on them, often by hand, those properties that came to be registered. Whenever a title sheet or an office copy needed to be made, an extract from these prints would be given as the micro-map. Since 1993 geospatial data has been kept in electronic format, the Digital Mapping System (DMS), which is nothing more than the Ordnance Map in electronic form. Instead of drawing properties on various Ordnance Map prints, they are entered into the system. Whenever a title sheets needs to be prepared, an extract from the system is given. The Index Map, now a digital layer on the base

takes account of the break-off disposition to B. For a recent example of a boundary dispute with such background see: *Welsh v Keeper of the Registers of Scotland* 2010 WL 2131305.

[60] Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, 2010).

[61] *ibid*. Parts 5 and 16 of the Report respectively.

geographical map, is best viewed by comparison to a political map of the world, a layer on its geographical map.[62]

One of the main proposals of Part 5 of the Report is to give legal recognition to the system outlined above, which already exists *de facto*.[63] The DMS and the Index Map would continue to operate but would be renamed to 'Cadastral Map', an internationally recognised name for such devises. It is thus a change of form, rather than substance. Another proposal is that the Ordnance Map could be replaced or supplemented with another reliable map, the 'base map', at the Keeper's discretion.[64] The Report gives examples of new mapping technologies, such as aerial or satellite imaging, but it is unlikely that the power would be exercised any time soon. The main criticism of the Ordnance Map is that it may be unsuitable for some legal purposes, because it is not always up-to-date; it may be inaccurate; the scale may be too small or that the seabed is not depicted. On the other hand however, as the Report observes, relying on the Ordnance Survey Map gives the system a high standard of mapping that may not easily be replaced. The publication also recommends that the Keeper's present practice as to tenements, such as flats or minerals, should continue. An application for registration will not require a plan and only the *solum* of the ground will be depicted on the Cadastral Map and its extracts.[65]

The Report also proposes an important change to the substantive law. The Keeper will not register an area to which another title sheet relates, even with exclusion of indemnity.[66] It was thought that having two title sheets overlap in respect of one area of ground is illogical and the question of indemnity is quite irrelevant to the problem. This provision may prevent many boundary disputes from arising.[67] Another change to the substantive

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[62] The Ordnance Map never attempted to show title boundaries. All it shows are detailed geographical features and public law boundaries, such as constituency boundaries

[63] Para. 4.43; Draft Bill, ss. 2, 3(1)(a) & (b), 5(2), 7(1)(a)(i).

[64] Para. 5.8; Draft Bill, s. 4(5).

[65] Para. 5.11; Draft Bill, s. 15(1). The Report does allow a possibility that the base map becomes three-dimensional in the future, but the Draft Bill does not require it now: para 5.43.

[66] Paras. 5.26 & 5.27; Draft Bill, s. 4(3) & (4).

[67] The mechanism of registration works in close conjunction with the mechanism of rectification. Suppose Black and White are neighbours. There is a boundary dispute between them: both have titles *habile* to include an area of ground in dispute. Black has a title registered in the Land Register with full indemnity and is in possession of the disputed ground. White wishes to register and wants to have the disputed area included in his title. Presently, the Keeper will register it, but will exclude indemnity. If White wishes to have the exclusion removed he must regain possession, keep it for ten years and then apply to have the exclusion removed. This will also have the effect of removing the disputed ground from Black's title, *ie* rectification. The new regime proposes a different order of matters. White will get no title to the ground in question in the first place. He will get a title with full indemnity only to the land to which Black has no title. Then he will have to go to court to

law will be the repeal of s19 Land Registration (Scotland) Act.[68] Boundary agreements will no longer be competent. It was thought that whatever benefit may flow from them can be achieved by other means, in particular, an ordinary conveyance or an excambion (exchange of land).

B. *A non domino* Dispositions

A non domino dispositions is the second of many aspects of the Report to be summarised here. As the work observes, there is a significant legitimate role for such dispositions despite the fact that a paradigm case has a nature of 'fraud' and the Keeper should not further it. The standard example of positive use of these devices given in the Report is that of regularising irregular titles, for example the title to a farm passed down in the family through generations without any deeds. The present 'owner' may wish to regularise his title. He would then use the vehicle of an *a non domino* disposition, granted by his solicitor's secretary, and registered by the Keeper with exclusion of indemnity. After ten years he could apply to have the exclusion removed and get a valid title. Another highly relevant example is to clean up boundary irregularities. The publication emphasises that there must be room for the operation of positive prescription in the Land Register and *a non domino* dispositions are an element of it. The present practice of the Keeper is to reject applications that are 'speculative'.[69] The Report proposes a legislative provision stating that such dispositions should be rejected by the Keeper as a general rule, unless they are 'legitimate in their purpose'.[70] The test for acceptance should rely on two filters. Firstly, the true owner should not have been in possession of the land in question (including civil possession) for the past seven years on the day of presenting the *a non domino* disposition for registration.[71] This is to reflect the idea that the true owner no longer 'asserts title'.[72] Secondly, the person presenting the application should have been in possession of the land for one year on the day of presenting the application.[73] This requirement will bar purely

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establish his right and seek an order requiring the Keeper to rectify the register. Whereas under the present system parties may go to court to establish the right of possession, under the new regime they will go to court to establish the title itself.

[68] Para. 5.32; Draft Bill, s. 98 & sch. 9.

[69] See (n 21).

[70] Para. 16.10.

[71] Para. 16.16; Draft Bill, s. 21(1) & (13)(a) read with s. 20.

[72] This term appeared in a similar proposal by the Commission: Discussion Paper 128, para. 4.57.

[73] Para. 16.17; Draft Bill, s. 21(1) & (13)(a) read with s. 20.

speculative applications and will ensure the applicant's position is secure enough to merit an expectation that it will subsist for the full prescriptive period. The standard of possession required for these provisions will have to be 'open, peaceable and without judicial interruption'.[74] which ties them to the standard required for prescriptive possession. One further point requires comment. Registration of an *a non domino* disposition will no longer confer title, albeit with exclusion of indemnity.[75] The entry will be a provisional one and no existing title sheets will be permanently altered as a result of the registration. Only upon completion of the prescriptive period will the entry become permanent and relevant title sheets will be rectified. Up to that time the provisional entry itself will be a rectifiable inaccuracy.

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Assuming that the new law as to *a non domino* dispositions was in force in 2010, it would apply to D's position in our scenario above in the following manner. Firstly, the Keeper would have to decide whether D's application is legitimate in purpose. As it is intended to clean up a boundary irregularity, the Keeper should accept it. Secondly, D may apply for registration in 2017 at the earliest because the developer ceased to be in possession in 2010. Thirdly, at that time D will have to have been in possession since at least 2016. Fourthly, if the Keeper accepts the application, the developer's title sheet will contain a provisional exclusion of the three feet wide strip of land. This exclusion will be an irregularity that could, at least in principle, be rectified by the developer. At the same time, D will get a provisional title sheet to the strip of land. Fifthly, the prescriptive clock will start to run for D on the day of registration and the seven-year period of possession prior to then may not be included in the computation of the prescriptive period. Provided possession is maintained, D may apply for a full title sheet in 2027, which would also have the effect of rectifying the developer's (or his successors') title sheet to remove the strip of land in question permanently from his title. Under the present regime, D would have a good prospect of receiving a valid title in 2020.

[74] Para. 16.19; Draft Bill, s. 21(1)(b)(ii).
[75] Para. 16.27; Draft Bill, s. 21(7).

7. *Conclusion*

Readers are strongly encouraged to familiarise themselves with the whole *Report on Land Registration*. Many issues discussed therein are directly relevant to the law of boundaries but have not been included here due to the volume of this, already lengthy, work. Other issues may have a relevance which is not readily apparent. If not for the sake of the law of boundaries, readers should go through the Report because the Bill is presently before the Scottish Parliament and may soon become a cornerstone statute of Scottish land law.

Casus Omissus – The Aberdeen Law Project

RYAN T. WHELAN

There is a misplaced perception that the North East of Scotland, particularly Aberdeen, is an area of great affluence. That is to some extent true. It is inaccurate to infer from this, however, that there is neither poverty nor deprivation. Both exist. Aberdeen is not a legal narnia where access to justice is universal. *Pro bono* has a considerable role to play within the Granite City.

Casus Omissus, or the Aberdeen Law Project as we are to be colloquially known, like many notable legal ventures of repute and standing, not least this very publication, was conceived in a public house, on a typically Aberdonian September evening in 2008. Discussions continued in a more conventional setting, and in November 2009 tentative steps were taken towards launching the project.

As the name suggests, *Casus Omissus*, is concerned with the gaps within our legal system. We thus principally exist in order to provide legal assistance to those that would otherwise be unable to seek or defend legal adjudication. Our motivation in offering this service to the people of Aberdeen is to provide a legal recourse where there would otherwise be none. This will be achieved through students, supervised by practitioners, providing members of the public with legal advice and otherwise assisting in pursuing their case. Recognising that *pro bono* representation is sparse in Scotland, *Casus Omissus* will, where we have rights of audience, appear on behalf of clients in Court.

The aims of *Casus Omissus* extend beyond the provision of advice and representation. Broadly speaking, the aims of *Casus Omissus* are threefold; (i) to increase access to justice for the economically deprived; (ii) to undertake educational outreach projects with schools and prison facilities, and; (iii) to promote legal education and access to the legal profession for those from 'non-traditional' backgrounds. Working to achieve the aforementioned objectives is a student body of over one hundred at the time of writing. The said students are divided into the core sectors within which *Casus Omissus* operate, namely: housing; employment; consumer rights; and the Innocence project. Following in the tradition of law clinics throughout the world, we have established a management board consisting of respected academics, practitioners and members of the judiciary. Professor Margaret Ross (Head of School, University of Aberdeen); Lord Woolman (Senator of the College of Justice); Lady Dorrian (Senator of the College of Justice); Sheriff Cowan (Sheriff, Grampian, Highland and Islands); Professor Ian Diamond (Principal and Vice-Chancellor, University of Aberdeen); Mr. Gary Allan QC (Advocate, Queens Counsel); Dr. David Parratt (Advocate); Mr. Roger

Connon (Partner, McGrigors); Professor Roderick Paisley (Professor of Commercial Property Law, University of Aberdeen); and Mr. Greg Gordon (Lecturer in Law, University of Aberdeen) have all kindly accepted invitations to join our inaugural management board.

The prevailing legal and social environment is one of great opportunity for *pro bono* ventures. The Gill review illustrated that there are many improvements that can be made regarding access to justice in Scotland. As the report noted, 'there is a need for changes to court practices and procedures so that people who do not have legal representation are able to enter and navigate their way through the court process effectively'. It is the aim of *Casus Omissus* to assist the public in this oft problematic navigation.

A recent conference hosted by the Lord Advocate further highlighted the possibilities that now exist for the establishment of an accomplished Scottish pro bono network. Within her keynote address Elish Angiolini QC noted the 'huge width of potential' pro bono work offers in the provision of legal services to those who have been excluded from them. ('For the Public Good: The Future of Pro Bono Legal Services in Scotland', Friday 14 May 2010.) This, combined with the economic downturn, presents a landscape within which *pro bono* is not simply desirable, it is a necessity. Furthermore, if undertaken correctly, *pro bono* will flourish to the benefit of the wider profession. As the Law Society asserted in response to the Gill Review, 'access to legal advice must be at the heart of Civil Justice in Scotland.' We at *Casus Omissus* hope to make a substantial and lasting contribution towards this end.

The present author is of the view that the motivation for undertaking *pro bono* should, ideally, be solely to assist worthy persons in a time of need. Nevertheless, in a more pragmatic sense, it is not necessarily objectionable that *pro bono* be undertaken for self-serving reasons. The caveat must however be that the work undertaken is not of a second class nature. Work done on a *pro bono* capacity should always be first rate, and provided that is so, there is little reason to object that the work was undertaken for the lawyer's own self interest. It seems counterintuitive in some quarters that *pro bono*, the undertaking of work without remuneration, can ultimately economically assist the profession by increasing revenue streams. To hold such a view is, however, to misrepresent the experience in other jurisdictions. It is trite in civil justice research that *pro bono* actually benefits law firms. In the purely economic sense, *pro bono* is desirable as it unearths worthy cases that are eligible for legal aid. Many such cases would otherwise be undiscovered because, quite simply, those involved would not approach a law firm. Furthermore, with companies becoming ever more conscious of their corporate social responsibility obligations, the development of an impressive *pro bono* output by commercial law firms will assist in submitting the most impressive legal tenders. *Pro bono* need not, therefore, be purely charitable.

A central principle of *Casus Omissus* is, in fact, sustainability. *Pro bono* projects should, in our view, be economically efficient. Think social business; not charity. We as a law project have taken a conscious decision, partly driven by necessity, to operate with minimal financial sustenance. Each of our partners are therefore central to the availability and success of *Casus Omissus.* We are grateful to the School of Law at the University of Aberdeen for providing facilities and professional support; law firms for legal assistance and sponsorship; and a number of practitioners, Advocates and judges for generously giving of their time to provide supervision, direction and training. In providing their respective means of support, each of our partners recognise that *pro bono* can be universally beneficial – clients gain from advice that would otherwise have been unavailable or not utilised; students gain from the practical experience; and the wider profession, not least law firms, benefit from a higher standard of intrant. Accordingly, access to justice need not be at the expense or detriment of any one person; we can – and should - all contribute, but in order to maximise the universal gain offered by *pro bono*, we should begin to make this contribution, as Professor Nicolson of Strathclyde University has noted, whilst attending Law School. The students of Aberdeen University now have that option.

If you are interested in assisting *Casus Omissus* in any capacity, we would be delighted to speak with you.

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ASLR Submission Guidance

The Editorial Board are keen to receive submissions from students, past and present, of the University of Aberdeen for the forthcoming 2010/2011 Edition. Submission guidance can be found online at: www.abdn.ac.uk/law/aslr

Overview

The purpose of the Review is to showcase the work of the students of Aberdeen, highlighting the many areas of law which are taught and researched at this university. As such, we welcome submissions on any area of Scots law, as well as articles with an international or historical focus.
Several types of articles will be considered:

- Case Notes (500 to 1500 words on a recent judicial development)
- Book Reviews (500 to 1500 words on a recent publication)
- Essays and Short Articles (1500 to 4000 words)
- Long Articles (4000 to 10,000 words)

The limits specified are for general guidance only.

Submissions are welcome from students at all stages, from first year undergraduate to postgraduate PhD level. Students may submit a piece of work which has been written for part of their degree, or may write something specifically for the Review.

Articles must provide a critical analysis of a particular area of law, publication or judicial decision. Comment should be original, relevant and aim to make an interesting contribution to the academic debate.

Every piece of work is reviewed anonymously by the student Editorial Board, before being sent for Peer Review. Submissions may be accepted outright, accepted subject to modification, or rejected. Constructive comments will be sent to the author.

Published articles will be compiled in an annual issue which will be available online and in Scottish law libraries.

All submissions must conform to House Style which follows the Oxford Standard for Citation of Legal Authorities (OSCOLA):
http://www.abdn.ac.uk/law/documents/aslr/house_style.doc

General Suggestions

The Editorial Board is particularly interested in receiving submissions on current legal developments.

The 50 most recent decisions from the High Court of Justiciary and the Court of Session can be found online at:
http://www.scotcourts.gov.uk/opinionsApp/last50results.asp?searchtype=supreme&txt=False

Suggestions of recent publications for review or comment:

- Hector MacQueen & John Adams, *Atiyah's Sale of Goods*, 12th edn, (Pearson, 2010).
- Christian von Bar & Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition,* Vol. 1-6 (Sellier, 2010)
- Emily Jackson, *Medical Law: Text Cases and Materials,* 2nd edn (OUP, 2010)
- Margaret Ross & James Chalmers, *Walker and Walker: The Law of Evidence in Scotland,* 3rd edn (Tottel, 2009)
- James Chalmers, Chris Gane & Charles Stoddart, *A Casebook on Scottish Criminal Law*, 4th Edn, (W. Green, 2009)
- Joe Thomson, *Delictual Liability,* 4th edn (Tottel, 2009)
- William Gordon, *Scottish Land Law* 3rd edn (W. Green, 2009)

For further information on the Review, submitting an article or becoming part of the Editorial Board, please contact the Managing Editor by visiting our website: www.abdn.ac.uk/law/aslr.

We would be delighted to hear from you.