

Aberdeen Student Law Review

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**FOREWORD BY THE HON. LORD WOOLMAN
SENATOR OF THE COLLEGE OF JUSTICE**

Fred Rodell was a legal scholar and an iconoclast. In 1936 he wrote that: ‘There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.’¹

The rule of law demands that statutes and judicial decisions are clear and understandable. The same is true of legal articles. Authors have no easy task in expounding the law. The contributions in this volume of the *Aberdeen Student Law Review* demonstrate admirable clarity. They refute Rodell’s observation.

Stephen Woolman
February 2018

¹ Fred Rodell, ‘Goodbye to Law Reviews’ (1936) 23(1) *Virginia Law Review* 38, 38.

INTRODUCTION AND ACKNOWLEDGEMENTS VOLUME 8

A journal such as this does not materialise without many hours of work and the assistance and support of a large number of people. We owe a great deal of thanks to every person who has embraced our enthusiasm for the Aberdeen Student Law Review over the past year. We have endeavoured to recognise all of those who have assisted, encouraged and supported us as below. We must do so with the caveat that the sheer number of people who have assisted, encouraged and supported us means that we may have, unintentionally, omitted some from our list.

We hope that our efforts, represented by this volume, maintain the high standard of the Aberdeen Student Law Review. That high standard is evident from previous volumes. We hope that you find this volume an interesting and enjoyable read, full of articles on topical issues.

It has been a very valuable experience, and an honour, to be Editors-in-Chief of the Aberdeen Student Law Review. We wish the next Editorial Board, and many others in future, the very best in their endeavours.

THOSE TO WHOM WE OWE PARTICULAR THANKS

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Editors-in-Chief
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EDITORIAL

*Editorial Reflections on the
Aberdeen Student Law Review*

KIERAN BUXTON* & EZGI EDIBOGLU**

Abstract

In this article, the present Editors-in-Chief outline the development of the Aberdeen Student Law Review and consider some of its guiding principles, in order to offer an idea of its objectives and identity. This article follows from other valuable contributions regarding Scottish law journals and student law reviews.

Keywords: Student Law Reviews, Editing, Publishing

1. Introduction

During the production of this volume, we have discussed this journal's past, present and future. We decided to write about these discussions here after reading an enlightening article¹ – which reflected on the *Juridical Review's* past, present, and future – by Professor Jane Mair, General Editor of the *Juridical Review*. We have also revised this article to include reference to the highly relevant issues addressed more recently by Alisdair MacPherson and Alasdair Peterson in an insightful article on student law journals in Scotland.²

In this article, we identify two guiding principles from the introductory remarks of previous editorial boards and then offer two examples of how the guiding principles have been applied to the present volume.

2. Past

Our reflections began – naturally – with Volume 1, published in 2010.

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¹ Jane Mair, 'The Juridical Review: some reflections on its past, present and future' (2017) *Jur Rev* 3.

² Alisdair MacPherson and Alasdair Peterson, 'The Rise of Student Law Journals in Scotland' (2017) *Jur Rev* 207. The ASLR is an academic-reviewed journal, *as well as* a student-run law journal. Each article published has been reviewed and approved by a suitably qualified academic member of Law School staff, in addition to editing and review by our student editorial team. In this sense, the ASLR features elements of both peer-reviewed journals and student law reviews and, as a result, embeds the journal within the School of Law through the necessary involvement of both students and staff.

The first guiding principle that we identify from the introduction to that volume is *maximising value*. We believe that it is implicit in the following: ‘there are bound to be disappointments [for those who submitted but were not published] (...) We tried to provide constructive feedback where possible.’³

In practical terms, we understand the above to show that we should maximise the journal’s role and influence at the School of Law by offering constructive feedback to *all* authors, even if their submission is not published. This is one way we can ensure that ‘none of those rejected [are] discouraged.’⁴

However, we consider that this guiding principle runs broader than the single example provided above. Another example of this is inspiring future contributions to legal scholarship.⁵ One of the simplest ways to achieve this is to continue the theme previous editorial boards have adopted: ensuring publication of a diverse range of articles.⁶ This ensures a broader readership within the pool of potential future authors. We have continued this theme. As our Patron, Lord Woolman, noted in the first of his many illuminating forewords to this journal, ‘there is great value in adopting such an approach. An understanding of one area of law can be enhanced by looking at another area’.⁷ Another way this principle is manifested is through the journal’s wider availability on legal databases: abstracts of articles are indexed on Westlaw and the full text of articles is available on HeinOnline.

The second guiding principle that we identified – that of *promoting and attaining high quality, critical and analytical academic writing* – is, to some extent, intertwined with the constructive feedback aspect of the above “maximising value” principle. For those authors whose work was not published, they benefitted from our application of this second guiding principle through our provision of detailed feedback. For those authors who were published, this principle is recognised by a comment in Volume 4 thanking published authors for working with the editorial board to bring ‘their article up to the highest possible standard’.⁸ The academic review aspect of our editorial process is also another example of this guiding principle. The scrutiny that this offers from specialists in the areas of law is invaluable as an additional quality check that maintains the journal’s credibility.

3. *Present*

We hope that the rigour of our editorial process is reflected in the quality of the articles contained in this volume, such that readers consider that the second guiding principle has been fulfilled.

³ Editorial Board, ‘Introduction to Inaugural Issue’ (2010) 1 ASLR vii.

⁴ Andrew Merry and Philip Glover, ‘Introduction to Volume Five’ (2014) 5 ASLR iv.

⁵ See Editorial Board, ‘Introduction to Volume Three’ (2012) 3 ASLR vii.

⁶ See, for example, ‘Introduction to Inaugural Issue’ (n 3) vii; Constantinos Yiallourides, ‘Introduction to Volume Six’ (2015) 6 ASLR iv. Whilst there are a wide variety of topics published in ASLR volumes, the topics of property, constitutional, energy, and criminal law have been those most frequently published.

⁷ Lord Woolman, ‘Foreword by the Hon. Lord Woolman’ (2010) 1 ASLR v.

⁸ Editorial Board, ‘Introduction to Volume Four’ (2013) 4 ASLR vii.

Whilst it is entirely appropriate that the excellent published articles that follow receive the attention of readers, it is also worth acknowledging the many submissions that were not published.⁹ In respect of those submissions, and in keeping with both guiding principles that we identified, we offered extensive feedback, intended – as we made clear to authors – in a constructive manner, irrespective of the fact those submissions were not published.

Perhaps unusually, two items of constructive feedback were offered in respect of every submission. The frequency with which these issues arose – and the fundamental importance they have for the ASLR's credibility, editorial peace of mind and future works by the authors of the submissions – means that mention of them here is merited.

The two items are: (1) a lack of footnote citations for assertions where one was required and (2) the replacement of sources in existing footnote citations with more appropriate – usually primary – sources.

As regards (1), we suggest that the best default approach is to footnote any assertion of law, no matter how “obvious”. As one commentator observed:

No litigator would ever submit a legal brief to a court where every “obvious” point did not include a citation, and to teach our students otherwise is simply irresponsible.¹⁰

This may lead to what some consider excessive footnoting but we would suggest, in agreement with one contributor to the extensive American literature of law reviews, that ‘footnotes remain the essential ingredient of legal scholarship’.¹¹

As regards (2), we refer to the above indented quote and an implicit presumption it makes: namely, that the ‘citation’ used is the appropriate one for the proposition made. That implicit presumption requires express acknowledgment, for it is a key skill in itself. If there is an assertion that the law is X, the citation *must*, in our opinion, be either the relevant legislation enacted by the competent law-making body or the judicial decision that establishes such to be the position.¹² Where such an assertion is not supported by either of those primary sources, we wonder if there is any difference at all between the assertion being supported by the citation of (a) a non-primary source or (b) the absence of any citation. This is because X is *not the law by virtue of either* (a) the non-primary source or (b) the authority of the student author – that being the implication of the absence of any citation.

Providing extensive feedback – such as the example above – is something that we consider to be fundamental in order to fulfil both guiding principles. The intended by-product – given that many articles published in this journal are adapted from papers authors have written for their studies – of fulfilling the guiding principles is

⁹ See, similarly, ‘Introduction to Inaugural Issue’ (n 3) vii.

¹⁰ Cameron Stracher, ‘Reading, Writing, and Citing: In Praise of Law Reviews’ (2008) 52(3) New York Law School Law Review 349, 361.

¹¹ *ibid* 363.

¹² Or, where it is appropriate in relation to a matter of Scots law, by institutional writings.

that articles featuring the attributes of high quality writing and research¹³ will continue to appear in future volumes of this journal.

The second example of how we have sought to maximise value is by engaging with other societies within the School of Law to raise both our and their respective profiles. Thus, at the end of this volume, readers will find a section featuring information and updates from five societies. This is a revival of, and expansion upon, a feature in earlier volumes of this journal,¹⁴ which we considered to be important in order to engage with, and promote, other societies and also to increase awareness of the ASLR within the School of Law.

4. Future

We do not propose to deal in any detail or length with the future of this journal.¹⁵ That is not due to any indifference on our part; rather, it is because we are grateful for the freedom that each editorial board has and we would not wish to attempt to compromise that. We simply hope that the importance of the guiding principles this article has identified will be taken account of by current and future students who become members of the ASLR's Editorial Board.

5. Conclusion

Managing the editorial board of a student-run law review is a challenging and onerous role. As our Patron, Lord Woolman, noted, 'editing legal work is exacting work'.¹⁶ Undeniably, it involves dedicating much time to extensive critical thought and reflection. However, in our view, those challenges are part and parcel of the overall enriching and rewarding aspect of being involved.¹⁷

Being involved develops key skills¹⁸ – in particular, identifying weaknesses in arguments and enhancing our own critical thought processes – as well as offering our editorial team the opportunity to read submissions on many areas of law they may not otherwise be exposed to and presenting a rare opportunity to provide what we hope is constructive feedback to peers.

In addition, publication in this journal marks an early – and significant – personal and professional landmark for those authors.¹⁹ We are delighted to be involved in assisting those authors achieve that landmark.

¹³ See Natalie Cotton, 'The Competence of Students as Editors of Law Reviews: A Response to Judge Posner' (2006) 154(4) *University of Pennsylvania Law Review* 951, 961-974.

¹⁴ See, for example, Ryan T Whelan, 'Casus Omissus – The Aberdeen Law Project' (2010) 1 *ASLR* 139; Ryan T Whelan, 'Take Ownership: The Aberdeen Law Project' (2011) 2 *ASLR* 135; Malcolm M Combe, 'The Aberdeen Law Project AGM 2013' (2013) 4 *ASLR* 117; Regina Gabbasova, 'European Law Students' Association, Aberdeen University' (2015) 6 *ASLR* 126.

¹⁵ For an insightful and substantive consideration of the future of Scottish student law reviews generally, see MacPherson and Peterson (n 2) 216-217.

¹⁶ Lord Woolman, 'Foreword by the Hon. Lord Woolman' (2012) 3 *ASLR* iv.

¹⁷ MacPherson and Peterson (n 2) 213.

¹⁸ Stracher (n 10) 369-370.

¹⁹ MacPherson and Peterson (n 2) 213.

ANALYSIS

Time for a Regulatory Revolution? A Critique of the Stewardship Code's Suitability for Corporate Governance in the Banking Sector

KATHERINE ROSE THOMSON*

Abstract

The global financial crisis of 2008 led to the deepest recession in eighty years. One consequence of that recession was a “credit crunch” affecting individuals and small enterprises and involving a government bailout of banks in the UK totalling £124bn. Accordingly, it is appropriate that sufficient research should be carried out to diagnose the causes of the crisis and the corrective measures subsequently implemented. Although the main pre-2008 problem was the lack of effective financial regulation, insufficient corporate governance was also identified as a significant contributing factor. Institutional shareholders have received much of the blame for not taking a proactive stance to monitor their investments and challenge poor board decision-making. This article will explore the corporate governance reform prompted by the financial crisis, specifically the Stewardship Code, and evaluate if this is satisfactory in promoting, and ensuring, good corporate governance in banks to safeguard the public interest of financial stability.

Keywords: Corporate Governance, Banks, Financial Regulation, Market for Corporate Control, Behavioural Economics

1. Introduction

In the aftermath of the 2008 financial crisis, many problems in the banking industry were exposed. One such problem was that the ‘unqualified pursuit of profit’¹ by banks was incompatible with protecting the public interest of financial stability. The root cause of that problem was inadequate corporate governance. As noted by Sullivan, ‘The [2008] crisis can be understood as a crisis of governance rather than an inherent failure of markets of capitalism itself’.² Sir Adrian Cadbury defined corporate governance as follows:

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¹ Andreas Kokkinis, ‘A primer on corporate governance in banks and financial institutions: Are banks special?’ in Iris H-Y Chiu and Michael McKee (eds), *The Law on Corporate Governance in Banks*, (Elgar Financial Law and Practice, 2015) 36.

² Rodney Sullivan, ‘Finance Briefing: The crisis is one of governance’ *Financial Times* (London, 2 August 2009) 1.

In its broadest sense, corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally require accountability for stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.³

This extended definition encapsulates the ends of corporate governance: to promote efficient, yet socially responsible, business and to align the interests of all affected parties. A more succinct definition is: 'the system by which companies [publicly listed companies especially] are directed and controlled',⁴ reflecting the far-reaching impact of a director's fiduciary duties under the Companies Act 2006.⁵ This highlights that corporate governance is an area of law affecting the day-to-day management of companies and financial institutions that play a crucial role in the economy. This article will explore the classical economic strategies that justify certain corporate governance practices. Moreover, it will be argued that banks, in particular, merit independent analysis of their corporate governance structure, due to the unique features of the banking sector. In due course, these unique features will present themselves as an obstacle for effective stewardship in banks.

Due to the fact that the crisis exposed a gap between the standards set out in the Corporate Governance Code⁶ and the actual practices of major companies, a series of reforms were undertaken in the UK.

Notably, the Walker Review⁷ recommended principles of stewardship, which were enacted by the Financial Reporting Council (FRC) in the form of the Stewardship Code.⁸ The aim was to tackle the problem of passivity of institutional shareholders – famously described as 'absentee landlords'⁹ by Lord Myners. The way by which this would be achieved was by eliciting 'more vigorous scrutiny and engagement.'¹⁰

³ Stijn Classens, 'Corporate Governance and Development: Global Corporate Governance Forum Focus 1' (*World Bank*, 2003) vii <<http://documents.worldbank.org/curated/en/913921468159897693/pdf/346670Focus1111ance1and1Development.pdf>> accessed 3 January 2018.

⁴ Committee on the Financial Aspects of Corporate Governance and Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (Gee 1992) para 2.5 (Cadbury Report).

⁵ Companies Act 2006, ss 170-177.

⁶ Financial Reporting Council, 'The UK Corporate Governance Code' (*Financial Reporting Council*, April 2016) <<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf>> accessed 3 January 2018.

⁷ David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities: Final Recommendations' (*HM Treasury*, 26 November 2009) <http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf> accessed 4 January 2018 (The Walker Review).

⁸ Financial Reporting Council, 'The UK Stewardship Code' (*Financial Reporting Council*, September 2012) <<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Stewardship-Code-September-2012.pdf>> accessed 3 January 2018 (UK Stewardship Code).

⁹ Paul Myners, 'Association of Investment Companies' (*HM Treasury*, 21 April 2009) para 38 <http://webarchive.nationalarchives.gov.uk/20091207163737/http://hm-treasury.gov.uk/speech_fsst_210409.htm> accessed 3 January 2018.

¹⁰ Arad Reisberg, 'The Stewardship Code: Road to Nowhere' (2015) 15(2) *Journal of Corporate Law Studies* 217, 228.

However, the effectiveness of the Code – especially within the context of banks – is questionable and new problems have arisen since. This article will analyse whether stewardship by institutional shareholders is both feasible and desirable in the banking sector. While many corporate governance mechanisms, such as board composition and executive remuneration, are very important in the context of banks, the prime concern of this article will be the role of institutional shareholders. These are professional organisations that invest on behalf of others, encompassing pension funds and insurance companies.

Finally, new proposals for corporate governance reform suggested by the current Conservative government will be reviewed in light of the progress made, or setbacks encountered, by the Stewardship Code in the context of its applicability to banks. Stewardship is only one element of corporate governance; however, it requires most immediate research since it is perceived as being part of the solution to the financial crisis, which is concerning in light of its deficiencies. Alongside the publication of a Green Paper,¹¹ results of the UK's largest banks' 'stress test' results¹² were released, announcing a concerning failure to withstand conditions similarly faced during the financial crisis.¹³ With this in mind, it is essential to rigorously analyse the corporate governance framework specifically applicable to banks. The question considered in this article is whether the present approach to corporate governance is effective in protecting financial stability, being a matter of public interest, or whether an overhaul of the present approach to corporate governance is required.

2. Corporate Governance in Banks

A. Foundations of Corporate Governance

From an economic standpoint, the modern corporation is to be approached as 'a complex web or nexus of contractual relationships facing agency problems in its organisation (...) [and] the challenge [of corporate governance] is to constitute an

¹¹ Department for Business, 'Energy and Industrial Strategy, *Corporate Governance: Green Paper* (UK Government, November 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf> accessed 4 January 2018 (Corporate Governance: Green Paper).

¹² Bank of England, 'Stress Testing the UK Banking System: 2016 Results' (*Bank of England*, November 2016) <<https://www.bankofengland.co.uk/-/media/boe/files/stress-testing/2016/stress-testing-the-uk-banking-system-2016-results.pdf?la=en&hash=8BA99023251AE8CBD9DFCE9B1D3442068D3C7EBC>> accessed 4 January 2018.

¹³ *ibid* 5.

efficient monitoring structure for these conflicting interests.¹⁴ This definition can be understood in reference to the issue of control as a 'central one'.¹⁵

This is of particular interest in listed companies, whose shares are held by a large number of shareholders: the ownership of shares is so dispersed that no shareholder, or group of shareholders, holds a block of sufficient size to guarantee effective control of the company.¹⁶

Berle and Means observed that this 'separation of ownership and control'¹⁷ gives rise to a principal-agent relationship. This conventional economic theory dictates that there is a degree of management control bias¹⁸ within the firm as the shareholders (*qua* principals) appoint managers (*qua* agents) to control the company on their behalf.

The concept that stock ownership is completely divorced from control allowed Jensen and Meckling to develop upon the costs of the private agency structure.¹⁹ According to Jensen and Meckling, agency theory presupposes that the welfare of one party depends upon the other:²⁰ one person must act for another on his or her behalf and in their best interests. They suggest that there are conflicts of interests because managers would wish to act in their own self-interests, such as extracting benefits from the company or pursuing opportunistic behaviour.²¹ This is based on the assumption that the agent is a 'rational actor'²² who seeks to maximise their own personal well-being and utility and, therefore, might shirk their duties to get the most efficient results.²³ This arrangement results in 'agency costs', which include losses in corporate value to principals.²⁴ Accordingly, the agency relationship can be viewed as a contract. Hence, law and economics conceptualise the company as a nexus of contracts, which connects and creates conflicts between all parties (including employees, suppliers, customers and creditors).

Further, the Residual Claimant Theory²⁵ explains the emphasis on shareholder protection in Anglo-American law.²⁶ This refers to the idea that shareholders are a unique type of principal: they are vulnerable insofar as they have a financial stake in

¹⁴ Dirk Heremans, 'Corporate Governance Issues for Banks: A Financial Stability Perspective – Discussion Paper Series 07.07 (KU Leuven Centre for Economic Studies, February 2007) 3 <<https://lirias.kuleuven.be/bitstream/123456789/120504/1>> accessed 5 March 2017.

¹⁵ Andreas Kokkinis, 'Rethinking Banking Prudential Regulation: Why Corporate Governance Rules Matter' (2012) *Journal of Business Law* 611, 613.

¹⁶ Kokkinis, 'A primer on corporate governance' (n 1) 4.

¹⁷ Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932) 5.

¹⁸ Heremans, 'A Financial Stability Perspective' (n 14) 5.

¹⁹ Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305, 308.

²⁰ Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 614.

²¹ Zhong Xing Tan, 'Stewardship in the Interests of Systemic Stakeholders: Reconceptualising the Means and Ends of Anglo American Corporate Governance in the Wake of the Financial Crisis' (2014) 9(2) *Journal of Business and Technology Law* 169, 173.

²² Brian Cheffins, *Company Law: Theory, Structure and Operation* (Clarendon Press 1997) 4.

²³ Kokkinis, 'A primer on corporate governance' (n 1) 4.

²⁴ *ibid.*

²⁵ *ibid.* 6.

²⁶ Tan (n 21) 176.

the company not protected by explicit contracts²⁷ and, in the case of insolvency, they will be the residual claimant after all other payments have been made through enforceable contracts. Thus, much of corporate governance and corporate law is geared towards protecting shareholder interests. The unique features of banks heighten the likelihood of these classical agency problems occurring. Those unique features bring into question whether or not the conventional corporate governance model of shareholder protection adequately accommodates banks' unique features.

B. The Unique Features of Banks

The fundamental economic strategy of corporate governance is to minimise or avoid agency costs.²⁸ While this is still true in the case of banks, they have unique features that differ from generic companies, which may warrant an alternative approach to corporate governance. These features include: provision of the public good of financial stability, interconnectivity of the banking sector, opacity of banks and lack of market discipline. For this reason, banks merit independent analysis in view of their importance in the economy and their unique features.

The vital importance of banks in society derives from their duty to provide the public good²⁹ of financial stability. Banks provide complex payment services systems facilitating transactions and, in that respect, they can be said to resemble utility companies providing an 'intangible network of essential importance for society as a whole'.³⁰ They facilitate and generate liquidity.³¹ Moreover, banks are very large employers³² and the financial sector accounts for nearly 10 percent of UK GDP³³ so they play a central role in facilitating and promoting the domestic economy. Finally, banks significantly influence the corporate governance of other companies. This is not only because they are among the largest FTSE 100 companies,³⁴ but also by way of debenture covenants and informal monitoring of financed companies.³⁵ Therefore, ineffective corporate governance at bank level may set a bad example for other

²⁷ Bearnard Sharfman, 'Enhancing the Efficiency of Board Decision Making: Lessons Learned from the Financial Crisis of 2008' (2009) 34(3) *Delaware Journal of Corporate Law* 813, 827-8.

²⁸ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 3.

²⁹ Kokkinis, 'A primer on corporate governance' (n 1) 9 ('one which is indivisible and that no one can be excluded from e.g. national defence').

³⁰ *ibid* 11.

³¹ *ibid* 10: 'as financial intermediaries banks efficiently transfer liquidity from depositors and bondholders to individual, corporate and sovereign borrowers, allowing for economic growth and expansion'.

³² The financial services sector accounts for 7% of total UK employment, see The City UK, *Key Facts about the UK Financial and Related Professional Services* (The City UK, March 2016) 6 <<https://www.thecityuk.com/assets/2016/Reports-PDF/Key-facts-about-UK-financial-and-related-professional-services-2016.pdf>> accessed 3 January 2018.

³³ *ibid* 8.

³⁴ Including Barclays, HSBC, Lloyds Banking Group and RBS, see London Stock Exchange, *FTSE 100* <<http://www.londonstockexchange.com/exchange/prices-and-markets/stocks/indices/constituents-indices.html?index=UKX>> accessed 3 January 2018.

³⁵ Kokkinis, 'A primer on corporate governance' (n 1) 11.

companies: this is of particular significance in the UK as it implements corporate governance on a self-regulatory basis.³⁶

Another distinguishing characteristic of the banking sector is its interconnected nature,³⁷ since banks conduct a major part of their business with other banks (e.g. syndicated loans).³⁸ Interbank lending ensures adequate liquidity for banks to meet liabilities, but risks a 'series of successive losses along a chain of institutions or markets comprising a system'³⁹ This spill-over effect is known as 'systemic risk' and means that problems in one bank can 'infect'⁴⁰ the entire financial system resulting in a serious crisis, such as the 2008-9 crisis. A banking crisis can have severe effects on society, such as curtailed bank lending and causing the whole economy to enter an economic recession resulting in increased unemployment.⁴¹ These adverse effects, which impact upon people who are not part of the decision-making process that caused such effects, are referred to as 'negative externalities'.⁴² It is therefore in the public interest that the corporate governance of banks effectively minimises the likelihood of such negative externalities occurring. However, in the UK, the corporate governance framework focuses on promoting shareholder empowerment, which may not be compatible with this objective: such a framework facilitated excessive risk taking, which resulted in such negative externalities. This will be discussed in more detail in section two. However, disregarding negative externalities, the approach to empower shareholders can be explained in the context of corporate governance due to the higher agency costs experienced by bank shareholders.

Challenging agency distortions in banks stems from the opacity of the sector: this limits the potential for shareholder governance. Bank assets are intrinsically opaque, which undermines the 'efficient market hypothesis' that claims the prices of shares and other securities reflect publicly available information.⁴³ It does not claim that market prices reflect the inherent value of securities, which, for banks, primarily consist of claims against borrowers and financial instruments. As opposed to assets of other companies (e.g. a factory and machinery), a loan portfolio is very difficult to value because it involves investigating the credit worthiness of each borrower to predict rates of default.⁴⁴ As Heremans argues: 'bank balance sheets are notoriously opaque for investors'.⁴⁵

³⁶ Upon recommendation by the Cadbury Report, the UK adopted a 'Comply or explain' approach which allows a company the flexibility to not adhere to the corporate governance framework if a justificatory explanation is provided.

³⁷ Kokkinis, 'A primer on corporate governance' (n 1) 13.

³⁸ A loan offered by a group of lenders.

³⁹ George Kaufman and Kenneth Scott, 'What is Systemic risk, and do Bank Regulators Retard or Contribute to it?' (2003) 7(3) *Independent Review* 371, 372.

⁴⁰ Kokkinis, 'A primer on corporate governance' (n 1) 12.

⁴¹ Paul Gregg and Jonathan Wadsworth, 'Employment in the 2008-2009 Recession' (2010) 4(8) *Economic and Labour Market Review* 37, 38.

⁴² Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

⁴³ Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) *Journal of Finance* 383.

⁴⁴ Kokkinis, 'A primer on corporate governance' (n 1) 21.

⁴⁵ Heremans, 'A Financial Stability Perspective' (n 14) 4.

Further, the opacity of the regulatory structure⁴⁶ may make it hard to value financial instruments. Therefore, the extent to which the market prices of securities reflect their fundamental value is contingent upon: (a) the quality of publicly available information and (b) the costs that investors face to acquire and process this information. In this case, processing information on banks' financial performance is particularly difficult, especially considering the volatility of share prices for a significant period after a crisis.⁴⁷ Accordingly, given there is no feasible way to detect the securities' intrinsic value, one can conclude that at some point investors will over value share prices.⁴⁸

Another agency problem is that management can exploit this deficiency of asset opacity by manipulating share prices to entrench their position. This is by managing the content of periodic financial disclosures (e.g. timing securitisations when share price is low).⁴⁹ This information asymmetry is a severe problem in the banking industry, which makes it difficult to monitor banks⁵⁰ engaging in activity that both decreases shareholder value and risks a financial crisis. Hence, the current framework, which will be examined in due course, is geared towards shareholder protection to overcome the challenge of information asymmetry between management and investors. That asymmetry stems from the opacity of bank assets.

Moreover, agency costs in banks may also be increased due to absent market discipline as a result of opacity. Since the market is unable to distinguish between sound and unsound banks, market confidence will suffer. There is strong empirical support that opacity is increased to a level unique in the banking sector,⁵¹ to the point where even banks themselves find it difficult to assess the riskiness of other banks accurately.⁵² Since investors lack the ability to assess the real value of assets based on available information and trading prices, they are unable to appreciate when increased returns on banks' equities is achieved by increasing leverage and taking on more risk.⁵³ Instead of constraining such level of risk taking, the capital markets actually facilitate such practices. Consequently, shareholders experience severe agency problems in the banking sector due to the unique opacity of bank assets.

⁴⁶ Ross Levine, 'The Corporate Governance of Banks: A Concise Discussion of Concepts and Evidence' (2004) World Bank Policy Research Working Paper 3404 <<https://openknowledge.worldbank.org/bitstream/handle/10986/14239/WPS3404.pdf?sequence=1&isAllowed=y>> accessed 3 January 2018.

⁴⁷ It is noted that this is more so than in non-financial firms, see Andrew Atkeson and William E Simon Jr, 'The Rising Fear in Bank Stock Prices' *The Wall Street Journal* (New York, 28 November 2011) <<https://www.wsj.com/articles/SB10001424052970204531404577052493270860130>> accessed 4 January 2018.

⁴⁸ Lynn A Stout, 'The Mechanisms of Market Efficiency' (2003) 28(4) *Journal of Corporation Law* 635.

⁴⁹ Kokkinis, 'A primer on corporate governance' (n 1) 24.

⁵⁰ Michael King, 'The Cost of Equity for Global Banks: A CAPM perspective from 1990 to 2009' (September 2009) *BIS Quarterly Review* 56, 70.

⁵¹ Giuliano Iannotta, 'Testing for Opaqueness in the European Banking Industry: Evidence from Bond Rating Agencies' (2006) 30(3) *Journal of Financial Services Research* 287.

⁵² Mark Flannery, Simon Kwan and Mahendrarajah Nimalendran, 'Market Opaqueness of Banking Firms' Assets' (2004) 71(3) *Journal of Financial Economics* 419.

⁵³ King, 'The Cost of Equity for Global Banks' (n 50) 70-71.

Furthermore, the market perceives banks as being 'too big to fail'⁵⁴ so bondholder monitoring is weakened by an implied government guarantee.⁵⁵ This refers to government bailouts of banks, as opposed to allowing banks to collapse. This difference in government approach owes itself to the fact banks are perceived as being so ingrained in the economy.⁵⁶ Consequently, the results of such a collapse would be far more devastating than the ostensibly unfair results of paying for bailouts with public money.⁵⁷ Deposit insurance provided by the UK Financial Services Compensation Scheme⁵⁸ also neutralises depositor monitoring. Depositors also face the problem of having a lack of expertise and a weak bargaining position in an oligopolistic retail banking market.⁵⁹ This idea of shifting risk of failure to the taxpayer is a moral hazard problem,⁶⁰ which is a concept applicable to banks specifically, rather than generic companies, due to the crucial public utility of financial stability that banks provide. Therefore, these wider macroeconomic distortions in the case of banks' distress explain the special concern for corporate governance in banks. While the conventional corporate governance approach in banks conforms to challenging agency problems, it is open to question whether this framework ensures financial stability.

C. The Conventional Corporate Governance Approach in Banks

While some scholars observe that a major cause of the financial crisis was the lack of an effective corporate governance framework,⁶¹ others argue that it was not the failure but, rather, the success of *conventional* corporate governance - having the objective of shareholder protection - that led to the crisis.⁶² Cheffins also believes that corporate governance had no deficiencies, suggesting that the crisis was due to extremely efficient adherence to the corporate governance model of shareholder value

⁵⁴ Peter Goodman, 'Too Big to Fail?' *The New York Times* (New York, 20 July 2008) <<http://www.nytimes.com/2008/07/20/weekinreview/20goodman.html>> accessed 4 January 2018.

⁵⁵ Donald Morgan and Kevin Stiroh, 'Bond market discipline of Banks: Is the Market tough enough?' (1999) Federal Reserve Bank of New York Staff Report 95/1999, 1 <https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr95.pdf> accessed 3 January 2018.

⁵⁶ Georgina Tsagas, 'The Market for Corporate Control in the Banking Industry', in Iris H-Y Chiu and Michael McKee (eds), *The Law on Corporate Governance in Banks* (Elgar Financial Law and Practice 2015) 286.

⁵⁷ John Armour and Wolf-George Ringe, 'Renaissance and Crisis' (2010) ECGI Law Working Paper No 175/2011, 40 <http://www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id1691688.pdf> accessed 3 January 2017.

⁵⁸ The FSCS provides protection for eligible customers of failed Prudential Regulation Authority-authorized financial services firms. See also Bank of England, 'Financial Services Compensation Scheme' <<http://www.bankofengland.co.uk/pr/Pages/authorisations/fscs/default.aspx>> accessed 3 January 2018.

⁵⁹ Kokkinis, 'A primer on corporate governance' (n 1) 29.

⁶⁰ Heremans, 'A Financial Stability Perspective' (n 14) 6.

⁶¹ David Erkens, Mingyi Hung and Pedro Matos, 'Corporate Governance in the 2007-2008 Financial Crisis: Evidence from Financial Institutions Worldwide' (2012) 18(2) *Journal of Corporate Finance* 389.

⁶² Nicholas Calcina Howson, 'When "Good" Corporate Governance Makes "Bad" (Financial) Firms: The Global Crisis and the Limits of Private Law' (2009) 108(1) *Michigan Law Review* 47.

maximisation, rather than a defective framework.⁶³ This model is adopted because, as mentioned above, the fundamental economic purpose of corporate governance is to reduce agency costs by protecting vulnerable shareholders to address efficiency concerns.⁶⁴ This norm is manifested in statute in the UK: ‘the director of a company must act in a way (...) most likely to promote the success of the company, for the benefit of its members as a whole’.⁶⁵ However, the economic make-up of banks, explained above,⁶⁶ fundamentally alters shareholders’ attitudes to risk. This is a crucial determinant of corporate governance.

The level of optimal risk of shareholders in a bank whose shareholdings are widely dispersed tends to be excessive from a societal perspective.⁶⁷ Collective action among shareholders to decide upon a level of risk at industry-wide level is particularly difficult⁶⁸ due to the dispersal of shareholding in the UK.⁶⁹ Therefore, shareholders of individual banks will support a profit maximisation policy because they will, in any case, suffer the consequences of risk-taking by other banks⁷⁰ as a result of systemic risk. As rational actors, shareholders are not inclined to incur the costs of adopting a less risky strategy when they know that, elsewhere in the industry, other shareholders will not adopt such an approach.

This is a classic example of the ‘prisoner’s dilemma’⁷¹ where the inability of ‘players’ (i.e. shareholders) to coordinate leads to an outcome that reduces the aggregate wealth of the players.⁷² This is an economic analysis of the decision making of individuals that make up a whole system and illustrates how rational decisions can lead to sub-optimal outcomes.⁷³ In the context of banks, it follows that the overall expected value of the banking system is reduced due to the lack of coordination. This analysis also sheds light on the potentially lower levels of risk that shareholders would take if they were able to take collective action.

Additionally, dispersed shareholders face a ‘free rider’⁷⁴ problem, which decreases the incentive of individual shareholders to monitor the management of banks.⁷⁵ Further, this model of shareholder value maximisation is likely to lead to constant pressures on banks’ senior management to take excessive risks. There is empirical evidence in support of this claim: most active shareholders enthusiastically

⁶³ Brian Cheffins, ‘Did Corporate Governance Fail During the 2008 Stock Market Meltdown? The Case of the S&P 500’ (2009) 65 *The Business Lawyer* 1.

⁶⁴ Jensen and Meckling (n 19) 308.

⁶⁵ Companies Act 2006, s 172 (1).

⁶⁶ See ‘The Unique Features of Banks’ above.

⁶⁷ Kokkinis, ‘A primer on corporate governance’ (n 1) 15.

⁶⁸ Bernard Black and John Coffee, ‘Hail Britannia? Institutional Shareholders of UK Companies Under Limited Regulation (1993) 92(7) *Michigan Law Review* 1997.

⁶⁹ John Kay, ‘Kay Review Launch’ (*Department for Business, Innovation and Skills*, 23 July 2012) para 6.12 <<http://webarchive.nationalarchives.gov.uk/20121204121011/http://www.bis.gov.uk/assets/biscore/business-law/docs/k/12-996-kay-review-of-equity-markets-speech-and-presentation.pdf>> accessed 20 March 2017 (The Kay Review).

⁷⁰ Kokkinis, ‘A primer on corporate governance’ (n 1) 16.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 5.

⁷⁴ Where other shareholders can benefit from the action taken by one shareholder without incurring any costs, see The Walker Review (n 7) para 5.16.

⁷⁵ Heremans, ‘A Financial Stability Perspective’ (n 14) 10.

supported further increases in leverage – excessive risk taking in the form of altering the company's capital structure - to increase profits.⁷⁶ Notably, there is a correlation between (a) banks that took higher risks and suffered more during the crisis and (b) the number of institutional shareholders.⁷⁷ Since institutional shareholders are both diversified and influential, it can be suggested that their involvement is likely to have promoted excessive risk taking. This adherence to the traditional corporate governance structure of profit maximisation, rather than a defective corporate governance framework, was, therefore, conducive to the financial crisis.

Given the unique risks that banks face, it is questionable whether maintaining the traditional corporate governance structure is an appropriate approach to take. Firstly, banks have a distinctive capital structure: due to the heavy reliance on debt finance,⁷⁸ since profitability rises as the equity-to-assets ratio falls, banks are more highly leveraged than other companies.⁷⁹ This is because banks' core business activity is to incur debt to lend out further funds to borrowers.⁸⁰ Therefore, even when banks may be in a stable condition, their capital structure appears like that of a near insolvent firm in any other industry.⁸¹ The problem associated with high levels of leverage in banks is that shareholders have stronger economic incentives to support very risky strategies, as they risk only a fraction of their diversified portfolio yet 'reap the benefits from 'betting' the whole of a bank's balance sheet'.⁸²

Furthermore, banks face a continuous risk of a 'crisis of confidence'.⁸³ Since there is a 'maturity mismatch'⁸⁴ of customers' deposits payable on demand and loans issued by banks which are repaid after a fixed period, at which point maturity is realised, no bank can meet a significant amount of their liabilities at any one time. If depositors rush to withdraw their funds,⁸⁵ as a result of – for example – reputational damage, the bank will collapse regardless of financial health.

This consequence is due to the collective action problem mentioned above, where depositors are unable to coordinate their actions. These depositors behave in a self-interested manner like the aforementioned 'rational actor' because they will withdraw deposits to protect their own personal wealth without due regard to the actions of other depositors *and* the aggregate effect on the whole system.

⁷⁶ Parliamentary Commission on Banking Standards, *Changing Banking for Good* (19 June 2013, HL 27-1, HC 17-1) paras 326-7.

⁷⁷ David Erkens, Mingyi Hung and Pedro Matos, 'Corporate Governance in the 2007-2008 Financial Crisis: Evidence from Financial Institutions Worldwide' (2012) 18(2) *Journal of Corporate Finance* 389.

⁷⁸ A typical bank is 95% debt financed and only 5% equity financed, see Jonathan Macey and Maureen O'Hara, 'The Corporate Governance of Banks' (2003) 9(1) *Federal Reserve Bank of New York Economic Policy Review* 91, 97.

⁷⁹ Harry DeAngelo and Rene Stulz, 'Liquid-Claim Production, Risk Management, and Bank Capital Structure: Why High Leverage is Optimal for Banks' (2013) ECGI - Finance Working Paper No 356 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254998> accessed 1 January 2018.

⁸⁰ Kokkinis, 'A primer on corporate governance' (n 1) 14.

⁸¹ The Modigliani-Miller Theorem suggests that profitability of a firm is independent of capital structure and reliance on debt, see: Franco Modigliani and Merton Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' (1958) 48(3) *American Economic Review* 261.

⁸² Kokkinis, 'A primer on corporate governance' (n 1) 15.

⁸³ *ibid* 11.

⁸⁴ *ibid*.

⁸⁵ Also known as a 'Creditor Run'.

Therefore, creditor confidence is crucial for solvency of banks. The effects of a crisis of confidence are perhaps most damaging to retail banks whose core function is to provide the services of deposit accounts to consumers; the creditors. News about a banking crisis will influence public opinion and consumers may act quickly to retrieve their liquid deposits and the bank will be diminished to cash flow insolvency. To give an extreme example of such a crisis of confidence, this behaviour is best depicted in the ‘bank run’ of Northern Rock before its collapse in 2007.⁸⁶

Also, due to systemic risk, this may happen throughout the entire sector when the reputation of one large bank is damaged. Heremans notes systemic risk is far more serious in the banking sector: ‘The banking system contains powerful propagation mechanisms that can amplify small initial shocks as they are much more interconnected than is the case in other sectors of the economy’.⁸⁷ Opacity of the sector amplifies systemic risk since more opaque banks benefit in times of euphoria but suffer in times of crisis.⁸⁸ These risks that banks face all pose a threat to financial stability, but do not concern shareholders in their pursuit of profit.

Overall, these idiosyncratic economic characteristics of banks warrant special concern for their corporate governance. This is particularly so considering the incentives for shareholders to support high-risk strategies. Therefore, shareholder empowerment as a conventional objective of corporate governance can have negative effects on the resilience of the financial system. Rather than defective corporate governance, the cause of the financial crisis was a result of the success of the shareholder value maximisation model and, therefore, the ‘architecture’⁸⁹ of corporate governance itself. Accordingly, it is of crucial importance to analyse whether subsequent reform addressed the misalignment between shareholder value maximisation and protection of financial stability.

3. Towards the ‘Concerned Investor’?

A. The Stewardship Code

In the post-crisis diagnosis, an ideological paradox emerged: while pressures of shareholder value maximisation were intrinsically linked to the financial crisis, institutional shareholder passivity was identified as one of the fatal causes.⁹⁰ Institutional investment, ‘as a means to manage the savings of many’,⁹¹ has become a ‘global socio economic phenomenon over the last five decades’.⁹² The rise of pension

⁸⁶ Dominic O’Connell, ‘The Collapse of Northern Rock: Ten years on’ *BBC News* (London, 12 September 2017) <<http://www.bbc.co.uk/news/business-41229513>> accessed 20 January 2018.

⁸⁷ Heremans, ‘A Financial Stability Perspective’ (n 14) 5.

⁸⁸ Jeffrey Jones, Wayne Lee and Timothy Yeager, ‘Opaque Banks, Price Discovery and Financial Instability’ (2012) 21(3) *Journal of Financial Intermediation* 383.

⁸⁹ Tan (n 21) 200.

⁹⁰ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 3.

⁹¹ Iris H-Y Chiu and Dionysia Katelouzou, ‘Making a Case for Regulating Institutional Shareholders’ *Corporate Governance Roles* (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896748> accessed 3 January 2018.

⁹² *ibid.*

fund management for retirement savings⁹³ and a lucrative insurance industry⁹⁴ may account for this. The implications of investment management discretion have a profound effect at a macroeconomic level, not only as a cornerstone of the investment economy, but also as an intermediation of savers' resources for long-term wealth creation.⁹⁵

This is concerning because UK institutional shareholders (hereinafter "shareholders") have traditionally taken a 'hands off'⁹⁶ approach to corporate governance. This was evident in the lead up to, and during, the financial crisis: risky strategies in the pursuit of profit were in the interests of shareholders. Therefore, shareholders were reluctant to change that approach, since they would benefit considerably if the strategy paid off. Shareholders were accused of being 'supine'⁹⁷ and doing 'nothing to prevent executives going off the rails'.⁹⁸ Certainly, '[i]nvestors have failed in one of their core tasks, namely the effective scrutiny and monitoring of the decisions of the boards and executive management in the banking sector'.⁹⁹ Lord Myners noted that the Institutional Shareholder Committee (ISC) had 'sunk beneath the surface just when it [was] needed most'.¹⁰⁰ Nevertheless, the widespread inactivity displayed by shareholders contributed to the propagation of the concept of the 'ownerless corporation'.¹⁰¹ This suggests such shareholders were uncomfortable with the responsibilities of ownership in a corporate context as opposed to investment and, therefore, did not embrace their role as 'owners' of the company.

As a result, the financial crisis accelerated shareholder activism up the reform agenda. This refers to the extent to which shareholders become involved in the monitoring and supervision of companies in which they hold shares. The Walker Review¹⁰² was commissioned by the government to investigate corporate governance deficiencies during the crisis. Walker believed 'a more productive and informed relationship between directors and shareholders should help directors in better management of company affairs'.¹⁰³ The idea was for shareholders to take a more

⁹³ Gordon Clark, 'Institutional Investors and Risk Management' in Gordon Clark, Adam Dixon and Ashby Monk (eds) *Managing Financial Risks: From Global to Local* (Oxford University Press 2012) 87.

⁹⁴ Due to the 'Housing Market Bubble', see: Richard Anderson, 'Financial Services: Boom and Recession' (2009) 39 Federal Reserve Bank of St Louis Economic Synopses 1.

⁹⁵ Adam Harmes, *Unseen Power: How Mutual Funds Threaten the Political and Economic Wealth of Nations* (Canada Stoddart 2001) 18.

⁹⁶ Brian Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73(6) *Modern Law Review* 1004, 1004.

⁹⁷ See Jennifer Hughes, 'FSA Chief Lambasts Uncritical Investors' *Financial Times* (London, 12th March 2009) 1.

⁹⁸ John O'Doherty, 'State to own 43% of merged Lloyds-HBOS' *Financial Times* (London, 12 January 2009) <<https://www.ft.com/content/845e7956-e079-11dd-b0e8-000077b07658>> accessed 4 January 2018.

⁹⁹ Treasury Committee, *Banking Crisis: Reforming Corporate Governance and Pay in the City* (HC 2008-9, 519-I) 64.

¹⁰⁰ Paul Myners, 'Association of Investment Companies' (n 9) para 48.

¹⁰¹ Paul Myners, 'IMA Annual Dinner' (*HM Treasury*, 19 May 2009) para 24 <http://webarchive.nationalarchives.gov.uk/20091207163737/http://hm-treasury.gov.uk/speech_fsst_190509.htm> accessed 3 January 2018.

¹⁰² The Walker Review (n 7).

¹⁰³ *ibid* 78.

‘hands on’ role in corporate affairs, which would do a great deal to keep agency costs in check.¹⁰⁴

Walker also underlines the ‘implicit social legitimacy’¹⁰⁵ that can be accrued from the discharge of ownership responsibilities, due to their influential position in the economy. He thus recommended adherence to a Stewardship Code (SC), based on the ISC Code of Responsibilities, to promote ownership among shareholders for a socially desirable level of shareholder behaviour.¹⁰⁶ Walker envisaged that, instead of statutory reform on fiduciary duties, shareholders should voluntarily commit themselves to a stewardship obligation, or explain where they were unwilling to do so¹⁰⁷ (known as “comply or explain”). The SC, which is complementary to the UK Corporate Governance Code,¹⁰⁸ was enacted by the FRC six months later. However, it should be noted that the idea of voluntary commitment to corporate governance originated in the Cadbury Report in 1994.¹⁰⁹

The Walker Review recognised that the financial crisis highlighted the need for a radical rethink of corporate governance within banks. This section evaluates whether or not Walker’s recommendations, present in the SC, fulfil this need. Indeed, not only must the SC generate net benefits, it must inevitably entail safer and sounder banks that safeguard financial stability.¹¹⁰ Importantly in this context of reform, shareholder activism became a ‘fashionable term’¹¹¹ following the conversation about corporate governance’s role in the financial crisis.¹¹² Thus, the proposition for shareholder activism was a politically appropriate one.¹¹³ However, the pursuit of seeking political appropriateness does not always result in a well-drafted framework.

Principally, the way in which the Code is drafted poses some problems as to its application, which – in turn – limits its effectiveness. This may primarily be a result of the hasty fashion in which it was enacted: its development was criticised for being ‘a remarkably speedy affair’.¹¹⁴ Notably, given the UK was among the leading forces pushing for corporate governance policies that contributed to the financial crisis,¹¹⁵ there was increasing pressure to address these issues by acting ‘quickly and, preferably, visibly’.¹¹⁶ After a rushed consultation period, the SC was published without making any major changes to the ISC Code: ‘in other words, a 20 year old second hand code was simply rebranded and sold (...) as a new one’.¹¹⁷

¹⁰⁴ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1005.

¹⁰⁵ The Walker Review (n 7) 70.

¹⁰⁶ Chiu and Katelouzou (n 91) 17.

¹⁰⁷ The Walker Review (n 7) 70.

¹⁰⁸ UK Stewardship Code (n 8) 1.

¹⁰⁹ Cadbury Report (n 4).

¹¹⁰ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1007.

¹¹¹ Demetra Arsalidou, ‘Institutional Investors, Behavioural Economics and the Concept of Stewardship’ (2012) 6(6) *Law and Financial Markets Review* 410, 410.

¹¹² Treasury Committee, *Banking Crisis: Reforming Corporate Governance and Pay in the City* (n 99) 57.

¹¹³ Arsalidou (n 111) 410.

¹¹⁴ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 223.

¹¹⁵ *ibid* 222; Anglo-American conceptions of corporate governance traditionally focus on shareholder value maximisation. One such policy may be the legalisation of share buy-backs.

¹¹⁶ *ibid*.

¹¹⁷ Lee Roach, ‘The UK Stewardship Code’ (2011) 11(2) *Journal of Corporate Law Studies* 463, 468.

Crucially, these principles were not tested prior to their introduction. Although government backing of a Code in an attempt to motivate investors' engagement is noteworthy, efforts may be rendered futile due to the lack of clarity surrounding shareholders' duties.¹¹⁸ A basic error was made: the SC fails to define the meaning of "stewardship".¹¹⁹ Differing interpretations of this concept allow for confusion and misunderstanding to prevail in the exercise of stewardship, which is detrimental to the objective of assertive monitoring. It is striking that even though this mistake was recognised,¹²⁰ attempts to clarify this in the 2012 version of the Code 'failed miserably'.¹²¹ The FRC used the term 'stewardship' in its definition of stewardship:

Stewardship aims to promote the long-term success of companies in such a way that the ultimate providers of capital also prosper. Effective stewardship benefits companies, investors and the economy as a whole. In publicly listed companies responsibility for stewardship is shared. The primary responsibility rests with the board of the company, which oversees the actions of its management. Investors in the company also play an important role in holding the board to account for the fulfilment of its responsibilities.¹²²

The above quote does not explicitly define stewardship. Rather, it focuses on what stewardship aims to achieve. It does not explain how 'holding the board to account' can be achieved by stewardship, what kind of acts constitute stewardship or to whom the shareholders (stewards) are accountable to.

The attempt also focuses on the aims of stewardship rather than explaining the concept by, for example, stipulating to whom shareholders are accountable. As Chiu argues: 'if we cannot pinpoint for whom institutional shareholders should act as stewards, then it becomes difficult to judge the exercise of stewardship allowing institutions to dominate the definition of stewardship'.¹²³ This seriously hampers the ability of shareholders to engage in the true spirit of stewardship, which is the only way it can achieve success on a self-regulatory basis, since the fundamental concept of stewardship is unclear.

Therefore, it appears that the SC was more effective in providing publicity for the UK's corporate governance standards than implementing meaningful principles to be embedded in corporate governance culture. This risks the notion of stewardship becoming 'lightweight (...) mere rhetoric'.¹²⁴

¹¹⁸ UK Stewardship Code (n 8) 5 ('Principles of the Code').

¹¹⁹ *ibid* 1 ('Stewardship and the Code'). Note how the FRC explain the aims of Stewardship without defining it first.

¹²⁰ Baroness Hogg, Former FRC Chairman, quoted in Reisberg, 'The UK Stewardship Code: on the Road to Nowhere?' (n 10) at footnote 55.

¹²¹ Reisberg, 'The UK Stewardship Code: on the Road to Nowhere?' (n 10) 230.

¹²² UK Stewardship Code (n 8) 1 ('Introduction: Stewardship and the Code').

¹²³ Iris H-Y Chiu, 'Institutional Shareholders as Stewards: Towards a New Conception of Corporate Governance' (2012) 6(2) *Brooklyn Journal of Corporate, Financial and Commercial Law* 387, 427.

¹²⁴ *ibid* 431.

B. Market Failures

The SC is the most detailed attempt to date in the UK to address the relationship between shareholders and the board of directors of public companies.¹²⁵ Its aspirations to ensure a concomitant governance and accountability framework for institutions in the wider public interest¹²⁶ is commendable, especially with the benefit of hindsight of the financial crisis.

Indeed, when measured against international standards, the Code is considered to be one of the leading benchmarks of what constitutes ‘good corporate citizenship’.¹²⁷ However, these appraisals may appear to be hollow and it is questionable whether or not the Code has achieved its objectives: the Kay Review acknowledged that ‘the extent to which the Stewardship Code has contributed to solv[ing] this problem is unclear’.¹²⁸

The SC faces challenges at the outset of its application due to inherent structural market deficiencies.

Firstly, share ownership trends changed dramatically by the mid-2000s.¹²⁹ Lynn notes ‘[i]t was a benign image (...) big companies were owned by everyone – and their profits funded our retirement. Attractive as it sounds (...) it is not really true anymore’.¹³⁰ UK shareholders migrated steadily away from UK share ownership, perhaps as a result of new pension fund regulations and changes in accounting treatment.¹³¹ Additionally, a maturing workforce meant pension funds had to pay much more attention to imminent pay-outs and, in this context, bonds matched their priorities better than shares.¹³²

Simultaneously, UK share registers had internationalised to a striking degree due to globalisation of financial markets.¹³³

While foreign ownership of stocks grew from one sixth to more than two fifths, the proportion of shares of publicly quoted companies in the UK owned by investors likely to be affiliated with the ISC had fallen from nearly three fifths to less than one third.¹³⁴

The UK investment industry used to be very close-knit,¹³⁵ managing equities worth fifty-five per cent of the market value of total quoted equities in 1994.¹³⁶

¹²⁵ Chiu and Katelouzou (n 91) 19.

¹²⁶ *ibid* 21.

¹²⁷ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 217.

¹²⁸ The Kay Review (n 69) 13.

¹²⁹ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1017.

¹³⁰ Matthew Lynn, ‘Power in Different Hands as City of London goes Global’ *The Business* (11 August 2007) 1.

¹³¹ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1018.

¹³² Brian Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2008) 389-390.

¹³³ Department for Business, Innovation and Skills, *A Long-Term Focus for Corporate Britain* (UK Government, 25 October 2010) 18 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31563/10-1225-long-term-focus-corporate-britain.pdf> accessed 4 January 2018 (A Long-Term Focus for Corporate Britain).

¹³⁴ Office for National Statistics, ‘Statistical Bulletin: Share Ownership Survey 2008’ (27 January 2010) 4.

¹³⁵ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1019.

¹³⁶ Geoff Stapledon, *Institutional Shareholders and Corporate Governance* (Clarendon Press 1996) 48.

Contrastingly, by the mid-2000s, major foreign investors – such as Sovereign Wealth Funds – would likely opt to invest in UK based companies without relying on a UK based fund manager.¹³⁷ Therefore, the SC appears oblivious to the fact that, due to shifting ownership trends, key investors – particularly overseas investors – fall outside the SC's mandate.¹³⁸ The FRC said that it 'hope(s) that investors outside the UK will commit to the Code' but recognises 'that, in practice, local institutions will usually take the lead in engagement',¹³⁹ explaining that domestic shareholders are the primary focus of the SC.¹⁴⁰

Further, in the revised version of the Code, the FRC appears to concede to foreign investors who expressed concern at first instance: 'overseas investors who follow other national codes (...) should not feel the application of the Code duplicates or confuses their responsibilities'.¹⁴¹ Therefore, it appears that efforts to promote compliance with the Code at international level are halted. This severely weakens the effectiveness of the SC since 'there has been a very substantial reduction in the overall share of UK equity holdings in the hands of UK-domiciled long-only institutions'.¹⁴² Further, it is reasonable to infer that overseas investors have less incentive than home investors to comply with a code aimed at promoting national economic success.¹⁴³ This shift in domestic ownership presents a challenging market failure inhibiting the coverage of the SC.

Moreover, another market failure impeding the SC's influence is the diversification of shareholding in the UK. This is a modern risk management strategy,¹⁴⁴ whereby equity portfolios are comprised with hundreds or thousands of shares¹⁴⁵ spread amongst different types of assets and issuers.¹⁴⁶ Consequently, resources, including time and effort, that investors are able to devote to monitoring a specific company are finite.¹⁴⁷ Diffused share ownership also leads to passivity where investors act simply as 'money capitalists (...) disinterested and uninvolved in the management'.¹⁴⁸

Diversification also entails shorter holdings of stock which has led to somewhat of an 'early exit culture'¹⁴⁹ in the highly liquid stock market.¹⁵⁰ Institutional

¹³⁷ Cheffins, 'The Stewardship Code's Achilles' Heel' (n 96) 1019.

¹³⁸ *ibid* 1013.

¹³⁹ Financial Reporting Council, *Implementation of the Stewardship Code* (July 2010) 6 <<http://www.frc.org.uk/getattachment/e27f3823-7ae3-4d21-9971-3810f709e12c/Implementation-of-Stewardship-Code-July-20103.pdf>> accessed 14 January 2018.

¹⁴⁰ UK Stewardship Code (n 8) 2.

¹⁴¹ *ibid* para 9.

¹⁴² The Walker Review (n 7) 27

¹⁴³ Cheffins, 'The Stewardship Code's Achilles' Heel' (n 96) 1021.

¹⁴⁴ The Kay Review (n 69) para 6.12.

¹⁴⁵ Simon Wong, 'Why Stewardship is proving to be Elusive for Institutional Investors' (2010) *Butterworths Journal of International Banking and Financial Law* 406, 406.

¹⁴⁶ Kokkinis, 'A primer on corporate governance' (n 1) 6.

¹⁴⁷ Reisberg, 'The Stewardship Code: Road to Nowhere' (n 10) 234.

¹⁴⁸ Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *Modern Law Review* 32, 47.

¹⁴⁹ Arad Reisberg, 'The Role of Institutional Shareholders: Stewardship and the Long/Short Term Debate' in Iris H-Y Chiu and Michael McKee (eds), *The Law on Corporate Governance in Banks*, (Elgar Financial Law and Practice 2015) 110.

¹⁵⁰ Cheffins, *Corporate Ownership and Control* (n 132).

shareholders prefer not to be ‘locked in’¹⁵¹ and instead want ‘ample scope to off-load underperforming assets when appropriate’.¹⁵² Wong remarks that shareholders commonly resort to ‘selling their shares as a preferred method of discontent’.¹⁵³ This further diminishes incentives for investors to engage in stewardship of boards since there is no attached long-term commitment.

Diffusion of share ownership in the market exposes the risk of free-riding.¹⁵⁴ Benefits of stewardship are distributed to shareholders on an equal basis, in the form of more sustainable returns, for example, regardless of the costs of stewardship, which may be disproportionately incurred by certain shareholders. This may be a persuasive deterrent to those considering adopting the role of monitoring which may result in a widespread lack of willingness among shareholders to engage. These shareholders may be more inclined to bet on being able to ‘free-ride’ off of another shareholder’s efforts. This is especially so given the shareholder’s relatively small shareholding in an individual company in the context of diversified portfolios.

Additionally, fragmentation of share ownership exacerbates the ‘collective action problem’,¹⁵⁵ since there is a general lack of coherence in a variety of voices expressing different concerns.¹⁵⁶ However, the SC appears to overlook this, basing the Code on the assumption that investors can come together in a forum for collaborative stewardship: Principle 5 notes that ‘Institutional Investors should be willing to work collectively’.¹⁵⁷ Therefore, the SC fails to account for change in ownership structures in the UK, which is seriously detrimental to the effectiveness of the Code in terms of its practical scope and effectiveness.

Another structural market deficiency that limits the SC’s effectiveness is the ‘explosion of intermediation in the investment chain (...) [which has led to] increased potential for misaligned incentives’.¹⁵⁸

The chain of intermediaries from the ultimate beneficiaries to the company has become ‘much longer and much more complicated than the traditional theoretical model would suggest’.¹⁵⁹ The specialisation of roles has prompted the inclusion of various new actors, such as investment consultants. This distances the ultimate beneficiary further from company activities, introducing increased agency costs. Crucially, this weakens the ‘owner mind-set’¹⁶⁰ and lessens the sense of accountability between the ultimate investor and company.¹⁶¹ Therefore, the SC’s framework for monitoring and engagement is not well suited to the modern shareholding market.

Additionally, insufficient expertise of shareholders may act as another deterrent to engagement. Many shareholders believe that it is unrealistic for them, as

¹⁵¹ Cheffins, ‘The Stewardship Code’s Achilles’ Heel’ (n 96) 1014.

¹⁵² Andrew Hill, ‘Preacher Myners is right to raise hell with investors’ *Financial Times* (London, 22 April 2009) 18.

¹⁵³ Wong (n 145) 408.

¹⁵⁴ The Walker Review (n 7) 71.

¹⁵⁵ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 232.

¹⁵⁶ See the comments of the former CEO of Standard Life, quoted in: Kate Burgess, ‘Capitalising on a societal shift in sentiment’ *Financial Times* (London, 22 September 2010) 17.

¹⁵⁷ UK Stewardship Code (n 8) 8 (‘Principle 5’).

¹⁵⁸ The Kay Review (n 69) 10.

¹⁵⁹ A Long-Term Focus for Corporate Britain (n 133) para 4.4.

¹⁶⁰ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 233.

¹⁶¹ Wong (n 145) 407.

opposed to the board of directors, to ascertain if a company is underperforming and to construct well-informed solutions.¹⁶² Alternatively, even if those shareholders do engage, it may be just as dangerous to corporate health as dominant boards in which they hold shares: when monitoring does happen, it is common for less qualified and more junior staff to carry out stewardship duties.¹⁶³ This reflects a degree of scepticism about the value of shareholder stewardship. These shareholders thus lack the expertise and experience to be able to adequately 'steward' or control excessive risk taking made by such dominant boards or, further, they may even encourage such behaviour if they believe their returns would benefit from it. Therefore, if shareholders are unwilling to dedicate sufficient resources towards stewardship there may be unintended consequences of engagement.

Furthermore, Wong suggests that another impediment to stewardship - in the interests of monitoring long-term corporate governance - is the 'inappropriate performance metrics [used by shareholders] and financial arrangements that promote trading and short-term returns,'¹⁶⁴ such as focus on quarterly reports and share prices. This emphasises the difficulty that shareholders face in measuring the company's performance against its long-term strategy, which obstructs the SC's aim of stewarding healthy management. Although Kay recommended that 'companies should try to disengage from the process of managing short-term earnings, expectations and announcements',¹⁶⁵ Wong argues that this issue pervades the market and will only be resolved with structural reform at industry level.¹⁶⁶ This emphasises the traditional role of shareholders and whether this is compatible with the concept of them performing the role of stewards.

Therefore, the current share ownership market struggles to facilitate the SC's aim of monitoring and stewardship. As a result, the SC has not bolstered shareholder engagement to the extent that it anticipated. Somewhat mistakenly, the SC fundamentally presupposes that shareholder empowerment produces positive effects. The SC promoted the belief that shareholders are part of the solution, not part of the problem.¹⁶⁷ However, this notion may be misguided.

C. Behavioural Economics and Short-Termism

Even in the absence of market failures, there would still be a major impediment to the success of the SC. The Code is criticised for being 'mono dimensional':¹⁶⁸ it addresses only market failures and pays little attention to the character of institutional shareholders. This is disappointing for a code that instructs such shareholders how to behave. It fails to recognise that 'investors do not act like computers in financial

¹⁶² Pauline Skypala, 'Heads Lock on Shareholder Oversight' *Financial Times* (London, 12 March 2009) 6.

¹⁶³ Michael Gleinster, 'Will the Kay Review have a Long-Term Impact on the Investment Chain?' (*Thomas Murray IDS*, 5 April 2013) <<http://www.ids.thomasmurray.com/myInvestorCircle/will-kay-review-have-long-term-impact-investment-chain>> accessed 3 January 2018.

¹⁶⁴ Wong (n 145) 406.

¹⁶⁵ The Kay Review (n 69) 13, see 'Recommendation 6'.

¹⁶⁶ Wong (n 145) 411.

¹⁶⁷ Ben Heineman, 'A Stewardship Code for Institutional Investors' (*Harvard Business Review*, 18 January 2010) <<https://hbr.org/2010/01/a-stewardship-code-for-institu>> accessed 20 March 2017.

¹⁶⁸ Arsalidou (n 111) 415.

models; behavioural finance replaces these idealised decision makers with real and imperfect people who have social, cognitive and emotional biases.¹⁶⁹ These imperfections and biases may adversely affect their ability to make sound economic decisions. Instead, the SC blindly purports to advance widespread shareholder activism, which may have dangerous consequences.

The SC was enacted on the assumption that shareholder involvement in company affairs is desirable since they are ‘rational actors’.¹⁷⁰ This assumption is reflected through the expectations in the SC that shareholders have detailed knowledge of company affairs and the capability to conclusively determine what constitutes a strong long-term strategy.¹⁷¹ Cheffins comments that this neoclassical economic perception of human behaviour relates to when one ‘makes decisions to improve their personal wellbeing or utility or wealth’.¹⁷²

However, economic theory allows for individual irrationalities.¹⁷³ One should not rely on the assumption of rational behaviour to guarantee that individuals formulate prudent decisions and exercise proper supervision.¹⁷⁴ Arsalidou states that such irrationalities may include optimism, overconfidence, anchoring and adjustment, framing and self-serving bias.¹⁷⁵

For example, investor overconfidence may contribute to flawed decision-making,¹⁷⁶ driving investors to overestimate the possibility of good outcomes and undervalue the possibility of negative outcomes. They are therefore ‘susceptible to joining the “momentum” gain (...) before the bubble bursts.’¹⁷⁷ Accordingly, it is concerning – especially in the banking sector – that, during times of market euphoria, behavioural weaknesses cause investors to ‘ignore the warning signals in data in favour of over-reliance on credit ratings’.¹⁷⁸ This is indicative of how shareholder influence on strategic managerial decisions may play out. After all, shareholders can be just as vulnerable to the same forces of recklessness and self-interest as directors.¹⁷⁹

Further, some investors will ‘often take decisions that are contrary to their own interests because of their aversion to losses or unwillingness to ditch a losing

¹⁶⁹ Julia Hanna, ‘Behavioural Finance – Benefitting from Irrational Investors’ (*Harvard Business School Working Knowledge Newsletter*, 6 June 2007) para 5 <<https://hbswk.hbs.edu/item/behavioral-financebenefitting-from-irrational-investors>> accessed 11 February 2018.

¹⁷⁰ Guido Kordel, ‘Behavioural Corporate Governance from a Regulatory Perspective: Potentials and Limits of Regulatory Intervention to Impact the Conduct of Corporate Actors’ (2008) 9(1) *European Business Organisation Law Review* 29, 32.

¹⁷¹ UK Stewardship Code (n 8) 7 (‘Principle 3: Institutional Investors should monitor their investee companies’).

¹⁷² Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 4.

¹⁷³ *ibid* 5.

¹⁷⁴ Joseph Stiglitz, ‘Regulation and Failure’ in David Moss and John Cisternino (eds), *New Perspectives on Regulation* (The Tobin Project 2009) 11, 16.

¹⁷⁵ Arsalidou (n 111) 415.

¹⁷⁶ ‘Of Manias, Panics and Crashes’ (*The Economist*, 12 June 2003) para 5 <<http://www.economist.com/node/1923462>> accessed 11 February 2018.

¹⁷⁷ Emiliou Avgouleas, ‘The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy’ (2009) 9(1) *Journal of Corporate Law Studies* 23, 33.

¹⁷⁸ Arsalidou (n 111) 415.

¹⁷⁹ *ibid* 417.

strategy.¹⁸⁰ Therefore, since 'the Code's rhetorical and ambiguous premises are more likely to pander to institutions' private interests',¹⁸¹ the assumption that shareholder activism results in positive outcomes is somewhat erroneous.

Much more attention should be paid to the processes shareholders go through to arrive at decisions in the SC and to put systems in place to educate them. Instead, the SC places unrealistic demands on shareholders to act in a way that goes against their instincts. There is convincing evidence of the risk of shareholders making serious mistakes, since it is claimed that they fail to act on perfect information in complex economic contexts.¹⁸² Behavioural science thus renders the current design of stewardship not only ineffective but also dangerous.

Furthermore, unregulated and irrational behaviour exposes short-termism. "Short-termism" refers to 'excessive focus of some corporate leaders, investors and analysts on short-term quarterly earnings and lack of attention to strategy, fundamentals and conventional approaches to long-term value creation'.¹⁸³ Kay believes it is a 'natural human tendency'¹⁸⁴ to make decisions providing immediate gratification at the expense of future returns. He explains this innate bias to action by referring to children who cannot sit without doing something. He questions whether people overcome these biases when they grow up to become corporate leaders. This explanation suggests that short-termism is omnipresent as a part of modern culture.

In the corporate context, short-termism involves excessive focus on achieving high short-term returns. While this is justified by the 'dubious'¹⁸⁵ efficient capital market hypothesis - which stipulates that stock prices accurately reflect the value of companies provided there are no information asymmetries - short-termism has severe implications on growth and development in the economy. This is not merely a theoretical assumption: Andy Haldane - Former Executive Director, Financial Stability at the Bank of England - acknowledged the evidence is 'broadly consistent with popular perceptions. Capital market myopia is real.'¹⁸⁶ For example, when share prices fail to fulfil expectations within the markets, companies will engage in drastic cost cutting, including redundancies, in an attempt to increase share price. Short-termism is also viewed as a significant impediment to growth and development, especially for Small and Medium Enterprises (SMEs).¹⁸⁷ Further, it 'militates against the development of the internationally competitive businesses and industries that are

¹⁸⁰ Brooke Masters, 'Watchdog to Protect 'Irrational' Investors' *Financial Times* (London, 24 January 2012) 1.

¹⁸¹ Chiu and Katelouzou (n 91) 20.

¹⁸² John Maule, 'Take Account of Psychological Factors' *Financial Times* (London, 29 July 2009).

¹⁸³ Dean Kremeyer and Matthew Orsagh, 'Breaking the Short-Term Cycle' (*National Public Radio*, July 2006) 3 <<http://www.npr.org/documents/2006/jul/shortterm2006.pdf>> accessed 3 January 2018.

¹⁸⁴ The Kay Review (n 69) para 6.

¹⁸⁵ Tan (n 21) 200.

¹⁸⁶ Bank of England, 'News Release: The Short Long - Paper by Andrew Haldane and Richard Davies' (*Bank of England*, 9 May 2011), 1 <<https://www.bankofengland.co.uk/-/media/boe/files/news/2011/may/the-short-long-paper-by-andy-haldane-and-richard-davies>> accessed 3 January 2018 (Haldane and Davies).

¹⁸⁷ George Cox, *Overcoming Short-Termism within British Business: the Key to Sustained Economic Growth* (*Policy Forum*, February 2013) 13 <https://www.policyforum.labour.org.uk/uploads/editor/files/Overcoming_Short-termism.pdf> accessed 11 February 2018.

essential to the UK's future economic prosperity'.¹⁸⁸ Worryingly, by facilitating shareholder monitoring and, thus, irrational influence on boards, the Code may produce damaging effects on the economy. Ultimately, it appears unlikely that the SC's principles are convincing enough to 'come to mind in time to override intuition'.¹⁸⁹ Facilitation of shareholder monitoring and, thus, irrational influence by the SC is incompatible with the SC's objective – of enhancing the quality of engagement between shareholders and companies. However, no attempt has yet been made to monitor or curtail this sort of behaviour.

Some remain sceptical as to whether shareholder behaviour can be modified into a socially optimal form envisaged by the SC, since shareholders are inherently unable to fulfil the role of injecting long-termism into corporate culture. The SC is thus removed from the reality of investing. Essentially, stewardship is not the norm in the investment industry, which explains 'rational reticence'¹⁹⁰ among shareholders. In the pursuit of bottom-line returns for its beneficiaries, investors' business models does not allow for sufficient monitoring and engagement with portfolio companies to provide meaningful interaction with corporate governance. Hence, empowerment through stewardship and greater engagement is futile in promoting responsible ownership and would only fuel short-termism.¹⁹¹ This is of particular concern in the case of banks, since shareholders already have an incentive to support risky strategies with short-term benefits due to their economic position, which is adversely affected by severe agency costs.¹⁹²

Accordingly, there is a need for a radical rethink of the concept of stewardship. This is especially true since Walker and Kay now concede that their goal of replacing the anonymous trader with the concerned investor remains 'a long way off'.¹⁹³

The fact that this is no easy task highlights the need to recalibrate the Code in light of its weaknesses. A major lesson should be acknowledged at this point: the Stewardship Code cannot be expected to solve the problem of irresponsible institutional investment in a vacuum. It made a fatal error of disregarding the structural problems that afflict modern investment management practices and characteristics.¹⁹⁴ It also paid insufficient attention to the behavioural weaknesses that prevent 'honest and sincere'¹⁹⁵ stewardship. By ignoring the irrational biases investors face in day-to-day decision-making, there is little scope to embed the true spirit of stewardship in modern corporate culture. Rather, it not only becomes another meaningless box-ticking exercise to investors, but actually facilitates a stronger channel for flawed decision making and short-termism.

¹⁸⁸ *ibid* 6. For an overview of short-termism in the US, see Lucian Bebchuk, 'The Myth that Insulating Boards Serves Long-Term Value' (2013) 113(6) *Columbia Law Review* 1637.

¹⁸⁹ Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioural Economics' (2003) 93(5) *American Economic Review* 1449, 1469.

¹⁹⁰ Ronald Gilson and Jeffrey Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113(4) *Columbia Law Review* 863, 867.

¹⁹¹ Lorraine Talbot, 'Why Shareholders Shouldn't Vote: A Marxist – Progressive Critique of Shareholder Empowerment' (2013) 76(5) *Modern Law Review* 791, 812.

¹⁹² Jensen and Meckling (n 19).

¹⁹³ Parliamentary Commission on Banking Standards, *Changing Banking for Good* (2013-14, HL 27-III; HC 175-III) para 663.

¹⁹⁴ Wong (n 145) 408.

¹⁹⁵ Arsalidou (n 111) 417.

The SC thus represents a 'risky shift in regulatory stance.'¹⁹⁶ It does *not* fundamentally alter the architecture of corporate governance away from shareholder value maximisation to entity preservation,¹⁹⁷ which is a shift required in the banking sector. Although shareholder empowerment has the potential to produce positive effects, more should be done to strengthen shareholders and couple empowerment with accountability. Unfortunately, the recent Green Paper¹⁹⁸ proposals for corporate governance reform do not appear to acknowledge this.

4. *The Limits of Private Law*

A. The Case for Supervision

The Stewardship initiative does little to shift the 'quick buck mentality'¹⁹⁹ at the core of the problems that contributed to the financial crisis. Notwithstanding the deficiencies of the Stewardship Code, and the risks associated with shareholder empowerment in bank governance, the government still appears to be 'seduced by the rhetoric of shareholder activism'.²⁰⁰

The recent Green Paper on Corporate Governance reform, published in November 2016,²⁰¹ falls short of addressing the underlying challenges that shareholders face. Its three main proposals relate to: (1) executive pay that is unrelated to performance; (2) strengthening shareholder; and (3) wider stakeholder voice and extending regulations to private companies (in response to the liquidation of British Home Stores). This demonstrates a piecemeal approach to reform by viewing separate issues in a vacuum and not as a systemic issue. Arsalidou suggests a 'careful redesign',²⁰² yet the government lends its focus to superficial solutions²⁰³ rather than approaching problems as an underlying issue that requires a cultural change.

These proposals thus represent a knee-jerk reaction to corporate scandals without considering the root problems. Fine tuning the existing corporate governance framework will do little to overhaul fundamental risk attitudes, which is so urgently needed in the banking sector.

Potential future reforms appear inadequate in fulfilling the objective of promoting a more stable investment culture, especially in banking. There is no

¹⁹⁶ *ibid.*

¹⁹⁷ Kokkinis, 'A primer on corporate governance' (n 1) 35.

¹⁹⁸ Corporate Governance: Green Paper (n 11).

¹⁹⁹ Department for Business, Innovation and Skills, 'Government Sets out Steps to Change Culture in UK Equity Markets' (*UK Government*, 22 November 2012) para 5 <<https://www.gov.uk/government/news/government-sets-out-steps-to-change-culture-in-uk-equity-markets>> accessed 20 March 2017.

²⁰⁰ Lorraine Talbot, 'Polanyi's Embeddedness and Shareholder Stewardship: a Contextual Analysis of Current Anglo-American Perspectives on Corporate Governance' (2011) 62(4) *Northern Ireland Legal Quarterly* 451, 460.

²⁰¹ Corporate Governance: Green Paper (n 11).

²⁰² Arsalidou (n 111) 417.

²⁰³ For example, the proposal to have workers on boards would provide little meaningful impact as input must be in the best interests of the company as a whole, not one constituent such as employees.

attention given to bank-specific corporate governance or the fact that more shareholder empowerment does not necessarily produce socially optimal results. Some argue that this requires rethinking the model of corporate governance.²⁰⁴ Currently, the UK adopts an 'Enlightened Shareholder Value' model, which is codified in the Companies Act 2006,²⁰⁵ and provides that companies must consider other stakeholders when acting in a way they consider promotes the success of the Company. Since the Act states that the 'success of the company' is for the 'benefit of its members as a whole',²⁰⁶ directors must act in a way that primarily produces value for shareholders, but consider other stakeholders whilst doing so. Haldane explains that this is essentially an explicit statutory statement of shareholder primacy.²⁰⁷ Although the shareholder primacy model may have detrimental effects in the banking industry, it is out-with the scope of this article to explore the debate on whether or not there should be a broader 'theory of the firm'²⁰⁸ to account for stakeholders beyond shareholders. Regardless of the rivalries between shareholder and stakeholder centrist models, corporate governance failures tend to happen 'because people are breaking the rules of shareholder value, not enacting them'.²⁰⁹ It is, therefore, attitudes and behaviour that future corporate governance reform should primarily address.

It is disappointing that there has been no acknowledgment at UK Government level of the unrealistic demands placed on shareholders in the current environment. The aim to require shareholders to take a socially constructive role in corporate governance on a voluntary basis is fundamentally flawed, since it is incompatible with their pursuit of profit maximisation. Shareholders lack the central quality – detachment from share ownership – required to be good stewards.

Instead of the introduction of incentives for good stewardship, such as weighted dividends²¹⁰ or tax benefits,²¹¹ enthusiastic stewardship has been made less feasible since the publication of the Financial Conduct Authority's intention to drive down fees that fund managers may charge investors for their services in an attempt to increase competition in the asset management sector.²¹² A lower income may well have a negative effect on the fund management industry's willingness to undertake higher levels of engagement and monitoring. Paul Lee - of Hermes Equity Ownership Services, which advises institutional shareholders - sympathises with the

²⁰⁴ Tan (n 21) 169.

²⁰⁵ Companies Act 2006, s 172.

²⁰⁶ *ibid* s 172(1).

²⁰⁷ Andrew Haldane, 'Who Owns a Company?' (*Bank for International Settlements*, 22 May 2015) 6 <<http://www.bis.org/review/r150811a.pdf>> accessed 3 January 2018.

²⁰⁸ Jensen and Meckling (n 19) 305.

²⁰⁹ 'Shareholder Value: Analyse This' *The Economist* (London, 31 May 2016) <<https://www.economist.com/news/business/21695940-enduring-power-biggest-idea-business-analyse>> accessed 3 January 2018.

²¹⁰ As suggested in Tamara Belinfanti, 'Shareholder Cultivation and New Governance' (2014) 38 *Delaware Journal of Corporate Law* 789, 845.

²¹¹ As suggested in Arad Reisberg, 'The Notion of Stewardship from a Company Law Perspective: Re-defined and Re-assessed in Light of the Recent Financial Crisis?' (2011) 18(2) *Journal of Financial Crime* 126, 132.

²¹² Financial Conduct Authority, *Asset Management Market Study Final Report* (June 2017) para 1.26 <<https://www.fca.org.uk/publication/market-studies/ms15-2-3.pdf>> accessed 16 January 2018.

'intermediaries Kay rails against'.²¹³ Lee noted that Kay 'does not propose to significantly change their incentives', so it is 'hard to understand why more would actively seek to rise to the challenge he lays out.'²¹⁴ It is therefore legitimate to conclude that the SC does not establish more than a mere box-ticking exercise. Similarly, the assumptions upon which the SC was enacted – namely that shareholders are able to act collaboratively, process perfect information in a complex economic environment and make rational decisions that are in the interests of the wider public – have not been fulfilled in reality. Correspondingly, this method of private ordering does not yield optimal outcomes:²¹⁵ a market failure exists which requires state control and regulation.

Cheffins believes a key weakness of a deregulatory agenda is that it 'relies too dogmatically on the efficiency properties of markets'.²¹⁶ This is true in the case of stewardship due to the structural market failures, mentioned earlier, that do not accommodate effective stewardship in the UK. According to Haldane and Davies: 'Without intervention, the long could become shorter still'.²¹⁷ Short termism is unlikely to be adequately tackled without a more robust policy initiative and is at risk of becoming more prevalent.

Though the Walker Review was commendable insofar as identifying careless investment to be a fatal problem, the recommendations of stewardship fall short of provoking a radical rethink of the fundamental corporate objectives of banks. Those objectives relate to ensuring a more sensible investment culture and a shift from shareholder value maximisation to entity preservation. To act as stewards for the wider public interest, shareholders in banks must be subject to greater state control. In a response to the Green Paper, the FRC supported greater state control: they identified that there are increasing demands on the framework, which is becoming fragmented.²¹⁸ To address regulatory gaps, the FRC then sought supervisory and monitoring powers.²¹⁹

Thus, the SC represents the limits of private law in pursuing a public policy initiative of economic stability. State intervention in stewardship activities in banks is accordingly justified on three grounds: firstly, the ineffectiveness of soft law; secondly, the dysfunctional market for corporate control in the banking sector; and, thirdly, the limits of financial regulation.

²¹³Arad Reisberg, 'The Role of Institutional Shareholders' (n 149) 125 referring to Paul Lee, 'Kay--Repurposing the Equities Markets' (2012) 218 *Governance* 7.

²¹⁴ *ibid.*

²¹⁵ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 7.

²¹⁶ *ibid.*

²¹⁷ Haldane and Davies (n 186).

²¹⁸ Financial Reporting Council, *FRC Response to the Department of Business, Energy and Industrial Strategy Corporate Governance Reform Green Paper* (17 February 2017) para 3 <<https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/FRC-Response-to-BEIS-Green-Paper-consultation-on-C.pdf>> accessed 28 October 2017.

²¹⁹ *ibid* para 9.

i. The Soft law Paradox

The Green Paper opens with the following sentence: ‘The UK has long been regarded as a world-leader in corporate governance, combining high standards with low burdens and flexibility’.²²⁰

The UK framework is distinguished for its ‘comply or explain’ approach and ‘open textured principles’.²²¹ This facilitative and market based approach is attractive to the business community because it does not require them to conform to rigid requirements. However, in 1992, following the Cadbury report, there were concerns that regulating companies by letting them ‘comply or explain’ was ‘touchingly naïve’.²²² There is reason to believe this to be true, especially in hindsight of the financial crisis. The evidence suggests that, in terms of the SC,²²³ soft law is not working. Therefore, even if the structural market failures of the Stewardship Code were to be rectified, there is a second layer of deficiency, which must also be addressed: compliance.

The FRC reported its multi-investor base of support led to ‘high calibre support’²²⁴ and high levels of ‘public commitment’.²²⁵ However, these claims should not be accepted at face value. There may be explanations for adherence to the SC that do not translate into a broader, necessary shift in investment culture throughout the sector, which is required to safeguard financial stability. It is well noted that ‘appearances matter in the investors’ world (...) [and] institutional shareholders may find it important to show support for a trendy concept in order to avoid criticism and show that they are indeed listening’.²²⁶ This also relates to the close media scrutiny in the investment industry, which may provide political impetus for reform,²²⁷ creating an apparent commitment that is – in fact – motivated by a ‘fear of the alternative’²²⁸ (i.e. tougher regulation). This is a weak argument to base a legal framework upon.

Therefore, adherence is not necessarily conducive to meaningful and broader cultural shift that embraces engagement and monitoring. It can, instead, simply result in investors merely going through the motions because it is cheaper to comply than construct an explanation.²²⁹ This shallow reasoning for compliance contributes very little to efforts to protect the wider public interest of financial stability. This has resulted in a substantial gap between the principles of the SC and actual practices in reality. Indeed, the FRC admitted that ‘many statements on the SC give little insight

²²⁰ Corporate Governance: Green Paper (n 11) 8.

²²¹ Chiu and Katelouzou (n 91) 31.

²²² ‘Cadbury’s Soft Centre’ *Financial Times* (London, 28 May 1992) 22.

²²³ The arguments made here are specifically referring to the operation of the Stewardship Code in the context of the banking sector.

²²⁴ Baroness Hogg, former FRC Chairman, cited in Reisberg, ‘The Stewardship Code: Road to Nowhere?’ (n 10) at footnote 103.

²²⁵ *ibid.*

²²⁶ Reisberg, ‘The Stewardship Code: Road to Nowhere’ (n 10) 226.

²²⁷ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 24.

²²⁸ Reisberg, ‘The UK Stewardship Code: on the Road to Nowhere?’ (n 10) 226.

²²⁹ Randall Morck, ‘Behavioural Finance in Corporate Governance - Independent Directors and Non-Executive Chairs’ (SSRN, 11 April 2007) 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=979880> accessed 21 March 2017.

into investors' actual practices.²³⁰ This approach that shareholders take to compliance exposes the flaw in soft law: that, where the responsibilities imposed to tackle governance problems become too onerous, they have the option to opt-out based on assessing the costs of complying versus explaining.

There is, therefore, little use in boasting of high standards and low burdens when there is no more than superficial effect. Distorted motivations to comply with the SC are a significant concern, as the result is entirely variable upon the input of stewards. For example, if shareholders comply beyond a 'box-ticking' approach then there may be a more beneficial output, since there would be more consideration given to risks involved in governance practices, long-term strategy and any areas of under-performance that may be easily missed. Inconsistent and inadequate compliance with such an important code is unacceptable given that the SC aims to prevent another financial crisis. Since this evidence of compliance indicates a largely disinterested approach from shareholders, the positive effects of comply or explain cannot be realised as the SC needs meaningful engagement for it to be successful which, in turn, has potential for ripple effects to set an example to the industry as a whole.

Moreover, the unenforceable nature of the SC means that it 'lacks teeth'.²³¹ Feedback from the FRC in January 2017 saw an improvement in the standard of reporting but found that explanations for non-compliance were 'poor'.²³²

This strongly suggests that reporting has little effectiveness if there are no consequences as to the standard of such reporting. Adjudication in the event of non-compliance may be trivial, as the FRC may seek to avoid upsetting shareholders in a context of rife political lobbying.²³³ The recent 'tiering' initiative²³⁴ encourages naming-and-shaming which is a step in the right direction. However, the inability of the FRC to respond effectively to breakdowns in compliance²³⁵ is inconsistent with other areas of public policy and regulation, where human behavioural irrationalities are explicitly recognised and sanctions are integral as deterrent and punishment.²³⁶

²³⁰ Financial Reporting Council, *FRC encourages better comply or explain disclosure and improved investor transparency* (FRC, 19 December 2013) para 5 <<https://www.frc.org.uk/news/december-2013/frc-encourages-better-comply-or-explain-disclosure>> accessed 2 November 2017.

²³¹ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 414.

²³² Financial Reporting Council, *Rebuilding Trust in Business Requires Better Governance Practices* (FRC, 11 January 2017) para 3 <<https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2017/January/Rebuilding-trust-in-business-requires-better-gover.aspx>> accessed 3 January 2018.

²³³ For example, the Prime Minister, Theresa May, recently made what was considered to be a u-turn regarding her promise to put 'workers on boards' made during her leadership campaign, see Anushka Asthana and Peter Walker, 'Theresa May: I won't force companies to appoint workers to their boards' *The Guardian* (21 November 2016) <<https://www.theguardian.com/business/2016/nov/21/theresa-may-force-firms-appoint-workers-boards-cbi>> accessed 4 February 2018.

²³⁴ Financial Reporting Council, *Tiering of Signatories to the Stewardship Code* (14 November 2016) <<https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2016/November/Tiering-of-signatories-to-the-Stewardship-Code.aspx>> accessed 25 March 2017.

²³⁵ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 415.

²³⁶ A comparative example is Health and Safety Law: there are extensive penalties imposed on employers for failure to comply with health and safety requirements through the Health and Safety (Offences) Act 2008. While failure to comply can produce severe physical injury in this case, failure to comply with codes of conduct in the financial services industry can also produce severe damage, albeit intangible. Human factors should be accounted for in both instances.

While ‘comply or explain’ offers flexibility to smaller shareholders with fewer resources, it is ill considered to promote a less onerous image of investing in a sector, such as banking, where investment duties encompass a wider public interest. In order to protect financial stability, ‘there is a public interest case for subjecting institutions’ corporate governance roles to regulatory standards and monitoring’.²³⁷ Therefore, the ‘comply or explain’ approach is not appropriate for delivering public policy objectives. This is another limit of private law in this context.

This article does not purport to explore the full depth of the hard versus soft law debate, which is largely inconclusive on both sides.²³⁸ In the context of bank governance, however, a strong argument for hard law regulation can be posited: namely, that although a ‘one size fits all’ approach is too rigid for a diverse business community, it is not for the banking industry. A hard law regulatory approach to stewardship in the banking sector would work rather effectively due to the uniform nature of banks. Kokkinis contends that the ‘homogeneity of banks enables bank specific governance rules to be far more prescriptive than general corporate governance rules, which have to be flexible enough to accommodate the wide diversity of generic companies’.²³⁹

Ultimately, the argument for state intervention by regulating stewardship in the context of the corporate governance of banks is a relatively straightforward one. Based on a simple cost-benefit analysis, the costs incurred from regulation (such as taxpayer cost of civil service, supervisory bodies and deterring a minimal amount of foreign investment)²⁴⁰ are far less harmful than the costs of a regional or global financial crash.²⁴¹ In short, the benefits of financial stability far outweigh the costs of regulation, which justifies state intervention in the banking sector. This is particularly evident in an industry where ‘comply or explain’ soft law is not adhered to on the basis of market pressures.

ii. The Dysfunctional Market for Corporate Control

Another justification for state intervention in stewardship is the ineffective market for corporate control in the banking sector, and the central role that shareholders play in it. Henry Manne hypothesised the theory of a market for corporate control: he noticed that directors were the first to be displaced in the event of a takeover²⁴² and, by replacing the internal system of management, the successful bidder eliminates the inefficiencies of the target.²⁴³ Thus, the threat of a takeover is enough to make a company more efficient. Essentially, shareholder primacy acts as a disciplining device on management, since inefficient management would be reflected in a lower share

²³⁷ Chiu and Katelouzou (n 91) 22.

²³⁸ Cheffins, *Company Law: Theory, Structure and Operation* (n 22) 418.

²³⁹ Kokkinis, ‘Rethinking Banking Prudential Regulation’ (n 15) 626.

²⁴⁰ Financial Reporting Council, *Rebuilding Trust* (n 232) para 7.

²⁴¹ Sean O’Grady, ‘Credit Crisis Cost the Nation £7trn, says Bank of England’ *The Independent* (London, 30 March 2010) <<http://www.independent.co.uk/news/business/news/credit-crisis-cost-the-nation-1637trn-says-bank-of-england-1931569.html>> accessed 4 January 2018.

²⁴² Henry Manne, ‘Mergers and the Market for Corporate Control’ (1965) 73(2) *Journal of Political Economy* 110.

²⁴³ Michael Jensen and Richard Ruback, ‘The Market for Corporate Control: The Scientific Evidence’ (1983) 10(1) *Journal of Financial Economics* 5, 44.

price. Consequently, that would result in the company becoming more vulnerable to a hostile takeover.²⁴⁴

While the UK favours this theory as a component of effective self-regulation,²⁴⁵ the market for corporate control in banking is weak.²⁴⁶ This is because hostile takeovers are very rare in the banking sector,²⁴⁷ providing a lack of incentive for strong managerial performance. Further, shareholder primacy is reflected in the Takeover Code,²⁴⁸ which places a large responsibility on shareholders. These factors strengthen the argument for state supervision in shareholder stewardship in the banking sector.

Kokkinis notes that the banking industry defies many of the general assumptions made about the market for corporate control.²⁴⁹ This is mainly due to the idiosyncratic economic features mentioned earlier in this article, such as the opacity of banks' balance sheets, the large-scale loss of human capital in the event of failure and the fact that the state acts as a residual guarantor,²⁵⁰ resulting in greater regulation of the Mergers and Acquisitions ("M&A") market than in other sectors. Since banks are characterised in the economy as being 'too big to fail',²⁵¹ there is little willingness for investors to gather information on the banks performance.

Crucially, due to opacity of banks' assets the share price does not accurately indicate the true value and riskiness of banks. Therefore, due to bank's complex corporate structure, the market for corporate control in banking does not lead to reduction of share price and subsequent takeovers when there is poor management. For that reason, the market for corporate control is dysfunctional because it is not an effective means of discipline. This warrants special consideration about the role that shareholders play in a bank takeover context.

Some consider that the UK is the most liberal jurisdiction in the world in terms of regulating takeovers.²⁵² The main aim of the Takeover Code²⁵³ is to ensure that shareholders are treated fairly and not deprived of the opportunity to decide on the merits of a particular bid.²⁵⁴ The shareholder primacy norm is made explicit in the strict 'non-frustration rule',²⁵⁵ which prohibits directors employing any defensive

²⁴⁴ Haldane (n 207) 6.

²⁴⁵ In pursuit of a free market economy, the UK relies heavily on the effectiveness of market discipline to enforce self-regulation.

²⁴⁶ Tsagas, 'The Market for Corporate Control in the Banking Industry' (n 56) 319.

²⁴⁷ 'The opacity of banks' assets makes it difficult for potential acquirers to spot suitable targets and regulatory approval—both by prudential and competition authorities—is required. Financing difficulties are also significant, as banks are very highly leveraged.' Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 612, at footnote 41.

²⁴⁸ The Panel on Takeovers and Mergers, *The Takeover Code* (12th edn, RR Donnelley 2016) General Principle 3 and Rule 21. See also: Companies Act 2006 s 172(1); Marc T Moore, 'Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law' (7 September 2016) University of Cambridge Faculty of Law Research Paper No 40/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835990> accessed 10 February 2018.

²⁴⁹ Tsagas, 'The Market for Corporate Control in the Banking Industry' (n 56) 319.

²⁵⁰ Andrew Johnstone, 'Preventing the Next Financial Crisis? Regulating Bankers' Pay in Europe' (2014) 14(1) *Journal of Law and Society* 6, 9.

²⁵¹ Armour and Ringe (n 57) 40.

²⁵² Tsagas, 'The Market for Corporate Control in the Banking Industry' (n 56) 306.

²⁵³ The Takeover Code (n 248).

²⁵⁴ *ibid* B1 ('General Principle 3').

²⁵⁵ *ibid* I18 ('Rule 21: Restrictions on Frustrating Action').

measures without shareholder approval once a bid has become imminent. This makes control over companies more contestable²⁵⁶ and allows shareholders to exert influence, making it easier for hostile takeovers to succeed.²⁵⁷ The non-frustration principle places ‘significant reliance on the shareholders’ decision’.²⁵⁸ However, as discussed earlier, dispersed bank shareholders have an interest in supporting strategies that appear to maximise profit, such as a takeover. This was demonstrated by the takeover of ABN Amro by the Royal Bank of Scotland (RBS).

The RBS takeover of ABN Amro in 2007 is a prime example of these two factors: (1) absence of a threat to displace underperforming management and (2) a platform for risk-pursuing shareholders. The takeover occurred after seven months of contested bid activity with Barclays²⁵⁹ driving the price up to three times ABN’s market value. ABN was acquired for £49bn, making it the largest banking takeover in history.²⁶⁰ It demonstrates the consequences of imprudent decisions in bank takeovers. ABN’s assets turned out to be seriously impaired, which led to the collapse of RBS, thus contributing to the financial crisis.

In addition to informational problems²⁶¹ and a passive supervisory approach,²⁶² dominant management style - lacking a threat of hostile takeover - may have deterred effective challenge by the board.²⁶³ Further, RBS shareholders supported the bid since boosts in share price of RBS were viewed to be indicative of growth and value creation.²⁶⁴ This failed takeover undoubtedly proves that a shareholder-centric legal framework in an ineffective market for corporate control is extremely hazardous, due to the unique features of banks and the consequences that stem from bank failure. Thus, the Takeover Code represents another limitation in private law in its delivery of a public policy initiative.

In summary, there is little threat that weak management in the banking sector will be displaced by way of a hostile takeover. Further, the legal framework empowers shareholders to the extent that board decision-making is exposed to their ‘irrational exuberance’.²⁶⁵ In view of the combination of these two features of the market for

²⁵⁶ David Kershaw, ‘The Illusion of Importance: Reconsidering the UK’s Takeover Defence Prohibition’ (2007) 56(2) *International Comparative Law Quarterly* 267, 268.

²⁵⁷ Paul Davies et al, ‘The Takeover Directive as a Protectionist Tool?’ (2010) *European Corporate Governance Institute Working Paper No 141/2010* (*European Corporate Governance Institution*, 2010) 28 <http://www.ecgi.org/wp/wp_id.php?id=420> accessed 21 March 2017.

²⁵⁸ Tsagas, ‘The Market for Corporate Control in the Banking Industry’ (n 56) 308.

²⁵⁹ Phillip Inman, ‘RBS Tries Hard Cash to Trump Barclays in Bidding War for ABN Amro’ *The Guardian* (London, 17 July 2007) <<https://www.theguardian.com/business/2007/jul/17/royalbankofscotlandgroup>> accessed 4 January 2018.

²⁶⁰ ‘Royal Bank of Scotland: The Ice was Thinner than it Seemed’ *The Economist* (London, 12 December 2011) <<https://www.economist.com/blogs/schumpeter/2011/12/royal-bank-scotland-0>> accessed 4 January 2018.

²⁶¹ Financial Services Authority, *The Failure of the Royal Bank of Scotland* (FSA, 6 December 2011) <<http://www.fsa.gov.uk/pubs/other/rbs.pdf>> accessed 4 January 2018, 7. The RBS Board only had limited access to confidential information amounting to “two lever arch folders and a CD” and hence conducted only a limited due diligence review.

²⁶² Treasury Committee, *The FSA’s Report into the failure of RBS* (HC 2012-13, 640) 11-14.

²⁶³ Financial Services Authority, *The Failure of the Royal Bank of Scotland* (n 261) paras 26-27.

²⁶⁴ Tsagas, ‘The Market for Corporate Control in the Banking Industry’ (n 56) 327.

²⁶⁵ Tan (n 21) 200.

corporate control in banking, there is a strong case for state intervention to balance corrosive market forces of shareholder empowerment.

Since the SC cannot guarantee shareholders of banks will exercise thoughtful stewardship, there must be supervision in the interests of financial stability. This is due to the increased responsibility of bank shareholders. Although one could argue supervisors may lack expertise,²⁶⁶ supervised stewardship *coupled with* measures²⁶⁷ supporting shareholders to make prudent decisions may safeguard against the excess of hyperactivity in supporting imprudent takeovers.

Supervision of shareholders' role in corporate governance is required, notwithstanding extensive substantive regulation in this field. For example, transparency requirements²⁶⁸ may well address the issue of bank opacity, but 'openness does not lead to better corporate governance'.²⁶⁹ Giving shareholders access to more complex information does not entail that they will understand it and act on it effectively, thereby curbing reckless behaviour. After all, regulation and corporate governance law²⁷⁰ should be complementary, not mutually exclusive.

iii. The Void in Financial Regulation

Financial regulation and corporate governance are traditionally viewed in isolation.²⁷¹ However, it is important to recognise that they can be complementary. With the increasing emphasis in corporate governance on pursuing a public policy objective of financial stability,²⁷² there is a convincing case to be made for the convergence of the private law of corporate governance with the public realm of financial regulation. Corporate governance law does not account for the fact that the way banks are internally governed - conventionally viewed as a *private matter* - constitutes an important factor of national, *public* financial stability.²⁷³

Financial regulation may mitigate the consequences of bank failure but corporate governance rules can act preventatively at an earlier stage to curb the

²⁶⁶ Tsagas, 'The Market for Corporate Control in the Banking Industry' (n 56) 317 notes that supervisors were 'equally surprised when the subprime crisis emerged'.

²⁶⁷ Such measures may aim at influencing shareholders' risk appetite or include annual training regarding takeovers to tackle the optimum bias discussed in section two of this article.

²⁶⁸ Basel Committee on Banking Supervision, *Revised Pillar 3 Disclosure Requirements* (BIS, January 2015) 1 <<https://www.bis.org/bcbs/publ/d309.pdf>> accessed 4 January 2018.

²⁶⁹ Antonino Vaccaro and Joan Fontrodona, 'Academic View: The Myth of Corporate Transparency' *The Economist* (London, 7 September 2010) <https://www.economist.com/blogs/newsbook/2010/09/myth_corporate_transparency> accessed 4 January 2018.

²⁷⁰ Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 612 offers extensive explanation as to the contrast between corporate governance law and regulation.

²⁷¹ *ibid* 616.

²⁷² The UK Government declares on its website: 'We are creating a framework that promotes a responsible and sustainable financial services industry, tackling the issues of (...) risk in the banking sector.' 'Financial Services' (UK Government) <<https://www.gov.uk/government/topics/financial-services>> accessed 22 March 2017; See also 'Record of the Meeting Between the Governor of the Bank of England and the Chancellor of the Exchequer to Discuss the November Financial Stability Report' (UK Government, 24 January 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585755/FSR_Minutes_December_2016_web.pdf> accessed 22 March 2017.

²⁷³ Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 616.

damaging behaviour that causes such failures.²⁷⁴ There is a trend that financial regulation evolves on the basis that continually raises standards for banks in a ‘haphazard way in response to successive scandals, crises and perceived regulatory failures’.²⁷⁵ For example, the Basel III Accord²⁷⁶ – an international voluntary regulatory framework – replaced Basel II by increasing capital standards following the crisis, with new requirements proposed in ‘Basel IV’.²⁷⁷

Nonetheless, the responsiveness to these higher standards is doubtful: in November 2016, the Bank of England announced that the largest UK banks performed very poorly – including a failure by RBS in their annual ‘stress test’.²⁷⁸ Therefore, there is clearly a weakness in the application of financial regulation. The inability of UK banks to perform well in similar conditions that preceded the crisis should be of significant concern to the government, particularly in an environment where economic stability may be jeopardised by factors such as Brexit, the Trump Administration and rising Chinese debt levels.²⁷⁹ The void in financial regulation should thus be addressed as a matter of urgency.

Kokkinis stresses that the ‘importance of effective corporate governance cannot be over emphasised’²⁸⁰ in these contexts. He uses the example of capital adequacy requirements to illustrate the need for corporate governance to support the weaknesses in financial regulation. Corporate governance is, in fact, a prerequisite for capital standards – a vital component of prudential regulation – to work.

For example, Basel III stipulates the percentage of risk-weighted assets that must be reserved for capital buffers²⁸¹ to cover the credit, operational and market based risks that banks face. These requirements align with the credit riskiness of the banks’ borrowers, usually assessed by Credit Rating Agencies (“CRAs”). However, these CRAs demonstrated the ‘inherent limits of human rationality’²⁸² by severely overvaluing assets in terms of their riskiness before the financial crisis. There is now an additional ‘internal ratings approach’, which gives discretion to banks to calculate the credit risk of their borrowers.²⁸³ Although this is supervised, there are neither the resources nor expertise for regulators to scrutinise every decision, due to the opacity of bank assets. This emphasises the reliance on the responsible intrinsic risk appetite

²⁷⁴ *ibid.*

²⁷⁵ *ibid* 611.

²⁷⁶ Basel Committee on Banking Supervision, ‘Basel III Accord: A Global Regulatory Framework for more Resilient Banks and Banking Systems’ (BIS December 2010) <<https://www.bis.org/publ/bcbs189.pdf>> accessed 4 January 2018.

²⁷⁷ Fraser Tennant, ‘New ‘Basel IV’ Capital Requirements Proposed for Banking Sector’ *Financier Worldwide* (Birmingham, 6 December 2016) <<https://www.financierworldwide.com/fw-news/2016/12/6/new-basel-iv-capital-requirements-proposed-for-banking-sector>> accessed 4 January 2018.

²⁷⁸ Bank of England, ‘Stress Testing the UK Banking System: 2016 Results’ (n 12).

²⁷⁹ *ibid* 11; Treasury Committee *The FSA’s Report into the failure of RBS* (n 262) 11-14.

²⁸⁰ Kokkinis, ‘Rethinking Banking Prudential Regulation’ (n 15) 617.

²⁸¹ Basel Committee on Banking Supervision, ‘Basel III: A global regulatory framework for more resilient banks and banking systems’ (n 176) para 50.

²⁸² Kokkinis, ‘Rethinking Banking Prudential Regulation’ (n 15) 619.

²⁸³ Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards* (BIS, June 2006) paras 211-537 <<https://www.bis.org/publ/bcbs128.pdf>> accessed 4 January 2018.

of boards, ultimately influenced by shareholders, to avoid reckless underestimation of assets that could lead to another financial crisis. Financial regulation can therefore only address a limited scope of bank safety; whereas the prerequisite of rational behaviour and attitudes to risk lies with effective corporate governance. The case for a more robust framework is accordingly strengthened.

Furthermore, the objective of financial regulation – to influence banks' risk profile reaching a socially optimal level – is obstructed by the unintended consequences such financial regulation may have. By constantly increasing tougher capital standards, forcing banks to reserve a proportion of contingency capital, financial regulation can actually have an adverse effect on risk taking. This is because banks' wealth correlates with a lower cost of equity,²⁸⁴ since issuing more loans is profitable, holding more capital is value decreasing for shareholders. As a result, shareholders may exert additional pressure on boards to maximise profits by increasing the riskiness of assets, which may be detrimental to economic growth.²⁸⁵

Additionally, the tougher the regulations are, the more banks will try to escape them.²⁸⁶ Securitisation was used heavily before the crisis to circumvent capital requirements by removing assets from banks' balance sheets.²⁸⁷ This demonstrates that demanding regulation can cause banks to resort to financial engineering to escape requirements. This economically destabilising activity ultimately stems from the influence of shareholders: 'where risk appetite is concerned, regulators and shareholders have divergent interests'.²⁸⁸ Therefore, this fundamental misalignment can only be addressed to a certain extent by regulation; corporate governance must fill the void by altering attitudes and behaviour to allow for a shift in investment and risk management culture in the banking sector. The deficiencies of the SC are, thus, very concerning in this context of risk attitudes and behaviours, reiterating the urgent need to rethink how it operates.

The stress test results should act as a wake-up call to the government, highlighting that the success of financial regulation is being hampered. With the void in financial regulation exposed, a more heavy-handed approach to stewardship in the banking sector should be considered. State intervention in stewardship is thus justified on the basis that meaningful and effective stewardship is a prerequisite for financial regulation to work. A convergence between the currently separate private law role of corporate governance and public role of financial regulation is perhaps a suitable alternative in the special case of bank governance.

²⁸⁴ Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 621.

²⁸⁵ *ibid.*

²⁸⁶ *ibid* 622.

²⁸⁷ Securitisation transforms illiquid asset backed securities into securities tradable on the bond market; See 'Securitisation: It's Back' *The Economist* (London, 11 January 2014) <<https://www.economist.com/news/leaders/21593457-once-cause-financial-worlds-problems-securitisation-now-part-solution-its>> accessed 4 January 2018.

²⁸⁸ Kokkinis, 'Rethinking Banking Prudential Regulation' (n 15) 624.

5. Conclusion

There are no easy solutions here.²⁸⁹ This is a complex area of law and policy that must strike a balance between the competing interests of many parties. However, it is clear that the current corporate governance structure, prompted by the Walker recommendations, is inadequate in the interests of safeguarding financial stability.

First, even in response to the financial crisis, the SC displays a lack of specificity to banks. It does not account for the idiosyncratic features of banks, such as opacity, which obstructs shareholder monitoring. Special concern for corporate governance is warranted due to the systemic importance of banks to the economy.

Second, there are inherent structural deficiencies of the SC that render its efforts of meaningful engagement futile. As a result of changing ownership trends, an elongated investment chain and portfolio diversification, the SC fails to achieve the objective of replacing the anonymous trader with the concerned investor. More importantly, the SC disregards the behavioural weaknesses of shareholders: a central element of the stewarding problem.

Accordingly, the government must take the initiative and encourage Parliament to construct a more robust arrangement that incentivises, supports and supervises stewardship as a first step to promoting a change in investment culture in banking. State intervention is justified on three grounds.

First, soft law is not delivering sufficient results. It has resulted in a shallow box-ticking culture that results in investors avoiding their true responsibilities with appreciation of the broader objectives of financial stability. The apparent success of the SC is, therefore, a mirage.

Second, given the shareholder primacy reflected in the Takeover Code, and the fact that the market for corporate control in the banking sector does not constitute a serious threat to underperforming management, shareholder stewardship duties should be supervised.

Third, state supervision of stewardship is necessary to fill the void in financial regulation. The risk appetite of shareholders must be moderated by a robust corporate governance structure in order for financial regulation to take effect. The recent stress test results must be viewed as an impetus for this.

Previous reforms merely constitute fine-tuning to the existing structure, which has not – itself – prompted a sufficient change in investment culture to ensure avoidance of another crisis of governance. As a result, there must be a governance revolution: a more heavy-handed approach is required to combat the crucial problematical attitudes to risk – a fundamental determinant of successful corporate governance codes.

This involves addressing the ideological paradox of the SC: that, despite prevalent shareholder pressure to pursue risky strategies before the crisis, there is an underlying assumption in the Code that shareholder activism will produce positive effects. The present structure does little to prevent the unqualified pursuit of profit in banks. While this article has not explored the full extent of the shareholder-primacy debate, it hopes to shed light on one of its focal issues: the impact of behavioural

²⁸⁹ Demetra Arsalidou, *Rethinking Corporate Governance in Financial Institutions* (Routledge 2015) 186.

weaknesses of shareholders. It is of vital importance that the government exercises caution before implementing reforms to further strengthen shareholders' voices. Such measures - which expose the irrationalities of shareholders - may be incompatible with Cadbury's notion of corporate governance: to align the interests of the company and society as closely as possible. The state must take measures to tackle the behaviour of institutional shareholders to shift the corporate governance culture in banks from shareholder value maximisation to entity preservation in the interests of the public at large.

ANALYSIS

Jury Directions under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016: A Long-Needed Success for Tackling Rape Myths or Another Measure Falling Short?

RACHAEL BAIN*

Abstract

It is generally understood that rape complainers are often treated with mistrust and suspicion, due to what are commonly known as “rape myths”. This is known to have an impact on the reporting and attrition rates of the crime. In recognition of this matter, new jury directions have been enacted. These directions aim to tackle the mistrust of complainers who do not report their rape immediately or resist their attacker. This article aims to prove the existence of rape myths within society and courts. It will critically analyse the use of similar directions in other jurisdictions before examining their place within the Scottish legal system. In order to do this, the article considers the proposals for and against their introduction. It concludes that jury directions are not likely to eradicate rape myths. However, jury directions could provide an effective stop-gap solution until there is an opportunity for public education to have a widespread reach and effect.

Keywords: Scots Criminal Law, Rape, Jury Directions, Evidence, Procedure

1. Introduction

It is said that ‘the rape victim is unique, in another sense, in that no other crime looks upon the victim with the degree of suspicion and doubt that the rape victim must face.’¹ Recent efforts to combat such suspicion have culminated in the introduction of new jury directions by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.² These directions are the main focus of this article. Before examining the likely effect of such directions, it is important to understand the current situation. The Sexual

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¹ Julie Allison and Lawrence Wrightsman, *Rape: The Misunderstood Crime* (Sage Publications 1993) 105 paraphrasing the observations of Joyce E Williams, Secondary victimization: Confronting public attitudes about rape (1984) 9(1) *Victimology* 66.

² Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6, introducing a new s288DA and s288DB into the Criminal Procedure (Scotland) Act 1995.

Offences (Scotland) Act 2009 (“the 2009 Act”) came into force on 1 December 2010.³ It provides a clearer and more coherent legal framework on rape and sexual offences than the previous law:⁴ Rape Crisis Scotland hailed ‘the commitment it [the 2009 Act] demonstrates to improving the prospects of those who have been victims of sexual violence in obtaining justice.’⁵

For the first time, the 2009 Act set out statutory definitions of what constitutes rape,⁶ other sexual offences,⁷ consent and some boundaries to it.⁸ At a time when same-sex relationships are becoming more common, the Act also importantly establishes that men can be victims of rape by introducing the concepts of anal and oral rape.⁹ Initially, it appeared that the Act would have a profound effect on the law of rape and it was hoped that there would be a significant improvement on the prosecution of rape and sexual assault.

The Act appeared to carry some success when it came to the number of people reporting incidents of rape and sexual offences. According to Scottish Government figures, since the introduction of the 2009 Act the number of reported allegations of rape has grown every year.¹⁰ In particular, it was notable that the number of rapes reported and recorded in 2014-15 was at its highest since 1971.¹¹ The reason behind this could be that the rules regarding rape and sexual offences were now abundantly clear, allowing individuals to understand when he or she was a victim of the crime. News reporting by sources such as the BBC Scotland¹² and designated charities such as Rape Crisis Scotland¹³ was abundant at the time, allowing lay people to realise their rights under the 2009 Act. Furthermore, after the introduction of the 2009 Act, Rape Crisis Scotland broadcast Scotland’s first TV advert about the myths surrounding rape,¹⁴ which potentially reached a significant proportion of the population.

However, despite the hope that surrounded this progressive piece of legislation, the impact has been somewhat underwhelming. While the 2009 Act has had great success in setting out the law and increasing reporting rates, there has not been a corresponding rise in prosecution rates for rape and sexual offences: according to Scottish Government figures, although there were 1901 reports of rapes and

³ Sexual Offences (Scotland) Act 2009 (Commencement No.1) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No.4) Order 2010, SSI 2010/357, art 2(a).

⁴ For the previous law on sexual offences, see the cases of *McKearney v HM Advocate* 1994 JC 88 and *Lord Advocate’s Reference (No1 of 2001)* 2002 SLT 466.

⁵ Rape Crisis Scotland, ‘Sexual Offences (Scotland) Act 2009 now in force’ (*Rape Crisis Scotland*, 2 December 2010) <<http://www.rapecrisisscotland.org.uk/news/sexual-offences-scotland-act-2009-now-in-force/>> accessed 24 February 2018.

⁶ Sexual Offences (Scotland) Act 2009, s 1.

⁷ *ibid* ss 2-11.

⁸ *ibid* ss 12-16.

⁹ *ibid* s 1(1).

¹⁰ Scottish Government, Official Statistics Publication for Scotland ‘Recorded Crime in Scotland, 2014-15’ <<http://www.gov.scot/Resource/0048/00484776.pdf>> accessed 24 February 2018.

¹¹ *ibid* 25.

¹² BBC Scotland ‘New sex offence laws now in force in Scotland’ *BBC News* (1 December 2010) <<http://www.bbc.co.uk/news/uk-scotland-11885686>> accessed 15 September 2017.

¹³ Rape Crisis Scotland, ‘Sexual Offences (Scotland) Act 2009 now in force’ (n 5).

¹⁴ Rape Crisis Scotland ‘“Not Ever” – Scotland’s first ever TV rape advert launched this week’ (*Rape Crisis Scotland*, 1 July 2010) <<https://www.rapecrisisscotland.org.uk/news/news/not-ever-scotland-s-first-ever-tv-rape-advert-launched-this-week/>> accessed 15 September 2017.

attempted rapes to the police in 2014-15,¹⁵ only 125 convictions were secured for rapes and attempted rapes during the same period.¹⁶ It therefore appears – using 2014/15 figures – that Scotland has around a 6.6% conviction rate in rape crimes. However, it is important to note that this figure does not take account of the fact that not every reported case goes to court. The Procurator Fiscal may decide not to prosecute cases based on issues of insufficiency of evidence.

Aside from conviction rates, existing research – which focuses often on the position of female victims due to the comparatively recent introduction in law of men being potential victims of rape¹⁷ – demonstrates that rape complainers face huge levels of suspicion and that the process of going through a rape trial is particularly harrowing.¹⁸ In an attempt to combat this, the Scottish Parliament recently debated and passed legislation aimed at reducing certain misconceptions that may be held about victims of rape.¹⁹ Under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, provisions have been inserted into the Criminal Procedure (Scotland) Act 1995 stating that a judge will have the responsibility, in certain cases, to direct the jury that there may be good reasons for complainers to delay the reporting of sexual offences or not to physically resist their attacker and that this does not necessarily mean the allegation is false.²⁰

This article first examines the motivations for the introduction of jury directions, analysing the extent to which rape myths are prevalent in society. It shall also analyse previous, unsuccessful attempts to introduce ‘rape-shield’ legislation. The second section looks at the use of jury directions in other jurisdictions to ascertain whether their use in those jurisdictions provides any insights for Scotland. Finally, the last section considers the arguments for and against the introduction of jury directions in Scotland. It also notes missed opportunities or other measures that could be taken to reduce rape myths in court.

2. *The Necessity of Jury Directions: Examining the Current Situation*

A. Introduction

In order to tackle the high attrition rates that occur in rape cases, it is important to first establish what the potential cause could be. There is a belief that ‘rape myths’ prevent

¹⁵ Scottish Government Official Statistics Publication for Scotland, ‘Recorded Crime in Scotland, 2014-15’ (n 10) 27.

¹⁶ Scottish Government National Statistics Publication for Scotland ‘Criminal Proceedings in Scotland 2014-15’, 15 <<http://www.gov.scot/Resource/0049/00494474.pdf>> accessed 8 February 2017.

¹⁷ On which, see Sexual Offences (Scotland) Act 2009, s 1(1).

¹⁸ Michele Burman, ‘Evidencing Sexual Assault: Women in the Witness Box’ (2009) 56(4) Probation Journal 379.

¹⁹ Scottish Parliament, *Abusive Behaviour and Sexual Harm (Scotland) Bill: Policy Memorandum (Scottish Parliament, 8 October 2015) paras 56-77* <[www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20\(Scotland\)%20Bill/SPBill81PMS042015.pdf](http://www.parliament.scot/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81PMS042015.pdf)> accessed 22 February 2017.

²⁰ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6, introducing a new s288DA and 288DB into the Criminal Procedure (Scotland) Act 1995.

rape cases being prosecuted effectively in court. Burt describes rape myths as being 'prejudicial, stereotyped and false beliefs about rape, rape victims and rapists.'²¹ However, Gerger states that it was not necessary for the rape myth to be false 'but rather as 'wrong' in an ethical sense'²² and fully describes rape myths as 'descriptive or prescriptive beliefs about rape (...) that serve to downplay or justify sexual violence that men commit against women.'²³

This section considers whether rape myths are a genuine cause for concern, thereby establishing whether the introduction of mandatory jury directions is required. This section shall also look at the previous attempt of the Scottish Parliament to reduce the attrition rate, through sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, as inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2009.²⁴ The conclusion of the section's analysis is that the underwhelming impact of these previous attempts left the Scottish Parliament had no other choice than to consider alternative measures.

B. The Spectrum of Rape Myths

Before considering the controversy surrounding the existence of rape myths in court, it is useful to consider the different types of rape myths and what they consist of. There are numerous widely held misconceptions within society that can affect how an individual who is claiming they have been raped may be viewed.

Reece argues that 'rape myth is a broad category and some are relatively unproblematic.'²⁵ It is true that there is a vast spectrum of rape myths. However this paper shall take a differing view to Reece's view that some myths are unproblematic. This contrasting position shall be dealt with in due course.

Temkin gives a list of some rape myths that are arguably present in the minds of the public and legal profession and, thus, may have an effect on the outcome of rape trials. These include: (1) that a victim will always fight back and resist; (2) a real victim will always report immediately; (3) that a victim will display great emotion when in court; and (4) that women often lie about being raped.²⁶ Gerger also lists a number of rape myths in his study.²⁷

While these myths are incredibly varied, they all have the same goal: shifting blame away from the perpetrator and placing it, either fully or partly, on the victim's shoulders. They also arguably tone down the harmfulness and damage that being raped does to a woman, particularly in cases of marital rape.

²¹ Martha Burt, 'Cultural Myths and Support for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217.

²² Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33(5) *Aggressive Behaviour* 422, 423.

²³ *ibid* 423.

²⁴ Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, ss 7-8.

²⁵ Helen Reece, 'Rape Myths - Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445, 456.

²⁶ Jennifer Temkin, "'And always keep a-hold of nurse, for fear of finding something worse': Challenging rape myths in the courtroom' 2010 13(4) *New Criminal Law Review* 710, 715.

²⁷ Gerger and others (n 22) 439.

C. The Prevalence of Rape Myths in Society

There are various conflicting opinions on whether rape myths are apparent in society, which shall be explored in this section. Differing viewpoints regarding whether or not these rape myths affect the thinking of juries, thus making them more likely to acquit the accused rather than convict, shall be examined.

For those who do not believe that rape myths have an impact on the justice system, introducing a scheme of mandatory jury directions clearly does not appear logical. Reece argues that ‘the regressiveness of current public attitudes towards rape has been overstated.’²⁸ Reece was clearly of the belief that the public do not hold prejudicial misconceptions of any significance about rape or victims of rape. However, this article shall later establish that there is convincing evidence of rape myths being present in the minds of juries.

Specifically, Reece takes issue with the ‘Real Rape’ myth. The myth is that strangers commit real rape, often using violence. She argues that there is increasing knowledge amongst the public and juries that penetration of a partner in the absence of consent is classed as rape.²⁹ Furthermore, she suggests that the reason for the higher prosecution of stranger rapes is due to the fact that there is more likely to be internal or external trauma capable of use as evidence.³⁰ She argues that Munro and Ellison’s study of mock jurors confirms this, as it demonstrated that the real rape myth ‘has fallen out of favour’.³¹

However, the Scottish Social Attitudes Survey 2014 clearly highlights flaws within Reece’s arguments: it demonstrates that there were still significant differences in the way that ‘real’ rape and partner rape are viewed.³² The survey found that 67% of respondents believed that rape by a husband would cause the victim a great deal of harm, compared to 85% who believed that rape committed by a stranger would cause a great deal of harm.³³ The survey notes that, because marital rape was still legal in Scotland until 1989,³⁴ the attitudes left behind linger.³⁵

Furthermore, Gurnham demonstrates that the real rape myth is still a prevalent issue in public opinion. Gurnham discusses a study in which respondents were presented with two scenarios: one in which the rape is committed by a boyfriend and

²⁸ Reece (n 25) 466.

²⁹ *ibid* 457.

³⁰ *ibid* 457-458.

³¹ Louise Ellison and Vanessa Munro, ‘A Stranger in the Bushes, or an Elephant in the Room? Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13(4) *New Criminal Law Review* 781, 784.

³² Susan Reid and others, ‘Scottish Social Attitudes Survey 2014: Attitudes to violence against women in Scotland’ (*Scottish Government*, November 2015), 18-20 <<http://www.gov.scot/Resource/0048/00489760.pdf>> accessed 24 February 2017.

³³ *ibid* 18.

³⁴ The previous law, which did not consider marital rape as a crime, was overturned authoritatively, and in full, in *S v HM Advocate* 1989 SLT 469, 473-475 (Opinion of the Court). See also the earlier decisions in *HM Advocate v Duffy* 1983 SLT 7 and *HM Advocate v Paxton* 1984 JC 105, which signalled a partial move towards the principled change in the law established in *S v HM Advocate*.

³⁵ Susan Reid and others, ‘Scottish Social Attitudes Survey 2014: Attitudes to violence against women in Scotland’ (n 32) 17.

the other by a stranger.³⁶ It was found that in the stranger situation, 88.9% of respondents were “not ok with the sex described”, compared to 58.6% in the boyfriend scenario.³⁷ Gurnham argues that the reason could be that people believe that there is a form of ‘ongoing consent’ capable of being drawn from the continuing relationship in the boyfriend scenario.³⁸ Clearly, this study further demonstrates the public perception that partner rape is less harmful, or that a person will always consent to sexual intercourse with their partner. Therefore, it would be misguided for individuals to claim that the real rape myth is no longer a pressing issue in society.

Aside from the real rape myth, the Scottish Social Attitudes Survey found clear evidence of numerous other rape myths, including: that marital rape is less damaging or serious; that a woman’s behaviour can be to blame if she is raped; that a woman’s clothing or amount she has had to drink can be to blame for her being raped; and that women can often lie about being raped.³⁹ The data collected is very concerning: for example 15% of respondents believed a woman was almost entirely to blame for wearing revealing clothing and 14% believed the same if a woman was drunk.⁴⁰ Furthermore, 23% believed that women often lie about being raped.⁴¹ The Survey discovered that if a woman were to kiss an individual, who then raped her, respondents’ attitudes changed greatly from if the woman had not.⁴² In the scenario of a woman kissing a stranger, 24% believed that her behaviour was ‘very seriously wrong’ and this reduced to 14% in the scenario of a wife who had kissed her husband.⁴³

The survey found that younger people, those who had been through higher education, those on higher incomes and those who had experienced gender-based violence in the past were more likely to believe that the victim was ‘not at all to blame’ in these various scenarios.⁴⁴ Interestingly, the survey found that 27% of women believed that ‘women often lie about being raped’ compared to 19% of the male respondents, highlighting that women can be inherently suspicious of rape victims.⁴⁵

Hence, there is clear evidence of numerous rape myths in the public’s attitude and belief towards rape victims. This is a serious issue when these members of the public are appointed to a jury and carry their prejudices in to the courtroom.

³⁶ David Gurnham, ‘Victim-blame as a symptom of rape myth acceptance? Another look at how young people in England understand sexual consent’ (2016) 36(2) *Legal Studies* 258, 265.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Susan Reid and others, ‘Scottish Social Attitudes Survey 2014: Attitudes to violence against women in Scotland’ (n 32) 22-25.

⁴⁰ *ibid* 23.

⁴¹ *ibid* 23.

⁴² *ibid* 22.

⁴³ *ibid* 22.

⁴⁴ *ibid* 24.

⁴⁵ *ibid* 24.

D. The Prevalence of Rape Myths in Court

As rape myths are evident within society, it is a reasonable assumption that they would also be evident within the courtroom. However, some dispute this and believe introducing jury directions would not make a practical difference as the attitudes and beliefs of jurors, who are drawn from society, are not the problem. Heaton-Armstrong argues that ‘those who ought to know better constantly and without qualification refer to complainants as victims, suggest jury acquittals are too frequent and that this is attributable to jurors’ ignorance (...) and minimise the extent to which false complaints are made.’⁴⁶ This issue is difficult to resolve, given that there are no definitive figures on how many rape allegations are false. Indeed, Rumney argues that ‘it is perhaps surprising (...) that while the issue of false allegations appears significant in the treatment of rape by the criminal justice system, there has been little detailed attention given to the reliability of the evidence on the prevalence of false allegations.’⁴⁷

Heaton-Armstrong argues that the figure varies and that some believe that up to 50% of allegations are false.⁴⁸ However, Grubb and Turner dispute this, stating that ‘this figure is constantly over-estimated by observers, including those working within the criminal justice system, whereas research indicates that the actual number of false allegations is approximately 2%.’⁴⁹ Indeed, Kelly et al. carried out a study in which they examined reports and used police guidelines to assess credibility. They discovered that 3% of the cases could be regarded as being ‘possibly’ or ‘probably’ false.⁵⁰ It is argued that ‘since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough to convict a man of a crime.’⁵¹ However, Allison and Wrightsman contend that ‘whatever the percentage of reported rapes that are false, it is lower than the public’s estimate.’⁵² They provide the reason that false rape stories are the ones more likely to be played out in the media.⁵³ Therefore, whilst there is dispute over the actual figures, it is clear that there may still be a problem with the public’s perceptions that the incidence of false rape accusations are greater than they actually are. This means there is an inherent mistrust of the complainer from the outset, which presents the complainer with a greater barrier to overcoming the prejudice in the minds of the public.

Consequently, Heaton-Armstrong’s assertion that false allegations play a large part in the attrition rate of rape can be placed into question. Indeed, Heaton-

⁴⁶ Anthony Heaton-Armstrong ‘Rape – Myth and Reality and the Need for Balance’ (2010) 50 *Medical Science Law* 111, 111.

⁴⁷ Philip Rumney ‘False Allegations of Rape’ (2006) 65(1) *Cambridge Law Journal* 128, 129.

⁴⁸ Heaton-Armstrong (n 46) 112.

⁴⁹ Amy Grubb and Emily Turner, ‘Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming’ (2012) 17(5) *Aggression and Violent Behaviour* 443, 445.

⁵⁰ Liz Kelly, Jo Lovett and Linda Regan, ‘A gap or a chasm? Attrition in Reported Rape Cases’ Home Office Research Study 293 (February 2005), 83 <<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>>.

⁵¹ Anonymous, ‘Corroborating Charges of Rape’ (1967) 67(6) *Columbia Law Review* 1137, 1138.

⁵² Julie Allison and Lawrence Wrightsman, *Rape The Misunderstood Crime* (Sage Publications 1993) 11.

⁵³ *ibid* 11.

Armstrong's reasoning is somewhat problematic upon inspection. Ironically, he seems to endorse the rape myths that he so vehemently denies exist. He appears to support the myth that women often cry "rape" and paints a suspicious picture of women, by describing 'fabrication of evidence through self-injury and the planting of exhibited material, attributing these to their attackers.'⁵⁴ When faced with the question as to why women would put themselves through the trouble of making a false complaint and trying to prove it, Heaton-Armstrong provides a list of reasons.⁵⁵ This list includes 'attention or notoriety seeking (...) revenge (...) reaction to rejection or a sexual obsession of the accused.'⁵⁶ This does little other than promote the suspicion of women who claim they have been raped and, therefore, appears to gloss over the studies demonstrating such rape myths to be untrue.

Despite criticisms, there is clear evidence to show that rape myths do exist and can cause trouble in the justice system. The attitudes of mock jury members were examined in a study conducted by Ellison and Munro, in which there was clear evidence to support the existence of rape myths among the respondents of the study.⁵⁷ The study focused on the calm demeanour of the victim, delayed reporting by the victim and a lack of resistance shown by the victim. The findings in all three of the areas found that mock jurors had misconceptions surrounding the reactions of rape victims.⁵⁸ The jury directions that have been introduced in Scotland tackle the issues of delayed reporting and lack of resistance or use of force.⁵⁹

In the case of delayed reporting, it was found that in the jury groups not provided with guidance there was evidence of belief in the myth that genuine victims report immediately. Those groups were found to claim that 'the complainant's response had undermined her credibility in their eyes, tagging her behaviour as "odd", "strange" and "disturbing"'.⁶⁰ Although the sample size was small, it is significant that 58% of the non-guidance respondents allowed their judgement to be clouded by the timing of the reporting to the police, especially when there is evidence to show that an increasing number of rapes are not reported immediately.⁶¹ Therefore, this was clearly an area in need of reform and the new jury directions may serve that purpose.

For the issue of lack of resistance, again there was evidence of support for the rape myth that a true rape involves the victim doing all they can to resist the rapist. Munro and Ellison found that 'it was clear jurors expected the complainant to offer some sort of resistance, even if it was only to slap, scratch or knee her alleged assailant – and to have sustained some injury as a result.'⁶² Again, despite the small sample

⁵⁴ Heaton-Armstrong (n 46) 112.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ Louise Ellison and Vanessa Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *British Journal of Criminology* 363.

⁵⁸ *ibid.*

⁵⁹ *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*, s 6, inserting s288DA and s288DB into the *Criminal Procedure (Scotland) Act 1995*.

⁶⁰ Ellison and Munro, 'Turning Mirrors into Windows?' (n 57) 370.

⁶¹ Graham Ross, *Abusive Behaviour and Sexual Harm Scotland Bill*, SB 15/74, 12 November 2015, 16 <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-74_Abusive_Behaviour_and_Sexual_Harm_Scotland_Bill.pdf> accessed 24 February 2018.

⁶² Ellison and Munro, 'Turning Mirrors into Windows?' (n 57) 371.

size, this certainly shows a tendency within some members of society capable of being part of a jury to hold the lack of resistance rape myth as true. It is indeed hoped that jury directions introduced by the 2016 Act will quell this.

E. The Underwhelming Impact of the Criminal Procedure (Scotland) Act 1995

Introducing legislation designed to tackle the issue of rape myths is not new to the Scottish Parliament. In 2002, existing ‘rape-shield’ legislation⁶³ was amended by the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002.⁶⁴ The purpose of section 274⁶⁵ is to limit certain questioning to the victim in rape trials. This was aimed at combatting the myths that ‘unchaste women are more likely to consent’ and the myth that these women ‘are less worthy of belief’.⁶⁶ Section 275 deals with the ability of the Crown or defence to make an application to present evidence, on issues such as the complainant’s previous sexual behaviour, that would otherwise be disallowed, in the interests of justice.⁶⁷

There was clear need for protection of complainers in rape trials, for these often involved degrading and embarrassing questioning being put towards the victim in order to try and undermine her testimony. Indeed, Burman viewed the techniques used by the defence to undermine the complainer’s testimony as ‘oppressive and invidious.’⁶⁸ Furthermore, Chambers and Millar conducted a study in which they found that ‘the actual experience of the trial for the majority of women confirmed their worst expectations principally because the defence cross-examination made the complainer feel that her own character and behaviour was on trial.’⁶⁹

However, in research conducted on the functioning of these provisions, there have been several flaws highlighted. Duff argued that ‘the new legislation has not been particularly successful in terms of protecting the victims of sexual offences from what many regard as irrelevant and often offensive cross-examination.’⁷⁰ The study conducted found that 72% of rape trials now involve an application under s275, with the defence making most of these.⁷¹ Of these applications the Crown tended not to object and the Court only refused 7%.⁷² Additionally, of the cases studied, the authors found that ‘just under half of the observed trials with s.275 applications involved

⁶³ Criminal Procedure (Scotland) Act 1995, ss 274-275.

⁶⁴ Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, s 8.

⁶⁵ Criminal Procedure (Scotland) Act 1995, s 274.

⁶⁶ Scottish Executive, ‘Redressing the Balance: Cross Examination in Rape and Sexual Offence Trials’ (Stationary Office 2001) 90-91.

⁶⁷ Criminal Procedure (Scotland) Act 1995, s 275.

⁶⁸ Burman (n 18) 383.

⁶⁹ Gerry Chambers and Ann Millar, ‘Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim?’ in Pat Carlen and Anne Worrall, *Gender, Crime and Justice* (3rd edn, Open University Press, 1995) 64.

⁷⁰ Peter Duff, ‘The Scottish “Rape Shield”: As Good as it Gets?’ 2011 15(2) *Edinburgh Law Review* 218, 220.

⁷¹ Michele Burman and others, ‘Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study’ (2007) Scottish Government Social Research 2007, 2 <<http://www.gov.scot/Publications/2007/09/12093427/0>> accessed 23 February 2017.

⁷² *ibid*.

evidence or questioning being introduced which had not been explicitly agreed in the application.⁷³

Although Duff argues that ‘one must be cautious about reading a pattern or trend’⁷⁴ from the various cases that have arisen in this area, there have been instances in which the courts have reached rather worrying decisions. The decision in *Kinnin v HMA*⁷⁵ provides worrying reading. There, a complainer’s remarks about wanting to have sexual intercourse with the accused’s son a few weeks prior to the incident was admissible as evidence. The Crown did not object to the raising of this as evidence and the Court held that the evidence was not too remote in time or in its relationship to whether the physical contact had been consensual. Indeed, Campbell and Cowan refer to this decision as ‘extraordinary’.⁷⁶ Furthermore, in the case of *Cumming v HMA*,⁷⁷ the Court allowed questioning of one complainer sitting on the accused’s knee at a social event after the alleged incident and of the other complainer’s attempts to steal from him and demands for money. While these cases cannot show the entirety of the Court’s attitude to sexual history evidence, it does demonstrate situations in which judicial discretion appears to be used too widely.

Clearly, Scotland’s previous attempts to tackle rape myths have had somewhat of an underwhelming impact. It is evident that the (then) current measures are simply not enough and, as a result, more needs to be done. The introduction of jury directions – while not solving the issues of sexual history evidence – hopefully serves as a means of disposing with rape myths and, therefore, reduces some of the prejudice women face.

3. *The Use of Jury Directions in Other Jurisdictions*

A. Introduction

While the introduction of jury directions in rape trials may be an entirely new concept to Scotland, such directions have been used in other jurisdictions for many years. This allows Scotland a useful opportunity to build on the mistakes visible in other jurisdictions to create an efficient system of jury directions in bringing a trial back to equal footing. This section examines several different jurisdictions that make use of jury directions in rape trials. It considers their successes and failures and assesses how Scotland can build on these, once the 2016 Act comes into force.

⁷³ *ibid* 5.

⁷⁴ Duff, ‘The Scottish “Rape Shield”: As Good as it Gets?’ (n 70) 236.

⁷⁵ *Kinnin v HM Advocate* 2003 SCCR 295.

⁷⁶ Liz Campbell and Sharon Cowan, ‘The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences’ in Peter Duff and Pamela R Ferguson, *Scottish Criminal Evidence Law: Current Developments and Future Trends* (1st edn, Edinburgh University Press 2018) 76.

⁷⁷ *Cumming v HMA* 2003 SCCR 261.

B. Victoria, Australia

Jury directions in Victoria are currently contained within the Jury Directions Act 2015 (“the 2015 Act”). It was recognised by the Victoria Law Reform Commission (VLRC) and the Victoria Department of Justice that the previous law on jury directions was very problematic.⁷⁸ The 2015 Act follows the Jury Directions Act 2013: both state that the purpose is to simplify the jury directions that judges provide in trials and to ensure that they are as simple and clear as possible.⁷⁹ The provision on lack of physical resistance remained much the same under the 2015 Act as it was under the 2013 Act, only differing in that this direction is no longer mandatory and only needs to be given if (a) counsel asks for the direction to be given and (b) the judge considers it appropriate to do so.⁸⁰ However, the directions regarding a delay in complaint have been completely overhauled under the 2015 Act, in order to clear up any confusion created by the previous mixture of common law and statute, which shall be discussed in the next paragraph.

i. Delayed Disclosure and the Crofts/Kilby Directions

Perhaps the greatest step forward in the 2015 Act was the clarification regarding which statutory jury directions had to be given and when they were to be given. The new Act removes the previous problem of judges being obliged to give directions that encouraged stereotypical misconceptions about rape complainers. The previous law was set out in the case of *Kilby*, where the High Court allowed juries to doubt the credibility of the complainer due to delay in disclosure.⁸¹

Despite introducing jury directions to combat this prejudicial direction, the case of *Crofts* ensured that a *Kilby* direction was still given.⁸² The effect of *Crofts* was that ‘mandatory directions about delay (...) were not intended to sterilise sexual offence complaints from criticism, or convert them into an “especially trustworthy class of witness”.’⁸³ This reasoning meant that the High Court considered, effectively, that it was still appropriate to warn the jury about the credibility of the complainer if she had delayed in making a complaint, in certain circumstances.⁸⁴

However, this changed under the 2015 Act: section 54 removed the common-law rules that were created under *Kilby* and *Crofts*.⁸⁵ The law also provides further protection for rape complainers, as a class, by providing a list of prohibited statements to ensure that credibility is not attacked due to a delay in complaint.⁸⁶ This is a marked improvement in the law; it is an effort to target the rape myth that a real victim will

⁷⁸ For reasons of space, this paper will not examine, in detail, the previous issues with the law. For further analysis, please see Victorian Law Reform Commission, *Jury Directions Final Report* (Final Report 17, 2009) <www.lawreform.vic.gov.au/sites/default/files/VLRC_JuryDirections_FinalReport.pdf> accessed 7 March 2017.

⁷⁹ Jury Directions Act 2013 (Victoria), s 5; Jury Directions Act 2015 (Victoria), s 5.

⁸⁰ Jury Directions Act 2015 (Victoria), s 46(3)(c)(ii).

⁸¹ *Kilby v The Queen* 1973 129 CLR 460, 472.

⁸² *Crofts v The Queen* 1996 186 CLR 427.

⁸³ Victorian Law Reform Commission, *Jury Directions Final Report* (n 78) 54.

⁸⁴ *ibid.*

⁸⁵ Jury Directions Act 2015 (Victoria), s 54.

⁸⁶ *ibid* s 51.

report a rape immediately. However, the 2015 Act still provides for a balanced direction to be given⁸⁷ and, therefore, prevents the risk of an unfair trial for the accused.⁸⁸ The Explanatory Notes to section 51 of the 2015 Act – which details the prohibited statements or suggestions about the complainer – state that either counsel or the judge may still suggest that in a particular case, the complainer’s credibility can be questioned by their delay in complaint.⁸⁹

The Victoria Department of Justice recognised this and argued it ‘will allow defence counsel and trial judges to make appropriate arguments, and give appropriate directions, respectively, in the context of the particular case.’⁹⁰ However, section 53 of the 2015 Act allows the prosecution to ask the judge to warn that ‘there may be good reasons why a person may not complain, or may delay complaining about a sexual offence.’⁹¹ This reform in the law provides a balanced direction, without enforcing stereotypes about the reactions of rape complainers. The Victorian Criminal Charge Book – which contains guidance and model directions – states that ‘these directions are designed to address certain misconceptions jurors may have about the significance of delay.’⁹²

ii. Mandatory and Requested Directions

The new Act amends the mandatory nature of the directions and instead provides a mixture of mandatory and requested directions. Section 46(3) provides that counsel can ask the judge to direct the jury about a lack of physical resistance.⁹³ The position on delayed disclosure contains some mandatory directions and some that can be requested.⁹⁴ It should be noted that the mandatory directions introduced in Scotland have now been made discretionary in Victoria.⁹⁵

The Department of Justice argue that the provisions are better being based on request as it promotes ‘shorter directions that are tailored to the issues in dispute.’⁹⁶ While the directions in the Scottish Act are merely template directions, it remains to be seen to what extent judges will make an appropriately tailored direction. Such directions would arguably make it easier for juries to understand the direction. If directions were made on a request basis, it would be easier for the judge to relate the direction to the circumstances of the case in court, enhancing clarity for the jury. As Scotland has not allowed for this provision, it is not clear whether jury directions will be of optimum utility for juries.

⁸⁷ *ibid.*

⁸⁸ *ibid* s 51 (‘Explanatory Notes’).

⁸⁹ *ibid.*

⁹⁰ Victoria Department of Justice, *Jury Directions: The Next Step* (2013) 56 <assets.justice.vic.gov.au/justice/resources/28aa15b5-5ae9-4408-a7a5-5e42fd55f156/jurydirections_thenextstep.pdf> accessed 3 March 2017.

⁹¹ Jury Directions Act 2015, s 53.

⁹² Judicial College of Victoria, *Victorian Criminal Charge Book Bench Notes* (Victoria) 4.8.2.20 <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm>> accessed 23 February 2018.

⁹³ Jury Directions Act 2015 (Victoria) s 46(3).

⁹⁴ *ibid* s 52-53.

⁹⁵ *ibid* s 46(3), ss 52-53.

⁹⁶ Victoria Department of Justice & Regulation, *Jury Directions: A Jury Centric Approach* (Victoria) (2015) 86 <assets.justice.vic.gov.au/justice/resources/935d6517-281e-4b0c-ae1e-f5ae69e33e23/jury-directions-a-jury-centric-approach.pdf> accessed 3 March 2017.

Additionally, the Victoria Department of Justice argue that allowing counsel to request directions may ‘reduce the risk of retrials, as appellate courts are less likely to interpose their own view of what directions were relevant if the parties have collaborated with the judge about what is and is not in issue.’⁹⁷ The reasoning behind this is that the accused will no longer be able to argue that the judge didn’t give certain directions and therefore compromised his right to a fair trial. However, this discretion to give the direction runs the risk of dispute between counsel and the parties over whether a direction should be made or not. This could lead to acrimony and hostility if the direction is not delivered despite the complainer seeking it.

iii. Timing of Directions

An area in which the new directions regime in Victoria prevails over the new Scottish system is that, under the Victoria 2015 Act, there is no set time for a judge to give a jury direction: if the judge believes the trial to be likely to contain evidence to show that there has been a delay in complaint, the judge ‘may give the direction before any evidence is adduced in the trial.’⁹⁸ It also states that, if evidence is brought to light during the trial, then the judge must give the direction as soon as possible and also that they can repeat the direction ‘at any time in the trial.’⁹⁹ This differs from the Scottish system in which the judge must give the direction during the charge to the jury, which is after all evidence has been presented.¹⁰⁰ As Duncanson and Henderson suggested, jury directions are far more effective if they have been given *prior to any evidence in the trial*.¹⁰¹ They argue that ‘the damaging influence of rape myths can only be diminished if the signifiers that evoke them are controlled from the earliest moments in rape trial proceedings.’¹⁰² They argue that ‘timing and order has a significant impact on the narratives that a jury is able to hear or construct from the evidence.’¹⁰³ Arguably, when introducing jury directions in Scotland, it would have been more effective to allow the judge to give directions at the start of the trial, as shall be discussed in the next section.

iv. A Counterintuitive Direction?

A fundamental change in the wording of directions made by the 2015 Act is of note to Scotland. Under the previous Victoria law, in the Crimes (Sexual Offences) Act 1991, a judge was obliged to direct that ‘delay in complaining does not necessarily indicate that the allegation is false’.¹⁰⁴ The wording of this direction was a point of contention. The Rape Law Reform Evaluation Project argued that ‘stating (...) delay does not necessarily indicate falsity (...) implies that there is reason to suspect that late

⁹⁷ *ibid* 86.

⁹⁸ Jury Directions Act 2015 (Victoria) s 52(1)(b).

⁹⁹ *ibid* s 52.

¹⁰⁰ Criminal Procedure (Scotland) Act 1995, s288DA(2) (as inserted by Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s6).

¹⁰¹ Kirsty Duncanson and others, ‘A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?’ (2016) 39(2) University of New South Wales Law Journal 750, 750.

¹⁰² *ibid*.

¹⁰³ *ibid* 759.

¹⁰⁴ Crimes (Sexual Offences) Act 1991 (Victoria) s 61(1)(b)(i).

complaints may be false.¹⁰⁵ Indeed, this direction appears to indicate that there is a real chance that the delay in complaint could indicate falsity. This concern was recognised by the Victoria legislature and this direction was removed from the legislation.¹⁰⁶

This should be of concern to those involved in the criminal justice system in Scotland, as the direction that was found to be counterintuitive and, thus, removed from Victorian law is the very same direction that has been introduced by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.¹⁰⁷ It is worrying that all mandatory directions that are to be introduced in Scotland contain the word 'necessarily', as this may result in them having the opposite impact from that which they were intended to. Subsequently, juries may find themselves going into deliberations believing that there is a reason to be wary of those who delay in complaining or do not resist their alleged attacker. This appears to be a lose-lose situation. As previously discussed, given some jury members' pre-existing bias towards rape complainers, the myth may still be present in their minds even where there is no jury directions. However, the inclusion of the directions, as phrased in the Scottish provisions, implies a legitimate basis for the belief in the myth. Therefore, there is concern around whether the wording of the Scottish directions will have an adverse impact in practice.

Overall, Victoria has a far more comprehensive and detailed system of jury directions in sexual offence trials than Scotland now has. The 2015 Act contains more detailed provisions on what can and cannot be said by the judge and when directions can be given.¹⁰⁸ This clarifies the law for judges and counsel and arguably improves the use of jury directions in trials.

C. New South Wales, Australia

In New South Wales, the judge has a statutory obligation to warn the jury about delay in disclosure.¹⁰⁹ However, there is no direction for a lack of physical resistance, but this is featured in the Criminal Trial Courts Bench Book – a guidance document intended to be used by Supreme Court and District Court judges.¹¹⁰

i. Delayed Disclosure and the Crofts direction

Delayed disclosure is dealt with at section 294 of the Criminal Procedure Act 1986 which contains, effectively, the same directions as those introduced in Scotland. However, there is also the addition of a provision that allows the judge to give a *Crofts/Kilby* direction: in which a jury may take a delay in disclosure into account when assessing a complainer's credibility.¹¹¹

¹⁰⁵ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Discussion Paper* (2001) 152 <www.lawreform.vic.gov.au/sites/default/files/Final%2BSexual%2BOffences_0.pdf> accessed 3 March 2017.

¹⁰⁶ *ibid.*

¹⁰⁷ Criminal Procedure (Scotland) Act 1995, s288DA(2)(b), as inserted by Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6.

¹⁰⁸ Jury Directions Act 2015 (Victoria), pt 5.

¹⁰⁹ Criminal Procedure Act 1986 (NSW), s 294(2).

¹¹⁰ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2016) <<https://www.judcom.nsw.gov.au/criminal/>> accessed 10 March 2017.

¹¹¹ Criminal Procedure Act 1986 (NSW), s 294(2).

The problem with this *Crofts/Kilby* direction was discussed previously in the analysis of the Victoria system. However, New South Wales has specifically allowed for it in its legislation. The Criminal Trial Courts Bench Book lays out a model direction for the situation in which the judge considers that there is sufficient evidence to satisfy giving a section 294(2)(c) direction.¹¹² A section 294(2)(c) direction states that a judge ‘must not warn the jury that delay in complaining is relevant to the victim’s credibility unless there is sufficient evidence to justify such a warning.’¹¹³

The model direction includes discussion of the accused’s position, namely that ‘the accused has argued that the delay (...) is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating that the complainant’s evidence is false.’¹¹⁴ The case of *Jarrett v R* laid out the test that ‘there must be something in the evidence sufficient to raise in the judge’s mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complainant.’¹¹⁵ However, this could prove problematic in practice. The entire test depends on the judge’s perspective of the case: while one judge may think a direction needs to be made, another may not. This could also give rise to opportunities of appeal, if the accused believes there was enough evidence for a direction to be made.

ii. Delay resulting in Forensic Disadvantage

When considering the introduction of jury directions in Scotland, it was argued by Maher that, for directions not to prejudice the accused, there should be a direction to provide that – in cases of delayed complaint – the accused will face a forensic disadvantage due to delay in reporting by the complainer.¹¹⁶ This is provided for under section 165B of the Evidence Act 1995 in New South Wales.¹¹⁷ The rationale behind this provision is that, due to the delay, the accused will have lost their chance to have evidence forensically examined. For example, if there has been a delay then there is no way to prove that penetration did not occur.

It may be argued that by not making such a provision available in Scotland, the directions will be favourable to the prosecution, because juries will not be expressly made aware of this point. However, in response to this, it is important to remember that the prosecution will have also lost the ability to rely on forensic evidence. Forensic evidence would be incredibly important to the prosecution in situations where intercourse is allegedly forced or in situations where intercourse is denied. Therefore, the argument of forensic disadvantage in favour of the accused is severely weakened when looking at the same issue from the perspective of the complainer.

An accused may argue that it is unfair for them to be disadvantaged given that they had no control over the delay of making the complaint. However, in certain cases, the delay in complaint can be a result of the accused, rather than the complainer. For

¹¹² Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book 2016* (n 110) 270.

¹¹³ Criminal Procedure Act 1986 (NSW) s 294(2)(c).

¹¹⁴ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book 2016* (n 110) 270.

¹¹⁵ *Jarret v R* [2014] NSWCCA 140.

¹¹⁶ Scottish Parliament Justice Committee, *Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill* (SP Paper 885.1, 2nd Report, Session 4, 2016) 29 (SP Justice Committee Second Report on ABSH Bill).

¹¹⁷ Similar provisions exist in Victoria, under the Jury Directions Act 2015 (Victoria) s 39.

instance, in *Jarrett v R*,¹¹⁸ the accused threatened to commit suicide if the complainant reported the rape.

Even though in *Jarrett* the judge at first instance did not give the direction, given the NSW law is based on each judge's perspective, there is a possibility that the decision may have gone the other way if a different judge had been presiding. It is arguable that the prosecution should not be disadvantaged where the complainant delayed in complaining due to factors out with their control – such as those within *Jarrett v R* – as discussed previously. Whilst, from a legal viewpoint, there may not have been any actual prohibition to the complainant reporting, there may be situations in which they feel a great deal of pressure not to report straight away and it appears somewhat unfair to allow the jury to draw a negative inference from this. Therefore, Scotland arguably went in the right direction by not including a forensic disadvantage direction.

iii. Lack of Physical Resistance Direction

Although there is currently no statutory direction for lack of physical resistance in New South Wales, it is included in judicial guidance. Section 61HA(7) of the Crimes Act 1900 states that a person cannot be taken to have consented to a sexual act by virtue of the complainant not physically resisting.¹¹⁹ This is echoed in the Criminal Trial Courts Bench Book (“the Bench Book”), which states that ‘a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.’¹²⁰

However, a further direction is also included in this Bench Book. It states that ‘absence of consent may be communicated in other ways such as the offering of resistance.’¹²¹ While the direction makes it clear that offering of resistance is not a mandatory requirement of indicating absence of consent, a jury would arguably still use this direction to draw an inference from a lack of physical resistance. Flynn argues that, under the current law in New South Wales, ‘directions given to the jury are not only inconsistent, but they arguably reinforce the myth that real victims typically ‘resist’ rape (...) [and] furthermore, it firmly places the jurors’ focus back on the complainant, and what they did to actively demonstrate non-consent.’¹²² Therefore, this article submits that, having considered the position in New South Wales, it is correct for a direction introducing physical resistance to be introduced. Such a direction makes clear to the jury that there is no need for physical resistance for there to be an absence of consent.

¹¹⁸ *Jarrett v R* [2014] NSWCCA 140.

¹¹⁹ Crimes Act 1900 (NSW), s 61HA(7).

¹²⁰ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book 2016* (n 110) 966.

¹²¹ *ibid.*

¹²² Asher Flynn and Nicola Henry, ‘Disputing Consent: The Role of Jury Directions in Victoria’ (2012) 24(2) *Current Issues in Criminal Justice* 167, 173.

D. England and Wales

The directions as introduced in Scotland via the 2016 Act, and which entered into force on 24 April 2017,¹²³ are not entirely alien within the UK. Whilst not contained in statutory provisions, the Crown Court Compendium in England and Wales allows for the judge to ‘counter the risk of assumptions about sexual behaviour and reactions to non-consensual conduct.’¹²⁴ The Compendium lays out more detailed instructions on how the direction should be given; for example, it may be given at the beginning or end of the trial and that the judge should discuss with counsel before giving the direction.¹²⁵

Furthermore, the Compendium states that ‘considerable care is needed to craft the direction to reflect the facts of the case and to retain a balanced approach.’¹²⁶ It also allows the judge to direct on lack of resistance, stating that the judge should ‘alert the jury to the distinction between submission and consent.’¹²⁷

However, there is a considerable lesson to be learnt from the English Court of Criminal Appeal case of *R v D*¹²⁸ when implementing jury directions in Scotland. In this case, the trial judge was criticised by an appellate court for giving a lengthy direction in favour of the victim, offering reasons as to why she may not have disclosed the rape until a later date, with ‘the absence of any balancing remarks as to the appellant’s case.’¹²⁹ It was held that the original trial judge’s speech ‘reads like the prosecution closing speech.’¹³⁰ Although in this case, the original jury verdicts were declared as ‘safe’, the case should still serve as a warning to judges that if they go too far with their direction, it could significantly increase the scope for an appeal.¹³¹

4. Jury Directions: A Welcome Addition to the Scottish Legal System?

A. Introduction

Having examined the use of jury directions in other jurisdictions, it is important to consider the support and opposition to them in Scotland. This section examines arguments put forward in the Scottish Parliament in favour of and against directions. It then considers the improvements that jury directions could bring to Scotland and take account of the views of various organisations that work with rape victims. The

¹²³ Entered into force under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No 1 and Transitional Provision) Regulations 2017, SSI 2017/93, reg 2(1)(c).

¹²⁴ Judicial College, ‘The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up’ (Judicial College, 2017) para 20-1 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-feb2017.pdf>> accessed 10 March 2017.

¹²⁵ *ibid* para 20-2.

¹²⁶ *ibid*.

¹²⁷ *ibid* para 20-3.

¹²⁸ *R v D* [2008] EWCA Crim 2557, [2009] Crim LR 591.

¹²⁹ *ibid* [13] (Judgment of the Court, delivered by Latham LJ).

¹³⁰ *ibid* [12] (Judgment of the Court, delivered by Latham LJ).

¹³¹ *ibid* [13] (Judgment of the Court, delivered by Latham LJ).

section concludes by considering whether the jury directions introduced will go far enough to reduce the suspicion and mistrust felt towards the complainer in a rape trial. Namely, it shall discuss the missed opportunities to tackle other rape myths, the mistake in the timing of the directions and whether there are other methods which will be better placed to tackle some of the issues prevalent in rape trials.

B. Opposition to Jury Directions

During Parliamentary debate, it was noted that the introduction of jury directions 'proved to be the most contentious aspect of the Bill.'¹³² It was noted that directions in trials are not unknown to the Scottish legal system;¹³³ it is common practice for judges to give procedural directions on matters such as the presumption of innocence and standard of proof.¹³⁴ However, the new jury directions in sexual offence cases differ as they have a statutory basis. Lord Carloway argued that they 'set a precedent', since it effectively involves Parliament directing judges on what should be included in their charge to the jury.¹³⁵ While lessons can be learned from the use of these directions in other jurisdictions, it remains to be seen how the directions are implemented in Scotland.

i. Threat to Judicial Separation

A major argument against the introduction of mandatory jury directions in rape trials was the threat that they are argued to pose to the judicial system. Margaret Mitchell MSP, now convener of the Justice Committee,¹³⁶ was very passionate in her belief that the new jury directions 'could set a dangerous and unwelcome precedent by eroding the judiciary's discretion and the separation of powers.'¹³⁷ Indeed, she strongly argued for removal of the provision 'in its entirety.'¹³⁸ Sheriff Liddle appeared to agree with the threat of statutory jury directions by noting that 'there are dangers involved in legislating for something that goes in a jury speech.'¹³⁹

However, the Cabinet Secretary for Justice, Michael Matheson, disputed this risk to judicial separation by arguing that Parliament 'regularly makes decisions on various matters that have an impact on the judiciary.'¹⁴⁰ Although an objector to the directions in the Bill, Lord Carloway, the Lord President and Lord-Justice General, disputes the fact that jury directions may be an unwelcome political interference, commenting 'we [the judiciary] respect Parliament's legislative function (...) if

¹³² Graham Ross, *Abusive Behaviour and Sexual Harm Scotland Bill: Stage 3*, SB 16/31, 16 March 2016, 11 (SB 16/31) <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_16-31_Abusive_Behaviour_and_Sexual_Harm_Scotland_Bill_Stage_3.pdf> accessed 23 February 2018.

¹³³ SP Justice Committee Second Report on ABSH Bill (n 116) 28.

¹³⁴ Judicial Institute for Scotland, 'Jury Manual' (*Judicial Institute for Scotland*, 2017) 5.6-5.7 <<http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualJune2017.pdf>> accessed 22 September 2017.

¹³⁵ SP Justice Committee Second Report on ABSH Bill (n 116) para 120.

¹³⁶ Scottish Parliament, 'Current MSPs' <<http://www.parliament.scot/msps/currentmsps/margaret-mitchell-msp.aspx>> (*Scottish Parliament*, Date Unknown) accessed 18 September 2017.

¹³⁷ Scottish Parliament Official Report, 28 January 2016, col 72 (SP Report 28 January 2016).

¹³⁸ Scottish Parliament Official Report J, 1 March 2016, col 50 (SP Report March 2016).

¹³⁹ Scottish Parliament Official Report J, 8 December 2015, col 36 (SP Report December 2015).

¹⁴⁰ *ibid* col 50.

Parliament wants to tell judges to give the jury the directions proposed in the bill, we will give them.’¹⁴¹

ii. Threat to the Role of Judge and Jury

It was argued that the jury directions might threaten the roles of the judge and jury. Lord Carloway commented that the Bill would result in judges assuming a prosecutorial role by ‘making statements of fact dressed up as law.’¹⁴² This was echoed in Victoria, where the Law Reform Commission noted opposition to mandatory directions on the basis that such matters ‘should be left to the jury, assisted only by the counsel’s arguments’.¹⁴³

However, Michael Matheson MSP attempted to allay these fears by arguing that a judge still has discretion as to whether or not they should make a direction and, therefore, their role would not be usurped.¹⁴⁴ The problem with that analysis, as Lord Carloway has highlighted, is that this discretion over the directions is not the golden ticket to judicial independence it is portrayed to be. Indeed, Lord Carloway comments that, due to a matter of interpretation, if a case falls within the scope of the directions, the judge appears to be required to give the exact wording that is in the Act as a direction.¹⁴⁵ He comments that he did not believe ‘that the bill in its present form allows the judge to vary it in some way; that would seem contrary to what Parliament would state.’¹⁴⁶ Therefore, if a judge were to stray from the wording of the statute this could raise the risk of an appeal, as the accused may try to claim that the judge misdirected the jury. Although there will likely be a model direction set out for judges to give, this will be unable to move away from the wording of the 2016 Act, as Lord Carloway believes that the content will not be capable of variation.¹⁴⁷

iii. Presumptuous Provision?

It was thought, during consultation, that the jury directions remained unnecessary when there is no way of knowing what goes on behind the closed door of the deliberation room. Due to the restrictions under the Contempt of Court Act 1981 section 8, there is no opportunity to discover *why* the jury made the decision they did. Grazia Robertson, of the Law Society of Scotland, argues that ‘without any empirical evidence of how they are thinking, it would be presumptuous to rush to produce directions when we are making presumptions about what jurors might or might not be thinking.’¹⁴⁸

For example, if a lack of resistance does not play on the jury’s mind at all throughout the trial or the deliberation then the direction is clearly unnecessary.

¹⁴¹ *ibid* col 46.

¹⁴² Lord Carloway, ‘Written Statement from Lord Carloway, the Lord Justice-Clerk on the Abusive Behaviour and Sexual Harm (Scotland) Bill’ (*Scottish Parliament*, 8 December 2015) 1 <http://www.parliament.scot/S4_JusticeCommittee/Inquiries/ABSH34._Lord_Carloway.pdf> accessed 24 February 2018.

¹⁴³ Victorian Law Reform Commission, *Jury Directions Final Report* (n 78) 103.

¹⁴⁴ SP Report March 2016 (n 138) col 54.

¹⁴⁵ SP Report December 2015 (n 139) col 39.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid*.

¹⁴⁸ Scottish Parliament Official Report J, 17 November 2015, col 18.

Furthermore, it could have a counter-productive effect and risk forming misconceptions in the minds of the jury, if the judge points out stereotypes that the jury had not previously considered. Such a direction may cause a previously unsuspecting jury member to draw inference from the complainer's lack of resistance.

The Sheriffs' Association recognises this when they state that 'the dangers are that the directions might in fact be unnecessary, might create a misconception where none existed and might confuse the jury's task by diverting it from the real matters in dispute.'¹⁴⁹ This clearly contradicts the aims of the new system of jury directions.

It is also argued that there is no evidence of juries holding these stereotypical views and, for this reason, the directions are redundant. Studies such as the Ellison and Munro mock juror study may be called into question as, despite findings of prejudices amongst their subjects, the study consisted of mock jurors and not actual ones. Therefore, it is not entirely clear whether these findings would translate over to real court trials.¹⁵⁰

However, in response to this, Munro states that the research proved that the directions 'could be beneficial to justice.'¹⁵¹ Furthermore, it is widely acknowledged that prejudice does exist amongst the public and can, therefore, be prevalent in juries, who are drawn from the public. The Justice Committee Report stated that there was no dispute that 'individuals serving on juries may bring their misconceptions into the jury box and that these may include misconceptions about how victims respond to sexual trauma.'¹⁵² The Report argued that 'juries are meant to reflect society at large (...) the hope is that in the jury room they will leave unfair prejudices behind and take informed and rational decisions.'¹⁵³ However, this view appears too idealistic. As juries are made up of the public, it is likely that they will have very little knowledge of the law and have learned and formed views through the media or their own experiences. Elaine Murray argued that 'juries are made up of ordinary people and we do not need to undertake a lot of jury research to know that the general public hold misconceptions about sexual offences.'¹⁵⁴ If they have prejudicial thoughts in their head about certain types of crimes, it would be naïve to expect them to put these aside and be completely impartial. Therefore, while it is not entirely clear whether jury directions will solve these issues, they could act as an influence on the thinking of juries.

iv. Better Placed in the Jury Manual?

Lord Carloway suggested that there is a need for these directions to be given in certain trials.¹⁵⁵ However, they argue that, instead of being placed in statute, the matter

¹⁴⁹ SB 15/74 (n 61) 16, quoting from the Sheriffs' Association's Consultation Response: Sheriffs' Association, 'Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences: Respondent Information Form' (*Judiciary of Scotland*, Unknown Date) <http://www.scotland-judiciary.org.uk/Upload/Documents/EquallySafeconsultationresponse190615_1.pdf>.

¹⁵⁰ SP Justice Committee Second Report on ABSH Bill (n 116) paras 141-143.

¹⁵¹ *ibid* para 141.

¹⁵² *ibid* para 124.

¹⁵³ *ibid* para 127.

¹⁵⁴ SP Report 28 January 2016 (n 137) col 71.

¹⁵⁵ SP Report December 2015 (n 139) col 39.

should be dealt with by declaring them to be within judicial knowledge and inserted in the Jury Manual, giving the judge discretion.¹⁵⁶

Currently, the Jury Manual contains no provision dealing with the subject matters of the new statutory directions.¹⁵⁷ Sheriff Liddle argues that the Jury Manual is a better option than the statute as it is ‘a dynamic volume of suggestions and recommendations and judges dealing with a certain array of facts and evidence could look at that and decide whether such things should be included in the charge.’¹⁵⁸ Lord Carloway comments that ‘to some extent, we must trust judges to act in an appropriate way in an appropriate case.’¹⁵⁹

However, this could prove to be problematic as there is no guarantee that a judge will always act in an appropriate manner and give a correct direction when it is needed. This could have ramifications for either the complainer or the accused, depending on the attitude of the judge. An example of this discretion disadvantaging the accused is the case of *R v D*,¹⁶⁰ discussed earlier. On the other hand, in *HMA v K*,¹⁶¹ discussed by Lord Carloway in evidence to the Justice Committee, the trial judge stated that the complainer was ‘condoning’ or ‘acquiescing in the rapes’ by continuing to live with the accused.¹⁶² Lord Carloway attempted to placate the distrust of judges acting in an inappropriate manner by arguing that these comments were not made during direction but were instead given by the judge to justify the sentence imposed.¹⁶³ However, this arguably does little to allay concern. Whether made during directions or not, if the judge still shows a backward attitude towards rape complainers that the 2016 Act’s amendments are trying to eradicate, there could be a risk of this manifesting itself within a future trial. Furthermore, while it may only be a small proportion of judges who present this issue, it still presents a risk of directions either not being given or being given in an inappropriate matter.

Additionally, Callender noted that if jury directions were to be purely discretionary it would be ‘less conducive to consistency.’¹⁶⁴ What is appropriate and correct to one judge may not be to another, leading to inconsistent directions. Therefore, inclusion in the Jury Manual, rather than statute, may not be the best option.

C. In Favour of Jury Directions

Having examined some of the arguments against statutory mandatory jury directions, this article now considers the reasons for their introduction. In Ellison and Munro’s study, mock trials were set up, demonstrating various rape myths and the mock juries

¹⁵⁶ *ibid* col 40.

¹⁵⁷ Judicial Studies Committee, ‘Jury Manual: Some Notes for the Guidance of the Judiciary’ (February 2012) <<http://www.scotland-judiciary.org.uk/24/720/Jury-Manual-Published>> accessed 23 February 2017.

¹⁵⁸ SP Report December 2015 (n 139) col 37.

¹⁵⁹ *ibid* col 41.

¹⁶⁰ *R v D* (n 128).

¹⁶¹ *HM Advocate v K* [2015] HCJAC 114, 2016 SLT 142.

¹⁶² *ibid* [7] (Opinion of the Court) quoting the words of the trial judge.

¹⁶³ Scottish Parliament Official Report, Justice Committee, 8 December 2015, col 44.

¹⁶⁴ Isla Callender, ‘Jury Directions in Rape Trials in Scotland’ (2016) 20(1) *Edin LR* 76, 79.

were given varying guidance before making their decisions.¹⁶⁵ This study found that, with regards to delay in complaint, judicial direction proved to be very effective. Contrastingly, the same results were not replicated with the lack of physical resistance direction.¹⁶⁶

i. Perception of Delayed Complaint

It was noted in Ellison and Munro's study that 'jurors who received educational guidance were significantly more likely to state that they were untroubled by the three-day delay in the trial scenario.'¹⁶⁷ Ellison and Munro found evidence of the complaint myth in participants, especially in female jurors, who tended to put themselves in the complainer's situation and rule on how they believe they would have acted. Ellison and Munro noted that many believed their 'immediate response in such a situation would have been to telephone a close friend or family member.'¹⁶⁸ However, the study found that jury direction was the most effective way of reducing the prevalence of this rape myth in deliberations. The number of jurors who took it into account was only 23%, compared to 58% in the non-guidance juries.¹⁶⁹ It was also more effective than expert evidence, which resulted in 28% of participants taking the delay into account.¹⁷⁰ The success was highlighted by one particular participant, who commented that: 'if I hadn't known the evidence/research regarding how long it takes to report allegations it would have clouded my judgment on why she [the victim] didn't report it sooner.'¹⁷¹

ii. Perceptions regarding Lack of Physical Resistance or Force

The same success was not replicated with a direction on lack of physical resistance. Again, there was found to be a prevalence of this rape myth within jury deliberations, more so within female jurors. Many female jurors argued that they would have fought back, with one commenting 'I just can't understand why she [the victim] wouldn't push him [the alleged offender] off or do anything. I cannot get my head around that.'¹⁷² It appeared that this direction was not enough to eradicate this thinking within the participants. However, it was noted that 'there were jurors who claimed to understand why a woman in the situation (...) could be so overwhelmed by fear or disbelief that she was unable to fight back.'¹⁷³ This demonstrates that jury directions are not a solution to overcoming these rape myths. However, they could be useful in alleviating some of the prejudice in the jury deliberation room.

¹⁶⁵ Ellison and Munro, 'Turning Mirrors into Windows?' (n 57) 363.

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid* 370.

¹⁶⁸ Louise Ellison and Vanessa Munro, 'Telling Tales: Exploring Narratives of Life and Law Within the (Mock) Jury Room' 2015 35(2) *Legal Studies* 201, 220.

¹⁶⁹ Ellison and Munro, 'Turning Mirrors Into Windows?' (n 57) 371.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid* 372.

¹⁷³ *ibid* 371.

iii. Views of Organisations

In Parliamentary consultations, numerous organisations that specialise in work with victims of rape or violence expressed their support for the directions. These organisations work with a wide demographic of victims, namely, female, LGBT and male victims of rape. For example, Rape Crisis Scotland commented that ‘providing factual information to jury members through the introduction of judicial directions could help address concerns about lack of information or attitudinal issues affecting jury deliberations.’¹⁷⁴

In the Justice Committee Report, a representative of Rape Crisis Scotland argued that they could ‘not see why there would be an issue with giving people factual information that would assist them in interpreting the evidence that they are hearing.’¹⁷⁵ Therefore, any concerns about directions favouring the complainer can be set aside.

The Scottish Human Rights Commission agreed that there would be no risk to an accused’s right to a fair trial if directions were used.¹⁷⁶ They considered the directions in relation to Article 6 of the European Convention of Human Rights. The Commission stated it ‘does not consider that these statements, if delivered appropriately, would prejudice an accused’s Article 6 rights.’¹⁷⁷ They also agreed with Rape Crisis Scotland by referring to the directions as ‘uncontroversial statements which may indeed serve to address misconceptions held by some members of the public,’ demonstrating that they do not consider the directions to be prejudicial to the accused.¹⁷⁸

iv. Does the Act go Far Enough?

Arguably, a mistake in the 2016 Act is the missed opportunity to include a direction on the demeanour of a victim after the attack and in court. Callender noted that ‘mock jury research shows that a complainant’s perceived failure to be visibly distressed when giving evidence negatively impacts on jurors’ decisions.’¹⁷⁹

In appropriate cases, section 275C of the Criminal Procedure (Scotland) Act 1995 could allow leading of expert evidence to rebut inferences of the complainer’s calm demeanour. However, in mock jury studies, jury directions proved to be somewhat effective: only 24% of mock jurors who had been given a jury direction on the point said it would have made *any difference* to their deliberation if the complainer had displayed a great deal of emotion, compared to 35% who heard expert evidence on the issues covered by the directions and 60% of mock juror who did not receive a jury direction or hear expert evidence.¹⁸⁰ It was found that jurors who had been given directions were more likely to try and understand why the victim was acting calm in

¹⁷⁴ Scottish Parliament Justice Committee, ‘Victims and Witnesses (Scotland) Bill: Written Submission from Rape Crisis Scotland’ (*Scottish Parliament*, 5 April 2013) 4 <http://www.parliament.scot/S4_JusticeCommittee/Inquiries/VW9._Rape_Crisis_Scotland.pdf> accessed 23 February 2018.

¹⁷⁵ Scottish Parliament Official Report J, 24 November 2015, col 2.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid* 36.

¹⁷⁸ *ibid* 35.

¹⁷⁹ Callender (n 164) 81.

¹⁸⁰ Ellison and Munro, ‘Turning Mirrors Into Windows?’ (n 57) 369.

court, with one stating 'she said she feels (...) detached and stunned since the incident and that is in line with trauma.'¹⁸¹

However, the directions were not a complete success in the study; around one in six of participants displayed signs of drawing negative inferences from the complainer's demeanour in court.¹⁸² They noted that one juror even referred to the complainer as a 'bunny boiler' due to her calm demeanour in court.¹⁸³ Notwithstanding this, given that there was some success with the direction it should have been considered before the introduction of the 2016 Act. As noted later, expert evidence is far more expensive and less consistent than jury directions. It is, therefore, arguable that a jury direction may have been a better solution to address this rape myth.

Another failure is the omission to give the judge discretion over *when* to give the relevant direction. This could prove to be a considerable oversight in the Act's new provisions, as there are doubts over how effective a direction given at the end of the trial will be in overcoming prejudices that have been existent since the beginning. If a juror has come into a trial believing certain stereotypes about the complainant, it is unlikely that a quick sentence at the end of the trial will be effective in overcoming the suspicion and mistrust built up during the prosecution and defence evidence.

Ellison and Munro discussed this in their study and stated that 'judicial directions - customarily issued at the close of a trial - may accordingly come too late to have a significant impact on juror assessment of witness credibility.'¹⁸⁴ They argue that if directions were presented near the beginning of the trial, jurors would not have the chance to assess credibility based on their own preconceptions.¹⁸⁵ On the other hand, it is argued that if jurors hear the direction at the close of the trial, it will remain in their minds as they go to deliberation.¹⁸⁶ The present author submits that, if a juror has heard the entire trial with a misconception or prejudice in their mind, a direction from the judge is unlikely to make a difference, whether remaining in their mind or not. This is something of an "early bird catches the worm" scenario: to have a chance at succeeding in their aim, directions should be given early in the trial and the Act's failure to allow for this has placed a limit on any success that it may achieve.

v. Alternative Measures

It was argued in evidence that the content of jury directions could be given through expert evidence rather than through statutory jury directions. Lord Carloway notes that it is common now for counsel to agree expert evidence before the trial, if it is not contested.¹⁸⁷ He argues that this carries more detail than the directions that will be provided through the Act.¹⁸⁸ However, this may not be as desirable as thought. Callender notes that juries tend to understand a direction better if it is 'clear,

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ *ibid* 377.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ SP Report December 2015 (n 139) col 37.

¹⁸⁸ *ibid.*

unambiguous and simple.¹⁸⁹ Therefore, if there is very detailed evidence given by an expert, there is a risk that the jurors could get confused and perplexed by what is being put to them and ignore the evidence rather than harness it.

Furthermore, Margaret Mitchell argues that a joint minute of agreement is subject to abuse by defence counsel who may try to get around it, despite previously agreeing a piece of evidence with the prosecution, something with which Lord Carlway agreed.¹⁹⁰ Indeed, Scottish Women's Aid took the view that it was unsurprising to find 'the defence in sexual offence trials carrying out "pre-emptive strikes" against the prosecution.'¹⁹¹

Additionally, there is a more expense involved in using expert evidence over jury directions. Lord Carlway and the then Crown Agent, Catherine Dyer, noted that there would be a huge cost burden if the Crown were to lead expert evidence in every case that contained the issues covered by jury directions.¹⁹² However, the Act does not disallow the prosecution from choosing to lead evidence if it wishes too. As Callender argues that the two are 'complementary measures.'¹⁹³ The introduction of jury directions will merely ensure that the information within them is given consistently across cases, as was argued by the then Cabinet Secretary.¹⁹⁴

Finally, a major initiative that could help to prevent prejudicial attitudes towards rape victims in court would be the pursuance of public education on the matter. However, this depends primarily on societal, rather than legal, developments. There have already been initiatives to help educate the public on the issue of rape, particularly, on the matter of consent.¹⁹⁵ Similarly, in respect of the physical resistance myth, the 'I Just Froze' campaign.¹⁹⁶ In studies, education has been shown to be effective in combatting rape myths. Foubert and Marriott's study found that education amongst college males resulted in men believing less rape myths than they had before the programme.¹⁹⁷ Although it was reported that two months later, their belief in rape myths rose again, it was found to still be 'significantly lower than it had been prior to seeing the programme.'¹⁹⁸ Therefore, there can be success in educating the public on matters that arise in rape trials.

Sheriff Liddle commented that there is a strong likelihood of jurors sitting on a trial with their own misconceptions or prejudices but argued that, as long as juries are

¹⁸⁹ Callender (n 164) 80.

¹⁹⁰ SP Report December 2015 (n 139) col 37.

¹⁹¹ SP Justice Committee Second Report on ABSH Bill (n 116) 37, summarising evidence given on behalf of Scottish Women's Aid by Louise Johnson in November 2015: Scottish Parliament Official Report J, 24 November 2015, col 6.

¹⁹² *ibid* 40.

¹⁹³ Callender (n 164) 81.

¹⁹⁴ Scottish Parliament Official Report J, 5 January 2016, col 32.

¹⁹⁵ See Thames Valley Police, 'Tea and Consent' (*Consent is Everything*, 2015) <<http://www.consentiseverything.com/>> accessed 21 February 2017.

¹⁹⁶ Rape Crisis Scotland, 'I Just Froze' (*Rape Crisis Scotland*) <<http://www.rapecrisisscotland.org.uk/campaigns-projects/i-just-froze/>> accessed 23 February 2017.

¹⁹⁷ John Foubert and Kenneth Marriott, 'Effects of a Sexual Assault Peer Education Program on Men's Belief in Rape Myths' (1997) 36(3/4) *Sex Roles* 259, 265.

¹⁹⁸ *ibid* 265.

a part of criminal trials, this will continue to occur.¹⁹⁹ However, if a stronger focus were placed on education, there will come a time when these prejudices will no longer be commonplace and more jurors may find it easier to be impartial. This move is not something that the law can control. It depends on the Government to bring forward proposals to increase education and awareness in this area. However, the law can try to fill the gap until this education filters through the public, who may be called upon to be jurors. While jury directions will not eradicate the problem of rape myths in their entirety, including them appears better than the alternative of doing nothing and they may serve some purpose in reducing certain misconceptions that research has recognised exists within society.

5. Conclusion

The Abusive Behaviour and Sexual Harm Act (Scotland) 2016 introduced into the Criminal Procedure (Scotland) Act 1995 novel mandatory jury directions to be given in rape trials. The directions allow for judges to comment on a delay or lack of complaint and a lack of physical resistance or use of force. The motivation behind this introduction is to reduce the prevalence of certain rape myths within court proceedings. It is hoped this will bring about a fairer trial, by ensuring that there are no prejudicial attitudes towards the complainer for displaying routine behaviour.

There is evidence to show that rape myths are widely held within society and, as members of the public make up juries, it is likely that these myths will appear in the deliberation room. Despite evidence that many rapes are not reported immediately, there is still a belief within the public that a genuine victim will report a rape immediately. Furthermore, there is also evidence to show that there is a general belief that a genuine victim of rape will do all she can to resist her attacker, especially amongst female jurors. Something must be done to combat these myths.

The use of such statutory directions is not an entirely novel concept. They have been used in other jurisdictions for many years. Each jurisdiction appears to have different successes and issues with the implementation of the directions. Of main note to Scotland is the ability of judges in other jurisdictions to give the directions *at any point in the trial* and the requirement for them to relate the directions to the case in court. It is interesting to note that Victoria has partly moved away from mandatory directions, allowing the judge greater discretion and eases the relation of the directions to the case. Scotland has not followed this route. It remains to be seen how the new provisions are implemented in Scotland and if the issues evident in other jurisdictions will arise again here.

The inclusion of the directions in the 2016 Act during the Bill stage was described as 'the 'most contentious aspect' of the [then] Bill.'²⁰⁰ There were various options proposed and arguments given for and against the provision. However, these directions were ultimately included in the 2016 Act. Despite studies showing that the directions could be effective, there appear to be omissions and flaws with the new

¹⁹⁹ SP Report December 2015 (n 139) col 38.

²⁰⁰ SB 16/31 (n 132) 11.

provisions. The issue of a victim's calm demeanour was not meaningfully considered during the legislative process nor included in the new provisions, despite evidence of jury directions having limited success in tackling it. Furthermore, regarding directions that are present, judges are restricted to giving the directions at the end of the trial. This may severely limit the effectiveness of the direction(s). Although there was debate over the need for the directions – since the Crown can lead expert evidence – the directions can be used alongside this evidence and ensure that the information is consistently provided in court.

It would be naïve to conclude that the introduction of jury directions would eradicate the existence of rape myths within courts. There is a clear need for an advancement of public education on this matter in order to address and eradicate the inherent mistrust and suspicion of rape complainers. However, this depends on societal development and is, therefore, primarily out with the control of the legal system. Jury directions can act as both a stop-gap until such education filters through and a supplement in situations where members have not benefitted from education or revert to mistrust of the complainer in the daunting atmosphere of the courtroom.

COMMENTARY

Regulating Nuclear Energy in Indonesia

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EDITORIAL NOTE: *This is an article on Indonesian law and policy of nuclear energy. As many of the laws, regulations and articles cited are Indonesian and in the Indonesian language, we have: (a) departed from OSCOLA referencing guide to provide links to primary sources – so that they are easily accessible despite being in another language – and (b) where appropriate, provided English translations for the footnotes.*

Abstract

Despite the shortage of electric power, the rapid decline of oil and gas reserves and the impacts of climate change, the Indonesian Government sets nuclear energy as the last option to meet the electric power demand and address energy security under its latest energy policy. However, this article's position is that the government's decision does not withstand scrutiny. The claim, made by some Indonesian energy scholars and experts, that the Government's authorities do not have the ability to regulate the use of nuclear energy is questionable. The use of nuclear power has been initiated since the 1950s. Moreover, research and development on nuclear energy for, among other things, agriculture and health, has been continuously undertaken by the Indonesian nuclear regulatory agency, BAPETEN. Internationally, the use of nuclear energy is heavily regulated. Conventions, standards, and guidelines have been established and updated to ensure the peaceful use of nuclear energy. Indonesia is a signatory to most of those conventions and has become the member of international nuclear organisations. This article suggests that Indonesia has sufficient tools to use its potential sources of nuclear energy safely. Thus, nuclear energy should be considered as holding greater potential than being the last option as currently set by the Indonesian government. In light of this background, this article will provide legal analysis on the existing regulations on nuclear safety in Indonesia. It will offer solutions to address issues that appear to cause hesitation for the use of nuclear energy.

Keywords: Nuclear Energy, Indonesian Energy Mix, International Nuclear Energy Law

1. Introduction

Indonesia has abundant natural resources; this includes, but is not limited to, oil, gas, and coal.¹ However, it remains unable to meet the increasing demand for electric

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power.² Between 2014 and 2016 it was established that around 20% of Indonesia's population had no access to electricity.³ In 2015, Jokowi Widodo, Indonesia's President, launched an accelerated programme to build power plants with combined capacity of 35,000 MW.⁴ However, this programme has yet to tackle the prolonged power shortage problem.⁵ The absence of necessary infrastructure, such as public roads and transmission lines,⁶ coupled with lengthy processes of land procurement are among the issues that may block the President's objective of ensuring the availability of electricity to all of Indonesia's population by 2019.⁷

Indonesia also faces other energy issues: energy security and climate change. As regards energy security, electric power generation in Indonesia relies heavily on coal and oil.⁸ However, coal and oil reserves are declining.⁹ According to a report published by the Department of Energy and Mineral Resources of Indonesia, if their usage continues, coal reserves will last no longer than 67 years and oil reserves will last no longer than 23 years.¹⁰ Hence, Indonesia must find a more sustainable solution to cope with this forthcoming energy scarcity. As well as the pressures presented by the

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¹ OECD, 'OECD Economic Surveys: Indonesia' (OECD, October 2016) <<https://www.oecd.org/eco/surveys/indonesia-2016-OECD-economic-survey-overview-english.pdf>> accessed 2 March 2018.

² Sylvie Cornot-Gandolphe, 'Indonesia's Electricity Demand and the Coal Sector: Export or meet domestic demand?' (Oxford Institute for Energy Studies, March 2017) 4 <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/03/Indonesias-Electricity-Demand-and-the-Coal-Sector-Export-or-meet-domestic-demand-CL-5.pdf>> accessed 19 January 2018.

³ Indonesian Investments, 'Electricity in Indonesia: Plenty Natural Resources but Shortage of Electricity' (Indonesian Investments, 16 August 2014) <<https://www.indonesia-investments.com/news/todays-headlines/electricity-in-indonesia-plenty-natural-resources-but-shortage-of-electricity/item2325?>> accessed 19 January 2018.

⁴ Cornot-Gandolphe (n 2) 5. See also The Jakarta Post, 'Less than half of 35,000 MW target to be achieved' (Jakarta Post, 24 October 2017) <<http://www.thejakartapost.com/news/2017/10/24/less-than-half-of-35000-mw-target-to-be-achieved.html>> accessed 2 March 2018.

⁵ PwC, 'Power in Indonesia: Investment and Taxation Guide' (5th edn, PwC 2017) 43 <<https://www.pwc.com/id/en/energy-utilities-mining/assets/power/power-guide-2017.pdf>> accessed 2 March 2018.

⁶ Agus Pambagiao, 'Direksi PT PLN harus taat pada keputusan ratas soal listrik 35 Ribu MW: The Board of Directors of PT PLN must comply with the decision of the limited meeting regarding 35 thousand MW' (Detik, 25 July 2016) <<https://news.detik.com/kolom/d-3260361/direksi-pt-pln-harus-taat-pada-keputusan-ratas-soal-listrik-35-ribu-mw>> accessed 18 July 2017.

⁷ Leo Jegho, 'Can Indonesia Supply 35,000 MW of Power by 2019?' (Global Indonesian Voices, 1 June 2016) <<http://www.globalindonesianvoices.com/26410/can-indonesia-supply-35000-mw-of-power-by-2019/>> accessed 2 March 2018.

⁸ Peraturan Pemerintah, 'No. 79 Tahun 2014 tentang Kebijakan Energi Nasional: Government Regulation No. 79 of 2014 on Energy Policy' art 9 <<http://peraturan.go.id/perpres/nomor-79-tahun-2014-11e44c503a840e40a801313232363539.html>> accessed 23 July 2017 (GR 79/2014).

⁹ Lukas Joko Dwiatmanto, *Penantian Pembangunan Pembangkit Listrik Tenaga Nuklir Indonesia: The Waiting of the Development of Nuclear Power Plant in Indonesia* (Orbith 2016) 60; Ditjen Minyak dan Gas Bumi, 'Statistik Minyak dan Gas Bumi 2015: Oil and Gas Statistics 2015' (Kementerian Energi dan Sumber Daya Mineral, 2015) <https://www.esdm.go.id/assets/media/content/Statistik_Migas_2015.pdf> accessed 2 March 2018 (Oil and Gas Statistics 2015).

¹⁰ Oil and Gas Statistics 2015 (n 9) 17.

decline of oil and coal reserves, Indonesia has pledged to use more renewable and low-carbon sources to combat the challenges posed by climate change. In relation to this, Indonesia has ratified the United Nations Framework Convention on Climate Change,¹¹ adopted the Kyoto Protocol,¹² and ratified the Paris Agreement.¹³ Indonesia has, therefore, committed to lowering greenhouse gas emissions in accordance with the abovementioned agreements. At present, Indonesia still emits a considerable amount of greenhouse gasses from, *inter alia*, energy consumption, land use, and deforestation.¹⁴ Given this, the continuing use of fossil fuels for electricity generation is likely to make it difficult for Indonesia to meet its commitments under the above agreements.

In response to recent energy challenges, the government issued Government Regulation No. 79 of 2014 on National Energy Policy (“GR 79/2014”).¹⁵ Under Article 10 of GR 79/2014, Indonesia focuses on energy autonomy by redirecting the use of energy resources from huge export to meeting its domestic needs and aiming to establish an energy mix strategy.¹⁶

Despite declining energy sources and the issue of climate change, GR 79/2014 sets ambitious targets to meet Indonesia’s energy demands: doubling the use of gas, tripling the coal use and increasing the use of renewables eleven fold.¹⁷ All of these targets are to be achieved by 2025.¹⁸ Moreover, Article 9 stipulates that the whole of Indonesia will have full access to electricity by 2020.¹⁹ This is an objective considered by some as difficult to achieve.²⁰ It is also important to note that, according to the GR 79/2014, Indonesia considers nuclear energy as the last option.²¹ This position is also adopted by the Indonesia Energy Outlook 2016.²² Setting nuclear power as the last

¹¹ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC). Ratified in Indonesia by: Law Number 6 of 1994 on the Ratification of UNFCCC <<http://sipongi.menlhk.go.id/cms/images/files/1025.pdf>> accessed 2 March 2018.

¹² Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 161 (Kyoto Protocol). Ratified in Indonesia by: Law Number 17 of 2004 on the Ratification of the Kyoto Protocol <http://pih.kemlu.go.id/files/UU_NO_17_TH_2004.pdf> accessed 2 March 2018.

¹³ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) FCCC/CP/2015/10/Add1, Annex (Paris Agreement). Ratified in Indonesia by: Law No. 16 of 2016 on the Ratification of the Paris Agreement <http://ppid.menlhk.go.id/berita_klhk/browse/250> accessed 2 March 2018.

¹⁴ Hans Nicholas Jong, ‘Indonesia still far from greenhouse gas reduction target’ *The Jakarta Post* (2016) <<http://www.thejakartapost.com/news/2016/06/07/indonesia-still-far-from-greenhouse-gas-reduction-target.html>> accessed 2 March 2018.

¹⁵ GR 79/2014 (n 8).

¹⁶ *ibid* art 10.

¹⁷ *ibid* art 9.

¹⁸ *ibid*.

¹⁹ *ibid*.

²⁰ International Energy Agency, ‘National Energy Policy: Government Regulation No. 79/2014’ (IEA, 26 August 2016) <<https://www.iea.org/policiesandmeasures/pams/indonesia/name-140164-en.php>> accessed 2 March 2018.

²¹ GR 79/2014 (n 8) arts 9, 11(3).

²² Secretariat General National Energy Council, ‘Indonesia Energy Outlook 2016’ 2 <https://www.esdm.go.id/assets/media/content/outlook_energi_indonesia_2016_opt.pdf> accessed 2 March 2018.

energy resort might be not surprising given robust public resistance to the development of nuclear power plants.²³

Nuclear energy is not a new source of energy in Indonesia: the program for developing nuclear power began in the 1950s.²⁴ Since then, several nuclear reactors have been erected in various places such as Bandung, Yogyakarta, Serpong and Pasar Jumat, Jakarta.²⁵ However, all of those are research reactors; none of them are designated for commercially generating electric power.²⁶ Nuclear power was once set out as part of the energy mix pursuant to Presidential Regulation No. 5 of 2006,²⁷ although it would only contribute to 2% of energy production.²⁸ However, public opposition halted the actual development of the nuclear power plant projects.²⁹

One of the main grounds for public resistance to the use of nuclear energy relates to safety concerns.³⁰ Besides that, from the geographical point of view, Indonesia is situated on the '*Ring of Fire*', a region extremely susceptible to earthquakes. Further factors include the distrust of government authorities by the public, deriving from allegations of rampant corruption practices and past incompetence in responding to natural disasters,³¹ and the declaration of a fatwa by Islamic scholars and clerics stating that nuclear power is a "Haram" (forbidden) source of energy.³² These factors drive down the possibility of developing the first nuclear power plant. For the above reasons, nuclear energy is presented by the anti-nuclear lobby as extremely unsafe for Indonesia.³³

²³ Alan Marshall, 'The case against nuclear power development in Indonesia' (2012) 5(1) *Journal of Geography and Regional Planning* 1, 5.

²⁴ Sulfikar Amir, 'Challenging Nuclear: Antinuclear Movements in Post Authoritarian Indonesia' (2009) 3(2-3) *East Asian Science, Technology, and Society* 343, 347.

²⁵ *ibid* 348.

²⁶ *ibid* 350.

²⁷ Peraturan Presiden Republik Indonesia Nomor 5 Tahun 2006 Tentang Kebijakan Energi Nasional: Presidential Regulation No. 5 of 2006 on the National Energy Policy, art 2 <http://www.batan.go.id/prod_hukum/extern/Perpres5_2006.pdf> accessed 2 March 2018.

²⁸ Susetyo Hario Putero and others, 'Challenge in the Public Acceptance and Cooperation on the Verge of Building the First Nuclear Power Plant in Indonesia: ASME Power Conference 2012' (*ResearchGate*, July 2013) 2 <<https://www.researchgate.net/publication/267581395>> accessed 19 January 2018.

²⁹ Sulfikar Amir, 'Revival in Post-Suharto Indonesia' (2010) 50(2) *Asian Survey* 265, 278.

³⁰ Fedina S Sundaryani, 'PLN to go nuclear if renewable energy goal flops' *The Jakarta Post* (25 April 2017) <<http://www.thejakartapost.com/news/2017/04/25/pln-to-go-nuclear-if-renewable-energy-goal-flops.html>> accessed 12 January 2018.

³¹ Jim Schiller, Anton Lucas and Priyambudi Sulistiyanto 'Learning from the East Java Mudflow: Disaster Politics in Indonesia' (2008) 85(1) *Indonesia* 51.

³² Greenpeace, 'A Reasonable Fatwa – Nuclear power is haram (forbidden)' (*Greenpeace*, 13 September 2007) <<http://www.greenpeace.org/international/en/news/features/fatwa-nuclear-power-haram/>> accessed 19 January 2018.

³³ OKEZONE, 'Indonesia Belum Butuh Listrik Tenaga Nuklir, Ini Penjelasan!': Nuclear Electric Power is not yet needed by Indonesia, here is the explanation!' (*OKEZONEFINANCE* 7 July 2017) <<https://economy.okezone.com/read/2017/07/07/320/1731299/indonesia-belum-butuh-listrik-tenaga-nuklir-ini-penjelasan>> accessed 28 February 2018. See also Untung Widyanto, 'Presiden Jokowi Diminta Dengarkan Suara Kelompok Anti-Nuklir: President Jokowi Asked to Listen to the Voice of the Anti-Nuclear Group' (*TEMPO.CO* 12 June 2015) <<https://nasional.tempo.co/read/674530/presiden-jokowi-diminta-dengarkan-suara-kelompok-anti-nuklir>> accessed 28 February 2018.

On the contrary, some energy experts believe that nuclear energy is still relevant and should be part of Indonesia's energy mix.³⁴ The involvement of nuclear energy, both as part of the energy mix and also as a solution for abating climate change, is positively viewed by some scholars in energy sectors.³⁵ Nuclear energy can produce a large amount of electric power without emitting greenhouse gases or causing air pollution.³⁶ Thus, it can be regarded as a suitable means by which to (a) achieve the reduction in greenhouse gas emissions Indonesia has committed to under the three agreements mentioned earlier and (b) alleviate the forthcoming problems regarding scarcity of energy sources.

This article's position is that the Government's decision, as manifested in GR 79/2014,³⁷ to consider nuclear energy only as a last resort is questionable. To support this position, an overview and analysis of the existing Indonesian law and regulations will firstly be undertaken. That overview and analysis will focus only on nuclear safety; assessing whether Indonesia has a sufficient legal framework to safely develop its first nuclear power plant.

Secondly, international level conventions on nuclear energy to which Indonesia is a party will be assessed. That assessment aims to ascertain whether such international level conventions could assist in supporting and improving nuclear safety in Indonesia.

Finally, the paper will address the matters of (1) how Indonesia could guarantee nuclear safety in a bid to gain public acceptance, enabling the state to accelerate the development of nuclear power plants; and (2) whether the current position under GR 79/2014, of nuclear energy being an option of last resort in the context of Indonesia's energy mix strategy, is appropriate. This article suggests that nuclear energy has great potential for addressing energy problems. The use of nuclear energy together with renewable energy would reduce Indonesia's dependency on fossil fuels and coal.

2. Indonesian Nuclear Energy Potential and Law

A. Legal Regulation and Public Perception of Power Plants' Nuclear Safety

The International Atomic Energy Agency (IAEA) has published many guidelines for states that wish to explore their nuclear power potential.³⁸ The IAEA recommends that

³⁴ Dwiatmanto (n 9) 59.

³⁵ Mario Einaudi Center for International Studies, 'Debate: Is Nuclear Power the Answer to Climate Change?' (*Cornell University*, 19 May 2016) <<http://www.cornell.edu/video/debate-nuclear-power-climate-change>> accessed 19 January 2018.

³⁶ Benjamin Sovacool and Christopher Cooper, 'Nuclear Nonsense: Why Nuclear Power is No Answer to Climate Change and the World's Post Kyoto Energy Challenges' (2008) 33(1) *William and Mary Environmental Law and Policy Review* 1, 16.

³⁷ GR 79/2014 (n 8) art 11(3).

³⁸ IAEA, 'Consideration to Launch a Nuclear Power Program' (IAEA, 2007) <<https://www.iaea.org/OurWork/ST/NE/Downloads/files/Considerations.pdf>> accessed 19 January 2018; IAEA, 'Milestone in the development of national infrastructure for nuclear power' (IAEA, 2007) <http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1305_web.pdf> accessed 19 January

one of the first phases for states embarking on the development of a nuclear power program is to establish of a national policy on nuclear power to ensure the inclusion of all stakeholders to support and realise the nuclear power program.³⁹ IAEA further recommends that one of the national policies to be prioritised is one on nuclear safety.⁴⁰

It is fundamentally important for public confidence in the use of nuclear energy that there is a robust framework for nuclear safety.⁴¹

This general point applies to all states, and so it follows that the Indonesian Government must firstly guarantee the safety of nuclear energy and its associated activities with comprehensive regulations in order to give an extra comfort to the public and, thus, obtain a solid base public acceptance regarding the use of nuclear energy.⁴² BATAN has held extensive discussions on the nuclear technology, and its advantages, in order to obtain public acceptance;⁴³ but the efforts do not appear to have been effective.⁴⁴ The issue that the anti-nuclear movement in Indonesia has is no longer about the lack of knowledge on the risks and the potential benefits of nuclear power for Indonesia, because such issue has been sufficiently addressed by the promotion of the use of nuclear energy by BATAN. Rather, the remaining problem is how to persuade the public to (a) embrace and accept that nuclear energy is the most feasible solution to address both the energy crisis and climate change; and (b) to provide guarantee, insofar as possible, as to the safety of such nuclear energy. This article suggests that the Government should ensure comprehensive laws and regulations are in place as a central way to influence the public's view of nuclear technology.⁴⁵ These laws and regulations would be expected to fully address the basis of the anti-nuclear movement's hesitation to the use of nuclear energy in Indonesia. However, it is not to say that the promotion of the wider benefits of nuclear power that BATAN has conducted on a regular basis should be stopped. The two are not mutually exclusive. The present author's view is that a robust legislative framework should be pursued in parallel with promotion of broader environmental benefits to nuclear energy.

Currently, Indonesia does have a set of regulations governing the use of nuclear energy. Law No. 10/1997 is the legal basis for carrying out nuclear-related activities.

2018; IAEA, 'Basic Infrastructure for a nuclear power project' (*International Framework For Nuclear Energy Cooperation*, June 2006) <https://www.ifnec.org/ifnec/upload/docs/application/pdf/2016-02/basic_infrastructure_for_a_nuclear_power_project.pdf> accessed 19 January 2018; IAEA, 'Evaluation of the status of National Nuclear Infrastructure Development' (IAEA, 2016) <http://www-pub.iaea.org/MTCD/Publications/PDF/PUB1737_web.pdf> accessed 19 January 2018.

³⁹ IAEA, 'Milestones in the Development of National Infrastructure for Nuclear Power' (*IAEA Nuclear Energy Series* 2015) 52 <https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1704_web.pdf> accessed 28 February 2018 (IAEA Milestones in the Development 2015). See also Helen Cook, *The Law of Nuclear Energy* (Sweet and Maxwell 2013) 3.

⁴⁰ IAEA Milestones in the Development 2015 (n 39).

⁴¹ Rosa Ptasekaite, 'Continuous Improvement of Nuclear Safety' in Christian Raetzke (ed) *Nuclear Law in the EU and Beyond* (Nomos 2014) 71.

⁴² See for the general point made in a non-Indonesian context, Cook (n 39) 17.

⁴³ Putero and others (n 28) 3.

⁴⁴ Amir, 'Challenging Nuclear' (n 24) 349-359.

⁴⁵ See generally, in support of this: Monica J Washington, 'The Practice of Peer Review in the International Nuclear Safety Regime' (1997) 72 *New York University Law Review* 439.

The law acknowledges that nuclear energy has many benefits but that its use must be strictly regulated and controlled by the Government because irresponsible use may cause potential radiation hazard.⁴⁶ As such, the law was enacted to balance the benefits and risks associated with the use of energy by regulating the use of nuclear energy as well as ensuring the safety, security, peace, and health of workers, the public and environment. For achieving the above objectives, Articles 3 and 4 of Law No. 10/1997 establish two governmental bodies, namely BATAN and the nuclear regulatory agency, BAPETEN. Both institutions have separate primary functions.⁴⁷ BATAN is an executive and promotional body. It is responsible for conducting research and development, general survey, explorations and exploitations, manufacturing, fabrication, and waste management.⁴⁸ On the other hand, BAPETEN has control over any nuclear activity, which includes issuing regulations and licences and inspecting the compliance of installations and their operators with the law.⁴⁹

In the context of ensuring the safety of installations, the separation of duties between BATAN and BAPETEN is important. The independence of BAPETEN, as the regulatory body, is required to ensure the *safety* of nuclear use: the decision making of BAPETEN will be expected to be immune to the influence or interests of other parties whose duties are to promote nuclear *use*. This separation of power is also in line with Article 8 of the Convention on Nuclear Safety (“CNS”)⁵⁰ and the accepted safety requirements established by the IAEA.⁵¹

The Government and BAPETEN have issued an extensive list of regulations on nuclear safety, either in the forms of government or presidential regulations, BAPETEN Chairman regulations or non-binding guidelines.⁵² Pursuant to the hierarchy of laws and regulations in Indonesia, as set out in Law No. 12/2011 on the Formulation of Laws and Regulations, these types of regulations serve as the implementing regulations of Law No. 10/1997. These regulations are promulgated only to provide further details on certain matters set out in Law No. 10/1997.⁵³ Note that laws in the same form as Law No. 10/1997 are higher in the legal hierarchy than

⁴⁶ Bagian Menimbang Undang-Undang No. 10 Tahun 1997 tentang Ketenaganukliran: Preamble of Law No. 10 of 1997 on Nuclear Power <<http://elira.batan.go.id/asset/download/Undang-Undang%20Republik%20Indonesia%20Nomor%2010%20tahun%201997%20tentang%20Ketenaganukliran.pdf>> accessed 2 March 2018 (Law No. 10 of 1997).

⁴⁷ *ibid* arts 3-4. See also Amil Mardha, ‘The renewal of licensing system for nuclear reactors in Indonesia’ (2008) 2(1) *International Journal of Nuclear Law* 66.

⁴⁸ *ibid* art 3.

⁴⁹ *ibid* art 4.

⁵⁰ The International Convention on Nuclear Safety (adopted on 17 June 1994, entered into force 24 October 1996) 1963 UNTS 293, art 8 (CNS).

⁵¹ IAEA, ‘IAEA Safety Standards: Governmental, Legal and Regulatory Framework for Safety’ (IAEA, 2016) 6 <<http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1713web-70795870.pdf>> accessed 2 February 2018.

⁵² BAPETEN, ‘Jaringan Dokumentasi dan Informasi Hukum - Badan Pengawas Tenaga - Nuklir: Documentation and Legal Information Network’ <http://jdih.bapeten.go.id/index.php/site/doklist/thnsk//kat_id/4/cr_kat_id//cari//page/3> accessed 2 March 2018.

⁵³ Undang Undang No. 12 tahun 2011 tentang Pemberntukan Peraturan Perundang-undangan: Law No. 12 of 2011 on the Enactment of Laws and Regulations, art 7 <<http://kelembagaan.ristekdikti.go.id/wp-content/uploads/2016/08/UU-12-Tahun-2011.pdf>> accessed 2 March 2018.

the types of regulations and guidelines mentioned previously, such that these implementing regulations and guidelines should not contradict with the higher standing of Law No. 10/1997.⁵⁴

i. Licensing

At the outset, Law No 10/1997 and the implementing regulations provide three steps for the Government to ensure the safe use of the nuclear power in Indonesia: licensing, inspection, and enforcement.

As for the licensing, article 17(2) of the Law states that: ‘the construction and operation of nuclear reactors and other nuclear installations, as well as decommissioning of a nuclear reactor, shall be subject to licensing’.⁵⁵ Article 17(3) of the law further states that ‘Government Regulation will set out the requirement and procedures for licensing as referred to in paragraphs (1) and (2)’.⁵⁶ The Government has issued two regulations: (i) Government Regulation No. 54 of 2012 on Safety and Security of Nuclear Installations (“GR 54/2012”)⁵⁷ and (ii) Government Regulation No. 2 of 2014 on Licensing on Nuclear Installation and Nuclear Material Utilization (“GR 2/2014”).⁵⁸ GR 54/2012 specifies the general provisions on the safety and security requirements of nuclear power plants and the responsibilities of the licence holder(s). GR 2/2014 provides detailed procedures and requirement for applying, reviewing, and assessing applications for nuclear licences.

Through the licensing system, the Government aims to verify and control the nuclear installations safety. Such verification and monitoring encompasses not only activities related to the operation of the nuclear reactors, but also covers the entire life cycle of the project starting from the site selection, design preparation, manufacturing, construction, maintenance and, finally, decommissioning.⁵⁹ Furthermore, under GR 2/2014, an applicant must follow the procedures and comply with the requirements to obtain the licence – either for construction, commissioning, or decommissioning – from BAPETEN. An applicant for a licence in every life cycle of a nuclear reactor – construction, commissioning, or decommissioning – must submit several documents that should satisfy certain administrative, technical, and financial requirements.⁶⁰

⁵⁴ *ibid* art 9.

⁵⁵ Law No. 10 of 1997 (n 46) art 17(2).

⁵⁶ *ibid* art 17(3).

⁵⁷ Peraturan Pemerintah No. 54 Tahun 2012 tentang Keselamatan dan Keamanan Instalasi Nuklir: Government Regulation No. 54 of 2012 on Safety and Security of Nuclear Installations <<http://peraturan.go.id/pp/nomor-54-tahun-2012-11e44c4f3464a500805e313231393339.html>> accessed 2 March 2018 (GR 54/2012).

⁵⁸ Peraturan Pemerintah No. 2 Tahun 2014 tentang Perizinan Instalasi Nuklir dan Pemanfaatan Bahan Nuklir: Government Regulation No. 2 of 2014 on Licensing on Nuclear Installation and Nuclear Material Utilization <<http://peraturan.go.id/pp/nomor-2-tahun-2014-11e44c4fed61a670bd6f313232343439.html>> accessed 2 March 2018 (GR 2/2014).

⁵⁹ Mardha (n 47) 68.

⁶⁰ GR 2/2014 (n 58) arts 7-13. Administrative documents are those such as the applicant’s deed of establishment and operating business licences. Technical documents include site evaluation report, technical data of nuclear reactors, information on the proposed design of reactors, and quality assurance program. Financial documents, evidence the financial arrangement between the operator and financial institutions that guarantee the completion of every stage of nuclear installations. See further: The Asia Institute, ‘A Survey of the Nuclear Safety Infrastructure in Southeast Asia and Prospects for the Future’ (*The Asia Institute*, 1 May 2010) <<http://www.asia-institute.org/wp>

Upon the receipt of the documents, depending on the types of the licences, BAPETEN will conduct a series of assessments within a given period. The proposed site selection, power plant design, construction and safety procedures, plant commissioning as well as the decommission plans will be reviewed by BAPETEN.⁶¹ Furthermore, on the issue of Indonesia's geography condition, GR 54/2012 and GR 2/2014 require BAPETEN to conduct a physical site evaluation.⁶² The assessment comprises analysis on the impacts of erecting nuclear installations on the environment and an evaluation of natural aspects upon the installations, such as geological, seismological, and meteorological aspects of the site and demography.⁶³

All the above legal requirements align with the CNS and IAEA safety standards. Article 7 of the CNS requires each contracting party to establish a legislative and regulatory framework that provides for a licensing system and prohibits the operation of nuclear power plants without a licence. Furthermore, IAEA's safety standards require that a regulatory body should have the ability to require the operators to provide relevant information on the nuclear installations.⁶⁴ In Indonesia, GR 2/2014 satisfies this requirement.⁶⁵

ii. Inspection by BAPETEN

BAPETEN has the authority to carry out inspections of installations using ionising radiation either under construction or already operating.⁶⁶ The inspections will be conducted periodically or at any time to ensure that the nuclear energy utilisation is according to the legal provisions.⁶⁷ The inspectors are authorised to (i) enter the installation's site and examine nuclear facilities at any time during the nuclear reactor life cycle; and (ii) oversee the level of radiation inside and outside the nuclear installations.⁶⁸ If the inspectors find irregularities or any situation in the installations that may danger the safety of the workers, surrounding people, plants, and

content/uploads/2012/09/2010-05-01-A-Survey-of-the-Nuclear-Safety-Infrastructure-in-Southeast-Asia-and-Prospects-for-the-Future1.pdf> accessed 19 January 2018.

⁶¹ Peraturan Pemerintah No. 54 Tahun 2012 tentang Keselamatan dan Keamanan Instalasi Nuklir, Pasal 87: Government Regulation No. 54 of 2012 on Safety and Security of Nuclear Installations, art 87 <https://jdih.bapeten.go.id/files/_000274_1.pdf> accessed 28 February 2018

⁶² Peraturan Pemerintah No. 2 Tahun 2014 mengenai Perizinan Instalasi Nuklir dan Pemafaatan Bahan Nuklir, Pasal 17: Government Regulation No. 2 of 2014 on Licensing on Nuclear Installation and Nuclear Material Utilization, art 17 <<http://www.hukumonline.com/pusatdata/download/lt52fb3b1a954b7/node/lt52fb3a3e3f7a9>> accessed 28 February 2018.

⁶³ BAPETEN Peraturan Kepala Badan Pengawas Tenaga Nuklir Nomor 5 Tahun 2015 tentang Evaluasi Tapak Instalasi Nuklir untuk Aspek Kegunungapian: Chairman Regulation (BCR) No. 5 of 2015 on the Site Evaluation in the Volcanology Aspect of Nuclear Installation (BAPETEN) <<http://jdih.bapeten.go.id/index.php/site/dokview/id/425>> accessed 19 January 2018.

⁶⁴ IAEA, 'IAEA Safety Standards: Government, Legal and Regulatory Framework for Safety' 6 <<https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1713web-70795870.pdf>> accessed 2 March 2018 (IAEA Safety Standards).

⁶⁵ GR 2/2014 (n 58) art 20.

⁶⁶ Law No. 10 of 1997 (n 46) arts 20(1)-(2).

⁶⁷ *ibid* art 14.

⁶⁸ GR 2/2014 (n 58) art 125.

environment, BAPETEN can instruct the termination of construction, operation and/or decommissioning of the installation(s).⁶⁹

The above procedures and requirements are again in line with the provisions of the CNS and IAEA's safety standards. Article 7(2)(iii) of CNS provides that 'a system of regulatory inspection and assessment of nuclear installations to ascertain compliance with applicable regulations and the terms of licenses'⁷⁰ must be set out in the contracting party's legislative and regulatory framework.

Commensurate to the provisions under the CNS, IAEA's safety standards suggest the regulator conducts a review and assessment of the facility.⁷¹ The review and assessment should also be considered when making decisions on the granting of licences to the operators, such as licences for modification, renewal, or revocation of the installations. In light of this, if BAPETEN finds that the operator fails to comply with the safety requirements, BAPETEN may revoke the operating licence granted to the operator or suspend its renewal until the operator satisfies its obligations.⁷²

iii. Law Enforcement on Safety Requirements

Law enforcement is guaranteed under law and regulations on nuclear energy: CNS requires the provision of enforcement mechanisms within regulations by each contracting party.⁷³ Its implementation in Indonesia is visible through Article 94 of GR 54/2012. That article states that BAPETEN can impose administrative sanctions on nuclear licence holders if BAPETEN finds a violation of any provisions of the law on nuclear safety. The sanction may be in the forms of written warning, suspension or even the revocation of an operator's licence.⁷⁴ Criminal penalties may also be imposed on the operators if, for example, a person or a company is engaged in nuclear power activities without a licence.⁷⁵ The operators are required to respond or undertake certain actions to rectify the violation pointed out by BAPETEN.⁷⁶ Depending on the type of violation(s), the submission of a work plan and report on the progress of rectifying any incompliance may also be required by BAPETEN.⁷⁷ Failure to appropriately respond to the letters might lead to the revocation of the licence. Consequently, the operators will no longer be allowed to continue any business activities: however, despite any licence revocation, the operator is still fully responsible for the management of nuclear installations, including nuclear materials and radioactive waste.⁷⁸

⁶⁹ BCR No. 1 of 2017 on the Implementation of Inspections in the Supervision of Nuclear Energy Utilization / Peraturan Kepala Badan Pengawas Tenaga Nuklir No. 1 tahun 2017 tentang Pelaksanaan Inspeksi dalam Pengawasan Pemanfaatan Tenaga Nuklir (BAPETEN) art 20 <<http://jdih.bapeten.go.id/index.php/site/dokview/id/481>> accessed 19 January 2018.

⁷⁰ CNS (n 50) art 7(2)(iii).

⁷¹ IAEA Safety Standards (n 64) 6.

⁷² GR 2/2014 (n 58) art 126.

⁷³ CNS (n 50) art 7(2)(iv).

⁷⁴ GR 54/2012 (n 57) art 94.

⁷⁵ *ibid.*

⁷⁶ *ibid* art 127.

⁷⁷ *ibid.*

⁷⁸ *ibid* art 120.

Notwithstanding all of the above, it is important to note that nuclear energy law is not static.⁷⁹ The coverage of nuclear energy law has broadened due to the enhancement of technology and the lessons learned from nuclear accidents.⁸⁰ In the Indonesian context, Law 10/1997 has been in force for 20 years without any substantive changes, whilst the technology surrounding nuclear safety has improved in the intervening time period, up to and including the present day. Therefore, it may well be said that the law is outdated. This is demonstrated by the following examples.

First, Law 10/1997 defines the terms of radioactive material as ‘any material that has been contaminated only by the operation of nuclear installations’.⁸¹ The radioactive materials generated from non-nuclear installations are therefore not covered under this definition thus leaving a legal vacuum in the regulation of nuclear safety.⁸²

Second, Small and Medium Reactors (“SMR”) designs have recently been introduced as an alternative to large nuclear power plants. The existing regulations only acknowledge land-based nuclear reactor models. Thus, the adoption of new technology, such as floating nuclear power plants,⁸³ may not be covered by the current legal framework.

Given the above, although there is a *sufficient* legal framework available in Indonesia for governing nuclear safety, the existing laws and regulations cannot be regarded as up-to-date and capable of addressing potential, future challenges. As briefly explained above, the definitions of certain, new nuclear technologies are yet to be provided under the law. Given the authority of BAPETEN to supervise relies on the provisions of the law, BAPETEN may also have an issue in overseeing the construction and operation of the power plants through the licensing mechanism if the operator is using advanced technology.

The above analysis suggests the claim of anti-nuclear groups,⁸⁴ that Indonesian authorities are incapable of handling such high risks, is – to a certain extent – reasonable, due to the lack of knowledge and legal vacuum. However, this problem may be rectified through the cooperation between the government and international community that will allow Indonesia to gain insights and experiences in order to enhance the effectiveness of national nuclear safety. Indonesia has ratified several international conventions on nuclear safety⁸⁵ and signed cooperation agreements with countries that are developing nuclear power plants.⁸⁶ Therefore, the next section will

⁷⁹ Cook (n 39) 3.

⁸⁰ *ibid* 4.

⁸¹ Law No. 10 of 1997 (n 46) art 1.

⁸² Djarot Sulistio Wisnubroto, ‘Analysis of the Institutional Framework for Radioactive Waste Management in Indonesia’ (2009) 35(2) *Atom Indonesia* 75.

⁸³ Bernadette K Cogswell and others, ‘Nuclear Power and Small Modular Reactors in Indonesia: Potential and Challenges’ (*Nautilus Institute for Security and Sustainability*, April 2017) 31.

⁸⁴ Amir, ‘Challenging Nuclear’ (n 24) 352-353.

⁸⁵ Keputusan Presiden Republik Indonesia No. 106 Tahun 2001 tentang Pengesahan Convention on Nuclear Safety: Presidential Decree of the President of the Republic of Indonesia on the Ratification of Conventions on Nuclear Safety <<https://jdih.bapeten.go.id/index.php/site/dokview/id/107>> accessed 2 March 2018.

⁸⁶ For example, a cooperation agreement on nuclear safety between Indonesian and the United States of America, see BAPETEN, ‘RI-AS Tandatangani Kerjasama Keselamatan Nuklir: RI-AS Signed Cooperation in Nuclear Safety’ (*Perpustakaan Badan Pengawas Tenaga Nuklir* 2016)

discuss whether the participation by Indonesia in these international arrangements could address the issue of sufficient yet not fully up-to-date laws and the criticism of allegedly incompetent authorities responsible for nuclear energy.

3. *International Law on Nuclear Safety*

Nuclear safety is not solely the concern of the states where the nuclear installations are constructed and operated. Nuclear safety is also a concern at an international level.⁸⁷ International laws and regulations on nuclear safety are also important as a platform for “nuclear states” to share extensive knowledge in order to assist the rest of the international community to set acceptable nuclear safety standards. Technology for the efficient use of nuclear power continually improves. Therefore, ensuring nuclear safety does not appear possible without a corresponding improvement in the relevant standards.⁸⁸ Such improvement would be best achieved through supervision by international institutions⁸⁹ and cooperation with the international community.⁹⁰ Furthermore, international participation is also justified in the context of public international law, since every state is generally obliged to prevent and mitigate any harmful consequence that may occur from its own high-risk activities,⁹¹ such as the use nuclear energy.⁹²

CNS is the primary international treaty that regulates nuclear safety. It is the legal product of a compromise to balance two relevant interests on nuclear energy use: (1) the growing concern about safety and (2) the impacts of international standards on the sovereignty of states in governing the use of nuclear energy.⁹³ CNS focuses on compelling signatory states to ensure the safety of nuclear use through: meeting the obligations thereunder; to continuously improve the international safety standards by making a periodic report; and evaluating the periodic report through the ‘peer review’ mechanism.⁹⁴

<<https://perpustakaan.bapeten.go.id/ri-as-tandatangani-kerja-sama-keselamatan-nuklir/>> accessed 28 February 2018.

⁸⁷ Norbert Pelzer, ‘Learning the Hard Way: Did the Lessons Taught by the Chernobyl Nuclear Accident Contribute to Improving Nuclear Law?’ (OECD 2006) 78 <<https://www.oecd-nea.org/law/chernobyl/PELZER.pdf>> accessed 2 March 2018.

⁸⁸ Ptasekaite (n 41) 75.

⁸⁹ Patricia Birnie, Alan Boyle and Catherine Redgwell, ‘Nuclear Energy and the Environment’ in Patricia Birnie, Alan Boyle and Catherine Redgwell (eds), *International Law and the Environment* (3rd ed, OUP 2009) 493.

⁹⁰ Norbert Pelzer, ‘Safer nuclear energy through a higher degree of internationalization? International involvement versus national sovereignty’ (2013) 91 *Nuclear Law Bulletin* 43, 82.

⁹¹ For example, see *Trail Smelter Case (United States v Canada)* (1938 and 1941) 3 RIAA 1905; *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4; *Gabčíkovo-Nagyymaros Case (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7; *Pulp Mills Case (Argentina v Uruguay)* [2006] ICJ Rep 113.

⁹² For example, see *Nuclear Tests Case (New Zealand v France)* (Admissibility Judgement) [1974] ICJ Rep 457; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Order)* [1995] ICJ Rep 288; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

⁹³ Pelzer, ‘Learning the Hard Way’ (n 87) 93-95.

⁹⁴ CNS (n 50) art 20.

Indonesia, as a party to CNS, could continually gain benefits from this 'peer review' mechanism. Through this system, BAPETEN could learn from other contracting states to CNS in order to improve nuclear safety provisions in Indonesia. However, the incentive nature of the CNS may be viewed as too weak: there is no formal mechanism where Indonesia could be faced with disciplinary actions if it fails to follow up the comments provided.⁹⁵ The preamble of the CNS reaffirms that 'nuclear safety rests with the State having jurisdiction over nuclear installations'. Thus, it is for Indonesia to determine the appropriate steps and actions required for ensuring their compliance with the Convention. Given this, BAPETEN must present a realistic picture of the conditions of the nuclear safety development in Indonesia in its report in order to receive meaningful inputs from other contracting states.⁹⁶

Apart from CNS, IAEA plays the central role in the establishing and adopting nuclear safety standards.⁹⁷ In collaboration with international organisations – such as the World Health Organisation (WHO), Food and Agriculture Organisation (FAO), International Labour Organisation (ILO), and the Organisation for Economic Co-operation and Development (OECD) – IAEA's standards gain international recognition to guide established or emerging nuclear states to develop a comprehensive national regulatory regime.⁹⁸ IAEA also offers nuclear safety services along with a voluntary review that can assist the states to obtain valuable information and experience on ensuring the safety of nuclear power plants: for example, the Operational Safety Assessment Review Team (OSART) programme allows states to request that the agency reviews the operation of a nuclear installation and provide recommendations regarding the installation's safety.⁹⁹

Furthermore, IAEA continually publishes updated technical guidelines on nuclear safety, such as safety fundamentals, safety requirements and safety guides.¹⁰⁰ It also maintains databases of safety recommendations that can be used by Indonesia in improving its nuclear safety provisions.¹⁰¹ Given this, the gap between the Indonesian authorities' knowledge and the evolving nuclear technology the public is concerned about can be alleviated with the assistance of IAEA through – among other things – submitting a request to IAEA or adopting the technical guidance that is openly available to all member states.¹⁰² However, the recommendations and standards are not binding. Tromans notes that, unless states enter into a separate agreement with IAEA that will allow it to inspect upon the consent of the state and operators and require compliance, IAEA does not have any power to force the state to

⁹⁵ Menno Kamminga, *The IAEA Convention on Nuclear Safety* (CUP 1995) 882.

⁹⁶ Washington (n 45) 460.

⁹⁷ Statute of IAEA (adopted on 23 October 1956, entered into force on 29 July 1957) 276 UNTS 3, art III(6).

⁹⁸ Birnie, Boyle and Redgwell (n 89) 496.

⁹⁹ IAEA, 'Operational Safety Review Team' (IAEA) <<https://www.iaea.org/services/review-missions/operational-safety-review-team-osart>> accessed 19 January 2018.

¹⁰⁰ World Nuclear News, 'IAEA updates regulatory self-assessment tool' (*WNN*, 5 May 2017) <<http://www.world-nuclear-news.org/RS-IAEA-updates-regulatory-self-assessment-tool-0505174.html>> accessed 28 February 2018.

¹⁰¹ See IAEA, 'Nuclear Security Series' (IAEA) <http://www-ns.iaea.org/security/nuclear_security_series.asp> accessed 19 January 2018.

¹⁰² Morris Rosen, 'Nuclear in Developing Countries: The Transfer of Regulatory Capability' (1979) 21(2-3) IAEA Bulletin 1, 2

follow its recommendations, undertake complete inspections or, however unsafe, instruct and enforce the closure of the power plant in question.¹⁰³

This article suggests that the Indonesian government should commit to implementing – in the most practical way possible – a binding requirement for Indonesian authorities to comply with IAEA recommendations and standards from time to time in domestic legislation, or via BAPETEN regulations, in order to make them enforceable.

Given the above, while the IAEA's review missions and guidance could certainly assist Indonesia improve its safety provisions and enhance Indonesian authorities' knowledge on nuclear technology and safety, they are still unable to address public distrust of the government authorities. Public transparency could be the answer to this problem. Adoption and implementation of all appropriate steps will not, of itself, be enough.¹⁰⁴ As the academic community notes: 'the promulgation of international safety standards cannot restore public confidence if the public suspects that the standards are not being followed or applied'.¹⁰⁵ This is particularly acute in the context of Indonesia, where there is long-term scepticism over nuclear energy safety. It is clear that a multifaceted approach is required, of which robust and up-to-date regulation is a key element.

4. Conclusion

In conclusion, the decision of the Indonesian government – implemented by GR 79/2014 – for nuclear energy to be the last option in the state's energy strategy is unjustifiable. From the above, Indonesia does have the potential to undertake commercial nuclear energy production: this potential could be utilised both for meeting electricity demand and lowering Indonesia's greenhouse gas emission levels.

Public concerns about the risks of nuclear production and use are understandable. However, technology, regulation, and collaboration on nuclear safety are continually evolving and progressing. A more suitable compromise may be to consider the introduction of small-scale nuclear power plants to gain incremental experience in generating electric power using nuclear energy.

The assumption that the Government does not have the ability to control and supervise nuclear use is not fully justifiable. Although Indonesia's current regulations are not fully up-to-date vis-à-vis the development of nuclear safety technology, the existing licensing system is sufficient to control and monitor the current, land-based use of nuclear energy in Indonesia. Furthermore, by applying international cooperation and complying with international obligations, Indonesia can gain valuable knowledge and, thus, exploit the potential of nuclear power – through

¹⁰³ Stephen Tromans QC, *Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context* (Hart Publishing 2010) 45.

¹⁰⁴ Richard Tanter and others, 'Nuclear Power, Risk Management and Democratic Accountability in Indonesia: Volcanic regulatory and financial risk in the Muria peninsula nuclear power proposal' (2009) 7(51) *Asia Pacific Journal* 1, 10.

¹⁰⁵ Washington (n 45) 462.

adoption of recommendations and standards within domestic legislation – without neglecting the safety aspects of that energy source.

BOOK REVIEW

The New States of Abortion Politics

JONATHAN DEANS*

1. *Introduction*

Readers from the United Kingdom can benefit from reading about abortion politics in the United States: a comparative understanding of how abortion restrictions are determined and driven by political machinations, before manifesting themselves in law, is useful to any country where abortion is not a settled issue. The highly divisive state of affairs in the US makes for the most stimulating read, but the tactics used by activists on both sides of the issue is also visible in other countries. Abortion is not a politically settled issue in the UK, with major controversy still revolving around it in Northern Ireland. The Abortion Act 1967 does not extend to Northern Ireland,¹ so the law there relies on antiquated criminal law statutes.² The result of these provisions is that abortion is criminalised in Northern Ireland, with exceptions permitted only when there is a risk that the mother may die or is likely to suffer long-term harm, which is serious, to her physical or mental health.³ This has become particularly topical given the current government's political engagement with the Democratic Unionist Party of Northern Ireland, a strictly anti-abortion party who may be able to use their newfound political advantage to restrict abortion rights throughout the UK.⁴ Recently, the high-profile UK Supreme Court judgment in *R (on the application of A (A Child)) v Secretary of State for Health*,⁵ concerning the Secretary of State for Health's refusal to provide free abortion services in England for women from Northern Ireland, decided – by a 3:2 majority – that the Secretary of State for Health's decision was lawful.⁶ The dissenting justices were Lady Hale,⁷ now the President of the Supreme Court, and Lord Kerr,⁸ who was the Lord Chief Justice of Northern Ireland from 2004 to 2009. That a case on abortion reached the Supreme Court, and led to some of its

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¹ Abortion Act 1967, s7(3).

² Offences against the Person Act 1861, ss58-59; Infant Life Preservation Act 1929; Criminal Justice (Northern Ireland) Act 1945, ss25-26.

³ *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 39 [73] (Nicholson LJ).

⁴ Siobhan Fenton and Thomas Goulding, 'DUP's anti-abortion policy: Theresa May's new coalition partner's stance explained' *The Independent* (9 June 2017) <<http://www.independent.co.uk/news/uk/dup-abortion-ban-policy-theresa-may-uk-election-hung-parliament-stances-reproductive-rights-a7781816.html>> accessed 18 January 2018.

⁵ *R (on the application of A (A Child)) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492.

⁶ *ibid* [1]-[36] (Lord Wilson, with whom Lord Reed and Lord Hughes agreed).

⁷ *ibid* [92]-[97] (Lady Hale DPSC) (as she then was).

⁸ *ibid* [50]-[91] (Lord Kerr).

most senior members arriving at drastically different conclusions, is evidence that the UK may be entering a period of more contentious abortion politics and litigation.

2. Context

The infatuation of academia and popular scholarship with the phenomenon of “Abortion Politics” has produced a saturation of the topic, which many may find overwhelming. The sheer volume of interdisciplinary materials on the issue provides fascinating engagement with niche topics such as the experiences of the Postwar Japanese⁹ or the constitutional law parallels between abortion and slavery.¹⁰ However, it can be difficult to know where an interested reader can find a more grounded approach.

For a book on abortion politics to have value to the interested reader in this crowded market, it should aim to achieve three objectives:

- (1) explore the topic from an angle that illuminates a facet of abortion politics without merely retracing old ground;
- (2) assist the reader to understand the contemporary nature of abortion politics, along with potential, future developments; and
- (3) communicate an interesting narrative: rather than a series of analytical essays, a story should be told, providing an engaging reading experience.

3. Content

A. Overview

The New States of Abortion Politics by Joshua C Wilson, the author of *The Street Politics of Abortion: Speech, Violence, and America's Culture Wars*,¹¹ satisfies these three aspirations. Following on from *The Street Politics of Abortion*, Wilson charts the shift in abortion politics from the grassroots activism of ‘street politics’ in the 1980s and 1990s to a contemporary resurgence characterised by legal and political wrangling. Wilson posits that this is a result of increased professionalisation of anti-abortion activism, resulting in the ‘new states of abortion politics’.¹² The effect of increasing legal expertise on the abortion debate is a fresh angle, understanding of which will assist to comprehend the development of abortion politics in the US.

It is important to convey that this book is not a work solely on abortion law nor medical ethics but, rather, a broader methodological account of changes in the social movements of abortion discourse. Wilson remains obstinately neutral throughout the book, refusing to comment on the merits of arguments and decisions and using

⁹ Tiana Norgren, *Abortion before Birth Control: The Politics of Reproduction in Postwar Japan* (Princeton University Press 2001).

¹⁰ Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* (Cambridge University Press 2013).

¹¹ Joshua C Wilson, *The Street Politics of Abortion: Speech, Violence, and America's Culture Wars* (1st edn, Stanford Law Books 2013).

¹² Joshua C Wilson, *The New States of Abortion Politics* (1st edn, Stanford Briefs 2016) vii-1.

detached terminology. This is a wise approach: it ensures that the book remains non-partisan and can be enjoyed as a detailed report by both sides of the debate. Criticism could be made for its brevity and dearth of analysis on certain issues. However, as part of the Stanford Briefs series, the aim of the book is to ‘address the essence’¹³ of the topic, so such an extensive assessment misunderstands the purpose of the text.

Wilson splits the book into four sections: a preface and three linked essays. The preface, entitled ‘The Professionalization of Abortion Politics’,¹⁴ sets the scene by detailing the events in recent years that have brought abortion politics back to the forefront of public discourse.

B. Part One: ‘Violence, Law, and Abortion Politics’

Wilson begins part one with reference to John Salvi, a Catholic who carried out fatal gun attacks on abortion clinics in 1994. Salvi's attacks helped to contribute to the public image of the anti-abortion movement as violent extremists. This shift in public opinion fuelled political will to implement laws restricting anti-abortion activism.¹⁵ Covering the twenty years of political and legal machinations in between, Wilson takes us up to the 2014 Supreme Court decision of *McCullen v Coakley*.¹⁶

Centred on the attempts of the state of Massachusetts to implement a law restricting protests at abortion clinics, the narrative does not provide an overview or analysis of “buffer zone” laws - which create a protected area around abortion clinics and/or their personnel - in the US. Instead, the analysis begins with the attempt to pass a law of such nature in the Massachusetts legislature, before moving on to the first legal challenge against it. This legal challenge, *McGuire v Reilly*,¹⁷ provides a key comparison with *McCullen*, which Wilson uses to promote his thesis.

In *McGuire*, the First Circuit Court of Appeals decided to uphold the law, making reference to the Supreme Court decision of *Hill v Colorado*, which affirmed the constitutional legality of a very similar buffer zone law.¹⁸ Following this, the Supreme Court denied the appellant's petition in *McGuire*, seemingly settling years of legal challenges.¹⁹

However, in *McCullen*, the US Supreme Court voted unanimously to strike down the law, with Justice Scalia stating that *Hill* should be overruled.²⁰ Wilson asks us to consider what changed between 2000 and 2014 to precipitate such a shift.

The answer, for Wilson, is two-fold.

Firstly, the changing composition of the court has altered the power balance, resulting in a more conservative court. As such, there will be less support in the court

¹³ Stanford University Press, ‘Stanford Briefs’ <<http://www.sup.org/books/imprints/?imprint=STANFORD%20BRIEFS>> accessed 29 January 2018.

¹⁴ Wilson, *The New States of Abortion Politics* (n 12) vii-1.

¹⁵ *ibid* 1-9.

¹⁶ *McCullen v Coakley* 573 US ___ (2014).

¹⁷ *McGuire v Reilly* 260 F 3d 36. (2001).

¹⁸ *Hill v Colorado* 530 US 703 (2000).

¹⁹ Wilson, *The New States of Abortion Politics* (n 12) 17.

²⁰ *McCullen* (n 16) 9-10 (Scalia J, concurring opinion).

for left-wing ideas, such as the protection of abortion clinics.²¹

Whilst the effect of the political make-up of the Supreme Court on the law and politics of the United States is nothing new, Wilson's second point – that the increased professionalisation of anti-abortion activism has elevated the legitimacy of these movements and expanded their influence in the legal sphere²² – demonstrates originality.

The role of Part One is to explain the background knowledge necessary to understand the elucidation of Wilson's argument in parts two and three. It should be noted that a level of background knowledge is assumed and part one is refreshing in that it does not insist on a tired retelling of early abortion politics and law. Beginning in 1994 allows Wilson to gloss over *Roe*²³ and *Casey*,²⁴ the landmark abortion law cases making it unconstitutional for states to prevent women choosing to have an abortion until the foetus is viable – meaning able to live outside the mother's womb – and enter a new chapter of abortion politics. However, this does mean that the otherwise immediately accessible work has a small barrier for the uninitiated reader.

A further, minor issue is the absence of critical analysis concerning the judgments, especially *McCullen*. While focus is on the changing discourse, rather than the decision itself, analysis of the legal arguments used can help the reader to discern the importance of factors such as the political composition of the court. If the decision can be viewed as manifestly correct, political concerns may take a back seat. If the decision can be viewed as questionable, political concerns or increased professionalisation may help to explain. As it is, the book lacks such an in-depth examination of this.

C. Part Two: 'From Allies to Alliances in the Antiabortion Movement'

In this part,²⁵ Wilson conveys his evidence of increased legal professionalisation. To do so, Wilson gives a simple, yet striking, comparative example of the key players involved in *McGuire* and *McCullen*. In 2000, volunteers from a small anti-abortion organisation with minimal resources conducted the litigation in *McGuire*. Contrastingly, in 2008, when the *McCullen* litigation began, a large group of Christian lawyers offered support, with full-time staff rather than volunteers.²⁶

Wilson delves into the history of both groups, the Massachusetts based "Pro-Life Legal Defense Fund" and the countrywide "Alliance Defending Freedom", explaining how the motivations for their establishment, the aims they wished to achieve, and the resources and techniques available to them differed. Put broadly, there was a transformation in the Christian legal world from informal local associations to countrywide enterprises that focus on galvanising and co-ordinating like-minded lawyers. This is attributed to the rise of the 'Christian Right', reflected in the ethos of these larger organisations that seek to promote Christian principles.

²¹ Wilson, *The New States of Abortion Politics* (n 12) 25-26.

²² *ibid* 28-30.

²³ *Roe v Wade* 410 US 113 (1973).

²⁴ *Planned Parenthood v Casey* 505 US 833 (1992).

²⁵ Wilson, *The New States of Abortion Politics* (n 12) 33-61.

²⁶ *ibid* 38-60.

A criticism of the work here is that its scope is drawn too narrowly: it is difficult to infer a structural change in the world of anti-abortion activism merely from an analysis of the institutions involved in two legal cases. Both of the cases are tied to the state of Massachusetts and the small number of groups mentioned may not be representative of the wider movement. This is not to say that Wilson's portrayal is unconvincing but it would benefit from both a discussion of anti-abortion activism in other states and statistical evidence.

As regards statistics, *McGuire* was decided in the First Circuit Court of Appeals, whilst *McCullen* made its way to the US Supreme Court. It is possible that the litigants in *McGuire* would have received support from a larger anti-abortion establishment if the Supreme Court had accepted their petition. It is also likely that many lower court cases are dealt with by smaller, local societies. Without a fuller account, it is difficult to determine how much the debate has been affected by increased professionalisation.

Following on from this, it is regrettable that Wilson only covers the participants in the cases from the anti-abortion side. The preface is entitled "The Professionalization of Abortion Politics" but, in reality, the book only covers the professionalisation of the anti-abortion ideology. Some consideration of development of legal expertise in the pro-abortion camp would have been valuable.

Despite these flaws, part two does an excellent job of communicating to the reader the contrast between the two sets of activist lawyers, illustrating how different the playing field had become between *McGuire* and *McCullen*.

D. Part Three: 'The Past as The Possible Future of Abortion Politics'

Wilson starts part three²⁷ by recounting the American experience with the abortion debate from the beginning. Wilson places the beginning at roughly 100 years before *Roe* was decided in 1973.²⁸ He also explains how this correlates with the rise of the 'Christian Right' in American society.²⁹ This avoids becoming a run of the mill account of key cases, such as *Roe*, by remaining within the previous parameters of discussion. The participants of the discourse continue to be the focus of attention, with Wilson disclosing how the Republican Party came to be synonymous with anti-abortion electioneering and advocacy.³⁰ Throughout this, a conceptualisation of the issue as somewhat symbolic becomes apparent, representing a struggle between Christian and secular values. With this in mind, a fuller description of the characteristics and values of the Christian Right would have been a useful inclusion, for Wilson does not spend as much time telling us what the movement is as he does telling us how it came about. From the coverage given to it by Wilson, the Christian Right can be summarised as the right-wing political factions in the United States which attempt to influence law, politics, and public policy with their interpretations of Christian doctrine.

Taking account of the piecemeal legislative attempts to restrict reproductive rights and overturn *Roe* allows Wilson to further illustrate the issues of increased professionalisation and the changing composition of the Supreme Court, discussing

²⁷ *ibid* 61-101.

²⁸ *ibid* 62.

²⁹ *ibid* 62-69.

³⁰ *ibid* 65-69.

the wider context rather than simply analysing a small sample of decisions.³¹ Placing this background information at the end of the book, instead of at the beginning, allows Wilson to take us back through what we have already learned, applying earlier reasoning. As such, the structure Wilson has chosen is a positive aspect of the publication. Diving into a subdivision of abortion politics from the outset hooks the reader with fresh information, whilst the last section explains the importance of what has been conveyed.

Towards the end of this part, Wilson covers some of the markers that can assist in predicting the future of abortion politics in the US.

Wilson starts with the situation in Texas. Texas House Bill 2³² aimed to introduce many restrictions on abortion rights in Texas by requiring *inter alia* abortion clinics to meet the same standards as facilities performing more serious surgery and for abortion providers to have admitting privileges at hospitals within 30 miles.³³ These restrictions were not necessary for the safe provision of abortions and were intended to restrict the access to them. After these provisions came into effect, the number of abortion clinics in Texas dropped by around 50%.³⁴ It was the basis of the litigation in *Whole Woman's Health v Hellerstedt*,³⁵ which reached the Supreme Court.

At the time of the book's publication, *Hellerstedt* had not yet been decided. Wilson correctly predicted that the decision in the case would be viewed as incredibly important.³⁶ On the other hand, his analysis of the problems that would arise if the court reached a 4-4 stalemate has become largely academic, as the court ruled 5-3 to strike down parts of the law as unconstitutional.

This, however, does not mean that Wilson's reasoning here is outdated or useless. He rightly highlights the powerful effect that Justice Scalia's replacement will have on the court and on America's abortion jurisprudence. We are left to wonder what Wilson would say about the recent addition of Neil Gorsuch to the Supreme Court, given Gorsuch is widely regarded as an originalist judge like Scalia.

Concluding his work, Wilson draws back from the issues in Texas to explain how significant a victory *McCullen* was for the anti-abortion movement, and details how it has invited further litigation to remove clinic-front regulations. Notwithstanding this, Wilson does not believe that the success in *McCullen* will result in a reversal of *Roe*, pointing to statistical evidence on the public ambivalence to abortion, as well as the possibility that the pro-abortion movement will be rejuvenated.³⁷

³¹ *ibid* 70-83.

³² Texas Senate, 'Texas House Bill 2' <<http://www.legis.state.tx.us/tlodocs/832/billtext/pdf/HB00002I.pdf#navpanes=0>> (Texas Legislature Online) accessed 29 January 2018.

³³ *ibid* §2.

³⁴ *Whole Woman's Health v Hellerstedt* 579 US ____ (2016) 4 (Opinion of the Majority).

³⁵ *ibid*.

³⁶ Wilson, *The New States of Abortion Politics* (n 12) 88.

³⁷ *ibid* 94-100.

4. Conclusion

The New States of Abortion Politics provides a compelling read for those generally interested in abortion scholarship. The subject matter is not so niche as to be impractical. Instead, it presents a novel perspective of the field while remaining grounded. Wilson's work deepens our understanding of abortion politics today and sheds light on what the future may hold.

As part of the Stanford Briefs series, the book does not engage much with complex inquiry. Instead, it seeks to provide an overview of the topic. In this regard, the work is successful in stimulating an interest but it is hoped that Wilson will return to this material in the future to provide a fuller chronicle of the issues raised. The analysis present in the book is cogent and thought provoking, so a more thorough exploration is safely within the capacity of the author. The fact that the reader is left hoping for more should be considered a warm commendation, for this text is engaging and strongly recommended.

NEWS SECTION

The University of Aberdeen hosts many law societies that offer students a broad range of experiences related to law. The ASLR would like to introduce some of them to incoming students and to anyone interested in taking part in this valuable aspect of university life.

Aberdeen Law Project

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European Law Students' Association

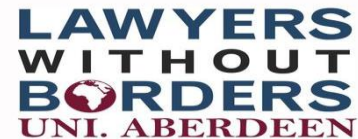
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Lawyers Without Borders Student Division

Including the Prize-Winning Speech from the Lawyers Without Borders Student Division Speaking Competition

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The Aberdeen Law Project

SOPHIE MILLS, *Student Director*

1. Overview

The purpose of the Aberdeen Law Project (“ALP”) is three-fold: (1) to secure access to justice for the economically deprived; (2) to increase opportunity within North East communities by undertaking education outreach programmes; and (3) to provide students with practical legal experience.

2. Activities

While the representation team fight the cases of clients who fall into the ‘justice gap’, the rest of ALP’s 100-strong membership undertake community outreach initiatives. Two of ALP’s projects work with the victims of crimes: one supports Rape Crisis Grampian by providing sessions on the court process; the other works with survivors of domestic abuse. We support rehabilitation through the delivery of employability classes to pre-release prisoners in HMP Grampian.

For young people, ALP has a dual focus: mock trials and the ambassadors programme. These increase awareness of the law and its potential as a career path for school children who might never have considered university or the law as options. This year, ALP has established a digital safeguarding project, helping secondary school pupils understand and deal with the risks and impacts of the digital world.

3. Events

ALP benefits from the continued support of key stakeholders who provide training and talks for our members. Recently, this included a lecture on the role that double jeopardy played in the World’s End murder case from former Deputy Chief Constable of Lothian and Borders Police, Tom Wood. We also received a lecture from our founder, and Chair of our Board, Ryan Whelan on advocacy skills. We have continued to network with representatives from law clinics both locally, through the Scottish University Law Clinic Network, and globally, receiving visits recently from Miami and South Africa.

In the near future, we will be holding our Annual Lecture. This is the highlight of our lecture calendar. We are delighted that Sir Anthony Seldon has agreed to be our keynote speaker.

4. Further Information

For anyone interested in obtaining more information, ALP’s website is www.abdnlawproject.com and ALP’s email address is: general@abdnlawproject.com

European Law Students' Association

ADRIANA MATKOWSKA, *President*

1. Overview

The European Law Students' Association (ELSA) group at the University of Aberdeen forms part of the national and international network of like-minded law students. ELSA offers a great opportunity to meet fellow students from other universities in the UK and Europe. ELSA is involved in a variety of projects, including the promotion of human rights, alongside the Council of Europe, and creating exciting opportunities regarding professional development for our members.

2. Initiatives

One of ELSA's initiatives is ELSA Delegations. This initiative allows ELSA members to actively participate in conferences organised by the United Nations, World Intellectual Property Organization, Council of Europe due to the special consultative status ELSA has with such intergovernmental organisations.

Another initiative available to ELSA members is the ELSA Summer School programme, where members can apply for spaces to study a specific area of law around the world.

3. Recent and Future Events

Our most frequent and well-established events at the University of Aberdeen are academic debates concerning the legal dimension of controversial topics. In this respect, we actively cooperate with the School of Law at the University of Aberdeen. We are grateful for the support of staff members who assist us with these events, with particular thanks due to Dr Douglas Bain. Last academic year, our debates focused on future of UK after Brexit. This autumn, our highly attended debate concerned counter-terrorism measures and their potential implications on human rights. A further academic debate will be arranged for spring 2018, the theme of which will be disclosed soon.

If you are interested in human rights or international trade law mootings, we have exciting opportunities available to apply for in September 2018.

4. Further Information

On behalf of our ELSA team at the University of Aberdeen, I would like to use this opportunity to extend an invitation to readers of the Aberdeen Student Law Review to attend our future events, join ELSA at the University of Aberdeen and participate in ELSA initiatives. If you have any questions, please do not hesitate to contact us at: elsa@abdn.ac.uk

Lawyers Without Borders Student Division

ANNA-SOPHIE TIRRE, *President*

1. Overview

Lawyers Without Borders (“LWOB”) is a non-profit organisation that manages volunteer lawyers to promote the rule of law, capacity building and access to justice through projects and initiatives around the world. This includes advocacy training, community outreach projects and neutral independent observation of court trials to strengthen the justice system of developing countries. Currently, the University of Aberdeen hosts the only LWOB student division in Scotland. It was founded in 2013.

2. LWOB at Aberdeen

The LWOB Student Division has two divisions: research and events.

The research division is comprised of a team of dedicated researchers that complete several research projects each academic year. To a large extent, these projects support the work of LWOB by researching an issue the organisation is involved in. Besides this, our research division also reaches out and offers its services to other NGOs around the world for further research opportunities. The themes of our reports surround legal analyses of topics such as gender based and domestic violence, corruption, human trafficking and civic and electoral rights. The research division is a great opportunity for anyone with an interest in international law and human rights: we encourage student of all levels and degrees to apply.

The events division comprises of three subgroups: socials and fundraising, social media, and academic events.

3. Recent Events and Awards

Highlights from this year so far include an academic talk on the Freedom of Expression and the launching of our blog, which will allow members to share written work on relevant topics they are interested in.

Our main annual event is our Human Rights Conference. The conference is structured as a panel discussion with speakers from around the UK and Europe participating. We were grateful to win Aberdeen University Student Association’s Event of the Year Award for the 2017 edition of the event. Past conferences have addressed the topics of indigenous rights and religious dress. The topic of this year’s conference will be “Euthanasia: Should a right to die be recognised by the law?”

4. Further Information

If you are considering joining us or have any questions, please visit our Facebook page at www.facebook.com/aulwob or email us at aberdeenunilwob@gmail.com

LAWYERS WITHOUT BORDERS PRIZE-WINNING SPEECH

Should the right to die be recognised by the law?

ELIZABETH OLOFSSON

EDITORIAL NOTE: *This is an adapted and edited text version of the winning speech delivered at a speaking competition organised by the Lawyers Without Borders Student Division at Aberdeen University. The title of this text will be the topic of the Student Division's 2018 Human Rights Conference in April. The speaking competition's aim was finding a student speaker to open the Human Rights Conference, as an interactive means by which to introduce the issue in question and the debate surrounding it.*

1. Introduction

[The stroke] left me paralysed below the neck and unable to speak. I need help in almost every aspect of my life. I cannot scratch if I itch, I cannot pick my nose if its blocked and I can only eat if I am fed like a baby – only I won't grow out of it, unlike the baby. I have no privacy or dignity left. I am washed, dressed and put to bed by carers who are, after all, still strangers. You try defecating to order, whilst suspended in a sling over a commode, and see how you get on.¹

This quote is by Tony Nicklinson, who – by judicial review – sought a declaration that it would not be unlawful, on the grounds of necessity, for his GP or another doctor to terminate or assist the termination of his life.²

2. Overview

Euthanasia and assisted suicide share some common characteristics: they are both the ending of a person's life with the aim of relieving that person of their suffering. In the case of euthanasia, it is – in the context of a doctor-patient scenario - the doctor's action that causes the patient's death.³ Contrastingly, assisted suicide is where the patient causes her own death, but someone else has helped her by, for example, prescribing a lethal dose of drugs.⁴ Under English law,⁵ assisted suicide is unlawful by virtue of section 2(1) of the Suicide Act 1961. Euthanasia is unlawful under the common law.⁶

¹ Statement by the Claimant, Mr Nicklinson, quoted in *Nicklinson v Ministry of Justice* [2012] EWHC 304 (QB), [2012] Med LR 383 [3] (Charles J).

² See *Nicklinson v Ministry of Justice* [2012] EWHC 2381 (Admin), [2012] HRLR 32 [18] (Toulson LJ) (as he then was).

³ See the outline of euthanasia in *Airedale NHS Trust v Bland* [1993] AC 789, 865 (Lord Keith).

⁴ See, under English law, the definition of assisting another to commit suicide: Suicide Act 1961, s2(1).

⁵ Suicide Act 1961 only applies to England and Wales: see Suicide Act 1961, s3(3).

⁶ See *Airedale NHS Trust* (n 3) 865 (Lord Keith): 'Euthanasia is not lawful at common law.' See also *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [17], read with [95] (Lord Neuberger PSC) (as he then was); *R (on the application of Conway) v Secretary of State for Justice* (Unreported, 18 January 2018) (Application for Permission to Appeal to the Court of Appeal) [7]-

In 2014, a nine-Justice panel of the UK Supreme Court dismissed Mr Nicklinson's appeal on Convention compliance of the 1961 Act by a majority of 7-2.⁷ It was held that a blanket ban on assisted suicide was not incompatible with Article 8 of European Convention of Human Rights, the right to a private and family life.⁸

In the Scottish Parliament, assisted dying has also been debated. In 2015, the late, independent MSP Margo MacDonald - who was suffering from Parkinson's disease - introduced the Assisted Suicide (Scotland) Bill.⁹ The bill would have allowed those with terminal illnesses to seek the help of a doctor to end their own life. However, MSPs rejected the bill by 82 votes to 36.

Supporters of assisted suicide and euthanasia place great emphasis upon the importance of autonomy: this argument is to the effect people should be able to make decisions for themselves about how they wish to live their lives.¹⁰ Indeed, Ronald Syme argues that 'the last weeks or days of a person's life are some of the most precious, because so little remains. They should not be crushed by toxic anxiety. They should be liberated from fear by the confidence of control.'¹¹ Furthermore, Joseph Raz argued that control over death gives more control over life.¹²

As we saw with Mr Nicklinson, he was stripped of all autonomy. He was confined to a truly undignified and humiliating way of life and, ultimately, death.¹³ Surely, using the only autonomy he had left, he should be able to choose when and how to die.

Proponents against assisted suicide and euthanasia argue that autonomy does not apply to death.¹⁴ Autonomy is about the ability to make choices, and autonomy promotes human flourishing. However, neither of these promotes personal growth, but the end of a person. Furthermore, critics sometimes claim that legalizing any form of the practice will lead to a slippery slope effect.¹⁵ Once you go down the slippery slope, it is hard to get back up again, or reverse the law. Also, accommodating either of these might send the message that the lives of disabled people or the terminally ill, are not worth living.

However, perhaps the strongest argument against is the protection of the vulnerable. There are high rates of depression among those with terminal illnesses, and many who consent to euthanasia may in fact simply be suffering from severe pain,

[8] (Sir Ernest Ryder). Written reasons for granting permission to appeal available at: <<https://www.judiciary.gov.uk/wp-content/uploads/2018/01/conway-judgment18.1.18.pdf>>.

⁷ *Nicklinson* (n 6) [324] (Lady Hale DPSC)(as she then was) (dissenting); [361] (Lord Kerr) (dissenting).

⁸ See *ibid*, the leading judgment of Lord Neuberger PSC (as he then was): [111]-[130].

⁹ SP Bill 40 Assisted Suicide (Scotland) Bill [as introduced] Session 4 (2013).

¹⁰ Sylvia Law, 'Physician-assisted death: an essay on constitutional rights and remedies' (1996) 55(2) *Maryland Law Review* 292, 298-299.

¹¹ Ronald Syme, *A Good Death: An Argument for Voluntary Euthanasia* (Melbourne University Press 2008) 205.

¹² See Joseph Raz, 'Death in Our Life' (2013) 30(1) *Journal of Applied Philosophy* 1, 10.

¹³ See, for an outline of the circumstances of Mr Nicklinson's tragic death: *Nicklinson* (n 6) [3]-[6] (Lord Neuberger PSC) (as he then was).

¹⁴ Imogen Goold, Jonathan Herring, *Great Debates in Medical Law and Ethics* (Palgrave 2014) 220.

¹⁵ Carl E Schneider, 'Rights Discourse and Neonatal Euthanasia' (1988) 76(1) *California Law Review* 151, 167.

distress or depression and are therefore not in a position to make a rational decision.¹⁶ The vulnerable person might worry about the expense of being looked after and feel that they are a burden to friends and relatives. This can put pressure on those making decisions to opt for ending their life.

The principle of protecting the vulnerable is particularly prominent in the leading case of *Pretty v UK*.¹⁷

Diane Pretty was suffering from motor neurone disease and was paralysed from the neck down. Pretty wanted her husband to provide her with assistance in suicide. Since such assistance from her husband would expose him to liability, the Director of Public Prosecutions was asked to agree not to prosecute her husband. This request was refused.¹⁸ The House of Lords dismissed Pretty's appeal.

It was argued on Ms Pretty's behalf that the right to life in Article 2 in the European Convention of Human Rights included a right to control the manner of one's death and therefore a right to commit suicide.¹⁹ However, the House of Lords and European Court of Human Rights held that Article 2 imposed a duty on the state to protect life, and this could not be taken to include a right to die.²⁰

It was also held that Article 2 positively requires the state to take appropriate steps to safeguard the lives of those within its jurisdiction.²¹ It is arguable that this could include protecting vulnerable people being pressured into committing suicide or consenting to a legalised form of euthanasia.

As regards Pretty's right to respect for private life under Article 8, the European Court of Human Rights considered that the right was engaged but that interference in this case would be justifiable as 'necessary in a democratic society' for the protection of the rights of others. In a unanimous judgment, the Court found no violation of the Convention in this regard.²²

A few years later, Debbie Purdy, who suffered from primary progressive multiple sclerosis, mounted a different sort of argument. She did not ask for future immunity for her husband, but she argued that she and her husband should be entitled to know what factors the Director of Public Prosecutions (DPP) would take into account when deciding whether to prosecute him.²³ Debbie Purdy's argument was that the DPP is plainly exercising his discretion not to prosecute in such cases, and that the criteria used to make such decisions should be open and transparent.²⁴

At first instance, the court held that it was bound by the decision in *Pretty*, and that Ms Purdy's article 8 rights were not engaged.²⁵ Although this was sufficient to

¹⁶ See e.g. Susan Wolf, 'Confronting Physician Assisted Suicide and Euthanasia: My Father's Death' (2008) 38(5) *Hastings Center Report* 23, 25.

¹⁷ *Pretty v United Kingdom* (2002) 35 EHRR 1 ("Pretty ECtHR").

¹⁸ For an outline of the facts, see: *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800, [1] (Lord Bingham).

¹⁹ *ibid* [3], rejected for the reasons given in [4]-[10] (Lord Bingham).

²⁰ *ibid* [8] (Lord Bingham); [59] (Lord Steyn); [86]-[88] (Lord Hope); [112] (Lord Hobhouse); [124] (Lord Scott).

²¹ *Pretty* ECtHR (n 17) [38] (Judgment of the Court).

²² *ibid* [68]-[78] (Judgment of the Court).

²³ *R (on the application of Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345 [30]-[31] (Lord Hope).

²⁴ *ibid* at 349 (summary of the arguments made for the Claimant, Mrs Purdy).

²⁵ *R (on the application of Purdy) v DPP* [2008] EWHC 2565 (Admin), [2009] HRLR 7, [57], [83]-[84] (Judgment of the Court).

dismiss her claim, the court further held that even if her Article 8 rights had been engaged, the interference would have been both proportionate and justifiable.²⁶

Debbie Purdy later appealed, successfully, to the House of Lords.²⁷ The House of Lords found that Ms Purdy's Article 8 rights were engaged by the DPP's refusal to give more specific guidance on how he exercised his discretion under section 2(4) of the Suicide Act 1961. The interference with her Article 8 rights could be justifiable under Art 8(2) only if the manner in which the DPP exercised his discretion was accessible and sufficiently precise to enable a person to regulate her conduct accordingly. The House held that it did not.²⁸ In order to comply with Article 8, the House held there should be an offence-specific policy identifying the facts and circumstances the DPP would consider when deciding whether to prosecute.²⁹

Following this decision, the DPP issued an interim offence-specific policy, and after a consultation process, the final policy was published in 2010.³⁰ However, it is important to note that Scotland's prosecution service, the Crown Office, has issued no such offence-specific guidance.³¹

The case of *Pretty* demonstrated a conservative approach of the courts to Ms. Pretty's assertion that her Article 8 right was engaged.³² It was only by virtue of the later ECtHR judgment that Article 8 was held as engaged.³³ However, the case of *Purdy* demonstrated that Art 8 was engaged. As a result of that development and the DPP's subsequent clarification, acts constituting assisted suicide under the 1961 Act may not be prosecuted in certain circumstances.

3. Conclusion

It is clear that the debate regarding legalising euthanasia and assisted suicide boils down to a balancing act between protecting vulnerable people being pressurised into dying, and strengthening the autonomy of the individual. With such a complicated balancing act, it is not surprising that both the UK and Scottish Parliaments appear unwilling to further clarify or relax the laws on these issues. Nevertheless, the case of *Purdy* led to a more lenient approach by the DPP in allowing a terminally ill person to receive assistance in dying via assisted suicide.

²⁶ *ibid* [82]-[84] (Judgment of the Court).

²⁷ *Purdy* (n 23).

²⁸ *ibid* [1] (Lord Phillips, agreeing with the leading judgments); [54]-[56] (Lord Hope); [64]-[69] (Baroness Hale) (as she then was); [85]-[87] (Lord Brown); [88], [104]-[106] (Lord Neuberger).

²⁹ *ibid.* See, particularly, [55] (Lord Hope).

³⁰ Director of Public Prosecutions, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (*Crown Prosecution Service*, February 2010) < <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> > accessed 19 February 2018.

³¹ This is what the unsuccessful litigation in *Ross v Lord Advocate* 2016 SC 502 concerned, in the context of Scots law and as against the Lord Advocate, rather than the DPP. The Petitioner's arguments were noted to rely 'heavily' on the judgment in *Purdy* (n 23): see *Ross* (n 31) [9] (LJ-C Carloway).

³² *Pretty* (n 18) [26]-[30] (Lord Bingham), holding that Ms Pretty's Article 8(1) right was not engaged but that, if that conclusion were wrong, it was justified under Article 8(2); [62] (Lord Steyn), adopting the same approach as Lord Bingham; [99]-[100] (Lord Hope), though contrast this with Lord Hope's comments in *Purdy* (n 23) [34]-[39]; see also [112] (Lord Hobhouse), [124] (Lord Scott).

³³ See *Pretty* ECtHR (n 17) [61]-[67], [87] (Judgment of the Court); *Purdy* (n 23) [38]-[39] (Lord Hope).

Legal Research Society

STEPHANIE DROPULJIĆ, *President*

1. Overview

The Legal Research Society (LRS) was created to facilitate the academic and social life of postgraduate researchers (PGRs) within the School of Law. The LRS Committee is elected annually by fellow PGRs to take up a variety of roles that, over the coming year, will facilitate the committee's actions and plans. As part of the LRS commitment to PGR studies, two members of the LRS also attend Law School Meetings to ensure that any issues that PGRs have are represented and addressed.

2. Recent Events

The past academic year 2016-2017 was an exciting year for the LRS. We organised a large conference between the law schools at Robert Gordon's University and the University of Aberdeen. This saw a number of PhD students present on a wide variety of legal topics, with staff members and colleagues in attendance. The LRS co-hosted an event with the Centre for Citizenship, Civil Society and Rule of Law, which video-linked Professor Chakravarti, a Professor of Political Science from Wesleyan University, USA, who gave a talk on 'Guilty, Not guilty, Nullify: Imagining a Three Opinion Verdict in the United States Criminal Justice System'. Professor Duff from the School of Law at the University of Aberdeen provided a response and talk on the three verdict system in Scotland. Throughout the academic year, we also held monthly forums for researchers to informally discuss their research as well as present upon upcoming conference papers. The LRS also hosted a 'Speak-Easy' event, which provides a panel discussion for taught LLM students on key topics, such as how to write a research proposal for PhD applications. This event also serves as a social event to encourage cooperation amongst LLM and PhD students.

3. Future Events

The incoming LRS committee was elected in October 2017 and have already put together a wonderful plan for the next academic year, including two potential conferences to be held in 2018. One potential conference is a tripartite law conference between three Schools of Law on areas of commercial law, energy law and environment law.

4. Further Information

For anyone interested in obtaining more information, the Legal Research Society can be contacted via the following email address: lrs@abdn.ac.uk

University of Aberdeen Mooting Society

OLIVER CHAPMAN, *President*

1. Introduction

The University of Aberdeen Mooting Society was established to enhance and develop advocacy skills of interested students. The Society remains the only entirely student-led Mooting Society in the UK. The Society has developed to cater to all years, with a focus on developing fundamental skills in junior years and offering specialised mooting opportunities in senior years.

2. News and Recent Events

This academic year, the Mooting Society has changed focus and created new platforms for mooting to engage students from all years. The “Just Moot It” program was created to run single moots on an ad-hoc basis, pairing students in teams of similar levels. The program was very successful and we are looking forward to developing it in future.

We also continued with internal moot competitions, as follows: First Year, Main Faculty, Family, Criminal, and English law. This year, some non-law students also participated in these internal moots. In order to ensure mooters were supported, we introduced mentors to any first-time mooter, regardless of the competition they entered. This led to more confident mooters and higher standards of moots.

We have also focused external moots and representing the University to a high level at an international level. Our teams in the Dundee Varsity and Alexander Stone competitions were very successful. We are glad to see first year mooters performing at a high level so early in their University careers. Allowing our English mooters to gain experience was another focus of the Society this year. Participation by students in the ESU Essex Court and UKLSA competitions has achieved this.

Regarding the international level, a team will attend the Jessup International Law Moot competition in February. We are hoping to continue the success from last year, when the Society won the Spirit of the Jessup award. As a result, we have put more effort into oral preparation for external competition. We have also strengthened our relationship with the Law Faculty via coaching and mentoring from academic staff.

This year we were also presented with a unique opportunity by taking part with the University of Dundee in the mock trial case of William Bury, the last man to be hanged in Dundee (129 years ago). The team took a step further in advocacy skills by learning how to examine witnesses and present medical evidence to court.

3. Further Information

For anyone interested in obtaining more information or taking part in a moot, please contact the Mooting Society by email at mooting@abdn.ac.uk

Aberdeen Student Law Review

Guidelines for Contributors

The Editorial Board is keen to receive submissions from past and present students of the University of Aberdeen.

The purpose of the ASLR is to showcase the work of the students of the University of Aberdeen, highlighting the many areas of law that are taught and researched at this university. As such, we welcome submissions on any such areas of law.

Several types of articles will be considered:

- Case Notes (500 to 1,500 words on a recent judicial development)
- Book Reviews (500 to 1,500 words on a recent publication)
- Essays and Short Articles (1,500 to 4,000 words)
- Full Research Papers (4,000 to 10,000 words)

All the limits specified above include footnotes.

Submissions are welcome from students at all stages, from first year undergraduate to postgraduate PhD level. Students may submit a piece of work that has been written as part of their degree, or may write something specifically for the ASLR.

Articles must provide a critical analysis of a particular area of law, publication or judicial decision. They should be original, relevant and aim to make an interesting contribution to the academic debate. The Editorial Board anonymously reviews every piece of work, 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 on Hein Online and in law libraries across the UK.

All submissions must conform to the ASLR House Style and must be accompanied by a title page and a signed declaration of originality; further information on this can be found on the ASLR website: www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95.

Finally, all submissions (including the title page, declaration of originality and manuscript) must be sent to aslr@abdn.ac.uk under the subject 'Submission for ASLR' by 15 September of every year.

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