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Immune or Not? Warships in Foreign Internal Waters and the UN Convention on the Law of the Sea

Dr Vincent P Cogliati-Bantz¹

On 20 December 2012, the International Tribunal for the Law of the Sea (ITLOS) rendered an order on provisional measures in rather extraordinary circumstances. It unanimously ordered that Ghana unconditionally release Argentina’s frigate ARA Libertad and its crew and allow them to leave the port of Tema and the maritime areas under Ghanaian jurisdiction.² The vessel, the flagship of the Argentinean navy, had been detained by Ghana following an interlocutory injunction by a judge of the High Court of Ghana on 2 October 2012, upon the claim by a company in respect of sums due under bonds issued by Argentina.

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In this, its sixth order on provisional measures since its establishment, ITLOS for the second time faced the criticism of some judges on the jurisdiction of the Tribunal to order the provisional measures sought by the Applicant. In the Libertad case, two judges questioned whether the arbitral tribunal to which the dispute was submitted would have *prima facie* jurisdiction over it.³ The problem was raised starkly in the context of the immunity of a warship in a foreign port which, despite being a well-established rule of international law, was allegedly not a rule to be found in UNCLOS and, therefore, not one capable of being vindicated through its compulsory dispute-settlement mechanism. The case also raises issues of the relations between domestic law and the international obligations of States, and of the conditions to be fulfilled when provisional measures are sought.

³ Art 290(5) of the 1982 UN Convention on the Law of the Sea (UNCLOS). In the *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) (Order)* (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf) Judge Vukas dissented but on the basis that there was no urgency. So did Judge Eiriksson but he opposed the content of the Order.
Domestic judicial autonomy and nature of the dispute

The case startles the observer by the allegation that Ghana had no dispute with Argentina and that the dispute was between Argentina and a ‘vulture fund’. In 2000, Argentina issued bonds pursuant to a Fiscal Agency Agreement (FAA) with Bankers Trust Company and, between 2001 and 2003, NML Capital Ltd, a Cayman Islands-registered company affiliate of a New York hedge fund, purchased bonds at a little over half their face value with a principal value over US$ 172 million.\(^4\) Argentina having defaulted on its payments in 2001, in the middle of a dire

\(^4\) See *NML Capital Ltd v Republic of Argentina*, [2001] UKSC 31, 6 July 2011 (*per* Lord Phillips, President). Before ITLOS, the Agent of Argentina explained that Argentina restructured its debt between 2005 and 2010 and this was accepted by 92% of its creditors. She summarised the *modus operandi* of these funds as follows: ‘Although the activities of the vulture funds first emerged in South America, since the 1990s they have got their claws, as it were, on a number of countries in sub-Saharan Africa, by acquiring their debts on the cheap. These funds then waited for financial aid and debt relief programmes to be offered by the World Bank, IMF and the developed countries before going on the attack, by presenting their bond certificates to American and European courts and seeking payment of the whole of the debt’. Verbatim Record, DocITLOS/PV.12/C20/3, 15 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV.12_C20_3_E.pdf).
economic crisis, the company commenced proceedings in the US District Court of New York under the FAA and, in December 2006, obtained a summary judgment for breach of contract in an amount in excess of US$284 million.\(^5\) NML subsequently sought to have that judgment enforced in the UK and, on appeal, the UK Supreme Court agreed with the US District Court that Argentina was not entitled to immunity in light of the waiver contained in the Bonds Agreements.\(^6\) The relevant terms of the Bonds read as follows:


\(^6\) (n 5) para 3. NML’s New York judgment was domesticated in the UK by Order of 5 December 2011. See Argentina’s Request for the Prescription of Provisional Measures (‘Request’), Annex C (submission of Argentina and
The republic has in the fiscal agency agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan… and the courts of the republic of Argentina (the ‘specified courts’)… To the extent that the republic or any of its … properties shall be entitled, in any jurisdiction… in which any specified court or other court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an

immunity, the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction.\(^7\)

The UK Supreme Court \textit{per} Lord Phillips found that under Section 3(1)(a) of the State Immunity Act 1978, a State is not immune as respects proceedings relating to a commercial transaction entered into by the State and, consequently, whether Argentina was immune from proceedings in the UK (as it claimed it was) depended upon the underlying transaction that had given rise to the claim. The transaction relating to the bonds being a commercial transaction entered into by a State with a company, Argentina was not immune from the proceedings commenced by NML in the UK. In any event, the Bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the 1978

\(^7\) Reproduced in (n 5) Annex 5, 61.
Act, and the second paragraph of the terms of the Bonds constitutes an independent submission to English jurisdiction.\(^8\)

On 4 June 2012, Ghana authorised the visit of the frigate ARA Libertad, a warship used for navy cadet training trips. The frigate arrived in Ghana on 1 October 2012 at the port of Tema whereupon it was served with a judicial order restraining the captain and crew from moving the vessel and from bunkering it. The Harbour Master was ordered to board the vessel and take possession of mandatory documents (e.g. ship’s register, crew and passenger manifest and safety certificates). It was further ordered that the order shall not lapse unless Argentina provides sufficient security in Ghana to satisfy the plaintiff’s claim.\(^9\) NML’s claim was for the amount of the judgment rendered by the US District Court plus interests. The plaintiff’s statement of

\(^8\) (n 4).

\(^9\) NML Capital Ltd v Republic of Argentina (n 4), Order for interlocutory injunction, Superior Court of Judicature in the High Court of Justice (Commercial division), 2 October 2012 (Order of Justice R Adjei-Frimpong). Reproduced in Request (n6), Annex 3 of Annex A. The Order was rendered *ex parte*. The amount of security was set at US$20 million. Verbatim Record, DocITLOS/PV.12/C20/1, 27 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV.12_C20_1_E.pdf).
claim argued that the issuance of Bonds was a transaction for which Argentina does not enjoy immunity and that immunity from execution of a related judgment was waived in the Bonds document anyway. The judicial order was sought on the ground that the frigate was ‘an asset of the Defendant within the jurisdiction available to be enforced against’.\textsuperscript{10} The consequence of \textit{in rem} proceedings were spelled out starkly by Argentina which identified ‘a concrete risk that, if ITLOS did not order the requested provisional measures, Ghana’s organs would order the enforcement of the warship to satisfy the amount claimed’.\textsuperscript{11} Argentina was convinced from the outset that the immobilisation of the vessel was a matter to be resolved with the Ghanaian authorities and that the substance of the dispute concerning the frigate was different from the execution of the New York or the UK judgment generally. Indeed, as early as 3 October Argentina requested Ghana to urgently adopt the necessary measures to put an end to the situation. Further similar requests remained unanswered, despite the fact that 4

\textsuperscript{10} ibid.
\textsuperscript{11} Request (n 6), para58.
October was the scheduled date of departure of the *Libertad*\(^{12}\) and despite the rapid aggravation of the situation.\(^{13}\)

The reasoning of Justice Adjei-Frimpong is explained in a further phase of the domestic proceedings following Argentina’s request that the Injunction be set aside. Argentina contended that the US judgments may not be enforced in Ghana, for under the Ghana Courts Act 1993 only the judgements of countries listed under Ghanaian legislation may be recognised. While the UK is listed, the judgment underlying the Injunction was issued in the US, not the UK. Moreover, in order for an English judgment to be enforced in Ghana it must be duly registered with the High Court of Ghana and both Ghana and UK law prohibit the registration of a judgment on a judgment.\(^{14}\)

Furthermore, Argentina argued that its waiver of immunity from suit concerned only actions brought in New York and in

\(^{12}\) Request (n 6), Annex 2 of Annex A.

\(^{13}\) On 4 October the officers of the frigate rejected a request by a representative of the Ghana Ports & Harbour Authority to meet with the commander in order to take possession of the ship’s documents. *ibid* para 8.

\(^{14}\) Statement (n 6) paras 16-18.
Argentina\textsuperscript{15} and then, rather ambiguously, that the waiver only be applied in proceedings to enforce judgments rendered in New York or Argentina, not in the UK.\textsuperscript{16} One should presume in the first instance that the Ghanaian judge is in the best position to interpret Ghanaian law. The matter was not examined by ITLOS and is it likely to be examined by the arbitral tribunal on the merits, as a matter of judicial economy, only if it finds that Argentina did indeed waive immunity from execution against military property in the Bonds documents, for only then would the jurisdiction of the High Court over the dispute with NML be relevant.\textsuperscript{17} Domestic law is only a fact for the international judge who may verify that the fact is actually established.\textsuperscript{18}

\textsuperscript{15} (n 6), Annex C, para19.
\textsuperscript{16} ibid paras 30-32. NML also claimed that Argentina had consented to the UK judgment being entered against it. Statement (n 5) para 22.
\textsuperscript{17} One may note that, in cases that came before ITLOS under Art292 on prompt release of vessels and crew, ambiguities in States laws were raised on occasion. Eg B H Oxman and V P Bantz, ‘The Grand Prince’ (2002) 96 AJIL 222; V P Bantz, ‘Views from Hamburg: The Juno Trader Case or How to Make Sense of the Coastal State’s Rights in the Light of its Duty of Prompt Release’ (2005) 24 UQLJ 422.
\textsuperscript{18} Certain German Interest In Polish Upper Silesia (Germany v Poland) (Merits), PCIJ Ser.A No.7, 19; Flegenheimer (Italian-United States Conciliation Commission), 25 ILR 91, 99; Grand Prince (Belize v France) (Application for Prompt Release) (Judgment), paras84, 93 (available at
While the New York judgment is not registrable, the High Court Justice considered that the common law regime, which permits a fresh action founded on a foreign judgment for purposes of enforcement was applicable in Ghana. This rests on the foreign judgment creating a simple contract debt between the parties.\textsuperscript{19}

Argentina in its Submission to the High Court devoted several pages to recalling the immunity of warships under international law, immunity both from jurisdiction and from enforcement.\textsuperscript{20} This was continued before ITLOS.\textsuperscript{21} But there

\textsuperscript{19} Request (n 6), Annex 4, 6-8. ‘[O]nce an asset of the Defendant/Applicant being the property of the Judgment Debtor is liable to be attached in aid of execution of the Plaintiff’s subsisting Judgment, the Ghana court becomes one of the “other courts” envisaged by the terms and since the judgment constitutes a civil contract under common law, Order 8 rule 3 subrule 1(m) operates to properly invoke the jurisdiction of this court’. ibid 11. Interestingly, subrule 1(m) which concerns service out of jurisdiction of notice of writ says that it may be effected if the action begun by writ is in respect of a contract which contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract. The Justice opined that the contract in question was the FAA, not the foreign judgment. ibid 9.

\textsuperscript{20} Request (n6), Annex C; relying notably on the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of
was no issue, for the Ghanaian judge, as to the immunity of a State (thus arguably of its warship) before a foreign court.\textsuperscript{22} The issue for him was the waiver of immunity in the FAA and the Bonds document, ie whether the ‘vessel … is immuned to the judicial process of this court’.\textsuperscript{23} Under Article 18 of the 2004 Convention on State Immunities, a State may \textit{expressly}, by international agreement or written contract notably, consent to pre-judgment measures of constraint. Justice Adjei-Frimpong considered that the terms of the Bonds had that effect over military property as well\textsuperscript{24} and that nothing in Ghanaian law

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\textsuperscript{21} Verbatim Record (n 9), 11,13.
\textsuperscript{22} Request (n 6), Annex 4, 12. The Judge later opined: ‘[T]hough there is no well established customary international law that warships enjoy immunity, the view in support of its is widespread’. ibid 21. This flies in the face of one of the most well-entrenched rule of international law, expressed in the famous US Supreme Court decision \textit{Schooner Exchange v MacFaddon}, 11 US 116. The High Court Justice cited views that the \textit{scope} of State immunity is a matter of controversy. This is not a novelty; but the immunity of \textit{warships} is contested by no one.
\textsuperscript{23} Request (n 6), Annex 4, 36.
\textsuperscript{24} (n 7): ‘the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity [i.e. immunity from pre- and post-judgment execution] to the fullest extent permitted by the laws of such jurisdiction’.
\end{flushleft}
excluded military property from the applicability of a waiver of immunity from enforcement, unlike in US law. But this presumed that customary international law itself, which is arguably incorporated in Ghana by its Constitution, allows a waiver worded as it is in the Bonds documents to be interpreted as encompassing military property. Argentina repeatedly argued that military property is specially protected and immunity of execution may only be waived expressly, and that the waiver in the Bonds document, which does not refer to military property specifically, does not constitute express waiver. In support, Argentina in the Submission to the Ghana High Court referred to the work of the ILC on the topic which notably indicates that ‘a general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of

25 Request (n 6), Annex 4, 23. See US Code Title 28 Sec1611(2). ‘Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding’. ILC Yearbook, 1991, vol II, part II, 56.
26 Request (n 6), Annex C (Submission), para22.
constraint against property in the categories listed in paragraph 1’, ie those listed in Article 21(1) of the 2004 Convention which notably refers to military property.\(^{27}\) It repeated its view in its Request for provisional measures\(^{28}\) and in the oral proceedings before ITLOS.\(^{29}\)

One of the most intriguing aspects of the case is that, during the oral phase, the Ghanaian Agent argued that Ghana had no dispute with Argentina since Ghana was not party to the

\(^{27}\) ILC Yearbook, 1991, vol II, part II, 59. Argentina also relied on domestic judgments: Request (n6), Annex C (Submission), 20 (USA); (Suppl. Submission) , 3-5 (France, Germany).

\(^{28}\) Request (n 6), paras41-48 (relying also on domestic laws such as the US Foreign Sovereign Immunities Act 1976). Para41: ‘Judge Frimpong interprets in an unreasonable and arbitrary manner the content of a waiver clause’.

\(^{29}\) Verbatim Record (n 9), 15: ‘[A] general waiver does not apply to warships’. Argentina made it clear that the immunity of warships, regardless of a general waiver clause, applies to both adjudicatory and enforcement jurisdiction of the State of the forum. ibid 16-17. Only enforcement jurisdiction was raised before the Ghanaian court. See Verbatim Record, DocITLOS/PV.12/C20/4, 1-2 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV_12_C20_4_E.pdf).
dispute between NML and Argentina. Furthermore, the executive branch of the Government supported Argentina before the High Court, an officer of the Ministry for Foreign Affairs having stated on 9 October 2012 that ‘as the department responsible for the conduct of our relations we want to ride on the established principles that we need the express waiver of a foreign government to subject that government to your foreign jurisdiction’. This is often practiced elsewhere with government intervention by amicus brief. It was also pointed by Argentina that the retention of the frigate was against public interests (arguably both of Argentina and Ghana) since the

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31 Annex D. ‘I want to refer to a ruling by a U.S. Court in the case of Ex-parte Republic of Peru in which Chief Justice Stone in ruling upon Peru’s claim of sovereign immunities stated that the department of state has allowed the claim of immunity and caused its actions to be certified to the District Court through the appropriate channels. The certification and the request that the vessel … be declared immuned must be accepted by a court as conclusive determination by the political arm of government that the continued retention of the vessel interferes with the proper conduct of our foreign relations’. ibid.

32 Eg in Australia through the general entitlement of the Commonwealth Attorney-General to intervene in judicial proceedings.
granting of the Injunction would be manifestly unjust.\textsuperscript{33} By restricting the dispute to one between Argentina and the judicial branch of Government, Ghana in effect purported to insulate that dispute from the international plane, arguing that Argentina should proceed with the Ghanaian judicial remedies at its disposal.\textsuperscript{34} Ghana did not suggest that it was not responsible for the actions of its judiciary.\textsuperscript{35} However it indicated that ‘the executive is unable to intervene directly to effect the release of the vessel… The Constitution of Ghana provides for a clear separation of powers between the three branches of the

\textsuperscript{33} Request (n 6), Annex C (Submission), para41 (citing the Ghana High Court (Civil Procedure) Rules 2004). Argentina was not ambiguous about possible countermeasures: ‘The Injunction directly threatens Ghana’s own relationship with all of these countries [i.e. those that have taken part on the training mission of the frigate or whose crew were aboard] – indeed, despite the law, these countries may well refuse to grant reciprocal military and diplomatic immunity to Ghana in the future if the Injunction is not set aside’. ibid 43 (emphasis in text). One should nevertheless point to Article 50(2)(b) of the ILC Draft Articles on State Responsibility (2001): ‘A State taking countermeasures is not relieved from fulfilling its obligations: …To respect the inviolability of diplomatic or consular agents, premises, archives and documents’.

\textsuperscript{34} Verbatim Record (n 29), 7-8; Statement (n5), para18.

government’. 36 Hence it seems that, in a dispute before Ghanaian courts, even if the executive agrees with the defendant State that that State is entitled to a right under international law, the executive has no option but to face international responsibility, including before an international court or tribunal if it has jurisdiction, or to let political tensions exacerbate, or both. 37 This curious result was justified by Ghana by relying on its commitment to the rule of law and separation of powers, a principle endorsed by the UN. 38 However, regardless of the normative status of the independence of the judiciary in international law, 39 it cannot be a direct duty of Ghana to

36 Statement (n 5), 5, note 16.
37 Eg the Argentinean statement in Verbatim Record (n9), 26.
38 Verbatim Record (n 30), 3.
39 Basic Principles on the Independence of the Judiciary, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan (26 August to 6 September 1985), UN Doc.A/CONF.121/22/Rev.1, 59: ‘The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’. A/RES/61/39 (2006): ‘Reaffirming further the need for universal adherence to and implementation of the rule of law at both the national and international levels’, A/RES/67/1 (2012): Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels: ‘13. We are convinced that the
Argentina in the case at hand, for the direct duty was the duty to respect the immunities of a warship.\textsuperscript{40} While the rule of law may be conveniently defined as subjecting State officials to legal rules and, therefore, it requires an independent judiciary, the rule of law cannot be interpreted to have the fantastic effect of allowing a domestic court to prevent the State from complying with its international obligations. An essential element of the rule of law is the rule \textit{by} law and this encompasses international law as well and it is a well-established principle of international law that a State may not invoke the provisions of its internal law as justification for its failure to comply with international law.\textsuperscript{41}

\textsuperscript{40} Verbatim Record (n 9), 5-6; Verbatim record (n29), 1.

\textsuperscript{41} Eg Art 27 of the Vienna Convention on the Law of Treaties. The point was made starkly by Counsel for Argentina: Verbatim Record (n 4), 9. Argentina had appealed the High Court’s Injunction and the appeal was pending during the proceedings before ITLOS. The High Court also issued an Order providing for the relocation of the vessel to another berth within the Port; Argentina appealed this order which was also pending. There is automatic stay of execution by virtue of Rule 27(3) of the Court of Appeal Rules. One may also express surprise at the Counsel for Ghana’s argument that, before the Court of Appeal, he would ‘probably personally lead the judge to assist’. Verbatim Record (n 29), 13.
Urgency and circumstances requiring provisional measures

Under Article 290(5) of UNCLOS, ‘pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the [ITLOS] may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires’.

Urgency of the situation is tied to the circumstances that exist and that will justify the prescription of provisional measures to preserve the respective rights of the parties under Article 290(1).\(^{42}\) The indication of such measures will take

\(^{42}\) Order, para 100. See also Southern Bluefin Tuna (n3), para 67; Mox Plant Case (Ireland v UK) (Provisional Measures) (Order), para 64 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.1 2.01.E.pdf). Judge Paik in the Libertad case considered that the time frame envisaged under Art290(5) is much tighter than under Art290(1) which provides for the prescription of provisional measures pendente lite. Decl Judge Paik, para 3 (available at
account of the time it takes to set up an arbitral Tribunal under Annex VII. In its Request, Argentina claimed that the detention of the frigate hindered the Argentinean Navy from using it for its specific function and that its rights where therefore made nugatory for an indefinite period of time,

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Paik_E_orig-no_gutter.pdf). Judge Treves in the Southern Bluefin Tuna case, para4, considered that the requirement of urgency is stricter when provisional measures are requested under paragraph 5 than it is when they are requested under paragraph 1 of article 290 as regards the moment in which the measures may be prescribed. In particular, there is no ‘urgency’ under paragraph 5 if the measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted. Available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Treves.27.08.99.E.pdf. Under the Rules of ITLOS, a request for provisional measures has priority (Art90).

43 Mox Plant (n 42) para64; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures) (Order), para68 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf). Argentina noted that action prejudicial to its rights is not only likely to be taken before the constitution of the tribunal, but that it has already taken place. Request (n6), para 63. ‘To date, Ghana has not appointed a member of the arbitral tribunal and has not reacted to the invitation of Argentina … to [appoint] the other members’. ibid para70. During the oral proceedings on 30 November 2012, Ghana announced that it had appointed an arbitrator and was ready to move speedily to the appointment of the three remaining arbitrators. (n29), 12. See Annex VII of UNCLOS, Art3.
including a risk that they would be irreparably lost if enforcement measures were to be taken against the ship.\textsuperscript{44} The risk here was certainly more than possible: in addition to the Injunction of 2 October confirmed on 11 October, Judge Adjei-Frimpong on 5 November 2012 granted a motion requested by the Ghana Ports and Harbour Authority to relocate the ship to another berth, on the ground that the continued presence of the frigate at its berth was economically detrimental to Ghana.\textsuperscript{45} Argentina immediately appealed but, on 7 November 2012, the Port Authority threatened to and attempted to board and move the ship; this precipitated another diplomatic crisis. Urgency of the situation, assessed by the risk of irreparable damage pending the constitution of the arbitral tribunal,\textsuperscript{46} was emphasized by the fact that the limited number of crew on board (the majority having been evacuated) made it impossible to carry out standard maintenance tasks, compromising the vessel’s safety and also disrupting the organisation of the armed forces of a sovereign

\begin{itemize}
\item \textsuperscript{44} Request (n 6), paras 54-58.
\item \textsuperscript{45} ibid Annexes E and G.
\item \textsuperscript{46} (n 42, 43) and \textit{Southern Bluefin Tuna} (n 3), paras 79-80.
\end{itemize}
Despite Ghana’s contrary view, ITLOS determined that Ghanaian activities against the ship ‘affect the immunities enjoyed by warships under general international law’. Attempts by Ghana to move the ship by force to another berth and the possibility that such actions may be repeated ‘demonstrate the gravity of the situation’ and therefore provisional measures ‘will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the parties’.

A real risk to rights that need to be fully preserved is inherent in the phrasing used by the Tribunal here. In its very first Order on provisional measures, the Tribunal made it clear that the rights of the Applicant had to be ‘fully preserved’. In

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47 Request (n 6), paras 62-68.
48 Statement (n 5), para 21: ‘The Port authority has been very careful to ensure that the ship and its remaining crew have been and will continue to be provided with all requirements; para23: ‘The grant of provisional measures now sought by Argentina is entirely inappropriate as Argentina has the ability to ensure the immediate release of the ARA Libertad by the payment of security’. This prompted Argentinean outrage during the oral proceedings.
49 Order, paras 98-110.
50 The M/V “Saiga” (No.2) case (St Vincent v Guinea) (Provisional Measures) (Order), para 41 (available at
the *Louisa* case ITLOS emphasized the lack of real and imminent risk that irreparable prejudice would be caused to the rights of the parties.\(^{51}\) It had done so, too, in the *Reclamation* case.\(^{52}\) Irreparable prejudice is the test adopted by the ICJ itself.\(^{53}\) Argentina relied on the standard established by President Huber in the *Sino-Belgian Treaty* case that the prejudice should be one that could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form.\(^{54}\) This is not a test that ITLOS has followed in its case law and Sztucki convincingly argues that absolute irreparability has been abandoned, and that interim


\(^{52}\) (n 43), para72.

\(^{53}\) *Fisheries Jurisdiction (UK v Iceland) (Provisional Measures) (Order)*, ICJ Rep 1972, para21. Under Art41 of the ICJ Statute, the ‘Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party’.

\(^{54}\) PCIJ Ser.A No. 8, 7. See Verbatim Record (n 9), 25.
protection has been granted on less demanding grounds.\textsuperscript{55} Irreparability in law (the Huber test) means that the right could not be repaired (eg by restitution, compensation or satisfaction) by the final judgment. But ‘there are no violations of rights which could not be made good in law by a reparation’.\textsuperscript{56} On the other hand, irreparability in fact means that the prejudice under consideration makes impossible full execution of the impending judgment and thereby full restoration of the prejudiced position of the judgment creditor, regardless of whether he might be compensated.\textsuperscript{57} Furthermore, interim measures will be appropriate even if the prejudiced rights are capable of restoration in the final judgment. In the \textit{US Staff} case the ICJ adopted the position that interim measures are to be indicated whenever there is a need to prevent the actual question of restoration of the prejudiced rights from arising upon the

\textsuperscript{55} J Sztucki, \textit{Interim Measures in the Hague Court} (Kluwer 1983), 111. However, in light of the discretionary assessment of ‘circumstances’ by the international judge, irreparability in law may be reintroduced as an additional criterion. ibid.
\textsuperscript{56} ibid 109.
\textsuperscript{57} ibid 110. \textit{Fisheries Jurisdiction} (n 53), para 22.
delivery of the final judgment. This is admittedly the standard adopted here by ITLOS which emphasized the preservation of the rights at stake: prejudice to the immunity of a warship makes full restoration impossible as soon as the prejudice arises. In addition, ITLOS took account of the risk of escalation inherently linked.

Rights protected by the indication of provisional measures are those which may be subsequently adjudged on the merits. Hence, an international court is more inclined to interpret ‘irreparability’ as ‘impossibility of full execution of the final judgment’. Even if the infringement could be alleviated by appropriate means, the Court could grant the provisional measures if otherwise it would prejudice the full execution of

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58 ibid 111-112: ‘The Court obviously could not content itself with the finding that the restoration of the embassy premises to the possession … of the requesting State was possible upon the delivery of the final judgment’. This case was relied upon by Argentina. Request (n 6), para 55.
59 (n 49) and Decl. Judge Paik, para6. ITLOS emphasized the preservation of the rights of both parties but Argentina claimed that Ghana had made no effort to show that it had a right that needs to be protected. Verbatim Record (n 4), 12. Judge Paik raised the point as well, in particular because Ghana did not differ from Argentina on the point that the frigate was entitled to immunity.
the final judgment.\textsuperscript{60} At the stage of provisional measures, the
rights invoked cannot with certainty be attributed to one party or
the other (but they must be preserved).\textsuperscript{61} However Judge
Shahabudden in the \textit{Great Belt} case rightly wondered whether
the Court could order provisional measures without having
required the requesting State to show that there is at least a
possibility of the existence of the right for the preservation of
which the measures are sought.\textsuperscript{62} Thus the ICJ also referred to
the existence of a legal \textit{interest} to be protected.\textsuperscript{63} This is
conceptually different from the question of \textit{prima facie}
jurisdiction of the court, for a given alleged right may be within
the jurisdiction \textit{ratione materiae} of the court without such right

\begin{footnotesize}
\begin{enumerate}
\item B Kempen and Z He, ‘The practice of the International Court of Justice on
Provisional Measures: The Recent Development’ (2009) 69 Zaörv 922 and
the case law cited there.
\item Eg \textit{Land and Maritime Boundary between Cameroon and Nigeria}
35; \textit{Application of the International Convention on the Elimination of All
Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional
\item \textit{Passage Through the Great Belt (Finland v Denmark) (Provisional
\item \textit{Nuclear Tests Case (New Zealand v France) (Provisional Measures )
\end{enumerate}
\end{footnotesize}
being, in the case at hand, a plausible right of the applicant.\textsuperscript{64} This view is also supported in doctrine\textsuperscript{65} and was examined as such in some of the World Court’s cases.\textsuperscript{66} The ICJ now expressly requires that it must be satisfied that the rights asserted by a party are at least plausible.\textsuperscript{67} This is how Argentina presented its claimed for, after dealing with the \textit{prima facie} jurisdiction of the Annex VII tribunal, it indicated that ‘the rights that must be preserved are more than plausible’. It notably noted that, so far as the Bonds documents were concerned ‘a general waiver cannot affect any military or any diplomatic assets, no matter whether either a broad or strict

\textsuperscript{64} ‘But jurisdiction over the merits is merely one element which the applicant must establish in order to succeed in the substantive case which it has brought … It is easy to appreciate that proof of the definitive existence of the right claimed cannot be part of the “circumstances” within the meaning of Article 41 of the Statute, but is rather a matter for the merits. It is less easy to accept that this applies to the establishment of a possibility of the existence of the right’. (n 62), para31.

\textsuperscript{65} Eg M H Mendelson, ‘Interim Measures of Protection in Cases of Contested Jurisdiction’ (1972-73) 46 \textit{BYIL} 315-316.

\textsuperscript{66} (n 62) 31 et seq.

\textsuperscript{67} \textit{Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures) (Order)}, ICJ Rep. 2009, para 57; \textit{Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures) (Order)}, ICJ Rep. 2011, para 53.
approach is followed in this regard’. While ITLOS noted in its Order that the latter ‘in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any question relating to the merits themselves’, one wonders whether the complete ignorance by ITLOS of the waiver issue is sound. No right of Argentina to immunity of its warship could have been the object of protection by provisional measures if that right was not plausible, that is, if it was not manifestly non-existent. Such would be the case if Argentina had arguably agreed in the Bonds documents to enforcement measures against its military assets.

The fact that an order for provisional measures must not prejudge the merits of the case is well-established and ITLOS relied here on the expressed requirement by the ICJ in the

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68 Request (n 6), para 41.
69 Order, para 106.
70 And an argument could be made that, even if no right of Argentina to immunity was plausible because it had apparently been lifted in the Bonds documents, Ghana was not allowed to invoke the manifest absence of such right it in its own court if NML could not enforce the US judgment under Ghanaian law.
Fisheries Jurisdiction case. In its prompt release cases, ITLOS refused not to make any determinations at all that bear on the merits of the case, for if the bond determined under Article 292 is based in part on the imposable penalties, and if these must be proportionate to the gravity of the alleged offence, ITLOS’s appreciation of the merits of the case is at stake. In the ARA Libertad Order, only Judge Paik alluded to the fact that ‘provisional measures are prescribed without there being any need to prove the conclusive existence of jurisdiction or the validity of claims’ but he did not elaborate. Previous orders made by ITLOS are not incompatible with the view that plausibility of the existence of the right the protection of which is sought by the Applicant is implied in the Tribunal’s reasoning. In the Saiga (No.2) case it was evident that St Vincent had plausible rights in relation to a vessel flying its flag.

71 (n 53), para 20; Louisa (n 51), para 80.
72 V Cogliati-Bantz, ‘Hoshinmaru (Japan v Russian Federation) and Tomimaru (Japan v Russian Federation) Prompt Release Judgments’ (2009) 58 ICLQ 249. ‘The Hoshinmaru case clearly suggests that the bond will be reduced by the Tribunal if the seriousness of the offence as alleged by the detaining State is unlikely to be borne by the facts’. ibid 251.
Judge Laing precisely noted that ‘the rights need not be definitively vested but might comprise a claim by the party in question which the Judges, in their discretion, conclude has juridical substance or significance’. In the Southern Bluefin Tuna cases, too, the plausibility of Australia and New Zealand’s rights, allegedly prejudiced by Japan’s fishing programme, appeared straightforward under Articles 64, 116 and 119 of UNCLOS. The same logic underpinned Ireland’s claim in the MOX Plant case.

75 In that case, Judge Wolfrum nevertheless wondered whether Ireland had a right to be informed in the first place: ‘Ireland argues … that its procedural rights (rights concerning information and cooperation) have been violated and will be prejudiced if the MOX plant is commissioned. The obligation to cooperate with other States whose interests may be affected is a Grundnorm of Part XII of the Convention, as of customary international law for the protection of the environment. In general it has to be taken into consideration, though, that the provisions of the Convention on the Law of the Sea formulate obligations rather than rights. Is it possible to argue that obligations of States Parties under a multilateral treaty create, as a corollary, rights for every other individual State Party? This is correct in bilateral relations. It would, however, be a simplification to say so in multilateral relations, such as those established by [UNCLOS].’ Sep Op Judge Wolfrum, 4 (available at...

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In the *Louisa* case, ITLOS for the first time expressly considered that it does not need to establish *definitively* the existence of the rights claimed by the Applicant.\(^76\) ITLOS however did not elaborate on the plausibility of the rights claimed by St Vincent; it noted that the Applicant contended that the Tribunal had jurisdiction on the basis of Articles 73, 87, 226, 245, 290, 292 and 303 and that Spain had detained the vessel in breach of Articles 73, 87, 226, 245 and 303.\(^77\) Spain on the other claimed that the M/V “Louisa” had not been detained for any offences relating to Articles 73 and 226 of UNCLOS and that the facts of the case did not reveal any violation of Articles 87, 245, and 303.\(^78\) ITLOS limited itself to stating that it had *prima facie* jurisdiction over the dispute,\(^79\) attracting the criticism of several judges.\(^80\) The fact that there may be parallelism between the provisions founding jurisdiction

\(^76\) [Louisa](n51), para 69.
\(^77\) Ibid paras 46-47.
\(^78\) Ibid para 53.
\(^79\) Ibid para 70.
\(^80\) Infra, III.
and those plausibly creating rights of the Applicant,\textsuperscript{81} does not render the distinction irrelevant, as noted above. The Tribunal said that it does not need to establish definitively the existence of the rights claimed by Argentina, but went on immediately to establish its \textit{prima facie} jurisdiction.\textsuperscript{82} Furthermore, in its Order ITLOS considered that, in accordance with general international law, a warship enjoys immunity, including in internal waters, and that this was not disputed by Ghana.\textsuperscript{83} The Ghanaian position however was not so straightforward, for it claimed both that the central issue was whether Argentina had waived immunity, an issue which it considered did not fall within an Annex VII arbitral tribunal, and that the immunity of a warship in internal waters does not involve the interpretation and application of UNCLOS.\textsuperscript{84} If ITLOS considered that the right to

\begin{itemize}
\item \textsuperscript{81} Art 288(1) of UNCLOS: ‘A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part’. Contrast with, eg, \textit{Border Area} case (n67), para50 (jurisdiction of the ICJ under a compromissory clause and optional declaration of acceptance of the Court’s jurisdiction) and para58 (plausible rights of sovereignty).
\item \textsuperscript{82} Order, para 60. See infra, III for \textit{prima facie} jurisdiction.
\item \textsuperscript{83} Order, para 95.
\item \textsuperscript{84} Statement (n 5), paras 12, 16-17.
\end{itemize}
immunity claimed by Argentina was one that belonged to it (with all plausibility), because that was also the view of the executive branch of Ghana’s Government, it should perhaps have stated that more clearly. The issue would be whether absence of challenge by the Defendant, at some stage during the procedure, that the right claimed by the Applicant is plausible, suffices to make that right plausible.

85 (n 31) and accompanying text.
86 ‘the State which is sought to be constrained may itself have an interest in showing that the requesting state has failed to demonstrate a possibility of the existence of the right sought to be protected’. Sep Op Shahabudden (n 62), 29.
87 An estoppel argument was used by Judges Cot and Wolfrum, but in relation to the jurisdiction of the arbitral tribunal. See infra. In the Border Area case, the ICJ did not consider the plausibility of the right claimed by the Defendant, but only that of the Applicant and it is that right which was challenged by the Defendant. ‘It appears to the Court, after a careful examination of the evidence and arguments presented by the Parties, that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible; whereas the Court is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua’. (n 67), para 58.
Prima facie jurisdiction

Under Article 290(5), ITLOS may grant provisional measures if it considers that the arbitral tribunal to which a dispute is being submitted would have prima facie jurisdiction. The Tribunal need not satisfy itself that the arbitral tribunal would have jurisdiction on the merits, but it must be convinced that the provisions invoked appear to afford a basis on which the arbitral tribunal’s jurisdiction over the dispute might be founded.

Argentina instituted proceedings against Ghana on 29 October 2012 before an arbitral tribunal to be established under Annex VII of UNCLOS, since Argentina and Ghana had not accepted the same procedure for the settlement of disputes under Article 287(5) of UNCLOS. Only three days before, on 26

88 The same reasoning applies to Article 290(1) when ITLOS is seised of the merits. See Saiga (No.2) (n50), para 29.
89 Order, para 60; Southern Bluefin Tuna (n 3), para52.
90 Argentina notably requested the arbitral tribunal to declare that Ghana violated its obligations under UNCLOS and pay adequate compensation, offer a solemn salute to the Argentinean flag and impose disciplinary sanctions on the officials of Ghana responsible for the breach of international law committed. Request (n6), Annex A. The President of ITLOS appointed three arbitrators on 4 February 2013. See
October 2012, Argentina withdrew with immediate effect, in accordance with Article 298(2) of UNCLOS, the optional exception to the applicability of Section 2 of Part XV of UNCLOS set forth in its declaration dated 18 October 1995 (deposited on 1 December 1995) to ‘military activities by government vessels and aircraft engaged in non-commercial service’ under Article 298(1)(b).\(^9\) Ghana had made no such declaration. Article 298(2) allows a State Party which had made a declaration to withdraw it at any time. On its face, this poses none of the difficulties that the ICJ faced when the US purported to modify, on 6 April 1984 with immediate effect, its 1946 Declaration of acceptance of the jurisdiction of the Court.\(^9\)

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\(^9\) Under Art 298(3), a State Party which has made a declaration shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in UNCLOS as against another State Party, without the consent of that party.

\(^9\) The ICJ noted that the 1946 Declaration contained a 6 months’ notice clause which formed an integral condition that had to be complied with. In addition, it noted that the right of immediate termination of declarations with infinite duration was far from established and that a reasonable period of notice would be required. *Military and Paramilitary in and against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility) (Judgment)*, ICJ Rep 1984, 420-421.
Withdrawals of declarations must be deposited with the UN Secretary-General, who must transmit copies to States Parties (Article 298(6)). One therefore assumes that Ghana had been made aware of the withdrawal prior to the institution of proceedings, as the matter was raised at no time during the written and oral phases before the ITLOS, and that the right to withdraw a declaration at any time under Article 298(2) means a right to withdraw with immediate effect. One also presumes that it was open to Ghana to deposit a declaration under Article 298(1)(b) immediately upon receipt of the Argentine withdrawal, so as to exclude the dispute from the jurisdiction of an arbitral tribunal under Article 288. It is perhaps also important to stress that the Argentinean declaration and its withdrawal are not restricted to disputes arising after a certain date. Hence the Argentinean withdrawal also applies to the dispute with Ghana that arose before 26 October 2012, arguably in the days following the Injunction of 2 October.93

93 One may contrast this with the declaration of acceptance of jurisdiction of the ICJ deposited on 26 April 1999 by the Federal Republic of Yugoslavia under Article 36(2) of its Statute, which applies to disputes arising after 25
The test of *prima facie* jurisdiction is well-established in the case law of the ICJ. In his Separate Opinion in the *Interhandel* case, Judge Lauterpacht considered that the ‘Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest’. This was endorsed by the ICJ in the *Fisheries Jurisdiction* case. The Court need not satisfy itself in a definitive manner that it has jurisdiction on the merits. For Judge Laing in the *Saiga (No.2)* case, the Applicant must ‘sufficiently’ establish the tribunal’s jurisdiction. Under Article 288 of UNCLOS, a court or tribunal has jurisdiction over any dispute concerning the

April. Yugoslavia initiated proceedings against NATO member States on 29 April but the Court was of the opinion that the dispute had already arisen when the acceptance of jurisdiction was deposited, for the bombings began on 24 April. Hence the declaration could not constitute a basis on which the jurisdiction of the Court could be founded *prima facie*. *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures) (Order)*, ICJ Rep 1999, 135.

*Interhandel (Switzerland v US) (Provisional Measures) (Order)*, ICJ Rep 1957, 118-119.

(n 53), para15.

Eg *Border Area* (n 67), para49.

interpretation or application of UNCLOS. This raised considerable controversy in the *Southern Bluefin Tuna* cases where ITLOS considered that a dispute between Australia, New Zealand and Japan over the latter’s experimental fishing programme was one over the interpretation or application of UNCLOS (Articles 64, 116 and 119), despite Japan’s contention that the dispute concerned the 1993 Convention for the Conservation of Southern Bluefin Tuna, a Convention the compromissory clause of which excludes any further procedure, thus preventing the applicability of UNCLOS’s compulsory dispute settlement mechanism (Article 281 of UNCLOS).\(^\text{98}\) In

\(^\text{98}\) ITLOS considered that ‘the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna’ (n 3), para 51. The Arbitral Tribunal itself, while recognising that ‘it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty’ (para 52), held that to find that ‘there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial’ (para54). It considered that it was without jurisdiction. Award available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&Ann
the ARA _Libertad_ case, Argentina invoked several provisions of UNCLOS over which a dispute with Ghana existed: Articles 18, 87, 90 and 32. With respect to the first three, it claimed that the detention of the vessel interfered with its right of innocent passage and its freedom of navigation was challenged by Ghana which considered that Argentina’s rights of navigation were not engaged in proceedings concerning enforcement measures taken in internal waters. ITLOS did not consider that these rights could _prima facie_ found the jurisdiction of the arbitral tribunal, for they do not relate to the immunity of warships in internal waters. There was no contention over the fact that warships enjoy immunities, including in internal 

ounceNo=7_10.pdf. ITLOS repeated its approach in the _MOX Plant_ case (n 42).

99 Request (n 6), paras 34-36. Verbatim Record (n 9), 9-10.

100 Statement (n 5), para 14.

101 Order, para 61. In his Separate Opinion, Judge Lucky considered that ‘preventing the vessel from leaving its berth … appears to be depriving [Argentina] of its rights under articles 18, 87(1) and 90 of the Convention’. Sep Op Lucky, para 29 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Lucky_E_orig-no_gutter.pdf). But if that were the case, any domestic proceeding affecting the movement of a vessel could fall under Art 288 of UNCLOS.
waters, although Ghana’s position was ‘fraught with contradiction’.\textsuperscript{102} Ghana considered that the central question was whether Argentina had waived immunity, a matter irrelevant to UNCLOS; but also that Article 32 of UNCLOS does not refer to the immunities of warships when in internal waters; and finally that the executive branch of government had stated its position with regard to the immunity of warships but was unable to intervene as Argentina requested.\textsuperscript{103} Article 32, which is contained in Part II on the territorial sea and contiguous zone, is worded as follows:

\textit{Immunities of warships and other government ships operated for non-commercial purposes.}

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

\textsuperscript{103} Statement (n 5), paras11, 15-17.
For Argentina, Article 32 confirms the existence of immunity enjoyed by warships with effect and for the purpose of UNCLOS as a whole. It used both textual and a teleological interpretation to justify that the immunity of warships relates to the whole maritime area. This was repeated later during the oral proceedings with the support of writers. Argentina’s position is that warship immunity is incorporated into UNCLOS and any relevant article cannot but be read in connection with Article 32. Conversely Ghana, on the considered that Article 32 only applies to the territorial sea and that the immunity of warships in internal waters is not governed by UNCLOS but by

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104 Verbatim Record (n 9), 12. It relied on the phrase ‘nothing in this Convention’ as opposed to ‘nothing in this part’. It also indicated that the Convention in other provisions applies to internal waters (eg Art25(2) and Part XII) and that the principle of effectiveness in the interpretation of treaties requires that the immunity of warships apply to internal waters. ibid. The exceptions (which are in fact not exceptions to immunities in the first place) mentioned in Art32 did not apply to the question at issue in the ARA Libertad’s case. Request (n6), para37.

105 Notably B H Oxman, (1983-84) 24 VJIL 816-817. ‘This understanding of article 32 ... is clearly established in all relevant works that have appropriately synthesised the law of the sea’. Verbatim Record (n4), 4.

106 ibid.
general international law.\textsuperscript{107} For Ghana, the regime of internal waters and the status of foreign vessels in ports are excluded from UNCLOS.\textsuperscript{108}

ITLOS agreed with Argentina. Its power to indicate provisional measures is dependent upon the \textit{prima facie} jurisdiction of the Annex VII tribunal over a dispute concerning UNCLOS. ITLOS acknowledged that there was a dispute over the applicability of Article 32.\textsuperscript{109} A dispute between the parties over the applicability of UNCLOS is not sufficient to found jurisdiction under Article 288, for the dispute must \textit{prima facie} be one that concerns the interpretation of the Convention.\textsuperscript{110} ITLOS was much more explicit in its Order than it was in the \textit{Louisa} case where it appears to have merely tacitly endorsed St Vincent’s claim that the dispute fell within certain UNCLOS

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\footnotesize
\textsuperscript{107} Verbatim Record (n 30), 19-20. ‘Where the drafters of the Convention wanted to incorporate general international law into the Convention so that it became part of the Convention, they did so’. ibid (quoting Art2(3)).
\textsuperscript{108} Verbatim Record (n 29), 3.
\textsuperscript{109} Order, para 65.
\end{flushright}
provisions, despite Spain’s objection,\footnote{\textit{Louisa} (n 51), paras 47-48,50-51,70.} thereby attracting four dissenting opinions.\footnote{Eg Judge Cot, paras1,19 (available athttp://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_me as/Dissenting_Opinion_of_Judge_Cot_E_edited_version.corr_for_publicatio n.pdf) ; Judge Treves, paras5,7 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas /Dissenting_Opinion_of_Judge_Treves_electronically_signed.pdf).} In the \textit{Libertad} case, ITLOS considered that Article 32 is not, on its face, restricted to the territorial sea.\footnote{Order, paras 63-64.} But the dispute could only concern UNCLOS if the question of warships immunities in internal waters, which was a right claimed by the Applicant, concerns the interpretation or application of UNCLOS. Judges Cot and Wolfrum opined that this was not the case. Firstly, they argued that internal waters are in principle not covered by UNCLOS (but by different sources). Thus they cannot ‘assume that all activities of the coastal State in its internal waters … are governed by the Convention’.\footnote{Joint Sep Op (n102), paras 26,34.} This is undoubtedly true, for the Convention is one on the law of the \textit{sea}. But it is also true that UNCLOS directly imposes
obligations on the Parties applicable in their territories.\textsuperscript{115} Judges Cot and Wolfrum went into a rather detailed analysis to prove that the regime of ports is left out of the Law of the Sea Conventions:\textsuperscript{116} that it was not the regime of ports at large that was under consideration, but the immunity of a warship in a foreign port. One wonders whether their standard of depth is appropriate for considerations that must remain \textit{prima facie}. Secondly, for them, ITLOS interpreted Article 32 as providing for the immunity of warships in internal waters.\textsuperscript{117}

But this is not what the Order says; the Order in essence says that Article 32 may be applicable outside the territorial sea. Article 32 refers to the immunity of warships without regulating such immunity itself, contrary to Article 95 applicable to the high seas and EEZ.\textsuperscript{118} For the two judges, Article 32 contains exceptions to the immunity of warships and makes it clear that no exceptions in the Convention apart from those in Article 32

\textsuperscript{115} Eg Arts 212, 125.
\textsuperscript{117} ibid para 30.
\textsuperscript{118} ‘Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State’. See Art 58(2) for the EEZ.
exist, but the Article’s place in Part II means that it is *prima facie* applicable to the territorial sea only. But one may note that Article 31 itself, which is referred in Article 32, does not on its face exclusively apply to the territorial sea (‘damage to the coastal State’). Thirdly, since Article 32 does not incorporate the customary law on immunity of warships, but merely refers to such immunity, the basis of such immunity is not found in UNCLOS. Would this also mean that no *prima facie* jurisdiction would have existed had the incident taken place in the territorial sea?

Under Article 32, warships immunity is not affected, that is, prejudiced, by UNCLOS and the meaning and scope of such immunity is admittedly determined elsewhere in international law. But the issue here is whether the right to immunity of warships in internal waters is manifestly outside the scope of the

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119 Joint Sep Op (n 102), paras 44-45.
120 ibid, paras 43, 50.
121 If ‘nothing in this Convention’ includes the powers that the Convention attributes to the coastal State in its territorial sea but if warships immunity is not a right under UNCLOS, then the reasoning seems to be that the breach of such right is not justiciable under Art 288.
UNCLOS, not whether the scope of such immunity is determined by the UNCLOS itself (a court or tribunal with jurisdiction under Article 288 is allowed to apply other sources of law when settling a dispute). It cannot be said that a dispute over the application of a Convention which acknowledges a right by expressly refusing to limit it and which involves a coastal State’s enforcement jurisdiction prejudicing this right is not *prima facie* one falling within that Convention. Uncertainties on the geographical scope of the right or the scope of the Convention’s impact on the coastal State’s powers in its internal waters would arguably not suffice to place the dispute manifestly outside the Convention. ITLOS may have actually been convinced that customary immunities of warships were incorporated into UNCLOS, for it referred to the definition of a warship in Article 29, applicable to the Convention at large, which is also placed in Part II.

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122 Art 293. See eg Articles 35(c) and 303(3) for a similar issue.
123 Order, para 64. The argument may be made that immunities are an inherent characteristic of the armed forces of a foreign State. ITLOS made it clear that ‘in accordance with general international law, a warship enjoys immunity, including in internal waters’. ibid para95. But it said so after it had
Interestingly, the two Judges were ready to accept that the arbitral tribunal’s jurisdiction may be founded on the basis of estoppel. The argument is that Ghana is estopped from objecting to the jurisdiction of the arbitral tribunal, given the assurances it gave to Argentina in an international agreement regarding the vessel’s departure from Tema. Argentina relied to its detriment on those assurances.\(^{124}\) Argentina emphasised the existence of this agreement.\(^ {125}\) While estoppel is accepted in international law to prevent a party from contesting a situation\(^ {126}\) and, therefore, it may also play a role in the challenge to the admissibility of a request,\(^ {127}\) one fails to see how Ghana being estopped from objecting to the jurisdiction of the arbitral tribunal actually founds such jurisdiction.

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\(^{124}\) Verbatim Record (n 9), 19.

\(^{125}\) (n 102), paras 61-66 and the PCIJ, ICJ and ITLOS cases cited.

\(^{126}\) (n 102), paras 58-59, 68. The exchange of notes regarding the dates and protocol of travel of the frigate are presented in the Request (n 6).

Furthermore, if, for Judges Cot and Wolfrum, the arbitral tribunal could not have jurisdiction under Article 32, it is difficult to support that it could have jurisdiction under the exchange of notes.\footnote{See also Sep Op Judge Rao , para12 (available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Ch_Rao_E_.pdf).}

**Conclusions**

One can only be satisfied that Argentina saw the return of its historic frigate, released by Ghana shortly after the Order was rendered. Provisional measures here safeguard the asset against a decision where the domestic judge arguably misconstrued international law. This is the Argentinean argument and it will need to be examined by the arbitral tribunal if it decides it has jurisdiction. Undoubtedly, the risk to Argentina’s sovereign assets abroad is very high, should the arbitral tribunal decide that it has jurisdiction and that immunity regarding these assets was actually lifted in the Bonds documents.
One nevertheless hopes that ITLOS will clarify its approach to provisional measures and the standard it uses towards *prima facie* jurisdiction. The dissenting judges in the *Louisa* case\(^{129}\) regretted the laxity with which the Tribunal examined its jurisdiction, and the Joint Separate Opinion in the *Libertad* case also arguably requires ITLOS to exercise more rigour.\(^{130}\) More rigour does not mean that the standard should go beyond a manifest lack of jurisdiction, but it signifies that ITLOS must actually satisfy itself that a dispute is grounded on a right within the scope of *UNCLOS*. The perception could be formed that ITLOS was unduly liberal to Argentina by not examining whether, on its face, the claimed right to immunity actually existed, that is, it had not been foregone in the Bonds document.

\(^{129}\)(n 112).

\(^{130}\) In a different context, one recalls that in the *M/V “Saiga” (Prompt Release)* case, several dissenting judges strongly disagreed with ITLOS accepting to characterise that the arrest of the vessel was falling within Art 73 of *UNCLOS*. 
Square Peg in a Round Hole: The Inability of the Courts Effectively to Substitute Further Procedural Rules for Due Process in the Assessment of Expert Scientific Testimony in Criminal Trials

Lisa Dickson & Stephen Pethick

Following the House of Commons Science & Technology Committee report the Law Commission was prompted to consult (in 2009) and report (in 2011) on Expert Evidence in Criminal Proceedings in

1 Kent Law School, University of Kent.
England and Wales in order to (1) improve the reliability of expert evidence used in criminal proceedings and so (2) to avoid wrongful convictions and acquittals based on unreliable expert evidence. Its proposals aimed, amongst other things, to provide judges with uniform criteria against which to assess such reliability. But we contend that such uniformity inevitably pays insufficient attention to the many variables that are relevant in instant cases at trial. Arguments for the implementation of specific tests of reliability of scientific evidence seem to us to cut across the due process requirements of an adversarial criminal trial. The existing rules and principles of criminal evidence offer a much more flexible and appropriate method in this regard. By contrast, trial judges following the Law Commission’s rubric would often be pressed to exclude or admit evidence in a manner contrary to the general principles of criminal

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evidence. Finally, it is important to note that in this paper we proceed by assuming that fundamental precepts of adversarial justice are (i) correct, and (ii) likely to persist as a feature of the common law of England and Wales.

It is important, as we shall see, to begin with some general observations. The detection and prosecution of crime is nowadays intimately connected to matters of science and forensic investigation. As a 2012 Government White Paper notes, ‘Forensic evidence can play a critical role in bringing offenders to justice’. The criminal justice system has not been slow to press scientific investigation into service, utilising science in a number of ways at different points within its machinery, and these operations have even come to be popularised in works of fiction, television series and through the

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national media. But despite the narrative presented in popular accounts, academics and other professionals working within the criminal justice system routinely acknowledge that the relationship between science and criminal proceedings has been a difficult one, and has led to uncertainty at every stage of the process in question. One example concerns the use to which scientific expert testimony is put in trial proceedings. This was called into question in a series of high-profile miscarriages of justice highlighted in successful appeals from 1989 to 2005. In these cases convictions were quashed because of, or at least in part because of, doubt about the reliability of the scientific testimony on which the convictions rested. One result has been that a small academic industry has

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arisen taking as its subject the proper manner in which courts should deal with science in general and with expert scientific testimony in particular.

Discussion revolves around the most appropriate method for determining the admissibility of scientific evidence. When is a new method of science to be deemed suitably developed for the purposes of the trial process? Who should determine whether the science in question is ‘junk science’ or not? Should this question be a matter of admissibility or of weight for the trier of fact to assess? Should scientists or experts determine when science is ‘ready’ to be used in court or does that encroach too far on the purview of the judge?\(^9\) Rulings and proposals proliferate, covering the spectrum from hazy ‘laissez-faire’ models (allowing the reliability of evidence to fall more or less entirely within the province of the trier

of fact)\textsuperscript{10} to the position of steadily more programmatic and precise schema intended to guide the judiciary as gatekeepers, ensuring that inadequate science never gets put to the trier of fact in the first place.

The core problem is this: though it is accepted on all sides that scientific testimony can help to explain what really happened where facts are contested at trial, courts and their actors often cannot understand the science, and so cannot properly weigh the scientific evidence. The sophistication of scientific causal explanations now frequently outruns the understanding of the court. In an adversarial system in

\footnote{For example, the Law Commission notes that ‘Criminal courts in England and Wales therefore only rarely rule expert opinion evidence inadmissible on the ground of evidentiary unreliability. The courts tend to allow expert evidence to be admitted on the assumption that its reliability will be effectively challenged during the trial by cross– examination or by the adduction of contrary expert evidence by another party, or both’ Law Commission, \textit{Expert Evidence in Criminal Proceedings in England and Wales} (Law Com No 325, 2011) paras 3.3–3.4.}
particular, this is a significant problem. Of course, there has been a long history in which successive courts have sought to accommodate the insights of science safely within criminal proceedings. Over this period, different issues have been at the forefront of judicial and academic attention at different times. However, much of the current focus is prompted by the miscarriages of justice noted above,\textsuperscript{11} in the idea that expert opinion evidence is presently admitted in criminal proceedings too readily, with insufficient scrutiny,\textsuperscript{12} thereby allowing unreliable scientific testimony to be put before the trier of fact. Indeed the Criminal Cases Review Commission has been concerned that ‘there is no doubt that the way in which expert evidence is presented to juries, and the weight that is attached to it, will become an

\textsuperscript{11} See Law Commission, \textit{Expert Evidence in Criminal Proceedings in England and Wales} (Law Com No 325, 2011), 1.3-1.7.
increasingly important feature in appeals’. As it is accepted (almost as a truism) that the trier of fact is ill-equipped to pick out unreliable from reliable scientific testimony, it follows that some cases have come to be decided on the basis of unreliable scientific evidence. Reliability has thus become the key concept driving present judicial attention and academic debate.

Our aim in this paper is to show that the Law Commission’s response to the matters in question is misconceived and focuses on introducing process rather than ensuring due process. We divide the paper into two main parts following this introduction. In the first, we articulate our argument through three sections. The first offers some further critical comment

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on the general frame for the Law Commissions proposals. The second addresses attention to empirical research that bears on the topic. The third section addresses matters that are more jurisprudential in character, though we will see that these are bound to the empirical research in interesting ways. In the second part we illustrate our misgivings by giving attention to the case in question, \( R \quad v \quad I, R & T \)\textsuperscript{15} before concluding.

**Disturbing the frame**

We have observed that issues of the reliability of expert opinion evidence frame the present debate, and form a starting point for the Law Commission proposals. However, there is cause to wonder whether the current focus on reliability of scientific testimony is fully warranted, whether in the proposals of the Law

\textsuperscript{15} [2012] EWCA Crim 1288.
Commission or elsewhere. After all, miscarriages of justice are not all due to the unreliability of scientific expert testimony, and indeed there is empirical evidence to indicate that such miscarriages are not even mostly due to the unreliability of scientific expert testimony.\textsuperscript{16} It is important to remember that the opportunity to bring an appeal under the Criminal Appeal Act 1968, s 2, s.23(1) and (2) allow the reliability of many kinds of evidence to be revisited on appeal, whether scientific or otherwise. It seems likely to us that the concern regarding miscarriages of justice implicating expert scientific evidence given at trial has been emphasised, through legal and media attention to the cases in question, just because the subsequent refutation of this evidence is often so striking and persuasive.\textsuperscript{17}

\textsuperscript{16} See, for example, DNA exoneration commentary from the Innocence Project, available at http://www.innocenceproject.org/understand/ accessed 05 April 2013.

\textsuperscript{17} See for example, \textit{R v Dallagher} [2002] EWCA Crim 1903.
As science progresses, so does the potential for expert testimony to be reconsidered as scientific tests improve. Thus, Holdsworth notes, ‘as knowledge increases, today’s orthodoxy may become tomorrow’s out-dated learning’.\(^\text{18}\) But the susceptibility of such evidence to clear refutation is a function of the strength of scientific testimony, not a sign of its weakness. In fact, the distinctive value of scientific testimony is gained, because its unreliability can be shown under empirical tests. In this way expert scientific testimony ought to be seen as the gold standard for evidence that is useful, clear and accountable, allowing for the ready prospect that successful appeals can be made on the basis of new objective scientific information. Matters are not so perspicacious and transparent for other types of evidence. To an extent this was recognised in the 2009 Law Commission Consultation Paper which commented:

\(^{18}\) [2008] EWCA Crim 971, para 57.
It is fair to say, however, that the problems associated with expert evidence can never be entirely resolved. Scientific knowledge is continuously advancing as more empirical research is undertaken, so it is inevitable that some hypotheses will come to be modified or discarded, that expert testimony based on any such hypothesis will subsequently come to be regarded as unreliable and that this will have a bearing on the legitimacy of convictions (and, to a lesser extent, acquittals) founded on such testimony.\footnote{Law Commission of England and Wales, \textit{The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability} (Law Com Consultation Paper No 190, 2009) 1.17–1.18.}

This problem exists not because of any failings on the part of scientific experts or their methodology, but because of the very nature of the scientific method. We are concerned about the frame for the Law
Commission’s proposals in another way too, for there is also cause to wonder whether the reliability of scientific testimony has come to be the focus of contemporary concern in part because of the special role of the judge in considering such evidence. The idea is simple enough as judges have followed Bonython, Frye, Daubert and other cases in assuming one or another type of gatekeeping role with regard to expert evidence, so convictions have been quashed – have been able to be quashed – where judges have erred in excluding or admitting the evidence in question. Significantly, no such appeal would be granted on the ground that the trier of fact had weighed the same evidence incorrectly, and such cases would likely not play so forcefully on public or

20 The Queen v Bonython [1984] 38 SASR 45.
legal minds precisely because, legally speaking, no miscarriage of justice would have taken place. In short, the special treatment accorded to expert opinion evidence by the courts creates the conditions in which miscarriages of justice can be committed, then can be quashed on grounds of error of law. As there is no comparable counterpart to this judicial gatekeeping role for other types of evidence, expert opinion evidence – including scientific evidence – has become one of the most visible examples of injustice because of evidentiary unreliability. But again, this is not a function of the unusual unreliability of such evidence but rather a function of its unusual treatment within due process in criminal proceedings. We also think it is significant that, whilst concerns about reliability presently frame calls for judicial or other intervention ahead of judgment of the trier of fact, empirical research still needs to be undertaken to ascertain whether error rate (that is, unreliability) is greater for expert scientific evidence
than for other forms of evidence. Indeed, it is difficult to perceive a justification for the distinctive treatment of the science otherwise. Information from the Innocence Project in the USA suggests that misidentification is a greater cause of injustice.\textsuperscript{24} However, there is a plain need for further, more comprehensive and more accurate study to be made; not least because the estimation of the Innocence Project is likely bound to the structural issues we discussed in the paragraphs above, rather than pointing straightforwardly to error rates per se. And of course, the simple increase in use of expert scientific testimony in trial proceedings (noted by Runciman\textsuperscript{25} in 1993, Leveson\textsuperscript{26} in 2010 and others) increases the

\textsuperscript{24} Innocence Project (USA) available at http://www.innocenceproject.org/understand/ accessed 05 April 2013.
\textsuperscript{25} Royal Commission on Criminal Justice (Runciman Commission) (Report CM2263, 1993).
likelihood that such evidence will be the cause of injustice through unreliability, without showing that this testimony is itself more unreliable than other types of evidence. In the absence of studies that attend empirically and with careful method to the reliability of different types of evidence, the overarching frame for the Law Commission’s legislative proposals and for the contemporary debate in general must be treated as impressionistic and unsupported.

Expert opinion testimony, and particularly that of scientific opinion, has thus been unfairly and inappropriately singled out for special attention in current debates. Such testimony appears to present a special case, in which both society and legal actors have been struck by ‘wrongful convictions in cases involving unreliable expert opinion evidence adduced
by the prosecution’. 27 But this may be due to matters unrelated to the peculiar unreliability of such evidence, but rather to (1) the ability of such evidence to be struck down on appeal because of the transparency and accountability of scientific testimony in the first place; (2) the judges’ role as gatekeeper, running admissibility together with reliability, and so allowing convictions to be quashed as errors of law; and (3) the increasingly common use of expert scientific opinion testimony in criminal proceedings, which inevitably increases the likelihood of unreliable scientific evidence being led in proceedings, leading in turn to wrongful convictions on the acceptance of such evidence. To impute this last phenomenon to some peculiar unreliability of expert scientific testimony, and then to imagine that this should motivate special rules governing the admissibility of such evidence, is to raise policy on the back of a clear fallacy of

27 Law Commission, Expert Evidence in Criminal Proceedings in England and Wales (Law Com No 325, 2011) 1.3.
composition. We do not think that the increasing use of expert scientific testimony in criminal proceedings warrants the application of special rules or tests as imagined by the Law Commission. Far from being necessarily linked to the unreliability of such evidence, it is more plausible to see the increasing implication of such evidence in wrongful convictions as a product of the success of such evidence in contributing reliably to safe convictions – hence its popularity in the hands of the prosecution to begin with.  

Again, it might be thought that the increasing importance of expert scientific testimony at trial (which also corresponds to its increasing use at trial, in turn arising, presumably, because of the increasing reliability of such evidence in speaking to different matters at issue at trial) is sufficient by itself to warrant

special treatment on grounds of admissibility. Certainly the premise is put often enough. But we note here that there is no specific judicial gatekeeping role attaching to, say, the reliability of significant eye–wit- ness or other direct testimony, nor has there been any significant argument made to subject such manifestly weighty evidence to some special judicial gatekeeping arbitration – precisely because such evidence should be left to the trier of fact in light of its significance. The same argument cannot reasonably now be made the other way, that expert scientific testimony should be checked first for reliability by the judge on grounds of its compelling weight in trial proceedings. And, as we have noted above, neither can the special treatment of expert scientific testimony reasonably be grounded in concerns about its peculiar unreliability. But these are, nonetheless, the

29 See, for example, Lord Justice Leveson, ‘Expert Evidence in Criminal Trials – the Problem’ (speech to the Forensic Science Society, London November 2010).
two strands that run through the literature at issue, framing the Law Commission’s and others’ proposals and rulings. We think these arguments don’t hold up, and so it turns out that disturbance done to our adversarial system (in removing factual matters in dispute from the process of cross-examination, and from the hearing of the trier of fact) depends in large measure upon arguments whose premises lack support and whose conclusions lack validity.

Of course, it must not be forgotten (and we do not) that criminal courts come principally to deliberate expert scientific evidence in a particular way, treating it not as an abstract jurisprudential question of the place of science within law, but as a concrete matter going directly to the admissibility of the testimony of experts, the admissibility of whose opinion evidence is an exception to the general exclusion of opinion in criminal trial proceedings. The judge is tasked with discharging the responsibility to admit or exclude the
expert scientific evidence as opinion evidence regarding the particular case at hand. In the Australian case of *Bonython*\(^{30}\) King CJ began his analytical treatment of the admissibility of expert testimony by noting that such evidence is admissible only where the subject matter of the opinion given is likely to be outside the experience and knowledge of a judge and jury. This much is accepted generally, for example in Australia, the USA and in courts in England and Wales.\(^{31}\) The requirement is not a function of the scientific nature of some expert testimony, but is rather a function of its admissibility as an exception to the general rule on opinion evidence. Even so, the notion that the trial judge has a gatekeeping role in relation to such evidence is thus already planted. King CJ also articulated a further universally accepted premise for the admissibility of such opinion evidence – that the expert in question has sufficient knowledge

\(^{30}\) *Bonython* (n 20).

\(^{31}\) See *R v Turner* (1975) 1 QB 834.
and experience to justify having his or her opinion placed before the jury as an expert opinion on the matter in question. This requirement allows for counsel’s objection to testimony during trial proceedings, as well as in pre–trial disclosure, where the expert in question begins offering opinion on matters beyond his or her expertise.\(^{32}\) Again, the relevant question falls to the judge to determine as a matter of admissibility, so here too, the judge assumes a gatekeeping role. In both cases, the gatekeeping role falls out under the idea that expert opinion evidence is an exception to the general case because it offers expert assistance to the court that would otherwise be unavailable to it in making its finding of fact.

Even in these small beginnings it is possible to trace the difficulties that courts – and thus the Law Commission – have come to grapple with. For seen this way, as responses to difficulties encountered in

\(^{32}\) See, for example, \(R v\ Tang\) [2006] NSWCCA 167.
judging the expertise of a supposed expert on a particular matter in question, the natural instinct, particularly for lower courts, is to find some further instruction or rubric to help adjudicate the matter. This instinct is further motivated by the realisation that the assessment of expertise, for any particular matter in issue, naturally runs together with the substantive assessment of both the science and scientist (where the expert opinion is scientific in nature). These forces prompt courts to look to further process in an attempt to avoid making a judgement about the science in question, on which they are ill-equipped to adjudicate. The result is the international plethora of judgments, rulings, legislative acts, academic treatises and, now, Law Commission proposals that presently crowd on the issue. Rather than addressing a single issue about the admissibility of opinion as expert testimony in England and Wales, we now have lists of accredited experts.\textsuperscript{33} We have had a Forensic Science

\textsuperscript{33} In part, through the now defunct Council for the Registration
Service, tests of the general acceptance of the science in question within that field, proposals for how novel scientific approaches should be dealt with under admissibility, tests of the reliability of the evidence in question, and arguments that reliability should, *laissez-faire*, go to the trier of fact,\(^{34}\) or be shared with the judge as an initial gatekeeper, or indeed be a matter for some pre–trial board or panel of experts. The proposals that are less schematic risk injustice because unreliable science will be put to the trier of fact; those that are more schematic risk injustice because the judiciary may exclude good science as unreliable, opposing counsel may not have the opportunity to examine it, and the trier of fact will never hear it in evidence. And pre–trial panels risk usurping the function of the court and jury altogether, particularly in light of the increasing use of scientific

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\(^{34}\) See for example Moses LJ in *Henderson* [2010] 2 Cr App R 24 CA.
and other expert testimony in criminal proceedings. Academics have argued for emphasis on the trier of fact or pre-trial panels, whilst courts, equally predictably, have sought out further procedural rules to dispose of their obligations. Everywhere there are tensions, and everywhere there are risks. Nowhere is there a simple, clear and practical solution.

**The practical solution**

All this heat and light might well be beside the point, however. Matters seem intractable where the frame is drawn according to the present difficulties facing the courts, and where proposals are made in response to

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these felt problems. But though there have been high-profile cases of wrongful convictions, there is empirical evidence to suggest that more programmatic solutions do not typically alter the practice of the courts in dealing with the issues of admissibility in question. For example, in the US context, David Faigman notices that despite appearances to the contrary, the *Frye*\(^{36}\) test, which appears restrictive in comparison to the later *Daubert*\(^{37}\) test, ‘much of the time’ produces ‘similar outcomes’.\(^{38}\) He writes:

> While *Daubert* is often perceived and applied by the courts rigorously, it is regularly described as being a permissive test. Similarly, *Frye* is typically considered a rigorous test, but

\(^{36}\) *Frye* (n 21).

\(^{37}\) *Daubert* (n 22).

\(^{38}\) David Faigman ‘Admissibility Regimes: The “opinion rule” and other oddities and exceptions to scientific evidence, the scientific revolution, and common sense’ (2008) Sw. U. L. Rev. 699, 700.
is often employed in a permissive manner.\textsuperscript{39}

Lord Leveson, in a 2010 speech, notices that despite the approval of King CJ’s 3-part test in numerous decisions, ‘only the first and third limbs of this test can be said to represent the current state of English law’, noting that the English courts add ‘a fourth requirement that the expert must be capable of providing an impartial opinion’.\textsuperscript{40} The omission of the second limb arises because it requires an assessment of ‘whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’ and, according to Leveson, ‘there remains a general reluctance on the part of judges to ensure what I shall

\textsuperscript{39} David Faigman, ‘Admissibility Regimes: The “opinion rule” and other oddities and exceptions to scientific evidence, the scientific revolution, and common sense’ (2008) Sw. U. L. Rev. 699, 702–03.

term the “reliable body of knowledge and experience” condition forms part of the test of admissibility’.\textsuperscript{41} Edmond and Roberts, writing in the \textit{Sydney Law Review}, cite empirical studies that appear to show that questions in cross-examination have little impact in disturbing the faith put by juries in the testimony of experts, whilst judicial warnings to juries concerning the weight and treatment properly to be given expert testimony provides only a weak safeguard against juries left to ‘flounder and resort to general impressions’.\textsuperscript{42} Edmond and Roberts take these empirical studies to show that adversarial trial procedures are poorly equipped to deal with expert evidence. We think they show that barristers need to be better at their jobs. But regardless of this difference about conclusion, the facts remain: empirical studies


\textsuperscript{42} Gary Edmond and Andrew Roberts, ‘Procedural Fairness, the Criminal Trial and Forensic Science and Medicine’ (2011) 33 Syd L Rev 359, 368.
suggest that process and regulation little alter behaviour of court actors, be they the judiciary, barristers, the triers of fact or indeed, the behaviour of expert witnesses themselves.

**More unreliable than other forms of evidence?**

Let us emphasise our argument so far. Some scientific expert opinion evidence is unreliable. But it has not been shown that such evidence is more unreliable than other forms of evidence. Some scientific expert opinion evidence is of particular weight in criminal proceedings. But not all such scientific evidence is so weighty, and many other forms of evidence such as direct evidence from well-positioned and impartial observers might have similar or greater weight in any particular trial. So the proposals made by the Law Commission can neither be grounded in the claim that scientific – and other – expert opinion evidence is
peculiarly unreliable, nor in the claim that it is peculiarly important. We are left with two arguments for the special treatment of such evidence, and thus for the proposals suggested in the Law Commission’s report. The first is that scientific expert opinion evidence is a special case just because expert opinion evidence is a special case. Because such evidence can depend, amongst other things, on hearsay evidence gathered from the work of other experts not present at the trial, special treatment and care is warranted. The second argument is that, regardless of jurisprudential and other conceptual points, and regardless of consistency with adversarial convention and due process, the plain fact is that judges, barristers and juries do not understand a lot of complex expert scientific testimony, and so further safeguards are needed beyond those in the ordinary case, in the interests of justice and fairness to the accused. We deal with these two arguments in turn, below.
The first argument can be negated fairly easily. Any assumptions made by an expert that depend upon hearsay will either be accepted by opposing expert or counsel, or, if contested, ought properly to be contested in the normal adversarial way.\(^4^3\) No reason can be found for the imposition of extraordinary rules, processes or judicial intervention just because scientific expert testimony is expert opinion testimony. Rather, this first argument turns out just to collapse wholesale into the second; ie, if the evidence is to be contested it will require understanding of technical matters and terminology beyond the scope of the judge, counsel and trier of fact. It is in the context of this question that the well-known and well-rehearsed debates flood in – the extent to which the courts

\(^4^3\) Including, for example, through pre-trial meeting. For consideration of the role of an expert in this way see Peter Sommer, ‘Meetings between experts: a route to simpler, fairer trials?’ (2009) Digital investigation, 5 (3–4). pp. 146–152. available at http://eprints.lse.ac.uk/21683/ accessed 08 April 2013.
should accede to a deference model,\textsuperscript{44} the extent to which experts should give opinion about ultimate issues of fact, and the quandary that supposedly presents itself to juries when acknowledged experts disagree. Indeed, to this traditional list can now be added more colourful debates, such as those concerning CSI and Reverse–CSI effects,\textsuperscript{45} and so on. All of these are without question matters that are important and worthy of serious consideration on their own terms. But they do not, singly or collectively, lead to the conclusion that the judges should be gatekeepers using an additional reliability test to ensure that unreliable science does not reach the trier of fact.

Our argument here can be put succinctly. The

\textsuperscript{44} See for example Ronald Allen and Joseph Miller, ‘Common Law Theory of Experts: Deference or Education’ (1993) 87 Nw. U. L. Rev. 1131.
motivation for an additional judicial gatekeeping rule is practical, to ensure that unreliable science does not come before a trier of fact ill-equipped to consider it effectively (no-one, it appears, has promoted the gatekeeping role, or a pre-trial panel, in order to prompt a move to inquisitorial and technocratic justice by the back door). The trouble is that a pragmatic gatekeeping role does not work. This is a considerable and damaging irony in light of the practical motivation for the approach. It doesn’t work because (i) as we know, courts are loathe to implement it, even whilst citing all *Bonython*\(^46\) limbs with approval,\(^47\) and because (ii) even where courts try to implement it, they cannot do so confidently and

\(^{46}\) *Bonython* (n 20).

effectively.\textsuperscript{48} Indeed, it is interesting to notice, as Shaw does, that both the British Psychological Society and the Forensic Science Service have expressed doubts concerning the ability of judges to assess the reliability of scientific evidence safely.\textsuperscript{49} In short we consider that it cannot be good to suggest a test to trial judges that leaves their best implementation of it inevitably hostage to successful appeal. It cannot be good for the judges themselves, but more significantly, it cannot be good law. We now trace and illustrate these misgivings through the recent case of \textit{I, R & T}.\textsuperscript{50}

\textbf{Reliability test}

\textsuperscript{49} Ken Shaw, ‘Expert Evidence Reliability; Time to Grasp the Nettle’ (2011) 75 JCL 368, 371.
\textsuperscript{50} [2012] EWCA Crim 1288.
In this section we relate $I, R \& T^{51}$ to matters proposed by the Law Commission in 2011. Firstly, we describe the case in question and then we summarise in advance of our general conclusions in the final part. In the Law Commission report, the following is noted at 2.14:

Following the publication of our consultation paper, the existence of a common law reliability test was confirmed by the Court of Appeal in *Reed*, at least for ‘expert evidence of a scientific nature’; but it is to be noted that the court did not demur from the established position that there is no enhanced reliability test for such evidence.

Heffernan and others had noted, following the Consultation Paper, that the Law Commission’s remit seemed too narrow, focussing just on the corners of, and detail for, a reliability test. It was not clear there

\[51\] ibid.
even was such a test in English law, and where such a narrow focus failed to embrace the many other aspects of the use of scientific testimony in courts that might otherwise have been regarded. Plainly, we agree. The Law Commission’s argument at 2.14 of its Report is a major plank in their defence of the narrowness of their focus. That is, in 2009 the reliability test was confirmed (in *Reed*),\(^{52}\) and so can now be the proper focus of attention and clarification.\(^{53}\) Hence the Law Commission’s subsequent proposals, arguing for statutory implementation of an enhanced reliability test of the sort specifically excluded by *Reed*.\(^{54}\) Support for the Law Commission’s fundamental proposition about current common law comes in the footnote to the section, the Law Commission noting there that in

\(^{52}\) *R v Reed; R v Garmson* [2009] EWCA Crim 2698.

\(^{53}\) The decision in *Reed* was not available at the time of the publication of the Law Commission’s consultation document (Law Com 190, 2009) and so only became a focus in the final Report of 2011 (Law Com 325, 2011).

\(^{54}\) *Reed* (n 52).
Reed.\textsuperscript{55}

The Court of Appeal held at [111] that while ‘expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury’ there is ‘no enhanced test of admissibility for such evidence’.

But these quotations fail to support the Law Commission’s conclusion. In Reed\textsuperscript{56} the comments are introduced at [111] with the observation that, ‘There are three relevant principles relating to the admissibility of the evidence given by Valerie Tomlinson [the expert]’. What the Court of Appeal then notes – as we can see – is that where the scientific basis for expert scientific testimony is ‘insufficiently reliable for it to be put before the jury’ then it shouldn’t be put before the jury. There is

\textsuperscript{55} ibid.
\textsuperscript{56} ibid.
no express test of reliability here, contra the Law Commission’s interpretation. The Court of Appeal’s ruling is, rather, a confirmation of standing rules of evidence, particularly those going to expert opinion evidence. Indeed, this is emphasised in the following quotation in which it is affirmed that there is ‘no enhanced admissibility test for such evidence’. It is entirely possible to read the Court of Appeal’s ruling consistent with, say, the requirement of relevancy as a condition of admissibility, and/or, say, with the common law principle that the probative value of any item of evidence must outweigh its prejudicial effect in order to be admitted in proceedings. If the court had intended to affirm the existence of a distinct common law test for the admissibility of expert scientific testimony, it could just have done so. But there is more.

Thus it may be noticed that the Law
Commission, at 2.14, asserts that Reed\textsuperscript{57} affirms an established position on expert scientific testimony, that ‘there is no enhanced reliability test for such evidence’. So, there is a reliability test, just not an enhanced one. But Reed\textsuperscript{58} does not say this at all. The ruling, quoted by the Law Commission in its footnote, says instead that there ‘is no enhanced admissibility test for such evidence’ (emphasis added). And this distinction is precisely that, between there being an express reliability test (on the Law Commission’s incorrect construal) and there not being one (on Reed itself). This confusion, in one form or another, then permeates through the Law Commission’s understanding of subsequent cases in 2.15, and in footnote 34. It might also be said that the imprecision and confusion in question permeates the law itself.

In any event, there are now further judgments

\textsuperscript{57} (n 52).
\textsuperscript{58} ibid.
on the question since *Reed*\(^{59}\) in 2009 and the other cases put in evidence by the Law Commission in reporting in 2011. These cases can help our understanding of the likely success of the proposals made. Thus in June 2012 the Court of Appeal heard an appeal from the Crown Court in Hull, in which the prosecution applied under s.58 of the Criminal Justice Act 2003 for judgment against a ruling by the trial judge (His Honour Judge Sampson) to exclude expert scientific evidence that the prosecution wished to adduce. We examine this appeal, *I, R & T*,\(^{60}\) below. It relates to the Law Commission’s proposals simply because it illustrates the difficulties courts have (at trial, or on appeal) in attempting to implement an enhanced reliability test such as that proposed by the Law Commission.

\(^{59}\) ibid.

\(^{60}\) *I, R & T* (n 15).
Closer look at I, R & T

The application concerned the admissibility of an established scientific test, the CIE test, on which the prosecution sought to rely in evidence. The case concerned whether a farmer and his daughter had processed animal blood correctly by heating it to 133 degrees centigrade for twenty minutes, as per the relevant regulations. It was accepted by the trial judge that the CIE test ‘is a well–established and highly reputable test with a variety of applications’. 61 One of these applications is to ‘test for the presence of animal proteins in the blood. If the blood has been heated to a temperature in excess of 75 degrees no animal proteins will be found’. The trial judge noted that the ‘presence of animal protein would therefore demonstrate that the blood had not been heated beyond 75 degrees, and, moreover, in the context of this case not processed to 133 degrees centigrade in

61 ibid [12].
The relevant evidence showed that animal proteins were found in the blood in issue. However, the blood sampled was also found to contain no bacteria (clostridium bacteria, it was noted, are destroyed at 120 degrees), and this fact, i.e. the lack of bacteria, appeared to be inconsistent with the reliability of the CIE test. Moreover, as the trial judge noted, it was accepted by both prosecution and defence that ‘CIE testing has never before been applied to blood which has purportedly undergone processing/storage/onward distribution in/at/from a plant such as [that in question].’ He continued, ‘No similar plants have been tested to compare results following a CIE test. The D’s submit that although this is a reliable test it is being applied in a novel context without evaluation of its efficacy in that context’.

The trial judge then offered his view, that ‘The
test for admissibility of scientific evidence is not straightforward. There is no single universal test in common law or in statute. There are factors which offer guidance to the judge when deciding the admissibility of scientific evidence’. He continued:

In my judgment the test for admissibility of the CIE test is that which is set out in paragraph 12 of the defendants’ submissions: Is the underlying science sufficiently reliable to be admitted in a court of law? The simple answer to that question in this case is ‘yes’, but in my judgment the better answer is yes unless there are factors over and above the vague and fanciful that cast doubt on the reliability of the CIE test in the context of/on the special facts of this case. 64

As the trial judge did indeed consider that there were

64 ibid [15].
such factors in the present case, he ruled that the evidence drawing on the results of the CIE test was to be excluded from the trial proceedings.

The trial judge thus appears to have applied an enhanced reliability test similar to that proposed by the Law Commission. Support for this can be found in the Law Commission report’s proposals at 5.35 (1) (b), (c), and (h), and – perhaps particularly – at (3), and in Clause 4 and Part 1 of the schedule, particularly at 4 (2) (d) & (e). Moreover, the trial judge’s approach makes robust sense, because the assessment of reliability surely cannot be understood restrictively here, but must be interpreted broadly, to mean reliability with regard to the circumstances in question (as it happens, per the Law Commission’s 4.1(2)(d)). Otherwise courts might rule admissible a procedure for scrambling eggs (certainly reliable, if only for that purpose) notwithstanding its unorthodox

65 ibid [16].
application in an instant case, for example in the drawing of conclusions about the presence of DNA at the crime scene (certainly unreliable for this purpose). But, interestingly, the Court of Appeal disagreed. The Court’s judgment was that once the trial judge had ruled that the CIE test is a ‘well-recognised and reliable test for establishing whether or not animal protein is or is not present in blood’, the test results were admissible. The Appeal ruling noted further that, ‘The fact that the test was used for a new purpose, or in a new context, did not of itself render the test unproven’.\footnote{ibid [29].} The Appeal judgment then addressed the trial judge’s further comment; i.e. in holding that in answering the test he ought further to consider whether ‘there are factors over and above the vague and fanciful that cast doubt on the reliability of the CIE test in the context of/ on the special facts of this case’. This, the Appeal Court ruled, was to ‘confuse the question of admissibility with the question whether, if admitted,
the expert evidence was such that on its basis a jury could properly convict I’. In consequence the Court allowed the appeal.

**Final thoughts on I, R & T**

It appears to us that the trial judge did nothing wrong in coming to his ruling at trial. Notably he does not suggest an addition to the relevant test of admissibility, which is approved both by him and the Court of Appeal in its ruling. Rather, the trial judge’s regard to additional matters (i.e. those ‘over and above the vague and fanciful that cast doubt on the reliability of the CIE test in the context of/on the special facts of this case’) is invoked by him in his attempt to answer the accepted test. The trial judge thereby employs an enhanced method in reasoning to his conclusion on admissibility. It is ‘enhanced’ in the

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67 ibid [30].
sense adopted by the Law Commission (viz. its proposals at 4(2)(d) and (e)), and in the straightforward sense that it is demonstrably more restrictive than the Court of Appeal thought permissible under existing law. The trial judge’s deliberation is reasonable – so reasonable, in fact, that it is difficult to comprehend how a reasonable judgment about admissibility could be made without attending to the contextual matters he puts in question. And this is because the law cannot easily or effectively cut issues of reliability at the joints. In short, reliability is reliability all the way down, and any attempt to open a court’s consideration to reliability, but then to restrict its deliberation there, will inevitable appear arbitrary and unreasonable on the instant facts.

Similarly, however, we also consider that the Court of Appeal acted reasonably in allowing the appeal in question. This is because, as the prosecution
averred in their contention to the higher court, the trial judge had confused the question of admissibility of expert evidence with the question of the weight of that evidence. We agree: the matters brought into question with regard to admissibility were properly the province of the trier of fact. Indeed, due process under the principles of our adversarial system demands as much as a minimum requirement. We acknowledge that our support of both courts is contradictory, but there is no paradox because the contradiction is entirely explicable as the failing of the supposed reliability test in question. Such contradictions are merely the predictable result of the imposition of a separate reliability test for admissibility in an adversarial system that requires evidentiary weight to be assessed by the trier of fact. Such a test is impossible for courts effectively to apply, and leaves trial judges’ best implementation of it inevitably hostage to successful appeal. Such a policy is bad for trial judges, bad for appellate courts, bad for legal
certainty, bad for adversarial due process and unworkable in practice.

Conclusion

It will naturally (and rightly) be objected that our treatment of various issues in this paper has attended inadequately to many finer points regarding the criminal courts’ treatment of expert scientific opinion testimony. We have not attempted a comprehensive overview of the law, or even of the detail of the reform proposals on offer, nor have we engaged these issues from a particular perspective (e.g. of best practice for forensic scientists at trial). Such studies have, in any case, been produced elsewhere, including academic treatments of the Law Commission’s proposals themselves. These proposals have, in critical comment, been perceived as an important move or the opinion has been that they offer very little new
consideration, if any at all. Instead we have tried within the short space of this essay to prompt a reframing of the debate. Our argument has been delivered in two parts. In the first we made some critical comments about the accepted starting points for present proposals, attacking the premises and reasoning that have been cited in support of the present focus on reliability. In the second part we took a more pragmatic approach, arguing that the promotion of reliability in tests for admissibility of expert opinion evidence is unworkable in practice. It sets judges up for failure, and provides fertile ground for successful appeals against conviction without providing any determinate reason in law why such decisions should have gone one way rather than the

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other.

The reframing we have in mind asks for the admissibility of expert scientific opinion testimony to be looked at in the round. As Edmond and Roach observe:

The Law Commission’s paper illustrates how a superficial understanding of Daubert tends to generate countervailing pressures to make exceptions for expert evidence based on experience, emerging technologies, and older techniques never shown to be reliable. The Law Commission’s proposal exemplifies the apparent reluctance (or inability) of many law reformers (and practicing judges and lawyers) to engage with critical non–legal literatures or contemplate change to traditional forms of practice in order to preserve fundamental legal principles underpinning the accusatorial

In fact we think there needs to be attention to actual error rates for different types of evidence in determining policy, but also to possibilities that have often been dismissed out of hand, such as the use of existing common law principles of admissibility in the deliberation of the matters in question. The use of relevancy, sufficient weight and the requirement that probative value outweights prejudicial effect, too breezily pushed aside in the Law Commission’s consultation paper,\footnote{See Law Commission of England and Wales, The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability (Law Com Consultation Paper No 190, 2009) at paragraph 4.3 and paragraphs 4.19-20.} might yet furnish appropriate tools to ensure due process, whilst possessing the obvious merit that these principles have evolved to cohere closely with the adversarial system of which
they are a part. Indeed, there is reason to believe that existing rules and principles of criminal evidence have been the only ones in use all along, at least in England and Wales, with courts applying a test of admissibility that, in the context of expert opinion evidence, requires that an assessment of reliability is made in its answer (viz. Reed and I, R & T, above). Indeed, much of the confusion in law, at least, has arisen precisely because of judicial uncertainty about how to incorporate a new common law test of reliability within this well–worn frame, rather than concerning reliability as simply a matter to be considered under the test of admissibility in such cases. We also consider that many of the perceived difficulties in handling expert scientific testimony could be answered if barristers were better at dealing with such testimony – which is not an unreasonable expectation for parties to have.
Doing the Right Thing for the Right Reason? A Critical Discussion of Procedural Justice Principles and Their Link to the Legitimacy of the State Police

Martina Y Feilzer¹

Doing the right thing for the right reason has become somewhat of a mantra for some in the police community: the Chief Constable of Greater Manchester Police used it as a heading for his blog in 2011. This simple phrase represents a significant shift in policing practice from the days of the Home Office dictating a detection-driven target culture (up to around 2010). It resulted in returning some discretion back to front line policing and links in with the concerns of procedural justice, and its alleged promise to improve levels of public confidence and police legitimacy. It also implies that the outcomes of decisions and the processes of making decisions

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should be based on ethical or normative considerations, not instrumental ones. This paper will trace recent developments in policing practice and link them to the concerns of procedural justice; and with that critically review whether the explicit or implicit expectation that procedural justice processes will increase public confidence in policing, and whether the state police’s legitimacy endangers the longevity and normative principle of the concept.

It is commonly assumed that police legitimacy and trust in policing are important to a democratic society, not only theoretically, but also practically. Policing by consent depends on the confidence and the backing of the public. This in turn will result in citizens abiding by the law ‘most of the time’ as well as their active participation in the criminal justice process by reporting crime, serving as witnesses in court, magistrates, referral panel members, and in other
voluntary roles. Some commentators expressed concerns that public confidence in the criminal justice system is too low, and that this constitutes a threat to police legitimacy as well as the day-to-day running of the criminal justice system – an indication of rating trends of the police since 1982 is included in Figure 1 below. While it is impossible to assess whether confidence in the police was as high as suggested by some in the mythical ‘golden age’ of policing up until the 1950s, the British Crime Survey has provided some evidence that satisfaction with the police has fallen since the 1980s alongside a rapid increase in crime up until


3 Assessments of long-term trends are complicated by changes in question wording in 2003/4 and removal of preceding questions in 2011/12.

4 See, for example, analysis by M Hough, ‘Policing London, 20 Years on’ in A Henry and DJ Smith (eds), Transformations of Policing (Ashgate 2007).
the mid-1990s. However, since the question measuring confidence in the local police was changed in 2003 to 2004, rates of confidence have steadily increased. According to the latest set of figures, in 2011 to 2012, 62% of respondents to the Crime in England and Wales Survey felt that their local police were doing a good or excellent job.\(^5\)

The assumption that falling levels of confidence constitutes a threat to the legitimacy of the state police is
derived from an understanding of legitimacy as being based primarily on citizens’ belief that power relations are legitimate.\(^6\) This understanding of legitimacy as ‘perceived’ legitimacy has been challenged by Beetham, who suggests it is a simplistic and incomplete understanding of legitimacy.\(^7\) Beetham\(^8\) contends that legitimacy is multi-dimensional and consists of three levels: power relations are set up in adherence to existing laws; the laws themselves are justified by reference to the values and beliefs shared by those in positions of dominance as well as subordinates; and that there is evidence of consent through actions by subordinates, i.e. those subject to the exercise of power. Consent is seen as a distinctly modern component of legitimacy of power relations.\(^9\) Thus, following Beetham’s arguments, the assertion that ‘any democratic system of law needs the

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\(^7\) D Beetham, *The legitimation of power* (Macmillan 1991), at pp7-12.

\(^8\) ibid, p16.

\(^9\) ibid, p18.
consent of those whom it polices" may be an ideal, but in itself is not a sufficient condition for the legitimacy of existing power relations.

So, on one hand, the concern with public opinion of the criminal justice system and the police in particular is linked to questions of the legitimacy of the state police. On the other hand, the concern with public opinion is pragmatic in nature, centring on the criminal justice system’s ability to function. The police are dependent on the support of the public in order to police effectively, not least because some 80 per cent of law-breaking is brought to the police’s attention by members of the public. Moreover, members of the public serve as witnesses in court, magistrates, referral panel

11 The term ‘state police’ is used here to distinguish the state funded local police services from private police organisations and structures.
members, and in other voluntary roles, thus ensuring the smooth running of the criminal justice system. There is little research linking levels of expressed confidence to levels of public engagement, including volunteering, with the police or the wider criminal justice system.

The concept of procedural justice

Crime and crime control have become highly politicised subjects in England and Wales since the 1970s, and the introduction of publicly elected Police and Crime Commissioners in 2012 may be regarded as the height of this process of politicization. The use of the police for political purposes has haunted the ‘institution’ since its modern incarnation slowly emerged after the 1829 reforms.13 These concerns mingled with scandals involving the abuse of police powers have greatly influenced the legal, policy, and political framework in

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which the state police operates today. In particular, many elements have influenced governmental strategy about state police accountability and governance. They include corruption scandals in the 1960-70s, the handling of industrial disputes in earlier parts of the 20th century as well as the miners’ strike in 1984, the on-going allegations of police discrimination and racism, and the recent allegations of collusion between the police and the press. The early years of the 21st century were dominated by an obsession with performance management in the public sector, including the state police and this influenced frontline police activity directly.14 Policing practices were dominated by the Home Office which dictated a detection-driven target culture for all police services in England and Wales. Only recently, after the election of the Coalition Government in 2010, were central Home Office targets relaxed and senior police

officers felt able to return some discretion back to frontline police officers. However, the return of discretion to individual police officers was tied to rules and decision-making processes and, in some instances, linked in with the notion of procedural justice in policing.

The literature on the subject of procedural justice has grown exponentially over the last few years, and is dominated by voices that hail its advent as the panacea to improving public confidence in policing and police legitimacy. Procedural justice derives from the US literature on police legitimacy, but has its basis in analyses of organisational power and perceived legitimacy following Weberian lines of thought. Procedural justice is linked to compliance theories, built on the assumption that those who perceive the police as a

legitimate authority will feel a moral obligation to obey their instructions voluntarily as well as actively support the police in community policing activities or crime prevention.16 Where police activity is regarded as an abuse of power or as illegitimate due to activities such as discriminatory practices, cooperation may wane and conflict may ensue. In this context, procedural justice relates to frontline policing based on impartiality and fairness,17 the focus being on a ‘fair and respectful’ process in contrast to outcome-focused policing strategies.18 The effect of procedural justice on public evaluations of policing has been empirically tested in a

18 Hough (n16) 182; T Tyler, ‘Legitimacy and compliance: the virtues of self-regulation’ in A Crawford and A Hucklesby (eds), Legitimacy and Compliance in Criminal Justice (Routledge 2013) at p12.
number of English-speaking countries, in Australia,\textsuperscript{19} the US\textsuperscript{20} and in North East England, providing ‘evidence of a connection between police fairness and public confidence in policing’\textsuperscript{21}.

The discussion above suggests that procedural justice is focused on and linked to achieving practical outcomes, such as public cooperation, public confidence, and increasing police legitimacy. As Mike Hough\textsuperscript{22} points out, procedural justice holds the promise to resolve some tensions between those concerned with the state’s use of force and those concerned with the control of crime, namely that ‘fair, respectful and legal behaviour on the part of justice officials is not only ethically desirable but is a prerequisite for effective

\textsuperscript{19} See L Hinds and K Murphy, ‘Public Satisfaction with police: Using procedural justice to improve police legitimacy’ (2007) 40(1) \textit{The Australian and New Zealand Journal of Criminology} 27–42.
\textsuperscript{20} Tyler (n18).
\textsuperscript{22} Hough (n16) 337.
justice’. Hough\textsuperscript{23} distinguishes between two types of legitimacy – legitimacy that is based on objective criteria such as democratic norms and the observance of human rights – and perceived legitimacy in the eyes of the public. His emphasis is on the role of procedural justice in influencing perceived legitimacy. That emphasis runs the danger of divorcing ‘people’s beliefs about legitimacy from their grounds or reasons for holding them’, which lie in the actual characteristics of a regime.\textsuperscript{24} Without tying beliefs of legitimacy or perceived legitimacy to characteristics of the regime, you may hollow out perceived legitimacy into a measurement of legitimation ‘generated by the powerful themselves’.\textsuperscript{25} In other words, analyses may be restricted to measuring the effectiveness of state propaganda on public beliefs, ‘rather than an analysis of the factors

\textsuperscript{23} ibid, 336.
\textsuperscript{24} Beetham (n7) 10.
\textsuperscript{25} ibid, 19.
which give people sufficient grounds or reasons for holding them’.  

Beetham\textsuperscript{27} suggests that expressed consent through action rather than perceived legitimacy should be one dimension of legitimacy. Of course, expressed consent will relate to some extent to perceptions of legitimacy. However, tying procedural justice closely to the aim of increasing perceived legitimacy risks the concept falling hostage to fortune. Were such perceived legitimacy not to materialize, e.g. confidence levels drop, procedural justice may be replaced by a new approach, promising increases in confidence. Therefore, it is essential to defend procedural justice as a normative concern crucial to the legitimate use of police force. In other words, that the police follow the legal norms and procedures stipulating equality of treatment and human rights is an element for legitimacy, a characteristic of the ‘regime’ that should give the public a reason for

\begin{itemize}
\item \textsuperscript{26} ibid, 10.
\item \textsuperscript{27} ibid, 20.
\end{itemize}
believing in the legitimacy of the state police. The state’s power to use force on its citizens needs to be applied in a fair and just manner as outlined by the legal framework in place in England and Wales – it is not a process that can be chosen on the basis of achieving certain desired outcomes. This is true for procedural as well as distributive justice; there is no denying that perceived legitimacy may be important in influencing compliance with police power, but there are a number of significant problems with reducing legitimacy to a perceptual issue.

One significant concern is the measurement of perceived legitimacy; the other relates to the question of conflict between the ‘objective’ measures of legitimacy such as adherence to human rights and perceived legitimacy. What if the perceived legitimacy by a majority of citizens is high, but there is clear evidence of disregard of human rights of a minority? Moreover, is it really possible to divorce the outcome of an interaction entirely from the process and the ‘perceived’ quality of
treatment leading up to the outcome? Finally, Tyler \(^{28}\) makes a distinction between favourable and unfavourable outcomes, but there is no discussion of the basis by which favourable or unfavourable outcomes are defined.

**Implementing procedural justice in policing**

How have the principles of procedural justice been implemented in policing in England and Wales? In 2008, the government-commissioned Flanagan report made 33 recommendations to improve policing. A number of the recommendations responded to the perceived need to counteract a ‘detection’ culture developed under New Labour’s performance management regime, which the then Labour Government admitted had resulted in

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\(^{28}\) Tyler (n18) 12.
‘perverse effects’.\textsuperscript{29} One recommendation, Recommendation 21, was specifically related to addressing ‘the lack of proportionate response in the service and to create a community focused performance regime for local crime’.\textsuperscript{30} As a result, a number of police forces trialled new forms of returning more discretion to the front line, described as ‘discretion with rules’,\textsuperscript{31} and by 2011, 12 police forces in England and Wales had adopted a variety of value-based decision making models\textsuperscript{32} and ACPO (The Association of Chief Police Officers) approved an ‘ethical national decision model’ in 2012\textsuperscript{33} (see Figure 2 below). The national decision making model could be regarded as an example of

\textsuperscript{32} A Lee, \textit{The importance of ethics for policing} (2010) Transcript of Presentation, at p7.
\textsuperscript{33} ACPO 2012. National Decision Model.
procedural justice: all decisions are made on the basis of clear procedures, and the six key elements are based on ACPO’s Statement of Mission and Values, thus encouraging consistency across police forces and fairness.
Figure 2: The ‘ethical national decision model’

Source: ACPO, 2012, 2
The underlying premise for the national decision making model is that the police in contemporary society are guided by multiple, interrelated goals that can sometimes be in conflict with each other such as reduction in crime, protection of the public, reducing fear of crime, and increasing public confidence in policing, to name just a few. Police officers in many frontline operational policing scenarios are faced with situations where they have to choose, not between an objectively wrong or a right decision, but rather different ‘right’ decisions dependent on the choice of one of the different purposes of policing and value bases of the criminal process.\textsuperscript{34}

Thus, the same scenario could lead to two different, but equally justifiable, decisions, one based on crime control to bring an offender to justice for a crime committed; compared to one based on the notion that crime control can sometimes be oppressive and that the use of coercive powers should be avoided in those circumstances

\textsuperscript{34} A Sanders, R Young & M Burton, \textit{Criminal Justice} (4\textsuperscript{th} ed, Oxford University Press 2010), at p21.
allowing for compassion and giving people a second chance to avoid criminalisation where it serves no public interest. Police officers are required to reflect on multiple, value-based perspectives in order to reduce legitimate value conflicts or ambiguous situations.35

The debate about which purpose or model of policing is more important is not a new discussion, and attempts to produce a comprehensive model for criminal justice which helps resolve the tensions between the different purposes goes back to Herbert Packer’s models of the criminal process in 1968. Various models have been proposed for the criminal process, from the human rights model to the enhancement of freedom model.36 The enhancement of freedom model may help with difficult police decisions and value conflicts as it asks

36 Sanders, Young & Burton (n34) 21-59.
the question of what action is ‘most likely to enhance freedom’ – arresting and prosecuting an 80 year-old man for stealing a packet of crumpets worth 50 pence or returning the stolen goods and taking no further police action? The model does come with other problems, but may be an interesting alternative to the discussion of procedural or instrumental models.\(^{37}\)

So, how do such theoretical models work in practice? In 2010 to 2011, the author (with a colleague) undertook some research which looked at the impact of value-based decision making (VBDM) on frontline police staff.\(^{38}\) We found that there were a number of theoretical problems with the concept of VBDM, some of which are transferable to the national decision model. Organisational values are subject to change, for example, ACPO’s Statement of Mission and Values undergoes changes; and are often too vague to be useful guides for

\(^{37}\) For an in-depth discussion of the freedom model, see Sanders, Young & Burton (n34) 21-59.

\(^{38}\) Feilzer & Trew (n31).
decision making. Below, I have included ACPO’s 2011 Statement of Mission and Values for illustration of this point:

The mission of the police is to make communities safer by upholding the law fairly and firmly; preventing crime and antisocial behaviour; keeping the peace; protecting and reassuring communities; investigating crime and bringing offenders to justice.

We will act with integrity, compassion, courtesy and patience, showing neither fear nor favour in what we do. We will be sensitive to the needs and dignity of victims and demonstrate respect for the human rights of all.

We will use discretion, professional judgement and common sense to guide us and will be accountable for our decisions and actions. We
will respond to well-founded criticism with a willingness to learn and change.

We will work with communities and partners, listening to their views, building their trust and confidence, making every effort to understand and meet their needs.

We will not be distracted from our mission through fear of being criticised. In identifying and managing risk, we will seek to achieve successful outcomes and to reduce the risk of harm to individuals and communities.

In the face of violence we will be professional, calm and restrained and will apply only that force which is necessary to accomplish our lawful duty.

Our commitment is to deliver a service that we and those we serve can be proud of and which keeps our communities safe.
The link of decision making to organisational values assumes that all staff are fully committed to the organisation’s proclaimed values. Cultural staff surveys undertaken by many police forces these days show that there are staff who hold negative views of the organisation and may dismiss organisational values for that reason; there is also evidence that a significant proportion of staff (e.g. 29% in North Wales Police) subscribe to a crime control model stipulating that ‘all laws should be enforced at all times – otherwise people lose respect for the law’. Not to mention the claims of the persistence of a homophobic, racist and sexist police culture which may influence some individual police staff’s behaviour and be in conflict with ACPO’s proclaimed values.\textsuperscript{39}

In addition to personal and cultural factors, there is a fundamental clash between the generally outcome-

\textsuperscript{39} For an overview of discussions of police culture, see L. Westmarland, ‘Police cultures’ in T Newburn (ed), \textit{Handbook of Policing} (2\textsuperscript{nd} ed, Willan 2008)
focused nature of policing – responding to an incident, noting whether a crime has been committed or reported, detecting a crime, etc., and the process focused nature of decision models. In the research mentioned, we found that police staff struggled with understanding the process-based model and simply changed the nature of the model into an outcome-focused one, i.e. it is justifiable not to take action if a crime is trivial, the offender is a first time offender, and the crime does not form part of a pattern, etc.\textsuperscript{40} So, whilst there have been attempts to operationalize procedural justice principles into frontline policing practice, it has proven difficult to convert a process-driven system into a meaningful tool for decision making in outcome obsessed practice.

In this context, it is worth returning to the question raised above, namely whether it is possible to look at process and outcome separately. On a pure procedural justice model, the outcome of the decision

\textsuperscript{40} Feilzer & Trew (n31) 26-28.
made following the correct procedures is irrelevant; ‘justice is manifested in the procedure itself’.41 However, in reality outcomes are extremely important. In 2010, the Equality and Human Rights Commission initiated legal compliance cases under the race equality duty established by the Equality Act 2010 against two police forces in England following their 2010 report ‘Stop and Think’, which assessed disproportionalities in police stop and search practices.42 The initial report looked at the evidence establishing persistent and long-standing disproportionalities in the use of stop and search powers against different ethnic groups, with black people being six times and Asians twice as likely to be stopped and searched by the police as white people.43 These figures

42 EHRC (2013). Stop and Think Again.
have not changed significantly over time,\textsuperscript{44} despite numerous attempts at addressing them. Police forces were asked to report on their stop and search practices, whether differences existed between different ethnic groups and how police forces justified such differences. As a result, the EHRC felt that in two forces stop and search practices were ‘unlawful and discriminatory,’\textsuperscript{45} and this assessment has since been embraced by a recent HMIC report on Stop and Search,\textsuperscript{46} who described the use of stop and search as a threat to the legitimacy of the police, and subsequently by the Home Secretary who announced a public consultation on police stop and search powers and called on the police ‘to get stop and search right’.\textsuperscript{47} So, regardless of how stop and search practices are perceived by the public, it seems very clear

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\textsuperscript{44} The EHRC (2010, 13) report states that the figures have remained fairly stable since 1995.
\textsuperscript{45} EHRC, 2013, 4.
\textsuperscript{46} HMIC, \textit{Stop and Search Powers: Are the police using them effectively and fairly?} (London: HMIC 2013) at p 3.
\textsuperscript{47} BBC (2013). 'Get stop and search right' says Home Secretary Theresa May'
\end{flushright}
that they do not conform to the legal requirements set out by Police and Criminal Evidence Act 1984 and the Equality Act 2010, and therefore constitute an example of police breach of rules and illegitimacy.\textsuperscript{48}

This issue is raised here as it points to the fundamental importance that policing processes \textit{and} outcomes follow the normative legal framework established by national legislation. It also highlights that, clearly, outcome matters: even if all stop and searches were carried out in a procedurally fair manner and thus, those involved perceived them as legitimate, assessing outcomes against objective measures such as discriminatory practice may lead to questions about illegitimate practice. It must be a basic premise of a democratic system founded on human rights principles to commit itself to treating its citizens fairly and equally, whether or not its citizens perceive this as a problem or not.

\textsuperscript{48} Beetham (n7) 20.
Public consent and co-operation

The reasons for police desire to engage with different communities in England and Wales are manifold. As mentioned above the police are dependent on cooperation and support from the public in terms of their day-to-day activities. This may be a particular problem for certain types of crimes and communities in England and Wales. For example, in Muslim communities, under-reporting of a variety of crimes, including racially or religiously motivated crime is a significant problem.49 Additionally, effective engagement with communities, in particular, young people is increasingly seen as a vital tool to prevent and detect crime. It is often argued that the police need the confidence of all community members to be able to offer effective police protection. Community policing in this sense aims to serve two purposes, the protection of the local community against

49 G Mythen, A Walklate and F Khan, ‘’I’m a Muslim but I am not a terrorist’: Victimisation, risky identities and the performance of safety’ (2009) 49(6) British Journal of Criminology 736-754.
crime, and intelligence gathering for the purposes of crime prevention and crime detection.

In the context of procedural justice, it should be noted that the effectiveness of any attempts to change the perceived legitimacy of the state police will depend on someone’s status in society; and again, this is related to Beetham’s argument that perceived legitimacy needs to be related to reasons for holding a belief in legitimacy.\textsuperscript{50} Marginalized communities such as the poor and the homeless are among those who come into frequent contact with the police, often involuntary or adversarial contact, and whose views of the state police may differ significantly from those of the majority.\textsuperscript{51} Additionally, police engagement with ethnic minorities and particularly, Muslim communities, may be affected by

\textsuperscript{50} Beetham (n7) 10.
\textsuperscript{51} For evidence of the impact of ethnicity on perception of ‘injustice’ in public-police interactions, see RS Engel, ‘Citizen’s perceptions of distributive and procedural injustice during traffic stops with police’ (2005) 42(4) Journal of Research in Crime and Delinquency 445-480, at p 470.
adversarial, order maintenance police practices, stop and search. It may also be affected due to other factors, for example, the counter-terrorism agenda and the rendering of a whole community as suspect. Mutual suspicion and fear affects relations between the police and some community members such as working class and minority ethnic young men, Muslim community members, the homeless, etc.\(^{52}\)

In order to protect a particular community from crime and gather intelligence, it is necessary to engage all members of that community. As a result of recognising the lack of engagement with some members of the community, community policing has been widely endorsed and implemented in police forces across

England and Wales.\textsuperscript{53} The policing strategy is proactive and based on policing by consent, which ‘implies community confidence that the police are acting with and for citizens’.\textsuperscript{54} The concept has been described ‘close to meaningless’, and was found to struggle with engaging the disaffected members of the community for whom it was designed. One of the conditions for effective community policing is two-way communication, in particular, communication with members of the community who may be politically disaffected and socially disadvantaged, and who may not have easy access to means of communicating with ‘authorities’ more generally.\textsuperscript{55}

\textsuperscript{54} ibid, 373.
Principles of community policing have found their way into unusual territory, which highlights the difference between perceived legitimacy, actual consent and cooperation on the ground. Counter-terrorism was traditionally led by ‘high policing’ agencies, Secret Service, central counter-terrorism units based in London, etc; whereas day-to-day policing and community protection was carried out by ‘low policing’ agencies; i.e. community beat teams.\(^5\) However, in recent years the boundaries between these policing strategies have become blurred. In 2008, the Metropolitan Police’s Special Branch set up the Muslim Contact Unit which imported some of the values of community policing into the counter-terrorism context,\(^6\) based on the shared commitment by Muslim groups and the police to prevent violence and terrorism through partnership, negotiation,


and communication.\textsuperscript{58} Subsequently, the Government’s counter-terrorism strategy, Prevent, has taken this counter-terrorism strategy, which hinges on effective community engagement, from London to all police forces in England and Wales.\textsuperscript{59}

The notion of working with the community to protect them rather than stigmatise them as a ‘suspect’ community would clearly be welcomed under a procedural justice framework. However, it ran into some problems. The close collaboration between Muslim groups and the police is regarded with suspicion, both by Muslim community members\textsuperscript{60} and mainstream politicians and the media.\textsuperscript{61} The Muslim community has been ‘othered’ in mainstream media, political and public

\textsuperscript{58} R. Lambert, ‘Empowering Salafis and Islamists Against Al-Qaeda: A London Counter-terrorism Case Study’ (2008) 41(1) Political Science (PS) Online 31-35.
\textsuperscript{60} See K. Khan, Preventing Violent Extremism (PVE) & Prevent: A response from the Muslim community (An-Nisa Society 2009).
\textsuperscript{61} Lambert (n58).
discourse since long before the terror attacks in New York and London. This ‘othering’, which is also evident in other European countries – notably in France with the ban on wearing the veil implemented in 2010 – has progressed to an extent that it makes the implementation of more progressive police tactics a very difficult undertaking.

This provides an indication of the context in which the legitimacy of the state police is constructed and how reasons for believing in the legitimacy of the state police may differ for different communities or community members. This discussion is important as it points to the limitations of attempting to change police practices in isolation from the ‘socially unjust contexts

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63 For a discussion of the difficulties of implemented counter-terrorism strategies in a climate of distrust in Sweden, see Peterson (n52).
within which the police work’. Assessments of fairness of police interactions are subjective and to a large extent dependent on individual’s expectations of police behaviour – Hough’s scenarios of the interaction of police officers and minority ethnic young people illustrate this perfectly. Interactions between police and public are also embedded in social and cultural contexts, which will mediate how police actions are interpreted.

**Measuring perceived legitimacy**

The preceding sections have set out that it is important to consider the reasons for the public’s belief in the legitimacy of the state police and how reasons for questioning legitimacy may be more apparent to some community members than others. In this section, I will

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65 Hough, 2013.
briefly discuss the problem of measuring perceived legitimacy or public confidence in the police as a shortcut for legitimacy.

Extensive research has been devoted to improving public opinion measures and academic discussions about the role of public opinion and the empirical nature of public opinion go back a long time. Public opinion as a concept is used in the political sphere – as communication to those in power – as well as in social psychology – as communication to others within a group. 66 In the main, public opinion is measured using survey research and in Britain this has been the case since the British Institute of Public Opinion (Gallup) was founded in 1937. The limitations of survey research are

well rehearsed, and while it is acknowledged that “sample surveys are indeed crude and reductionist”, they are still the preferred tool of politicians and policymakers to assess public views. One aspect of public opinion surveys, which is particularly relevant in the context of perceived legitimacy, is the danger of surveys and survey questions being used as a ‘means of manipulating public attitudes’. This relates to the criticism by Beetham, that focussing on perceived legitimacy alone leads to an inability to distinguish between effective legitimation practices by the powerful through propaganda and good marketing, and active consent by citizens.

Survey research in relation to public confidence in the police illustrates the problem set out above; measures of public confidence have been scrutinised and

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67 Hough (n16) 338.
68 Roberts et al (n66).
69 Beetham (n7).
found wanting in terms of their validity and reliability. Some argue that levels of diffuse or general confidence in the police express perceptions of the moral and social cohesion of society, rather than reflections on the operational efficiency and effectiveness of the police or satisfaction with the fairness of processes or outcomes. In other words, levels of confidence are expressive and ‘symbolic of day-to-day concerns about neighbourhood cohesion and collective efficacy’. In line with this, recent research exploring facets of public confidence confirmed a strong link with respondents’ basic beliefs about the nature and causes of criminality. The factors

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considered included objects of confidence (outcomes, actions and attributes of the criminal justice system), conditions of confidence (person characteristics, knowledge of the criminal justice system), and the impact of confidence on behaviour (willingness to engage).\textsuperscript{74} The research also questioned the assumed link between measures of public confidence and public willingness to engage with the police. Turner et al.\textsuperscript{75} suggest that people’s willingness to engage is based on habits, a feeling of moral duty and an assessment of costs and benefits of engaging. Thus a key question about the relationship between public-police interaction, in particular the effect of procedural justice on willingness to engage, remains.

A number of research studies have shown that survey responses are not provided in the abstract, but that they are always situated in time, place, and in

\textsuperscript{75} Ibid, 58-59.
relation to people. They are recounted as stories. Such findings not only point to a fundamental problem of survey research aiming to detach answers from the individual and concrete context in which they are given in order to categorise and generalize, but also pertinently to the measurements at the heart of the procedural justice model. Questions are asked in relation to whether respondents are more likely to respond positively if they are treated fairly, and of course, respondents will be strongly inclined to respond positively. There are clear dangers in asking people what they say they do, rather than observing what they do in practice. Few people would answer honestly and say that they would also comply if they were treated unfairly just in order to get

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77 Murphy, et al (n16).
out of an undesirable situation, choosing the path of least resistance.

Conclusions

The discussion of procedural justice in policing should be welcomed; it constitutes a vital contribution to the debate around public confidence in the police, but also revives the discussion about how the legitimacy of the state police is understood and constructed in contemporary society. Perceived legitimacy of the police is probably important; however, assessing perceived legitimacy on the basis of existing methodological tools is difficult. The extent to which policing outcomes are legally valid\(^{78}\) - in other words, the extent to which the police complies with the laws protecting citizens from police abuse, particularly those in marginalised positions – is possibly more important as an indication of

\(^{78}\) Beetham (n7) 20.
legitimacy and more easily measurable. Additionally, it seems rather artificial to distinguish in absolute terms between the impact of process and outcome on the reception of police-public interaction. Elevating one over the other may result in only partial explanatory models.

The amount of work on procedural justice and legitimacy of the state police makes an assessment of current levels of knowledge a difficult undertaking. However, it seems to me that many discussions about procedural justice are conceptually muddled in the sense that they are read to include other assumptions which are not necessary elements of procedural justice models. Current debates run a danger of conflating separate ideas under a procedural justice umbrella. There appears to be an assumption, for example, that order maintenance policing and crime control policing goes contrary to procedural justice principles.

It may be worth exploring research that links reasons for legitimacy with evidence of action signifying
consent and co-operation by the public; in other words, it may be worthwhile conducting research measuring what citizens do rather than what they say they do. There are a number of examples that may illustrate that changes in policing have affected legitimacy of the state police in certain aspects of their work. Greater reporting rates for rape incidents would be such an example. Have changes in policing practices in relation to rape victims resulted in a narrowing of the gap between rapes measured by the Crime Survey for England and Wales and those reported to the police? Similarly, but potentially more difficult to assess, do changes to police stop and search practice following a procedural justice model impact on rates of charges with assaults on police officers or charges of public order against those subjected to stop and search?

The fairness and quality of police public interactions should not be tied to instrumental concerns of increasing perceived legitimacy or increasing compliance. The state police must be principled, fair,
and proportionate in policing practices. This is a fundamental principle of a democratic state based on human rights principles, and thus of a legitimate state police force. In the context of policing, it is important to do the right thing for the right reason.
Where Principle and Pragmatic Meet: The World of UNHCR’s Protection Work

Erika Feller

There is a natural complementarity between the protection and solutions mandate of the United Nations High Commissioner for Refugees (UNHCR) and the international system for the protection of human rights. Protection operates within a structure of individual rights and duties and state responsibilities. Human rights law is a prime source of existing refugee law protection principles. At the same time, it increasingly serves to complement them. The entire

1 This paper was originally prepared for and delivered as a lecture at the Venice Academy of Human Rights on 17 July 2012, as part of the summer program of lectures on “The Limits of Human Rights”, organized together with the European Inter-University Centre for Human Rights and Democratisation.

2 The author is the Assistant High Commissioner-Protection of the United Nations High Commissioner for Refugees. The views expressed in this paper are her own and do not necessarily represent the views or positions of the UNHCR.
refugee experience, from forcible displacement, through the search for asylum, to securing a durable solution, is in fact one barometer of the respect accorded to basic human rights principles worldwide. The evolution has been quite negative over recent times, with many States decreasingly prepared to make their asylum systems, where such exist, as accessible and as adequate as hitherto. This can be attributed to several causes, including the magnitude of displacements, their often protracted nature, the levels of national and regional insecurity they can generate; as well as what are perceived to be seriously onerous financial, political, environmental and social costs of maintaining large refugee populations, or receiving continuous arrivals.

Maintenance of asylum space is increasingly dependent on refugee protection activities, which do not compromise a State’s concerns about national security in the present international context of proliferating transnational crime and terrorism. The blurred distinctions
made in countries, not only in the north, but also in the south, between refugees and other irregular migrants has further eroded the consensus on the need to maintain generous asylum regimes. These problems as states assess them have to be accommodated in the protection and solutions strategies of UNHCR. They are as much a part of the framework in which the agency must deliver on its mandate as are the human rights of its beneficiaries. There are both clear complementarities, but also differences between the refugee-specific mandate of UNHCR and the mandates of other human rights organs and mechanisms. There is a need to maintain the mutually supportive, but separate, character of respective mandates. This is particularly in light of the narrowing of asylum space and the fact that the margins are wide for an aggressive sovereignty to reassert itself in the policies and practices of states. The health of the institution of asylum is dependent on the proper balance of principles and pragmatism.
Forced displacement remains one of the most visible and profound consequences of persecution, other human rights abuses and armed conflict. Millions are trapped in spiraling cycles of violence, deprivation and displacement inside their countries, while many of those able to flee and seek asylum find themselves in long-term camp exile. There are also an increasing number of refugees and IDPs seeking support and assistance in urban areas, not camps.

The scope of such displacement is enormous, which is proving a huge challenge for the limited resources, outreach assistance and protection capacities of the aid organisations and shows no signs of abating. Of the world’s 42.5 million displaced, 25.9 million people - 10.4 million refugees and 15.5 million IDPs -

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3 The statistics provided date from 2011, the last year comprehensively available at the time of publication. Statistics with respect to Syrian refugees date from early March, 2013.
were receiving protection or assistance from UNHCR at the beginning of 2012.\textsuperscript{4} It does not include the almost 5 million Palestinian refugees assisted by the United Nations Relief and Works Agency [UNRWA]. The early months of 2013 saw, on average, some 2500 refugees a day crossing out of Syria into Jordan. The Syrian crisis had by March displaced over one million people externally in the region,\textsuperscript{5} and an estimated number of more than two million internally displaced persons. Fighting in 2012 in Northern Mali at its height caused almost 319,000 to cross borders. In the first months of 2013, 25,000 persons swelled the numbers of refugees from the Central African Republic fleeing the rebel advance and coup d’etat of March. Inter-ethnic violence in the Rakhine State in Myanmar provoked a high level of internal displacement throughout 2012 and renewed


\textsuperscript{5} The one million mark was reached 5 March, 2013. Over 400,000 Syrians became refugees in January and February 2013 alone.
departures in significant numbers. The UN has estimated that by January 2013 there were some 115,000 IDPs and over 275,000 Rohingya asylum seekers and refugees hosted in countries in S.E. Asia and Bangladesh.

As a general rule, more than 80% of refugees are hosted within their own region, often in countries struggling to meet the needs of their own citizens. The asylum countries among the top 10 might at first glance appear to be the more unlikely. Pakistan was host to the largest number of refugees worldwide (1.7 million), followed by the Islamic Republic of Iran (887,000) and the Syrian Arab Republic (755,400; government estimate).6 On average, one out of four refugees in the world originated from Afghanistan.7

If most refugees remain in their regions, the numbers who do not are nevertheless on the rise. In

7 ibid at 15.
2012, an estimated 479,300 asylum applications were registered in the 44 industrialized countries. This represents an increase of 8% over 2011 and is the second highest level [with 2003 witnessing the highest] in the past decade.\(^8\) Some 7.1 million people are living in ‘protracted’ exile.\(^9\) In Pakistan, Kenya and Eastern Sudan, for example, there are tens of thousands of Afghan, Somali and Eritrean refugee children, respectively, whose grandparents were the last family members to see their home country. Over 10,000 children have been born to Somali refugees in Dadaab Camp, Kenya, who themselves were born in the camp.

Just a decade ago, an average of 1,000,000 refugees returned home each year with the help of UNHCR. This number has dropped by 80% as continued

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\(^8\) UNHCR Asylum Trends 2012 – Levels and Trends in Industrialized Countries.
insecurity or lack of livelihoods discourages return.\textsuperscript{10} 2011 saw the third lowest number of voluntarily repatriated refugees in a decade. Numbers continued to decline in 2012. At the same time, solutions other than returning home remain equally elusive. Developing countries, facing their own economic and social challenges, are reluctant to offer refugees local integration. Despite a growing number of industrialized countries that admit refugees through organized resettlement programs, the number of places available each year accommodates less than 1\% of the global refugee population.

Despite the continued massive number of refugees, in recent years IDPs have emerged as the largest group of people receiving UNHCR’s protection and assistance - as many as 15.5 million in 26 countries at the end of 2011, though the total number of IDPs from

\textsuperscript{10} ibid at 18.
conflict could be as high as 26.4 million.\textsuperscript{11} Then there are the additional populations of concern. They include a conservatively estimated 12 million stateless people, and people displaced by natural disasters and environmental factors.\textsuperscript{12}

Displacement triggered or reinforced by factors such as natural disasters, desertification, population growth, rapid urbanization, food insecurity, water scarcity, and violence related to organized crime has become a phenomenon of growing concern. The number of people displaced by natural disasters has multiplied in recent years, exceeding the number displaced by conflict. Climate change often exacerbates these other drivers of displacement and could increase this number by many.

millions in decades ahead. Moreover, it recognizes no borders.\textsuperscript{13}

**The factual context**

These realities have led to an international refugee protection system under considerable pressure. True, many states, especially in the developing world, continue to keep their borders open to refugees, accompanied by acts of extraordinary generosity from host populations directly affected by the arrival of refugees. However, it is also a fact that a disturbing number of people do not enjoy the rights which international refugee and human rights law formally guarantees them.

There are contextual reasons which explain, if not justify this. Affected host states are mostly countries struggling to meet the needs of their own citizens. They do have genuine concerns about protracted stay which

\textsuperscript{13} Global Trends 2011 (n 4) at 5.
can provoke community unrest, lead to environmental damage and exacerbate local and regional insecurities. This is very much the case when camps lose their civilian character and play host to militants and their families.\textsuperscript{14} Protracted refugee situations are not the high-profile and strategically important operations preferred by donors, and hence are almost invariably neglected and underfunded.\textsuperscript{15} More often than not, refugees find themselves in remote, isolated and seriously underdeveloped areas, with limits placed on their freedom of movement and other rights, including access to work, and where livelihood opportunities [for both exiled populations and citizens alike] are scant.\textsuperscript{16} In many cases, security is precarious, education for children is rudimentary and support structures for the traumatised

\textsuperscript{16} ibid 115.
are absent. Such circumstances breed their own protection problems, including anti-social youth behaviour, exploitative employment, illicit livelihoods activities, prostitution, militia recruitment and irregular onward migration. Gender-based violence has become an endemic feature not only of the conflict itself, but also of its aftermath in refugee camps and settlements.\(^{17}\) If the international community has been aware of this for quite some years, programs to prevent and address it are still very uneven. Support to victims is inadequate and their access to justice is limited, in tandem with a high level of impunity for the perpetrators.

In the developed world, access to basic rights can also be rather relative. It is characterized by countries with divergent approaches, inconsistent practices, and barriers to accessing safety. There are several factors which lead to these restrictions on rights. Developments over recent years have placed a strain on the

\(^{17}\) ibid.

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sophisticated protection systems put in place in Europe, North America and Australasia. Providing asylum has proved sometimes very costly, in monetary and other terms. Population displacement is a humanitarian, but also, with terrorism and transnational crime on the rise, a serious political and security concern for these states. With irregular arrivals increasingly viewed through a security prism in many parts of the world, borders have become a particularly shadowy place, with interception, turn-arounds and refoulement taking place often outside the frame of proper scrutiny.\textsuperscript{18} Detention, periodically arbitrary and often of children, is prevalent, with possibilities to challenge this through, for example, habeas corpus or judicial review not always provided.\textsuperscript{19} The result is that asylum seekers, many of whom are or may be refugees, can find themselves in a sort of legal

\begin{footnotesize}
\textsuperscript{18} Address by Ms. Erika Feller: Counter-Terrorism Committee.
\end{footnotesize}
limbo where protection of their legal rights take second place to harsh migration controls. In some countries there are fewer safeguards regulating resort to, or the conditions of, detention of migrants and asylum-seekers than that of criminals.

Stateless people fall into a particular human rights void. The International Covenant on Civil and Political Rights (ICCPR), as the Human Rights Committee has recognized, stipulates that with few exceptions human rights are ‘not limited to citizens of States parties but must be available to all individuals, regardless of nationality or whether stateless… who find themselves in the territory or subject to the jurisdiction of the State party’.20 The reality is, though, very different from the theory. Stateless people have been termed ‘the ultimate forgotten people’. A stateless person is someone who has no national identity or legal personality in his or

her country of residence. For the millions of stateless people around the world, no nationality means identity documents conferring legal personality and the rights that go with this – access to health care, education, property rights, freedom to leave and return to your country – are simply not available. Births may not be registered. There may even be anonymity in death, with a recognised civic funeral not possible. In many ways these people simply do not exist.21

UNHCR and human rights

(a) Refugee problems are human rights problems

In the words of Mary Robinson, the former High Commissioner for Human Rights, ‘the admission of asylum seekers, their treatment and the granting of a

refugee status are, themselves, crucial elements of the international system of protection of human rights’. UNHCR’s Executive Committee of the High Commissioner’s Programme (ExCom) has noted, in fact on a number of occasions, the ‘multifaceted linkages between refugee issues and human rights’ as well as ‘the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards, as set out in relevant international instruments’.

The refugee problem is quintessentially an issue of rights – of rights which have been violated and of resulting rights, set out in international law, which have to be respected. A refugee, classically defined, is a

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persecuted person, denied her security of person, unable to exercise in safety her right to freedom of expression, to freedom of association, to freedom of belief, to pursue her political convictions, or just even to be who she is born to be. More broadly defined, a refugee is also someone unable to continue to live in safety where he is, due to the discriminate or even indiscriminate dangers of war or serious civil disturbance.\textsuperscript{25}

The rights at issue here are human rights of the fully classical sort. Refugees are, though, also entitled to benefit from a regime of rights and responsibilities specific to their predicament. The conventions making up the Bill of Rights were drafted for the norm – a world of nation states and their citizens. In the case of a refugee, the link between the individual and the formally

responsible nation state has, at least temporarily, been severed. In practical terms this means no Embassy to rely upon, no identity documents available, and no guaranteed access to judicial and social protection mechanisms citizens will take for granted. Flight and external displacement effectively ‘de-citizenise’ people. They need a rights-based surrogate protection which international law, international institutions and third countries have been making available for over 60 years now.26

(b) The 1951 Refugee Convention: a human rights text

The Universal Declaration of Human Rights, Article 14 (1) calls for respect for the right of an individual to seek and enjoy asylum from persecution. Yet, no clear content had been given internationally to the notion of asylum

26 ibid.
until, in the wake of two world wars and resulting mass
displacements, the 1951 Convention relating to the
Status of Refugees was adopted. With Nauru in 2011,
147 States are currently parties to the Convention and/or
its 1967 Protocol. Together these instruments
incorporate, either directly or by way of interpretation,
the special rights attaching to refugees, which include:

- The right not to be returned to persecution or the
  threat of persecution (the principle of non-
  refoulement).

- The right not to be discriminated against in the
  grant of refugee protection.

- The right not to be penalised solely for having
  entered into or being illegally in the country
  where asylum is sought, given that persons
  escaping persecution cannot be expected to
  always leave their country and enter another
  in a regular manner.
• The right not to be expelled, except in specified, exceptional circumstances to protect national security or public order.

• The right to minimum and articulated conditions of stay.

The Convention regime also incorporates in its Preamble some foundation concepts that must frame the grant of protection. The Preamble takes particular cognisance of the fact that ‘the United Nations has manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms’. The Preamble also recognises that refugee protection is to be considered social and humanitarian in nature, so that its conferral should not become a cause of tension between states. Moreover, it accepts that the grant of asylum may place unduly heavy burdens on certain countries, with a satisfactory solution to the problem of refugees only
achievable through international co-operation. By virtue of the Final Act of the Conference of Plenipotentiaries, the Convention’s framework is also predicated on acceptance of the principle of family unity and the need to facilitate refugee travel, among other issues.

(c) UNHCR is a human rights agency

A system of rights has scant chance, in today’s world, of reaching its full effectiveness unless it is backed, in one form or another, by an oversight or implementation body. The 1951 Convention was one of the first of the human rights instruments, post-war, negotiated in an era when oversight of a state’s action for and on behalf of its

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own, or others’, citizens was still in its early stages. UNHCR was an early if partial attempt to put in place a treaty supervision arrangement outside the framework of oversight between and among the States parties themselves.

UNHCR was established on December 14th, 1950, just a few weeks after signature of the European Convention on Human Rights, and two years after the proclamation of the Universal Declaration of Human Rights.29 Being an integral member of the family of the United Nations - an institution whose charter and leadership commits all member states and organizations to foster and work to realize human rights globally, UNHCR is a human rights agency. It is, however, one with a particular mandate.

UNHCR has a specific mandate from the General Assembly to extend international protection to refugees and to work with States to find lasting solutions. The mandate is set out in its Statute which, among other provisions, has general directives as to how UNHCR might deliver upon both responsibilities. These are directed at formal restoration of basic rights, as well as the creation of an enabling environment so that these rights have a reasonable chance of being enjoyed.

Operationalising human rights: challenges of adequacy, appropriateness, efficacy and protection outcomes

(a) Adequacy of the legal tools

The rights at the base of refugee protection cannot be viewed in isolation of the broader framework in which

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they must be actualised. This is a context of nation states, their sovereign prerogatives, and their national interests and responsibilities which are not always coherent and compatible. UNHCR has long understood the importance of promoting convergence and accommodation between the legitimate interests of states and their international responsibilities to protect refugees. Here, the 1951 Refugee Convention is still a highly valuable, but imperfect tool.

If the Convention is clear in terms of the rights, it is close to silent about which States’ responsibility it actually is to protect these rights in any given case. It rests on concepts of burden and responsibility-sharing, but without sufficient guidance, definitions or indicators to help make this real. It takes an approach to protection which has individuals at its centre, when many situations now involve mass arrivals. It was drafted in an era before many of the forms of persecution witnessed today had even a name, much less attracted global recognition,
such as ethnic cleansing or gender crimes, and certainly before there was the plethora we see today of non-state actors, like paramilitaries or gangs, also creating significant forced displacement.

When should a state party to the Convention be required to provide for the rights to which an asylum seeker or refugee is entitled; when is another state the more appropriate provider; what are the criteria for determining when responsibilities are engaged and when they can be refused; what forms of human rights violations engage the refugee protection responsibilities of states? The answers to these and other related questions are only partially to be found in the legal instruments.

It is perhaps interesting to illustrate some of the dilemmas confronting application of the Convention through a case study constructed on the basis of real situations. Let us take the typical case of a woman who is outside her home country, fears serious consequences
for her physical security should she return and who arrives in a foreign country in an ‘irregular’ manner. She seeks to be allowed to present her claim for protection and have it processed. From an international refugee law and human rights perspective, her mode of travel, the legality of her entry, or even the differing situations of other groups of migrants that may have arrived alongside with her, should not limit her right in this regard. It is her right to have access to and present her claim before effective protection mechanisms.

Yet does the state to which she presents her claim for protection have itself to accept it? What if she is a victim of trafficking and her fear is of social ostracism and local revenge as much as of State persecution? What if she has fled not individualised persecution, but generalised violence? What if she passed through other countries on the way? What if she has come directly, but there is another country to which, while she personally has no links, persons of her nationality are regularly
admitted, for example on the basis of a Treaty of Peace and Friendship? What if a part of her own country seems to be at peace?

The fact is that each or all of these considerations may well have legal consequences that create insurmountable obstacles to accessing the protection she may well need - that is, assuming she is able to navigate all the entry hurdles in the first place. She may have to confront an asylum reception system dominated by political and public distrust. Particularly if she arrives outside of a regular visa-entry regime, she may be labeled as a ‘queue-jumper’, ‘bogus asylum seeker‘, a woman with links to illegal human trafficking, classified as a prostitute, an economic migrant or at best a victim of a criminal migration racket, and therefore, by definition, not by decision, someone outside the frame of any asylum procedures.

So in our example, we have a woman who may well be a refugee, and who at a minimum is someone
with the right to have her situation properly adjudicated. But we have, too, a number of complicating factors, revolving around notions of agents of persecution, secondary movement, safe country, internal flight alternative, ‘external flight alternative’, as well as the imperative of combatting smuggling and trafficking, which could quite likely lead to the woman not being able to access any protection mechanisms.

Of course a proper interpretation of the Convention, consistent with its objects and purposes, means that there has to be a provider of protection. A state is clearly in violation of its Convention obligations if, by its own actions, a situation is created whereby protection is not available. But gaps and ambiguities in the Convention framework and its concepts unfortunately help those so inclined to interpret away their responsibilities in specific situations.

When is a gap a gap? If the international protection regime rests on the 1951 Convention, at the
regional level other instruments come into play which extend the scope of its application, including importantly the 1969 Organization of African Unity Convention for Africa, the 1984 Cartagena Declaration for Latin America, and the web of Directives being developed as part of the envisaged Common European Asylum System. There are also the complementary bodies of law, and in particular international human rights law and related texts. Refugee law academic Guy Goodwin Gill makes the point: ‘If the concept of international protection might once have been perceived as merely another form of consular or diplomatic protection, limited to one closely confined category of border crossers, today its roots are securely locked into an international law framework which is still evolving… This encompasses refugee law, human rights law, aspects of international humanitarian law, and elementary considerations of humanity’.\textsuperscript{31} For states that

are not party to the 1951 Convention and/or 1967 Protocol or relevant regional refugee instruments, human rights treaties may provide one of the few sources of state obligations in relation to asylum-seekers and refugees.

The human rights instruments would certainly have an application in the example just given. Detention is one area where they have a growing relevance. It is a spreading practice, even in States counted among the earliest and most loyal supporters of UNHCR’s clients. On 24 April 2012, UNHCR released a position paper on protection for refugees and asylum-seekers in one such state, Hungary, in response to requests from governments in other European Union States who have been facing domestic legal challenges to returning asylum seekers to Hungary under Dublin II arrangements.32 Hungary was the first country in Europe

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32 UN High Commissioner for Refugees, ‘Hungary as a country of asylum: Observations on the situation of asylum-seekers and
to ratify the Refugee Convention after the downfall of communism and hosted tens of thousands of refugees amid the breakup of Yugoslavia in and after the 1990s.\textsuperscript{33} Since 2010, new laws and policies have come into effect whereby the human rights and protection needs of asylum-seekers have been overshadowed by law enforcement objectives in the fight against illegal migration.\textsuperscript{34} Key concerns for UNHCR include the increasingly systematic detention of visa-less asylum-seekers in harsh prison-like conditions, without any differentiation.\textsuperscript{35} Typically, an asylum-seeker may be detained for the full 4-5 months of their in-merits procedure and spend much of the day locked in their rooms. The new laws also provide for the detention of families with children for up to 30 days and for

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\begin{footnotesize}
\textsuperscript{33} ibid at para 2.
\textsuperscript{34} ibid at para 9.
\textsuperscript{35} ibid at para 43.
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administrative detention up to one year. This is where other binding statements of rights, like minimum detention standards and the Convention on the Rights of the Child, can be of great assistance to clarify and expand the scope of protection responsibilities.

This said, this increasingly interconnected and mutually reinforcing web of international human rights and refugee law is also a more and more complicated, and sometimes contradictory, legal terrain and policy puzzle. There are, for example, complementary non-refoulement provisions in international and regional human rights law available – under Article 3 of the 1984 UN Torture Convention, Article 6 and 7 ICCPR, mirrored in the ECHR - which serve to protect those who may have been wrongly left out of the refugee protection regime. At the same time, though, the same provisions can and sometimes do serve as a haven for persons who under the exclusion clauses of the 1951 Convention do

\[\text{\textsuperscript{36} ibid at para 45.}\]
not merit refugee protection. Where persons who are clearly not entitled to refugee protection are nevertheless allowed to stay in countries because of the operation of human rights provisions, correct as this is according to the human rights instruments, it can erode public confidence in the institution of asylum unless clear distinctions are made.

The puzzle is further complicated by lack of clarity as to the legal reach of many rules. Some are purely optional and bind only those States which have accepted them by ratifying the relevant treaties. Some are binding in a region or some regions, but clearly not at the universal level. Some are accepted by organisations like UNHCR as mandatory, but only applied in their discretion by States. It does not help, either, that the lodging of reservations to international instruments is a widespread practice, circumscribing the level of protection able to be relied upon under a specific instrument in a specific country. Increasingly UNHCR is
trying to bring more clarity through strengthening its relationship with the judiciary, including through direct involvement by invitation or at the initiative of the agency in precedent-setting cases.

Where ‘hard law’ does not provide all the answers, UNHCR also endeavors to push the boundaries through its own standard-setting activities in the realm of ‘soft law’. The Executive Committee of UNHCR, whose membership is upwards of 80 States, is charged to advise the High Commissioner on protection matters. This advice is normally offered in the form of Conclusions on issues of doctrine and practice. Conclusions have traditionally been adopted by the Committee, by consensus, on the basis of UNHCR originated texts. If the process is somewhat grudging at the moment, it has nevertheless generated significant statements, on issues ranging from the handling of gender-related claims to proper processes for adjudicating refugee status.
(b) Appropriateness: protection through the human rights bodies

The 1951 Convention has long been recognized as a human rights instrument and international human rights norms increasingly inform the interpretation of Convention provisions, provide complementary protection to persons who may fall outside the Convention, but still need international protection or complement the standards and rights granted by the 1951 Convention. What is not so clear is how far the human rights bodies themselves can complement UNHCR’s supervisory role.37 UNHCR has long been reticent about too close a relationship with these bodies. While accepting that it holds much information that is pertinent to the deliberations of the human rights treaty bodies and entities like the Human Rights Council, not to mention the International Criminal Court, UNHCR is concerned about the dangers of too close links politicizing its work.

and compromising thereby its access to beneficiaries, their security, the confidentiality of their stories, and the safety of UNHCR staff on the ground. Without access and security, programs cannot be delivered in the field.

These concerns have lessened somewhat through the consolidation of the treaty monitoring system and the garnering of greater experience with cooperating together to enlarge asylum space and advocate on behalf of persons of concern. UNHCR is now making concerted efforts to strengthen its relationship with the treaty bodies, other UN human rights institutions and their special procedures, and regional bodies and courts. From information-sharing to contributions to the preparation of the General Comments on Convention articles by the treaty-based committees, the Office tries constructively to feed into their knowledge and understanding about the links between particular rights and refugee protection and to become a more predictable resource generally on refugee issues. The Universal Periodic Review (UPR)
reporting process has opened up a useful new way to talk with states on asylum and refugee issues in their countries and to reinforce protection advocacy around them. The public nature of the reports is an important part of the process of promoting accountability. It is distinct from UNHCR’s more specific engagement on the ground with governments, which is often quite confidential in nature.

Given the relatively limited expertise of Committee members on refugee law, they have responded positively to this evolving relationship, even if the extent to which states report on asylum and refugee issues varies widely.\textsuperscript{38} The treaty bodies are increasingly, as a result, taking on board a spectrum of displacement issues – from refoulement or detention, through registration and documentation difficulties, reception problems, denial of access to education,

\begin{flushleft}
\textsuperscript{38} ibid.
\end{flushleft}
healthcare, or social security, to concerns linked to refugee status determination.

The majority of the treaty bodies permit complaints or petitions to be made alleging violation of their rights by a state party. No similar mechanism exists in respect to refugee rights. This gap has led to a growth in asylum-seekers and refugees bringing claims before the human rights mechanisms, utilizing human rights non-refoulement provision comparable to Article 33 of the Refugee Convention, even if as a matter law, none of the treaty bodies have specific jurisdiction over the rights contained in the 1951 Convention. The two main types of cases regularly submitted to the treaty bodies concern the threat of return to serious risk of harm or violations of fundamental rights, as well as the prohibitions on arbitrary detention of asylum-seekers and refugees. It is also worth noting that, although the complaints procedure is remedial not preventive, early warning is a feature of the activities of some of the bodies. The
Committee on the Elimination of Racial Discrimination (CERD) for example operates an early-warning facility, with the intended purpose of helping to prevent situations escalating into conflict; it is supposed also to assist with ‘confidence-building measures to identify and support’ racial tolerance in order to prevent the resumption of conflict.\footnote{Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, Including early Warning and Urgent Procedures: Working Paper, 1993, A/48/18.} The CERD has written letters in relation to refugee and displacement situations.

Despite the political nature of the Human Rights Council, there are advantages in closer cooperation. The complementarities of advocacy and capacity building through the Council and efforts to protect rights on the ground are increasingly interesting for agencies like UNHCR.\footnote{UNHCR and Human Rights (n 1).} The Special Procedures take their strengths from this perspective. Some of the forty odd processes specifically address displacement issues, such as the
rights of IDPs or the crime of human trafficking, while the country mandate holders review country situations where UNHCR has large programs. The country-specific special sessions of the Council on Sri Lanka, Myanmar, Congo, Syria, OPT, Lebanon, Libya, Cote d’Ívoire and Haiti has been followed attentively by the agency and has served as a platform for further advocacy.  

In particular, the UPR process is shaping up as a valuable new avenue through which to promote respect for refugee law principles. UNHCR’s experience with the UPR has been very positive. First, the process is a universal undertaking, allowing UNHCR to provide submissions concerning the treatment of refugees and asylum seekers in very many countries, not only those at the center of attention because of mass refugee flows. Second, as governments freely and voluntarily accept recommendations, these can be a basis for non-contentious engagement with the state in question. The

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41 ibid.
‘shadow reports’ of the NGOs in the UPR process strengthen its content and directions. The review of all 193 UN member states during the first UPR cycle generated a total of 1,203 UPR recommendations, covering 153 countries, which referred explicitly to issues related to forced displacement, asylum or statelessness.\textsuperscript{42} UPR is now web cast, meaning it can reach a huge audience simultaneously. The Council’s supporters hail this as a real breakthrough when it comes to holding governments accountable for what they say and do.

Having watched with marked interest the UPR process, UNHCR has sought to have the Council take up some specific rights issues affecting displaced persons, for example, difficulties for refugees to re-acquire

confiscated land, houses and property, or their problems in obtaining identity documents. The Council’s debates and advocacy around the right to a nationality, based not least on reports submitted to it on minority issues and contemporary forms of racism, have been valuable for UNHCR’s efforts to assist and protect stateless people and to campaign against xenophobia.43

All this said, clearly the Council has a way to go before it could be considered a major player in refugee protection. As a periodic process, reviewing each State once every four years, the UPR process does not have the flexibility to address issues on an urgent basis. It is also not meant for extreme situations as it does not in itself have teeth. In practice, it is less a ‘peer review’ than a ‘self-review’, and how far it will go is primarily determined by how far a country concerned allows it to go. The process is too often defeated by the ‘collusion of camaraderie’. When the Council goes beyond peer

43 ibid.
review to take up actual situations, questions still abound about the actual result on the ground. The Council works essentially through promotion and awareness-raising. When it comes to protection, it uses ‘name and shame’ devices, but it lacks implementation mechanisms and sanction possibilities. Its direct link to victims is at best tenuous, even given that for the more complex issues, there are the Special Procedures. This is an important limiting factor of such Council mechanisms for challenging operational environments.

(c) efficacy - the European Court of Human Rights as a protection tool

It is an unsettling fact that a large proportion of the caseload of the European Human Rights Court concerns asylum issues (the ‘ECtHR’). The growing volume of

44 António Guterres (UNHCR), ‘Remarks at the opening of the judicial year of the European Court of Human Rights’, 28 January 2011, available at:
requests for interim measures is a reflection of the fact that many asylum-seekers, refugees and other forcibly displaced people consider that their rights are not respected, even in States with a very long protection tradition and party to all the relevant instruments. These States struggle in particular with the claims to protection from persons who have fled their homelands because of conflict or indiscriminate violence. A narrow interpretation of the refugee definition and of Article 15(c) of the EU Qualification Directive, the instrument which defines who qualifies for refugee status or subsidiary protection in EU law, often leaves them without protection. With UNHCR’s approach to the link between refugee status and conflict-driven flight not always being respected, the ECtHR has become an effective protection ‘partner’ for the organization. Some examples will illustrate this.

<http://www.unhcr.org/refworld/category,COI,UNHCR,SPEECH,,4d6377fe2,0.html>.
On February 23, 2012, the ECtHR, based on its earlier case law on the extraterritorial application of human rights law, issued a landmark judgment in the case of *Hirsi Jamaa et al. v. Italy.* The case concerned a group of Somalis and Eritreans who in May 2009 had tried to reach Europe by boat, but had been intercepted beforehand on the High Seas by Italian coast guard and customs vessels, some thirty-five nautical miles south of the island of Lampedusa. The group was returned to their place of embarkation, Libya. The Grand Chamber of the European Court unanimously ruled that even though the applicants never reached Italian territorial waters, Italy had breached several obligations under the European Convention on Human Rights, including to protect the applicants from torture and inhuman or degrading treatment (Article 3 of the European Convention) as well as the prohibition of collective expulsion of non-

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45 *Hirsi and Others v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012 (Grand Chamber).
nationals (Article 4 of Protocol No. 4 to the European Convention).

The case had particular significance for UNHCR in that it endorsed the interpretation that the principle of non-refoulement applies extraterritorially. UNHCR has long taken this position, but has not always been supported in so doing: for example, the UNHCR position contrasts with that of the U.S. Supreme Court, which held in the 1993 judgment of Sale vs. Haitian Centers Council that the prohibition of non-refoulement did not apply extraterritorially,\textsuperscript{46} hence legitimating the practice of the U.S. Coast Guard in intercepting Haitians outside U.S. territorial waters and repatriating them directly to Haiti.

In a climate of increasingly stringent migration control measures, the Hirsi judgment sends an important signal for the protection of the rights of so-called “boat people”. The precedent-value of the decision will likely

\textsuperscript{46} Sale v Haitian Centers Council 509 U.S. 155 (1993).
extend beyond the reach of the European Convention, to countries where push-back policies have become one coping mechanism for dealing with the controversies attached to boat arrivals.

As this case illustrates, the ECtHR can be, jurisprudentially and actually, an important protection partner. UNHCR has integrated this understanding into its protection strategies in Europe. For example, it supports implementing partners, local lawyers or even applicants themselves in submitting requests for interim measures under Rule 39 of the Rules of Court, which empowers the Court to put in place binding interim measures, including suspension of deportation orders.47 This provides a unique opportunity to halt the imminent expulsion of an applicant to situations amounting to *refoulement* to irreparable harm contrary to the European

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Convention on Human Rights. Application of Rule 39 usually concerns the right to life (Article 2) and the right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3). Exceptionally, the prohibition of slavery and forced labour (Article 4) and the prohibition on the imposition of the death penalty (Article 1 of Protocol 6 and Protocol 13) are also the subject of Rule 39 measures. The Court has even, if rarely, granted interim measures in cases where the applicants complained of unjustified interference with their family/private lives under Article 8 ECHR. Recently, the Court used Rule 39 interim measures to allow two Eritreans and one Ethiopian, stowed away on a Maltese flagged ship in Ukrainian territorial waters, to disembark and to be granted access to a lawyer and to the asylum procedure.\textsuperscript{48} In another case, the Eritrean journalist Mr. Gebremedhin turned to the Court to avoid being returned to a risk of persecution, after his asylum

\textsuperscript{48} Kebe and Others v Ukraine Application No 12552/12, Merits, 2012.
application was rejected at the French border. By virtue of the interim measures of the Court, he was admitted onto the territory and, a few months later, the authorities recognized him as a refugee in the sense of the 1951 Convention. In that case, the Rule 39 mechanism compensated for the absence of automatic suspensive effect of an appeal made in the accelerated asylum procedure at the border.

UNHCR does not itself submit Rule 39 requests so as to preserve the neutrality of the office should it appear as third party intervener before the ECtHR. The total number of Rule 39 decisions taken by the European Court of Human Rights in 2011 was 2,778, which is significant even if it constitutes a decrease in comparison with the figures from 2010 (3,680 decisions).

49 Gebremedhin v France Application No 25389/05, Merits, 26 April 2007.
50 Jean Paul Costa (President of the European Courts of Human Rights), ‘Requests for Interim Measures’ (Statement issued by the President of the European Court of Human Rights), 28 January
The value of the Court goes beyond the prevention of *refoulement*. It has materially contributed to defining the scope of the *non-refoulement* principle, the development of procedural guarantees and basic standards of treatment.\(^{51}\) Again by way of example, in *Salah Sheekh v the Netherlands*,\(^{52}\) the Court set out important safeguards for the application of the so-called internal flight or relocation alternative. This concept refers to a specific area of an asylum-seeker’s country of origin where he or she is assessed to have no well-founded fear of persecution and could reasonably be expected to establish him- or herself. The safeguards developed by the Court were incorporated by the European


\(^{52}\) *Salah Sheekh v the Netherlands Application No 1948/04, Merits, 11 January 2007*. 

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Commission into its proposed recast of the EU Qualification Directive.53

Another recent case dealt with important questions surrounding statelessness, flowing from the dissolution of the former-Yugoslavia and the erasure of the names of former citizens of Yugoslavia from the register of citizens of the then new state of Slovenia.54 According to the Court’s ruling, the Slovenian authorities had failed to remedy comprehensively and with promptness the grave consequences for the applicants of the erasure of their names. It noted that the applicants [the ‘erased’] had been deprived of a legal status that had previously given them access to a wide range of rights – including entitlement to health insurance and pension rights - and opportunities, for instance in the sphere of employment. It held in particular that there had been a violation of Article 8

54 Kurić and Others v. Slovenia Application No 26828/06, Merits and Just Satisfaction, 26 June 2012.
(right to respect for private and/or family life) of the European Convention on Human Rights (ECHR); a violation of Article 13 (right to an effective remedy) in combination with Article 8 ECHR; and a violation of Article 14 (prohibition of discrimination) in combination with Article 8 ECHR. Furthermore, the Court indicated to Slovenia that it should set up within one year a compensation scheme for the ‘erased’ people in Slovenia.

This case is the first case addressing issues pertaining to stateless persons in which UNHCR has intervened as a third party before the ECtHR, which was concluded with a judgment on the merits.\textsuperscript{55}

(d) Protection outcomes: rationalising rights in the field

Rights play an important role in shaping UNHCR’s interaction with its UN partners and in forging common standards for humanitarian engagement in the field. Better harmonization of programs and closer integration of activities into a ‘One UN’ agenda is currently a policy orientation of the UN system. The goal is stronger synergies between the political, security and human rights dimensions of its work, i.e. between the human rights ‘generalists’, the peace and security entities and the humanitarians. This is leading, for example, to the increasing incorporation of the protection of civilians mandate into United Nations Peacekeeping missions. A UN-wide Human Rights Due Diligence Policy has been adopted, which requires all [including UNHCR] to work within policy frameworks which ensure that activities pursued [notably in the context of security and law
enforcement] are compliant with international human rights standards and norms.\footnote{UNHCR, ‘United Nations Delivering as One’ available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=4a2d0d4e6>.}

Advocacy, capacity building and legal interventions are a central part of UNHCR’s protection work. However, the litmus test of the organisation’s effectiveness in fulfilling its protection mandate is the protection outcomes it is able to realise, in the field, for persons of concern. How different is advocating for rights and delivering on protection? To what extent is the language of rights a tool of real operability in this regard?

Rights are the anchor for the protection of refugees (and sometimes in different ways, other conflict-affected populations) in the complex political and security environments where refugee situations
develop.\textsuperscript{57} This is particularly the case where the interests of states and those of refugees may not coincide. Rights are a powerful advocacy tool for protection entities (including elements within governments) seeking to protect the welfare and interests of refugees. For a refugee-receiving state they can serve as a neutral, humanitarian rationale for providing asylum and responding to basic human needs. In situations where the state is under considerable pressure from a neighbouring state not to do so, there is certainly benefit to be had, for the relationship between the two states, from having an entity like UNHCR, with a fundamentally rights-based mandate, able to act as an independent, non-political guardian of refugee rights, based on international standards.

Accepting that displaced individuals and populations are rights-bearers, not just passive and

\textsuperscript{57} Thanks to UNHCR staff member Vicky Tennant for her observations from an internal mission report upon which I have drawn.
vulnerable recipients, reinforces that the organisation has an accountability to its beneficiaries that goes beyond the provision of charity. This approach is particularly pertinent when it comes to sexual and gender based violence. UNHCR has recently set in train an access to justice initiative which rests on the understanding that victims of violence are first and foremost rights bearers and subjects before the law, for whom access to justice should be an integral part of any meaningful protection interventions undertaken for sexual and gender-based violence survivors. Offices are called upon to advocate for and partner in initiatives focused on diminishing impunity, and enhancing access to justice mechanisms as well as the actual delivery of justice outcomes through these mechanisms. Justice is a broad-based concept including not only remedies for violations of rights and reparations for harm suffered, but at an earlier stage dealing with impunity through education, training and prevention activities.
Rights are a very important barometer when it comes to UNHCR’s work in countries of origin particularly in the context of return and reintegration. It is the extent to which individuals are able to exercise their rights upon return that determines the viability and sustainability of return. With this in mind UNHCR carries out protection monitoring in countries of return and regularly partners in this regard with national human rights institutions. In Afghanistan for example, UNHCR built, over a four year period, a partnership with the Afghanistan Independent Human Rights Commission. One of the key elements of the partnership was the establishment of a joint human rights monitoring and case management system, which enabled UNHCR not only to expand its geographical coverage in a country where access was a serious concern, but also to build the capacity of a national institution in a key area such as protection and human rights monitoring.
If the pursuit and defence of rights are an integral part of protection programs, it is not the rights framework alone which will ensure that meaningful protection is actually realised in practice. This is influenced by the much broader range of factors found at the intersection where politics, security, refugee community dynamics, donor priorities and international capacities meet. UNHCR has to be able to manoeuvre between all of these often competing forces. Understanding and navigating what influences how states behave in practice and what refugees actually want, not only need, is what will eventually determine whether their protection is real or in theory only.

In the first instance, this requires a fine sense of when to resort to the language of rights and responsibilities, and when to bring needs more to the fore. This may be the case, for example, when using human rights language may jeopardise the safety of persons of concern and the staff on whom they depend,
or hinder access to beneficiaries who are in dire need of assistance. Many governments view the role of human rights-mandated actors with grave suspicion. This has been exacerbated recently by the growing reach of the international criminal justice system. Accountability and humanitarian space are not always complementary. Accountability which addresses impunity is fundamental for victims and it should also serve as a disincentive to further abuse. One irony though is that what should be an added protection for victims may actually lead to their further victimization by leading to denial of access to needed humanitarian assistance. The prospect of being held accountable, in tandem perhaps with serving as a deterrent, has encouraged some governments to strictly curtail the activities of humanitarian workers, so that they are not exposed to events which might later found a criminal indictment. Some regimes are particularly suspicious of protection-mandated agencies as they see protection activities as a channel for information gathering, monitoring and reporting into accountability
mechanisms such as the international criminal tribunals. In such circumstances, how UNHCR frames its protection interventions will be particularly important to what it can actually do on the ground.

The perceptions of the beneficiary communities, not only of the host states, will be a significant influencing factor. Effective engagement on protection requires a profound understanding of how communities themselves understand protection, what their protection priorities are, and the protection mechanisms they themselves can draw upon. It is very important that the way in which UNHCR designs and implements its emergency operations does not exacerbate existing tensions and risks. This means for example that, in sensitising populations about their rights, promotion must be done in a responsible manner in a way that strengthens rather than weakens communities’ cohesiveness. Promotion activities need to be contextually sensitive and supported by the availability
of mechanisms to support the rights in practice. Protection must also be based on an understanding of why communities and individuals may choose to behave in ways that may seem counter-intuitive to external actors. Approaching protection solely from the perspective of rights and entitlements may distort the understanding of what is meaningful to refugees themselves, and what they see as critical to their security, dignity and well-being. In many emergency displacement situations, considerable numbers of refugees may opt to stay at the border. This is where they have access to grazing for their animals, the ability to cultivate their crops and keep watch over their homes and land, and to preserve the possibility of rapid return, even though relocation to camps would have offered a safer option, albeit rendering them reliant on assistance. This suggests that protection from the perspective of refugees is closely linked to a vision of a future, and preserving future coping capacities, and not just to immediate needs. It also brings up several issues such as
the management of an influx of combatants or whether refugees should be permitted to remain in host communities in border areas. In these situations, arguments based solely on rights are unlikely to succeed, unless the solution proposed is seen to be in the interests of host communities and the receiving state.

As communities are key actors in their own protection, the realisation of protection in practice is inextricably linked to community capacities. The experience of displacement can fundamentally disrupt family and community structures. An effective protection-focused emergency response must seek to preserve and restore this protection capital, *inter alia* through swift action to facilitate the restoration of community structures.

In summary, then, protection and rights are critically linked, conceptually and in their realisation, but there are fine dividing lines. Approaches that match what the principles call for and what protection demands on
the ground are required. Operationalising protection is about satisfying two linked, but different imperatives; strengthening and restoring community capacities for self-protection (or ‘protection capital’), whilst at the same time working with governments and drawing upon the framework of rights to provide a stable basis within which such community-based protection can flourish.

**Conclusion: Some of the Challenges**

The 1951 Refugee Convention is intended to confer a right to international protection on people who are vulnerable because they lack national protection, and to assure refugees the widest possible enjoyment of their rights. But translating this aspiration into reality remains a challenge.

This article is a very summary presentation of the difficulties for countries and for refugees trapped in large-scale displacement dramas. It is intended to
demonstrate, amongst all else, the scope and formidable nature of the challenges of survival and response – for governments and for the refugees. It serves to underline the realities – the necessity of, but the inadequacies as well - of asylum today for the large percentage of the beneficiaries and the providers. It also attempts to give a particular and telling context to the refugee principles designed to frame the management of such situations, where they are fundamental and where the gaps are, and indeed whether asylum as it is currently understood and practiced, needs to be re-visited with some urgency. This includes reviewing the applicability of the evolving doctrine of Temporary Protection. 58

To keep asylum meaningful there is a need to ensure that all refugees are able to exercise their rights; that refugee protection does not depend on where an individual seeks asylum; that individual and group

determination systems are made coherent, particularly in relation to conflicts; that governance structures for asylum are further developed to resolve tensions between states; and that UNHCR continues to serve as both a partner and a watchdog for individual states and the international community on matters of asylum.

Rights are at the origin and are the goal of all UNHCR does. However resorting to the language of rights, employing the human rights institutions and even analyzing and responding to needs through the lens of human rights may not always, alone, lead to the best protection outcomes. Action in support of refugees is essentially humanitarian, and has to be able to rely on confidence-building and neutrality, which can make the difference when it comes to access to beneficiaries, success or failure of interventions on their behalf, and the security of agency staff. Finding the most optimal balance between the principles which must set the framework and the pragmatism which must also guide
actual programming is the singular challenge for humanitarian action in today’s world.
Desperately Seeking Suffrage: The Fight for the Prisoner’s Right to Vote

*Dr Steve Foster*¹

It is now nine years since the European Court of Human Rights declared that the blanket ban on convicted prisoners voting in national and European elections was in violation of the ‘right to vote’ under Article 3 of the First Protocol to the European Convention on Human Rights (1950). Since that time the government have pursued a (failed) appeal against that decision – and subsequent European Court decisions upholding the tenor of its original decision – and have taken various measures either to ignore the ruling or delay the measures necessary for it to comply with its obligations, in international law, to pass measures that will be

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consistent with the Convention and the European Court’s jurisprudence.

The latest of these responses - the Voting Eligibility (Prisoners) Draft Bill 2012 – offers three options to Parliament with respect to reform, or non-reform in this area. The first two options will inevitably lead to further challenges on the basis of proportionality, but the latter option (retaining the status quo) will expose the government to condemnation with respect to its attitude towards human rights and threaten its (already brittle) relationship with the Council of Europe, the European Convention and the European Court of Rights.

In the meantime, prisoners remain disenfranchised and 2,534 cases pending against the UK government with respect to prisoner’s voting rights have been adjourned until September 2013 to allow the government to initiate its latest proposals.
This article will examine the legal and political fight for, and against, prisoner enfranchisement that has taken place since the ban was first challenged in the domestic court over twelve years ago. It begins by outlining the provisions of the new Draft Bill, but will then examine those proposals via a reflection of the various legal challenges to prisoner disenfranchisement, and the permissible residue of discretion allowed by the European Court’s margin of appreciation in this area. The article will also use the battle for the prisoner’s right to vote to illustrate the futility of human rights law, reminding the reader that despite several judicial pronouncements, prisoners are still not entitled to vote and have received no compensation or effective redress for breach of their human rights.
Prisoner disenfranchisement and the Draft Bill

The issue of prisoner enfranchisement has excited great legal, political and moral debate,\(^2\) and in the UK has been at the centre of wider political and constitutional discussions surrounding human rights, the sovereignty of Parliament and the role of the European Convention on Human Rights and the European Court of Human Rights.

Following a series of protracted legal defeats before the European Court of Human Rights,\(^3\) in


\(^3\) Hirst v United Kingdom (No 2) (2004) 38 EHRR 40; Hirst v United Kingdom (No 2) (2006) 42 EHRR 41(Grand Chamber); and MT and Greens v United Kingdom (2011) 53 EHRR 21. The government was also granted permission to appear as a part to
November 2012 the government published a Draft Bill – the Voting Eligibility (Prisoners) Draft Bill,\(^4\) offering a Committee of both Houses three options for possible reform in this area and inviting the Committee to conduct full Parliamentary scrutiny of those options, although the Bill concedes that there will, no doubt, be other possible options for the Joint Committee to consider.\(^5\) This relatively flexible approach contrasts with previous consultation papers, which offered the public limited options, including an express instruction not to suggest total enfranchisement for prisoners.\(^6\) It will be interesting, therefore, to see the government’s response if the Committee suggests that option, or other

\(^{4}\) Cm 8499. The Bill was presented to Parliament by the Lord Chancellor and Secretary of State for Justice.

\(^{5}\) The Voting Eligibility (Prisoners) Draft Bill, Introduction, 4.

more generous options than on offer in the Draft Bill, below. It is also frustrating to note that the Bill offers the option of retaining the status quo, an option clearly not allowed it by the European Court’s jurisprudence, and one which is included to prepare the government for a potential face off with the European Court of Human Rights and the Council of Europe.

The Bill then states that once the Committee has finished its scrutiny, the Government will reflect on its recommendations and continue the legislative process by introducing a Bill, refined following Parliamentary scrutiny, for debate as soon as possible thereafter.\footnote{The Voting Eligibility (Prisoners) Draft Bill, Introduction, 5.}

Clause 1 of the Bill offers the first option: a ban for prisoners sentenced to 4 years or more. This threshold has been offered in previous proposals,\footnote{See notes 52 and 53 below.} and appears to be the furthest that the government is prepared to go in complying with its obligations under
the Convention and the Human Rights Act 1998. Schedule 1 of the Bill then clarifies Clause 1 by stating that both a prisoner serving a custodial sentence for a term of 4 years or more and a prisoner serving a life sentence, is disqualified from voting at a parliamentary or local government election. A custodial sentence is defined as a sentence of imprisonment, detention or custody passed in respect of any offence, and a prisoner as a person detained in, or on temporary release from, prison, or someone who is unlawfully at large, but who would otherwise be so detained.

The Schedule also applies to life sentence prisoners and a life sentence is defined as either a sentence of imprisonment, detention or custody for life, or during Her Majesty’s Pleasure, passed in respect of an offence, or a sentence for public protection under ss 225

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9 The Voting Eligibility (Prisoners) Draft Bill, Schedule 1, paragraphs 1 and 2 respectively.
10 ibid, para. 3(1).
11 ibid, para. 4(1).
or 226 of the Criminal Justice Act 2003 (including one passed as a result of the Armed Forces Act 2006).\textsuperscript{12} The inclusion of life sentences in the Bill makes it clear that the government do not want to entertain the argument that a life sentence prisoner should become enfranchised once they have served their minimum term within the life sentence. In this sense the present government has the same view as the previous Labour government, who made it clear that such prisoners would not be included in any proposals for extending prisoner enfranchisement.\textsuperscript{13} This argument has been used in a number of domestic court cases involving challenges to the present ban; the prisoners arguing that the retention of the ban, once the minimum term has expired, is both illogical and in breach of the right to liberty as, by that stage, the causal link between punishment and

\textsuperscript{12} ibid, paras.3(2)(a) and (b) respectively.
\textsuperscript{13} Voting Rights of Convicted Prisoners within the United Kingdom, Consultation Paper CP6/09, April 8 2009), see note 30 below.
disenfranchisement has been broken.\textsuperscript{14} This issue was not fully addressed by the Grand Chamber of the European Court in \textit{Hirst (No 2)},\textsuperscript{15} although the Chamber stated provisionally that it saw no logical justification for the ban to extend beyond the punishment period given that disqualification was seen as part of the prisoner’s punishment.

Clause 2 of the Bill then offers the option of a ban for all prisoners sentenced to more than 6 months. This option is subject to the matters clarified in Schedule 2 of the Bill, which are the same as those applied to Schedule 1, above, and Schedule 3 with respect to the third option, below. For the reasons stated later in this article the second option, the lowest threshold offered by any government in response to the European Court’s

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\textsuperscript{15} \textit{Hirst v United Kingdom (No2)} (2004) 38 EHRR 40, [49].
rulings, is almost certainly outside the margin of appreciation offered to the government by the tenor of the Scoppola v Italy (No 3)\textsuperscript{16} judgment, while option one is only questionably within it, because of its inflexibility and the failure to take account of, or apply exemptions for, the nature of any specific offences that warrant such a sentence, or the character, behaviour and risk of the individual prisoner.

Clause 3 of the Bill proposes a ban for all convicted prisoners – in other words a re-statement of the current situation and as mentioned above is inserted in clear defiance of the European Court’s rulings and to prepare the government for the inevitable conflict with the Court and the Council of Europe should the Joint Committee propose, or Parliament otherwise adopt, a plan to retain the current legal position.

The possibility that Parliament may choose the final option is certainly not fanciful, given the

\textsuperscript{16} (2013) 56 EHRR 19.
government’s current antipathy towards the Court and the Convention, and the desire to reform its approach towards the European Court and the Human Rights Act 1998. This article will proceed on the basis that the Joint Committee, and then the government, propose something less drastic and will comment on any such proposals with respect to their compatibility with the Convention and the Court’s jurisprudence. The article will also examine the impact that the legal and political battle has had on the prisoners’ attempts to vindicate their right to vote, but before doing so, it will be helpful to outline the battle thus far, beginning with the relevant domestic legislation and its legal challenges.

Prisoner disenfranchisement in domestic law

The current law is contained in the Representation of the People Act 1983. Section 3 of the Act provides that:
A convicted prisoner during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election.

Further, s 8 of the European Parliamentary Elections Act 2002 extends that restriction to elections to the European Parliament. Although this article will not examine the compatibility of the ban under EU law, it is noted that an unsuccessful challenge has been made in that respect in the Scottish courts,\textsuperscript{17} and that the prisoner is currently appealing to the Supreme Court on this issue.\textsuperscript{18}

Although the legislation excludes prisoners on remand, the provision applies a blanket ban on all convicted prisoners serving a sentence at the time of election, and following the coming into force of the Human Rights Act 1998 it was challenged by serving

\begin{flushleft}\footnotesize\textsuperscript{17} Re McGeough’s Application for Judicial Review [2011] CSOH 65.
\textsuperscript{18} See ‘UK accused of dithering over prisoners’ voting rights’ \textit{The Guardian} (16 July 2012).
\end{flushleft}
prisoners in the domestic courts as being incompatible with Article 3 of the First Protocol to the Convention, which provides:

The High Contracting Parties undertake to hold free elections...under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

However, in *R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General*, the High Court ruled that the legislation constituted a legitimate and proportionate interference with the right to vote under Article 3 of the First Protocol. The decision was based on its reading of the existing jurisprudence in this area, which appeared to offer a wide margin of appreciation to each member state. In particular, Kennedy LJ stated it was Parliament’s role to maintain and enhance the integrity of the electoral process, and that although recognising

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that the existence of a legitimate aim might be difficult to articulate, there were clearly elements of punishment and electoral law to consider. In his Lordship’s view, Parliament had taken the view that convicted prisoners had forfeited their right to have a say in the way the country was being governed whilst they remained in custody. There was a broad spectrum of approaches among democratic societies and the United Kingdom fell into the middle of the spectrum. The United Kingdom’s position in that spectrum was clearly a matter for the Parliament and not the courts, even in difficult cases such as the post-tariff discretionary life sentence prisoner.\textsuperscript{20}

The views of Kennedy LJ, encapsulating as they do the need for judicial deference and the need for the UK government to be provided with a wide margin of appreciation by the European Court in this area, have informed the arguments of political and public opinion

\textsuperscript{20} [2001] HRLR 39, [40-41].
against prisoner enfranchisement for over ten years. Although the views of the domestic court were overridden by the European Court of Human Rights in *Hirst (No 2)*, it is evident in later European Court decisions that there is indeed room for such deference from both courts; although it appears that by the time that the European Court conceded such the government’s view had become so entrenched that any opportunity for democratic dialogue had been lost.

**Challenging disenfranchisement in Strasbourg**

On appeal to Strasbourg, in *Hirst v United Kingdom (No 2)*\(^2\) the European Court of Human Rights held that the UK blanket ban was disproportionate as it applied to every prisoner irrespective of their sentence and was thus beyond the government’s margin of appreciation in this

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area. The government’s appeal to the Grand Chamber of the European Court was unsuccessful, the Grand Chamber stressed that the right to vote was crucial to the foundations of a meaningful democracy and was a right, and not a privilege. Further, there was no question that prisoners forfeited their Convention rights merely because of their status as prisoners; there was no place under the Convention for automatic disenfranchisement based purely on what might offend public opinion. In the Grand Chamber’s view:

…although the Convention did not exclude the imposition of restrictions on individuals who, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations, the principle of proportionality required a discernible and

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23 (2006) 42 EHRR 41.
24 ibid at [59] of the Grand Chamber’s judgment.
25 ibid [69].
sufficient link between the sanction and the conduct and the circumstances of the individual concerned.\textsuperscript{26}

The Grand Chamber did, however, accept that the domestic legislation \textit{might} be regarded as pursuing the aims pleaded by the government, in so far as it was aimed at preventing crime, enhancing civic responsibility and respect for the rule of law, and of conferring a punishment in addition to the sentence.\textsuperscript{27}

Thus, it found no reason to exclude these aims as incompatible with the right guaranteed by article 3 per se. However, it noted that the provisions applied in a blanket fashion to the full range of offences which warranted imprisonment; the criminal courts made no reference to disenfranchisement during sentencing, and it was not apparent that there was any direct link between the facts of any individual case and the removal of the

\textsuperscript{26} ibid [71] [author’s italics].
\textsuperscript{27} ibid [74].
right to vote. Further it noted that any issue of justification appeared to be regarded as a matter for the legislature, thus excluding the courts from any assessment as to the proportionality of the measure. Although the Grand Chamber offered little guidance as to what measures were necessary to comply with Article 3, it stressed that the domestic legislature had never sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners.

As we shall see, the government did not respond to the decision in *Hirst (No 2)*, resulting in further action being taken against it before the European Court. Thus, in *MT and Greens v United Kingdom*, it was held that the failure of the government to pass legislation in response to *Hirst* was in breach of Article 3 and gave the

\[\text{ibid [77]. In addition, there had been no substantive debate by the legislature on the continued justification of the policy in the light of modern day penal policy and of current human rights standards.}\]

\[\text{(2011) 53 EHRR 21.}\]
government 6 months - from 23 November 2010 - to pass legislation complying with the judgment. Further, given the government’s failure to respond to *Hirst (No 2)*, further pressure was placed on it by subsequent European Court decisions, beginning with the decision in *Frodl v Austria*,\(^{30}\) which appeared to narrow the government’s margin of appreciation. In *Frodl*, the Court held that there had been a violation of Article 3 when a prisoner had been disenfranchised under a law that provided that anyone committing an offence with intent that carried a sentence of more than one year would forfeit the right to vote. Although the European Court accepted that the ban was less restrictive than the one considered in *Hirst*, it found that the lack of judicial input into the decision to disenfranchise the particular prisoner led to a violation of Article 3.\(^{31}\) This suggested that any legislative restriction on the prisoner’s right to vote would need to include this impartial judicial

\(^{30}\) (2011) 52 EHRR 5.

\(^{31}\) ibid [36].
safeguard, although the judgment in Hirst indicated that such a safeguard was merely desirable rather than compulsory.

In addition, certain parts of the judgment in Frodl suggested that there may have to be a link between the offence and democracy:

It is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.\textsuperscript{32}

Whether that suggests that the offence would need to be related to electoral offences or the like, or whether that is just an example of such, in any case the Court stressed:

The essential purpose of [these] criteria is to establish disenfranchisement as an exception

\textsuperscript{32} ibid [34] [author’s italics].
even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary...\(^{33}\)

The Court refused Austria’s request to appeal that decision to the Grand Chamber, and subsequently, in *Scoppola v Italy (No 3)*,\(^{34}\) the European Court re-iterated the unacceptability of blanket bans by finding that an automatic life time ban on voting for those sentenced to life imprisonment was indiscriminate, disproportionate and outside any acceptable margin of appreciation. At this stage, therefore, an impasse had been reached between a UK government, that was unwilling to comply

\(^{33}\) ibid [35].

\(^{34}\) (2013) 56 EHRR 19. The case concerned a complaint made by Franco Scoppola, who is detained in Parma prison, having been sentenced in 2002 to life imprisonment. Under article 29 of the Italian Criminal Code, a life sentence, and a sentence of at least five years, entails a lifetime ban from public office, which in turn amounts to a permanent forfeiture of the prisoner’s right to vote.
with its obligations under the Convention to enfranchise at least some prisoners, and the European Court, who appeared to be offering little margin, or guidance, to the UK government on what reform would be acceptable.\textsuperscript{35} Any possible dialogue between the government and the Court, thus, had broken down, and instead a diplomatic argument had broken out as to the role of the European Court in establishing the fundamental rules for prisoner enfranchisement.\textsuperscript{36}

In the light of this growing, restrictive jurisprudence, and the failed attempt to appeal the \textit{MT and Greens} case to the Grand Chamber, the United Kingdom requested and was allowed to make representations in Italy’s Grand Chamber appeal in \textit{Scoppola}. In particular, pending the outcome of the \textit{Scoppola} appeal, the UK government had been allowed

a further extension of the time limit set by the Court to amend its inconsistent domestic legislation; having already ignored the limits set by the Court in its previous cases. On 22 May 2012 the Grand Chamber of the European Court of Human Rights delivered its long awaited judgment in the case of *Scoppola v Italy*. The Grand Chamber held that the decisions in the UK cases are still good law and must be complied with and gave the UK government 6 months to make legislative proposals to amend the existing law so that it complies with the Convention and those previous rulings.

The Grand Chamber stressed that the right to vote was crucial to establishing an effective and meaningful democracy, but that such a right was not absolute and that the Contracting Parties were to be afforded a margin of appreciation in the limitations that they applied to that right; the question for the Court,

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37 *Scoppola v Italy (No 3)* (n 34) [82].
38 ibid [83].
therefore, was as to the proportionality of that interference.\footnote{ibid [92].}

With respect to reconsidering the Grand Chamber’s decision in \textit{Hirst (No 2)}, it noted that since that judgment nothing appeared to have changed at the European and Convention levels that might justify the re-examination of the principles laid down in that case; indeed, the Court noted that, on the contrary, if anything, the trend was towards fewer restrictions on convicted prisoners’ voting rights.\footnote{ibid [95].} Accordingly, the Court reaffirmed the principles in \textit{Hirst (No 2)}, in particular the fact that when disenfranchisement affected a group of people generally, automatically and indiscriminately, based solely on the fact that they were serving a prison sentence, irrespective of the length of sentence and irrespective of the nature or gravity of their offence and
their individual circumstances, it was not compatible with Article 3.41

The Grand Chamber then considered the requirement of judicial intervention in the decision to disenfranchise the prisoner, noting that in the present case the Chamber had followed the decision in Frodl v Austria,42 and found a violation of Article 3, because the nature or gravity of the offence committed by the applicant had not been examined by a judge. However, in the Grand Chamber’s view, while the intervention of a judge was clearly likely, in principle, to guarantee the proportionality of the restrictions on prisoners’ voting rights, such restrictions would not necessarily be automatic, general and indiscriminate simply because they had not been ordered by a judge.43 The Grand Chamber also pointed out that such a requirement was not expressly mentioned in the Grand Chamber’s

41 ibid [93].
42 (2011) 52 EHRR 5.
43 Scoppola v Italy (No 3) (n 34) [99].

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judgment in *Hirst (No 2)* as part of the essential criteria in determining the proportionality of any disenfranchisement matter; the factor of judicial intervention being regarded as merely preferable.\(^{44}\) Accordingly, States could decide either to leave it to the courts to determine the proportionality of any measure restricting prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied.\(^{45}\)

With respect to the compatibility of the relevant Italian Law as it affected the applicant’s case with Article 3, the Grand Chamber noted that the provisions showed the national legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. Further, the measures were only applied in connection with certain

\(^{44}\) ibid [100].
\(^{45}\) ibid [102].
offences against the State or the judicial system, or to offences which the courts considered to warrant a sentence of at least three years’ imprisonment. Further, on the facts, the applicant had been found guilty of serious offences and sentenced to life imprisonment, and in those circumstances it could not conclude that the disenfranchisement provided by Italian law had the general, automatic and indiscriminate character that had led it, in Hirst (No 2), to find a violation of Article 3. Unlike in Hirst (No 2), a large number of convicted prisoners in Italy were not deprived of the right to vote in parliamentary elections. Furthermore, the Grand Chamber noted that under Italian law a prisoner could, three years after finishing their sentence and displaying good conduct, apply for rehabilitation so as to recover

46 ibid [106].
47 ibid [107]. This sentence had in fact been subsequently commuted to 30 years.
48 ibid [108].
49 ibid.
the right to vote.\textsuperscript{50} Accordingly, the Grand Chamber found that the government’s margin of appreciation in this sphere had not been overstepped and that therefore there had been no violation of Article 3.\textsuperscript{51}

The decision in \textit{Scoppola (No 3)} affects the UK’s law and the government’s response to reform in this area in a number of ways. First, and most specifically, the Grand Chamber has overruled the Court’s previous judgment in \textit{Frodl} to the effect that judicial involvement in the decision to disenfranchise a prisoner was a pre-requisite for compatibility. It is now clear that the decision to disenfranchise a prisoner can be made by the legislature and/or the judiciary provided the rules are not arbitrary and disproportionate, as they were found to be in \textit{Hirst}. However, given successive governments’ failure to respond to reform in a proportionate and logical manner, it might be suggested that the inclusion

\footnotesize{\textsuperscript{50} ibid [109]. This rehabilitation request can be lodged earlier where early release was granted in connection with a re-education scheme. \textsuperscript{51} ibid [110].}
of a judicial involvement in the decision to disenfranchise might protect the prisoner from arbitrary interference, and the government from further legal challenge.

Secondly, the Grand Chamber has made it clear that each state will be provided with a wider margin of appreciation with respect to choosing which prisoners will be disenfranchised than was thought possible prior to this decision. This wider margin is apparent in the Scoppola case itself, as the Grand Chamber have overruled the Chamber’s decision to the effect that a life time ban was arbitrary and thus in violation of Article 3 of the First Protocol. Thirdly, however, the Grand Chamber has stressed that any proposals must comply with the basic requirements of legality and proportionality that it laid down in Hirst (No 2); in other words, any exclusion must be sufficiently related to the legitimate aims of crime prevention and the rule of law, and to the prisoner’s crime, as well as satisfying the test
of proportionality. Hence the Grand Chamber will not tolerate a blanket ban based on the idea that all prisoners forfeit their right to vote - a choice offered to the Joint Committee by the recent Draft Bill. Further, although extensive bans are permitted – for example the lifetime ban in Italy – there should be sufficient safeguards to ensure that the ban does not operate in an arbitrary fashion. For example, in Scoppola the Grand Chamber noted that Italian law militated against the lifetime ban by allowing the prisoner to appeal against the decision in the future.

Responding to the European Court’s decisions in Hirst and MT and Greens

It is within the above guidelines, therefore, that the government must respond to the European Court’s rulings. Before considering the options available to the government, and the compatibility of the recent Draft
Bill proposals with the Convention, it is worth noting earlier responses of the last two governments to the issue of prisoner enfranchisement.

As stated earlier, in *Hirst (No 2)*, the UK had been given little or no guidance as to what measures were necessary to comply with Article 3 and the judgment. Thus, the United Kingdom government was left to decide on the best means of securing compliance. In December 2006 a consultation document was published by the Department of Constitutional Affairs, setting out the principles of prisoner enfranchisement and the options available to the United Kingdom, which was followed by the Ministry of Justice’s second stage consultation document, outlining the government’s initial proposals. In these documents the government

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suggested a number of options of enfranchisement, but favoured the idea that prisoners sentenced to less than one years’ imprisonment would be automatically entitled to vote (subject to certain exceptions based on the type of offence for which the prisoner had been convicted). There followed a number of criticisms from both the Joint Select Committee on Human Rights, and the Council of Europe, with respect to the government’s refusal to act on these recommendations and to introduce amending legislation.

Following the decision in M and T, the government suggested, initially, that those serving sentences of 4 years or less would be enfranchised, but

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56 ‘Thirty thousand prisoners will get the right to vote after victory in the European courts’ The Daily Telegraph (6 January 2011) page 2. See Cabinet Office, ‘Government approach to prisoner voting
later proposed that only those sentenced to one year or less would be allowed to vote.\textsuperscript{57} However, in February 2011, it abandoned those reforms and instead proposed that there was to be an open vote in the House of Commons on prisoner voting.\textsuperscript{58} The European Court in \textit{Hirst (No 2)} had indeed highlighted the fact that Parliament had never debated the issue of prisoner enfranchisement. However, it is clear that the Court would not regard such debate as an alternative to legislative action,\textsuperscript{59} despite the constitutional legitimacy

\begin{footnotesize}
\begin{enumerate}
\item ‘Tory “free vote” on prisoner polls’ \textit{Independent on Sunday} (1 February 2011).
\item See D Thompson, ‘Votes for prisoners or not? Sleep walking into a constitutional nightmare’ (2011) SLT 153.
\end{enumerate}
\end{footnotesize}
of such procedure in gathering parliamentary views on this matter.\textsuperscript{60}

The vote was preceded by a meeting of the parliamentary constitutional committee, which received advice over the legal implications of the government’s refusal to comply with \textit{Hirst} and stressed that a blanket provision of any nature, irrespective of the length of the sentence, would not be acceptable to the European Court of Human Rights.\textsuperscript{61} In particular Eric Metcalfe of JUSTICE stressed that the problem was the blanket nature of the ban, of the individual decision-making of it, not the length, stressing that there was not a magic figure that ‘with one leap we are free.’\textsuperscript{62} This warning was consistent with the European Court’s stance at that time, but as we have seen is probably over cautious given the

\textsuperscript{60} See D Nicol, ‘Legitimacy of the Commons debate on prisoner voting’ [2011] PL 681.
\textsuperscript{62} ibid, at paragraph 12.
widenning of the state’s margin of appreciation via the decision of the Grand Chamber in *Scoppola*.

Pre-empting the vote, the then Justice Secretary, Kenneth Clarke, stressed that the government would comply with its obligations and that at least some prisoners would get the right to vote, promising that the government was going to do the minimum necessary to comply with the ruling.63 However, by a large majority it was decided to take no action to give prisoners the right to vote and to defy the European Court’s judgment in *Hirst (No 2)*.64 In the House of Commons, senior Tory back bencher David Davis and former Labour Justice Secretary Jack Straw urged the House to defy the Court’s ruling and MPs backed that motion by a majority of 234 to 22.65

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63 J Kirkup, ‘Prisoners will get the vote, Kenneth Clark says’ *The Daily Telegraph* (9 February 2011).
65 HC Deb 10 February 2011, vol 523, col 584 (Division 199).
The proceedings, inevitably, excited passionate views, and the majority’s view is typically summarized by David Ruffley (Bury St Edmunds) (Conservative):

It is completely unacceptable … that a criminal who has violated law to such an extent that that he or she is incarcerated and has their freedom withdrawn … should be given the right to vote in a democratic election. It would give the British public the impression that the system has more respect for the criminal than for the sensitivities and interests of the victim, which are far too often overlooked. … It would give the impression of a Parliament out of touch at best, and at worst the poodle of a European court.\(^{66}\)

Of the minority, Tom Brake (Carshalton and Wallington) (Liberal Democrat) put forward two reasons in favour of allowing prisoners the right to vote:

\(^{66}\) HC Deb 10 February 2011, vol 523, col 540.
The first is that when the European Court of Human Rights finds that UK law contravenes the European convention... the UK government should address that illegality. Once we start picking and choosing the laws that we should apply and those that we can disregard... where does it end? The Americans know where it ends: in Guantanamo Bay and Abu Gharib... The second reason... is that it is the appropriate course of action. Prisoners have committed a crime. Their punishment is to lose their liberty. That is fair and just. What is then gained by seeking to inflict civil death on them? In what way does that benefit the victim? ...What is the logic behind the ban? We do not remove prisoners’ access to health care, nor do we stop them practising their religion, so why should we impose a blanket ban on prisoners’ right to vote?  

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Those two contrasting views have been reproduced to stress the current impasse between the government and the European Court and to contextualise the variety of proposals offered in the recent Draft Bill. Those proposals, and their compatibility with human rights law, will be considered later in the article, but the article will now consider how the government’s reluctance to comply with the judgments has impacted on the prisoner’s right to seek justice in the domestic courts.

Seeking justice in the domestic courts Post-

Given the continual dispute between the government and the Council of Europe and the European Court of Human Rights on this issue, it has been largely forgotten that prisoners have lost their right to vote in national and local elections since the European Court’s first rulings in 2004 and 2005 without any legal redress. In particular, during this period prisoners had lost the right to
participate in the May 2010 general election. If the government was not prepared to fulfil its international obligations by responding to the Court’s rulings, then could the prisoners make use of the Human Rights Act 1998 in domestic courts to gain redress?

As the 1998 Act adopts an interpretative approach to remedying Convention rights violations, the domestic courts’ role is correspondingly limited. The court may under s.3, when it is possible to do so, interpret legislation in line with Convention rights, but cannot re-write legislation which is clearly incompatible with such rights; its only power in such cases being to issue a declaration of incompatibility. The inability of the courts to provide redress for breaches of Convention rights is similarly limited, as it is not possible to award compensation for the acts of public authorities that were clearly lawful at that time. It is in the context of these limitations that the article will now examine two domestic challenges to the government’s failure to
respond to the European Court’s decisions in *Hirst (No 2)* and *MT and Greens*.

Prior to the General Election, a test case was brought to challenge the compatibility of the 1983 Act, but in *R (Chester) v Secretary of State for Justice*,\(^68\) the Administrative Court refused to grant a declaration of incompatibility with respect to s.3 and, specifically, the government’s decision not to allow post–tariff life sentence prisoners the right to vote, despite the fact that a general declaration had been made by the Scottish courts.\(^69\) This was because the court was concerned that the parliamentary process of legislative reform would be interfered with if it granted a declaration before the proposed statutory provisions were in place, and the decision was upheld by the Court of Appeal.\(^70\) In

\(^{68}\) [2010] HRLR 6.

\(^{69}\) *Smith v Scott* [2007] CSIH 9.

\(^{70}\) *Chester v Secretary of State for Justice, The Times*, January 17 2011. For similar refusals in the Scottish and Northern Ireland courts, see, respectively, *Traynor v Secretary of State for Scotland*
refusing what was seen by Laws LJ as a request by the prisoner for an advisory opinion, his Lordship described the grant of such an opinion in the present case, as to what legislation, as yet undrafted might possibly contain, as a ‘step too far’. 71

The real obstacle to the granting of the declaration sought by the prisoners was of course that had it been given, the courts, rather than Parliament, would have taken upon itself to decide whether the exclusion of post-tariff life sentence prisoners from voting was consistent with the margin of appreciation offered to the government from the decision in Hirst (No 2). As stated earlier, this issue was not fully addressed by the Grand Chamber of the European Court in Hirst (No 2); although the Chamber stated provisionally that it saw


71 Chester v Secretary of State for Justice (above, n 14) [31] (Laws LJ). His Lordship distinguished the decision of the Court of Appeal in R v HM Treasury, ex parte Smedley [1985] 1 QB 657 on the basis that in that case a proposed piece of delegated legislation would have been ultra vires enabling primary legislation.
no logical justification for the ban to extend beyond the
punishment period given that disqualification was seen
as part of the prisoner’s punishment.\textsuperscript{72} Of course, the
domestic courts’ refusal to grant further declarations of
incompatibility to mark the continuous defiance of the
government to change the law was based on the
assumption it would usurp Parliament’s duty to respond
to the judgment of the European Court and to enact
appropriate legislation - a function it had no intention of
carrying out. It is suggested that a declaration of
incompatibility, as the only possible remedy available to
the prisoners given the domestic courts’ inability to grant
compensation under the Human Rights Act 1998, should
have been granted to highlight the government’s
continued refusal to abide by even the bare essentials of
the \textit{Hirst} and \textit{MT and Greens} judgments, and that the
European Court should recognise that the refusal to grant
such a declaration in these specific circumstances is a

\textsuperscript{72} \textit{Hirst v United Kingdom (No 2)} (2004) 38 EHRR 40 at [49].
breach of Article 13 of the Convention (the right to an effective remedy). That should be the case despite the European Court having accepted in *MT and Greens* that as a general rule there is no right of a victim to have domestic legislation declared incompatible with Convention rights by the domestic courts.

The decision in *Chester* was followed by the High Court decision in *Tovey, Hydes and others v Ministry of Justice*, a case which raised a number of issues with respect to the remedies available to disenfranchised prisoners and the effectiveness of the Human Rights Act 1998. Following the decision of the European Court in *MT and Greens v United Kingdom*, the prisoners sought both a declaration of incompatibility of both s.3 of the 1983 Act and s.8 of the European Parliamentary Elections Act 2002, and damages for the fact that they were not allowed to vote in the May 2010

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74 The High Court decided to take Tovey and Hyde’s claims as the ‘lead’ cases for 583 similar claims being made by prisoners.
General Election, and for the government’s failure to implement legislation in response to the decision of the Grand Chamber in *Hirst (No 2).*

The Ministry firstly sought to defend that action, and to strike the case out, by reliance on s.6(2)(a) of the 1998 Act, which provides that s.6(1) does not apply where as a result of one or more provisions of primary legislation the relevant public authority could not have acted differently; or, under s.6(2)(b), that it was acting so as to enforce provisions of primary legislation which, though incompatible with the Convention, cannot be read down so as to be interpreted in a way which permit it to act otherwise. Secondly, with respect to the claim that the government failed to implement changes to the legislation following the European Court’s ruling in *Hirst,* the Ministry sought to rely on s.6(6) of the 1998 Act, which provides that although an act of a public authority (for the purposes of s.6(1)) includes a failure to act, it does not include (a) a failure to introduce in, or lay
before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.

As the first claim was dependant on proving that the public authorities could have acted other than in breach of Convention rights, the High Court was asked to consider employing s.3 of the Human Rights Act 1998 to interpret the relevant legislation in a Convention compliant manner. Section 3(1) of the 1998 Act provides that primary and subordinate legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with Convention rights, although the section further provides that s.3(1) does not affect the validity, continuing operation and enforcement of any such legislation if the primary legislation prevents removal of that incompatibility.75

Longstaff J stated that both legislative provisions were clear and that unless they could be interpreted so as to accommodate the judgment in *Hirst*, a prisoner must

75 Human Rights Act 1998, s 3(2)(b), s 3(2)(c).
be refused the vote.\textsuperscript{76} The question for the court, therefore, was whether an alternative interpretation was possible within the ambit of s.3 of the Human Rights Act 1998. In addressing this issue his Lordship referred to the approach previously adopted by Lord Bingham in \textit{Sheldrake v Director of Public Prosecutions},\textsuperscript{77} where he stated that although the interpretive obligation under s.3 is a ‘very strong and far-reaching one, and may require the court to depart from the legislative intention of Parliament’, there is a limit beyond which a Convention compliant interpretation is not possible.\textsuperscript{78} Applying those tests his Lordship stated that in this case the claimant would need to persuade a court that a provision which provides that he is ‘legally incapable’ of exercising the vote provides instead that he was ‘legally capable’; that the court ‘would have to interpret and apply the

\textsuperscript{76} \textit{Tovey and Hydes v Ministry of Justice} [2011] EWHC 271 at [35].
\textsuperscript{77} [2005] 1 AC 264 (HL).
\textsuperscript{78} ibid, para.28; relying on the House of Lords decision in \textit{Ghaidan v Godin-Mendoza} [2004] 2 AC 557 as illustrated in \textit{R (Anderson) v Secretary of State for the Home Department} [2003] 1 AC 837 (HL) and \textit{Bellinger v Bellinger} [2003] 2 AC 467 (HL).
legislation as though “No” could mean “Yes”.’ 79 In his Lordship’s view ‘such an interpretation on the face of it flies directly counter to the legislative wording’. 80 However great the imperative to adapt UK statutes to provide for fundamental rights basic to democratic states, to interpret the statute in this way would be a step too far – for it would, in Lord Bingham’s words, ‘change the substance of the provision completely, or would remove its pith and substance.’ 81

His Lordship also considered an additional argument, rejected earlier by the Court of Appeal in Chester v Ministry of Justice, 82 that as the European Court in Frodl v Austria 83 had decided that a judge had to take the decision on disenfranchisement as part of the

79 Tovey (n 76) [37].
80 ibid.
81 ibid [38].
82 [2010] EWCA Civ 1439, at [24].
83 (2011) 52 EHRR 5.
sentencing process,84 s.3 of the 1998 Act required the court to read down the 1983 Act by adding words that would confer on the judiciary the function of deciding on the prisoner’s enfranchisement. Alternatively, and if that would amount to constitutional legislation, it had been asked to make a further declaration of incompatibility. Although this argument had not been raised specifically in this case, Langstaff J noted that it had been rejected by the Scottish Registration Appeals Court as involving a substantial departure from a fundamental feature of the legislation.85 Although his Lordship in this case did not feel bound to follow these previous decisions, he found nothing to persuade him that the clear “no” in the words of the statute could be interpreted to mean “yes”.86

84 This part of the European Court’s judgment was subsequently overruled by the Grand Chamber’s decision in Scoppola v Italy.
85 Smith v Scott [2007] CSIH 9, relying on the approach of Lord Nicholls of Birkenhead in Re S (Minors) [2002] UKHL 10, [27]. See also the decision of the Northern Ireland High Court in R v Secretary of State, ex parte Toner and Walsh [1997] NIQB 18.
86 Tovey (n 76) [45].
His Lordship then considered the claim that the failure of the Secretary of State to amend the statute in the light of the *Hirst (No 2)* judgment justified an award of compensation under the Human Rights Act. His Lordship rejected this argument with reference to s. 6(6) of the Act, above, adding that s. 6(6) itself was not susceptible to a reading down by interpreting it in a way which, though wholly impermissible in English common law, would advance a Convention right. 87 Specifically, his Lordship held that the words in s. 6(6) did not permit anything to be read in or reduced so that a failure to introduce a proposal for legislation, or to make primary legislation, is not excluded from the word ‘act’ within s. 6.

Further, Longstaff J opined that s.6 was not open to the interpretative obligation in s.3 because it came from the self same Act and would involve one section of the Act (s.3) having predominance over another (s.6). In

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87 ibid [47].
his Lordship’s view, the Act was intended to give effect and authority to the Convention in UK law, specifically within the limits set by the Act, of which s.6(6) was one. It is submitted at this stage that it should not necessarily be impermissible to interpret one section of the Act in the light of another so as to achieve the general purpose of the legislation, which is not only to give effect to the Convention within its specific provisions, but more widely, to ensure that domestic law (including the Human Rights Act itself) is applied in a manner that is consistent with Convention case law and principles, including the right to an effective remedy for breach of Convention rights. In any case, his Lordship noted that the section was not preventing the claimant from having the vote; it simply prevented him from suing for compensation, not for a breach of the right to

88 ibid.
89 Notwithstanding this view, the author agrees with his Lordship’s view that s. 6(6) was not realistically capable of being interpreted in a way which would allow compensation to be awarded for a failure to introduce or pass legislation to rectify a breach of the Convention or to fill a gap of protection.
vote, but for a failure to introduce legislation to remedy such a breach.\textsuperscript{90}

His Lordship then gave another reason why the claim for compensation should fail: that the European Court itself had determinedly turned its face against any monetary award for prisoners seeking enfranchisement.\textsuperscript{91} His Lordship relied on the Grand Chamber’s judgment in \textit{Hirst (No 2)} where, in considering the claim for non-pecuniary loss, it stated that:

\begin{quote}
It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with the judgment. \textit{In the circumstances} it considers that
\end{quote}

\textsuperscript{90} \textit{Tovey} (n 76) [47].
\textsuperscript{91} ibid [48].
this may be regarded as providing the applicant with just satisfaction for the breach *in this case*.\textsuperscript{92}

It is suggested, therefore, that the European Court was not attempting to lay down any general rules or principles regarding non-pecuniary loss in these cases, but rather was stating that, *assuming that the government would comply with its ruling*, a declaration of a violation of Article 3 would be appropriate and satisfactory in this situation.

His Lordship also sought to rely on the European Court’s recent judgment in *MT and Greens v United Kingdom*,\textsuperscript{93} where it considered the award of punitive and aggravated damages inappropriate in the present case, because such damages are awarded, respectively, to reflect the particular characteristic of the violations suffered by the victims and to serve as a deterrent in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{92} *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 at [93] [author’s italics].
\item \textsuperscript{93} *The Times*, 24 November 2010.
\end{itemize}
\end{footnotesize}
respect of violations of a similar nature by the State; and to reflect the fact that they were victims of an administrative practice. This was the case even though it was a cause of regret and concern to the Court that no amending measures had been brought forward in the five years since the *Hirst (No 2)* judgment. Further, with respect to compensatory damages, although the Court accepted that ‘the continuing prohibition on voting may give rise to some feelings of frustration in respect of those prisoners who could reasonably expect potentially to benefit from any change in the law’, a finding of a violation, ‘*when viewed in tandem with the Court’s direction under Article 46*’, to bring forward legislative proposals within six months of the judgment, constituted ‘sufficient just satisfaction *in the present cases*’.  

Again, it is clear that the European Court’s decision on Article 41 was made on the facts, and was particularly influenced by the Court’s assumption that

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94 *MT and Greens v United Kingdom* (n 29) at [97].
95 ibid [98] [author’s italics].
the government had every intention of complying with the judgments in *Hirst (No 2)* and, of course, with the pilot judgment made in the case before it. Thus, although the European Court may, as a general norm, have set itself against the grant of non-punitive awards in these cases, it may well reserve itself the opportunity of granting such awards, including punitive and aggravated awards, when a state deliberately defies the judgments of the Court and fails to provide just satisfaction in the form envisaged by the Court. There is certainly no rule that non-pecuniary loss is not available in cases of disenfranchisement, because in one case the European Court awarded 3,000 euros for such loss when a mentally disabled person was barred from voting.\(^96\) The decisions in *Hirst (No 2)* and *MT and Greens* should certainly not be taken by the domestic courts, or the government, as an indication that the European Court

\(^{96}\) *Kiss v Hungary*, Application No. 38832/06, at [48] of the judgment. The Court merely stated that the applicant must have suffered some non-pecuniary damage, but did not explain why.
would refuse to grant non-pecuniary loss in cases where the victim has been denied the right to vote.

Further, the fact that both the legislature and the domestic courts are not willing, or able, to grant any form of just satisfaction, means that the European Court will again be asked to rule on this issue, when domestic prisoners take further action against the government for its refusal to comply with both judgments. In this regard it is interesting to note that the European Court has recently issued a press release stating that it will adjourn the 2,534 cases pending against the UK government with respect to prisoner’s voting rights until September 2013 to allow the government to initiate its latest proposals, under the monitoring of the Committee of Ministers.\(^97\) The expectation of the UK government is, of course, that if in the near future Parliament does pass legislation

complying with the European Court’s rulings, a subsequent European Court will rule that such measures constitute just satisfaction, and that no non-pecuniary loss will be offered to the prisoners under Article 41 of the Convention. The realisation that the Court might not award financial redress to the prisoners has, of course, encouraged the last two governments to employ its delaying tactics in this area. To deny the prisoners adequate redress for their loss of voting rights would question the efficacy not only of the Human Rights Act, already shown in Chester and Tovey, but also the European Convention’s machinery for redressing Convention rights’ violations.

Finally, Langstaff J considered the prisoners’ claim for a declaration of incompatibility under s.4 of the Human Rights Act 1998. His Lordship noted that a declaration had already been granted by the Scottish courts in Smith v Scott and thus concluded that there appeared to be nothing of additional practical use in
granting a declaration in this case.  

Nevertheless, his Lordship conceded that it might just be arguable that a court might be persuaded that it was a matter of personal importance to a prisoner to know that he had rights which were denied him, and to secure a declaration to that effect. However, his Lordship stressed that the provisions’ incompatibility arose because of the blanket nature of the ban, and that the Convention and the case law of the European Court did not require a state to introduce the franchise universally to all prisoners. His Lordship recognised that the state had a wide margin of appreciation in deciding the category of prisoner for whom a restriction on the right to vote would not be a disproportionate interference with his rights generally. Thus, noting that the prisoner Hydes was serving a sentence for burglary with a minimum of 4 years and 265 days, he concluded that it was not obvious that however that margin be exercised in honouring the

98 Tovey (n 76) [51].
99 ibid.
government’s international obligations he would be within that category which would then be enfranchised. Consequently, it could not be said that if the compatibility were removed the prisoner in question would be entitled to vote; all would depend on how, legitimately, Parliament chose to legislate.\textsuperscript{100} Accordingly, his Lordship struck the prisoner’s claim out, finding in the alternative that it had no reasonable prospect of success.\textsuperscript{101}

In making this decision his Lordship simply follows the approach of both the High Court and the Court of Appeal in \textit{Chester}; that until Parliament actually passes legislation in an attempt to comply with the judgment in \textit{Hirst}, it would be inappropriate and futile to grant a declaration of incompatibility of the present legislative provisions. Whilst agreeing with the

\textsuperscript{100} ibid [52].
\textsuperscript{101} ibid [54]. At this stage, it should be noted that prisoners such as Hydes would not benefit from even the most generous proposal in the recent Draft Bill.
domestic court’s general findings that to decide otherwise would usurp Parliament’s legislative role in drafting provisions to comply with the European Court’s judgments in *Hirst* and *MT and Greens*, such an argument seems to lose its constitutional strength when the government has made it clear on several occasions that it has no intention of abiding by the judgments. Admittedly, this was not clear to the High Court when the case was decided, yet it is not certain whether it would still have felt it inappropriate to make a declaration even had the case been decided after the parliamentary vote - the court perhaps feeling that this was a diplomatic and political issue which needed to be resolved by the government and Parliament rather than the courts. This deadlock, and the prisoners’ deep sense of frustration is, of course, exacerbated by the fact that the European Court will not give clear guidance on the legitimate scope of any reform that may be undertaken by the government. Accordingly, a further declaration of incompatibility was the *only* remedy available to the
prisoners at that stage. Neither, it is suggested, would such a declaration have been futile, as it would provide another warning to the government to remove incompatible legislation, and may, eventually, lead the European Court to award compensation in subsequent proceedings, given that the government has refused to provide just satisfaction in line with its own rulings and those of the domestic courts.

**Prisoner enfranchisement: the options**

Following the recent decision of the Grand Chamber in *Scoppola* the United Kingdom government was given 6 months from that judgment to provide the Court with proposals that satisfy Article 3 of the First Protocol and the general criteria provided by the Grand Chamber, above. In the meantime, prisoners remain disenfranchised and 2,534 cases pending against the UK government with respect to prisoners’ voting rights have
been adjourned until September 2013 to allow the
government to initiate its latest proposals. Thus,
although the government appear to have a relatively
broad discretion, it is clear that the current blanket ban is
unacceptable and that any measures need to show a
relationship between the nature and seriousness of the
offence and the act of disenfranchisement. Thus, the
government’s response to the judgment will need to
consider measures which are potentially acceptable to
the Court and the government’s Convention obligations.

The options outlined in the recently published
Draft Bill have already been examined, as have the
previous reactions to the European Court’s rulings. This
leaves us with the current situation and the question
whether any of the government’s proposals, other than a
total ban, would be acceptable to the European Court. It

102 European Court of Human Rights, ‘Press Release: Court adjourns
2,354 prisoners’ voting rights cases’ (26 March 2013)
<http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-
is suggested that a ban for all prisoners other than those serving 6 months or less, would be regarded as arbitrary by the Court and thus not in compliance with Article 3; particularly as those prisoners who would benefit from the relaxation would be so small as to question whether the very essence of the right in Article 3 was being extended to prisoners. Thus, although such a measure may be politically popular, in the sense that it is felt to meet the bare minimum of the government’s obligations, it is more than likely to be rejected by the Court in (inevitable) subsequent proceedings.

The proposal to extend the franchise to those serving less than 4 years would, applying the reasons stated by Eric Metcalfe, above, be equally objectionable, particularly if such a threshold is automatic and merely a convenient figure, and uninformed by the nature and seriousness of the offence. Of course since that opinion was offered, the Grand Chamber (in Scoppola) has widened the margin of appreciation available to States
and it might be suggested that a threshold of 4 years may fit within that margin. Nevertheless, as we have seen, the Grand Chamber in upholding relevant Italian law noted that the provisions showed the national legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. The Court also noted that the measures were only applied in connection with certain offences against the State or the judicial system, or to offences that the courts considered to warrant a sentence of at least 3 years’ imprisonment. Any measures, therefore, require some articulation of why these offences may justify a ban, or suspension, of the prisoner’s right to vote; and a blanket ban based entirely on the length of the sentence may not pass muster with the Court. Equally, as suggested earlier in this article, the inclusion of a judicial control, although not strictly required, would provide a welcome safeguard against arbitrary interference predicated on beliefs that
prisoners should lose the right to vote simply because they are prisoners.

What must not be forgotten, of course, is that the measures proposed by the Joint Committee, or ultimately adopted by Parliament may, in certain respects, be harsher than contained in the current law. For example, Italian law provides for a lifetime ban (albeit subject to appeal) for serious offences and life sentence prisoners, and for a suspension of the right beyond shorter sentences, whilst our domestic law gives back the right to vote automatically on release. This illustrates the arbitrary nature of the current domestic law, which looks solely to the fact of incarceration, although ironically our laws impose a lesser penalty on offenders than those States who have had their provisions accepted by the Court as consistent with Article 3. It would, therefore, be open for the government to justify longer bans for those convicted of very serious offences, especially if those
offences have a relationship with the convicted person’s disregard for society and the rule of law.

There remains the further question as to whether particular offences, such as electoral fraud or those involving abuse of public office, should be singled out for special treatment, perhaps in the form of an, appealable, lifetime ban. No such proposals appear to be in the government’s mind, although the Joint Committee have been enjoined to consider options other than those contained in clauses 1 to 3.

Indeed there exists within Member States of the Council of Europe a wide range of legal provisions covering the issue of prisoner enfranchisement.\(^{103}\) These range from total or _de facto_ bans,\(^{104}\) complete

\(^{103}\) See House of Commons Library, Standard Note SN/PC/01764, 22 November 2012 (Appendix).

\(^{104}\) Andorra, Armenia, Bulgaria, Estonia, Georgia (an application has been made to the Court challenging domestic law), Liechtenstein (a draft Bill has been presented to Parliament), Russia and San Marino.
enfranchisement, and other laws which provide for partial disenfranchisement for certain offences, and lengths of sentences, often at the discretion of the trial judge. The UK government are bound to argue that certain regimes in the Council of Europe have harsher regimes than its current ban or the more generous of its recent proposals, often disenfranchising beyond the sentence. However, it should be noted that many of those regimes have not been challenged before the European Court of Human Rights, whilst others possess the, albeit not mandatory, safeguard of judicial input. Rather than draw invidious comparisons with other regimes, the government is better advised to follow the general tenor of the Court’s judgments, which have consistently warned against arbitrary and blanket bans lacking an

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105 Albania, Azerbaijan, Bosnia and Herzegovina (apart from those sentenced by the International Criminal Court), Croatia, Czech Republic, Denmark, Finland, Ireland (since 2006), Latvia (apart from local elections), Lithuania, Macedonia, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland.
appropriate link between the crime, the sentence and disenfranchisement.

Observations and conclusions

The litigation surrounding the right to vote for convicted prisoners has exposed a range of political, public and judicial attitudes towards prisoner enfranchisement, and prisoners’ rights in general. On one hand, the initial decision of the domestic courts represented the idea of automatic forfeiture based on general and unarticulated ideas of punishment and civic responsibility, and this view has been adopted by successive governments during and since the judgment in Hirst (No 2) in their desire to retain the status quo. On the other hand, the decisions of the European Court of Human Rights in Hirst (No 2), Frodl and Scoppola question the bald assertion of automatic forfeiture and insist on a clear link between reasoned legitimate aims of sentencing and
punishment and the loss of the prisoner’s *prima facie* right to vote. This clearly limits the scope of any reform that the current government does introduce, leaving the government the stark choice between genuine and real compliance or a diplomatic, and possible legal, impasse between it and the Council of Europe.

The reluctance and ultimate refusal by successive governments to accept that prisoners maintain their basic human rights on incarceration is certainly not novel, and prisoners have fought long and hard to gain their rights to procedural justice in disciplinary proceedings,\(^\text{106}\) the right to legal and personal correspondence,\(^\text{107}\) the right to marry and found a family,\(^\text{108}\) and the right to due process in matters relating to release and recall from prison.\(^\text{109}\)

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\(^{107}\) *Golder v United Kingdom* (1975) 1 EHRR 524 and *Silver v United Kingdom* (1983) 5 EHRR 347.


All of these cases have been staunchly defended by the government, and in the cases of prison discipline and the right to found a family, appealed, unsuccessfully, to the Grand Chamber of the European Court. The referral to the Grand Chamber in _MT and Greens_, therefore, is another instance of the government reluctantly accepting the spirit and tenor of judgments of the Court and attempting every avenue of appeal before accepting the inevitability that prisoners do enjoy their Convention rights. However, the reluctance of the government to accept the judgment of the Court in this area is unprecedented; the government being prepared to defy the European Court and compromise its relations with the Council of Europe and its obligations under international human rights law for the sake of denying prisoners the right to vote.

The government’s inflexible and intransigent stance with respect to the prisoner’s right to vote reflects the deep-rooted belief, shared by many politicians and
on occasion by members of the domestic judiciary, that
prisoners forgo their rights on incarceration and that their
civil status is suspended on their sentence; thus
relegating their rights to mere expectations that are
enjoyed at the discretion of Parliament, and the
administrative decisions of Secretaries of State and the
prison authorities. This idea of automatic forfeiture
has often been supported in domestic decisions relating
to questions such as whether prisoners should enjoy the
general right to free speech, or the right to found a
family whilst in prison. So too, it appears to be at the
heart of many objections to extending the franchise to
sentenced prisoners.

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110 See S Foster, ‘Automatic Forfeiture of Fundamental Rights:
Prisoners, Freedom of Expression and the Right to Vote’ (2007)
16(1) Nottingham Law Journal 1.
111 R v Secretary of State for the Home Department, ex parte
O’Brien and Simms [1999] 3 All ER 400 (HL) and R (Nilsen) v
Secretary of State for the Home Department [2005] 1 WLR 1028
(CA), on the question of whether prisoners could gain access to
journalists and write their memoirs whilst in prison.
112 R (Mellor) v Secretary of State for the Home Department [2001]
EWCA Civ 472; [2001] 3 WLR 533 and Dickson v Premier Prison
The battle for prisoner enfranchisement has also exposed the futility of the prisoners’ protracted and successful challenge to the offending legislation in both the domestic courts under the Human Rights Act 1998 and before the European Court of Human Rights under the Convention machinery. The European Court denied the prisoners substantive compensation for the loss of their right to vote, on the ground that finding the government in violation of Article 3 was “just satisfaction” and thus sufficient to dispense with the prisoners’ claims. This reflects the Court’s reluctance to award non-pecuniary loss for breach of an individual’s democratic rights, where it is difficult to assess the damage to the victim and where there may be no evidence of loss of liberty, or harm to the victim’s property or person. This is, of course, compounded by the domestic courts’ refusal to grant such damages under the Human Rights Act 1998, and then to refuse to grant further declarations of incompatibility to mark the government’s consistent failure to comply with the European Court’s ruling.
The failure of the European Court to grant substantial compensation in *Hirst* and *MT and Greens* was clearly predicated on the belief that the government would adhere to the ruling in *Hirst*, and the warning given in *MT and Greens*, and consequently change the law. It thus allows it to feel secure in the knowledge that whatever diplomatic and political pressure may be placed on it to comply with the rulings, there would be no possibility of having to meet large compensation claims – the very factor which forced the government to put forward limited proposals for reform at the end of last year.\(^{113}\)

It is clear that unless and until the government takes a measured and appropriate response to the judgments in *Hirst*, *MT and Greens*, and now *Scoppola (No 3)*; it will continue to be in breach of its obligations

\(^{113}\) R Watson, A Asthana and F Gibb, ‘Cameron seeks extra cover on jail votes’ *The Times* (19 February 2011) page 5; S Coates, ‘Cameron is clear to defy Europe on human rights’ *The Times*, (18 February 2011) pages 1, 9.
under the European Convention. As noted previously,\textsuperscript{114} the government’s continued illiberal and restrictive approach to the reform of prisoner enfranchisement laid it open to potential challenge in Strasbourg and in the domestic courts, and the refusal of successive governments to pass the necessary legislative measures to comply with the European Court’s ruling in \textit{Hirst} then led, inevitably, to further challenges under the Convention and the Human Rights Act 1998. These difficulties have now re-surfaced after the Grand Chamber’s ruling in \textit{Scoppola v Italy}. Unlike the situation after \textit{MT and Greens}, the government now appears to have a wider margin of appreciation and an opportunity to introduce provisions, which, in certain respects, are less generous to prisoner enfranchisement. However, any such provisions must take note of the basic principles set out in the recent judgment and must be informed by logic, proportionality and a desire only to

\textsuperscript{114}See S Foster, ‘The long and winding road: the long battle for the prisoner’s right to vote’ (2010) 16(1) \textit{Cov Law J} 19, at 29.
disenfranchise individuals that are truly deserving of such a penalty. The simple fact that the individual is at the relevant time a lawfully incarcerated prisoner will not suffice, and ill-thought out variations on that theme will also be unacceptable.

The Voting Eligibility (Prisoners) Draft Bill offers three options: a ban for prisoners sentenced to 4 years or more, a ban for all prisoners sentenced to more than 6 months, or a ban for all convicted prisoners. For the reasons stated above, the second possibility is almost certainly outside the margin of appreciation offered to the government by the Scoppola judgment, and the first one only questionably within it because of its inflexibility. The final possibility is not worthy of a state that professes to believe in the rule of law and which has obligated itself in international law to abide by decisions of the Court. As with the 2006 proposals, it displays the government’s contempt for the Council of Europe, the Convention and the Court, and the basic notions of
human rights, and constitutional and democratic fair play. It is to be hoped, therefore, that the Committee provides more proportionate and reasoned options, reflecting the real tenor of the European Court’s jurisprudence and allowing the injustice of the previous law, and the failure to achieve justice for its shortcomings, to be redressed.
Does the European Convention Allow a Conviction to be Based on Evidence Obtained Through Inhuman or Degrading Treatment?

Orhun H Yalincak

Whether the European Convention on Human Rights (‘Convention’) allows a conviction to be based upon evidence obtained through inhuman or degrading treatment - contrary to Article 3 of the Convention - has only recently been confronted by the European Court of Human Rights (‘ECtHR’), and the answer remains disappointingly unclear. Article 3 of the Convention

1 LL.B. St. Mary's College, University of Durham (2012); MSc Exeter College, University of Oxford (2013) with many thanks to the Centre for Criminology and Faculty of Law staff at the University of Oxford for their guidance and support. Any errors or omissions are my own.
provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”³ The rights laid down in Article 3 of the Convention are not open to derogation even in times of emergency, and have been hailed as representing “one of the most fundamental values of democratic societies,”⁴ and have been referred to by the ECtHR as absolute.⁵

This essay argues that recent case law of the ECtHR has cast doubt on the absolute nature of this right by effectively severing it into two sections with different implications for the fairness of trials: evidence obtained by torture will automatically render a trial unfair, while evidence obtained by inhuman or degrading treatment, which provided the proceedings when viewed as a whole

³ Article 3, ECHR.
⁴ See e.g. Chahal v United-Kingdom (1996) 23 EHRR 413, [79]; Saadi v Italy (2008) 49 EHRR 30, [127].
are fair, may be perfectly compatible with the right to a fair trial in the absence of countervailing “public interest” factors.\textsuperscript{6} However, this gives rise to several inter-related questions: first, what are the underlying principles, if any, of the ECtHR’s approach to Convention rights, such as Article 3 and Article 8 and their link to Article 6? Secondly, what role does considerations such as “public interest” or other factors play in the Court’s Article 3 and Article 6 jurisprudence? Thirdly, what are the consequences of the Court’s approach in its interpretation of Article 3 vis-à-vis Article 6? This essay will argue that the result of the ECtHR’s approach has been a mass of incoherent case law, which has been marred by inconsistencies due to the ECtHR’s failure to formulate and apply a consistent set of underlying principles. It will further be argued that, as a result of the ECtHR’s approach the very structure of the Convention has been called into question. However, it will be questioned whether such academic criticisms

\textsuperscript{6} Ashworth (n 2) 161.
overlooks the structural limitations of the Convention and the supranational nature of the ECtHR.

To start the discussion, section 1 sets out the structure of the Convention. This section discusses the overarching structure of the Convention and the hierarchy of rights. Section 2 provides an overview of the ECtHR’s interpretation of Article 3. Section 3 establishes the relationship between Article 3 and Article 6 of the Convention. Section 4 explores the various theories or rationales for evidentiary exclusion and ECtHR jurisprudence and provides the answer to the central enquiry of this essay. This section also expands the discussion from the context of Article 3 vis-à-vis Article 6, to include the relationship between Article 6 and Article 8, to highlight the absence of any consistent or coherent underlying principles that can be discerned from ECtHR’s case law on these rights. Section five offers a conclusion and reviews the consequences of the ECtHR approach. This section also discusses whether
the search for an overarching principle to guide the ECtHR’s interpretation of the Convention is idealistic.

**Not all rights are equal**

There is no official ranking of the rights set out in the Convention, however, the structure of the Convention itself implies that the rights it safeguards are not all of equal importance. However, there are three arguments to conclude that there is a hierarchy of rights in the Convention. First, Article 15 of the Convention permits derogations from certain Convention rights “[i]n times of war or other public emergency threatening the life of the nation[…]to the extent strictly required,” with the

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7 P Roberts, ‘Excluding Evidence as Protecting Constitutional or Human Rights?’ in-L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) 187; see also Ashworth (n 2) 146.

8 Ashworth (n 2) 146.
exception of Articles 2, 3, 4(1) and 7.\[^9\] It is undeniably part of the object and purpose of the Convention that such non-derogable rights should enjoy a higher degree of protection and are, therefore, variously referred to in ECtHR jurisprudence as ‘absolute.’\[^10\] Nonetheless, even non-derogable rights are susceptible to express and implied internal limits at the definitional stage, and are thus not necessarily entirely unqualified.\[^11\]

Secondly, a hierarchy of rights in the Convention can be discerned from the differing degree to which the Convention admits qualifications upon its rights.\[^12\] For instance, qualifications circumscribe the right to respect for private life (Article 8), the right to freedom of


\[^10\] ibid; see also A Orakhelashvili, ‘Restrictive Interpretation of Human-Rights Treaties in Recent Jurisprudence of the ECHR’ (2003) 14(3) EJIL 529, 561.


\[^12\] Ashworth (n 2) 147.
thought and religion (Article 9), the right to freedom of expression (Article 10), and the right to freedom of assembly and association (Article 11).\textsuperscript{13} All of these rights are qualified by a second paragraph, which provides for state interference if it can be established that this is “necessary in a democratic society” on one of the stated grounds subject to the doctrine of proportionality.\textsuperscript{14}

Thirdly, situated between these two categories is an intermediary category, which Ashworth refers to as ‘strong rights’ and includes the right to liberty and security of the person (Article 5) and the right to a fair trial (Article 6).\textsuperscript{15} The rights contained in Articles 5 and 6 are not subject to any explicit qualification, however, the ECtHR has stated that they are not absolute.\textsuperscript{16}

\textsuperscript{13} ibid.
\textsuperscript{14} ibid.
\textsuperscript{15} ibid 147; see also Croquet (n 9) 313.
\textsuperscript{16} ibid,
**ECtHR interpretation of Article 3 of the Convention**

The brevity of Article 3 of the ECHR “masks the complexity of the issues engendered by its terms.”\(^{17}\) Article 3 encompasses five types of treatment: torture; inhuman treatment; degrading treatment; inhuman punishment; and degrading punishment.\(^ {18}\) While the ECtHR does not always clarify precisely which type of treatment has occurred in cases of breach, the focus tends to lie on the thresholds that separate Article 3 from treatment that falls outside the prohibition in Article 3, as well as the threshold that separates torture from inhuman or degrading treatment or punishment.\(^ {19}\) The leading case focusing on the distinction between torture and cruel, inhuman or degrading treatment is *Ireland v United Kingdom*,\(^ {20}\) where the Court stated, “The Convention, with its distinction between torture and

\(^{17}\) Addo & Grief (n 9) 510.

\(^{18}\) Mavronicola (n 5) 26-27.

\(^{19}\) ibid (collecting cases) (internal citations omitted).

\(^{20}\) *Ireland v United Kingdom* (1978) 2 EHRR 25.
inhuman or degrading treatment should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.\(^{21}\)

In subsequent cases, the ECtHR has been extremely reluctant to attach the “special stigma”\(^{22}\) which accompanies a finding of torture.\(^{23}\) The reasons for the ECtHR’s reluctance are manifold and outside the scope of our discussion, however, they centre on the Court’s reluctance to open up Pandora’s box and destabilize its political support.\(^{24}\) Article 3 also encompasses certain positive obligations including, *inter alia*, the adequacy of the criminal law and the criminal justice system in protecting individuals from suffering proscribed treatment at the hands of non-state agents;\(^{25}\) the provision of medical care and conditions of

\(^{21}\) ibid [167]; see also Mavronicola (n 5) 32.

\(^{22}\) ibid.


\(^{24}\) ibid.

\(^{25}\) ibid (citing *A v United Kingdom* (1998) 27 EHRR 611, [20]).
imprisonment,\textsuperscript{26} the requirement to protect vulnerable persons at known risk of suffering Article 3 treatment;\textsuperscript{27} and a requirement to investigate plausible complaints of the proscribed treatment.\textsuperscript{28}

While Article 3 is absolute at law--it is labelled as ‘absolute’ and declared to be applied as such by the ECtHR, “the mouthpiece of the law”\textsuperscript{29}-- exceptions or definitional restrictions can qualify rights that are traditionally perceived as absolute.\textsuperscript{30} For example, an absolute right subject to exceptions is the right to life (Article 2).\textsuperscript{31} Similarly, the rights against torture, inhumane and degrading treatment contained in Article 3 requires that a certain threshold be reached before it can

\textsuperscript{26} ibid (citing Alksanyan v Russia 52 EHRR 18).
\textsuperscript{27} ibid (citing Z v United Kingdom (2001) 34 EHRR 3, [73]).
\textsuperscript{28} ibid (citing Assenov v Bulgaria (1998) 28 EHRR 652 (finding obligation under Article 13); cf Aydin v Turkey (1997) EHRR 1866 (finding obligation under Article 3)).
\textsuperscript{30} Croquet (n 9) 314.For an in-depth discussion of the nature of absolute rights see Mavronicola (n 5).
\textsuperscript{31} ibid (e.g.-Article-2(2)(a)-(c)).
be triggered, which supposes a weighting of all the circumstances of the case,\textsuperscript{32} and involves a “degree of relativism,”\textsuperscript{33} and “allows for a measure of discretion.”\textsuperscript{34} In that sense, Article 3 ECHR suffers from definitional restrictions.\textsuperscript{35} The ECtHR has also made it clear that the boundaries between torture and the other forms of proscribed treatment or punishment will continue to shift, by stating, that the Convention is a “living instrument which must be interpreted in the light of present-day conditions,”\textsuperscript{36} and noting that “certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in the future.”\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{32} ibid; see also Ashworth and Redmayne (n 11) 36-37.
\item \textsuperscript{33} D Feldman, ‘Civil Liberties and Human Rights in England and Wales’ (2\textsuperscript{nd} edn, OUP 2002) 242.
\item \textsuperscript{34} H Fenwick, ‘Civil Liberties and Human Rights’ (3\textsuperscript{rd} edn, Cavendish Publishing 2004) 44-45.
\item \textsuperscript{35} Croquet (n 9) 314 (citing \textit{Soering v United Kingdom} (1989) 11 EHRR 439 (Ser.A) at 32 (noting even absolute rights can be the object of internal limits in the form of definitional restrictions)).
\item \textsuperscript{36} Mavronicola (n 5) 33 (collecting-cases).
\item \textsuperscript{37} ibid (internal citations omitted).
\end{itemize}
Linkage between Articles 3 and 6

Issues pertaining to the exclusion of evidence in legal proceedings that have been obtained in breach of one of the Convention rights, such as Article 3, have revolved around Article 6’s guarantee of a right to fair trial.38 Inadmissibility of evidence is never directly mandated by Article 6 of the Convention;39 however, the ECtHR’s jurisprudence shows that the use of evidence obtained in violation of a Convention right, particularly Article 3, is considered to violate the Convention, not because its use would breach these standards per se but because they would breach a defendant’s right to a fair trial enshrined in Article 6.40

38 Roberts (n 7) 187.
Article 6 of the Convention monitors judicial proceedings that threaten deprivation of an individual’s rights under the Convention. It requires that all defendants receive a right to a fair and public hearing and articulates several standards to meet this requirement. The ECtHR considers a fair trial to be an adversarial one, where the proceedings embrace the principle of “equality of arms.” In relation to the admissibility of evidence, Article 6 when read in conjunction with Article 13, has been held to imply that there must be an effective procedure during a criminal trial by which to challenge the admissibility of evidence, which has been obtained unlawfully or in breach of the Convention. This has meant giving both parties a “real

42 ibid.
opportunity” to examine and challenge the evidence before them.\textsuperscript{45} Specifically, the ECtHR considers whether the domestic courts respected the rights of the defence to challenge the legitimacy of the evidence and whether the defence had the right to question witnesses.\textsuperscript{46} The ECtHR also considers whether incriminating statements are voluntarily made and whether the tainted evidence comprises a substantial or decisive basis for a conviction.\textsuperscript{47}

 Searching for rationales for evidentiary exclusion in ECtHR jurisprudence

The ECtHR has considered the issue of whether evidence obtained in breach of Article 3 will violate Article 6 on a number of occasions.\textsuperscript{48} However, subsequent decisions of the ECtHR have never clearly

\textsuperscript{45} Gasper (n 41) 284 (internal citations omitted).
\textsuperscript{46} ibid.
\textsuperscript{47} ibid, see Section 4 \textit{infra} for discussion of such examples.
\textsuperscript{48} Emmerson & Ashworth (n 44) 635 (collecting cases).
articulated a principled foundation or provided consistent reasoning leading to substantial academic criticism. Section 4.1 briefly discusses various theories of evidentiary exclusion and traces their role in the ECtHR’s jurisprudence relative to the relationship between Article 3 and Article 6, and expands the discussion to include the Court’s jurisprudence relative to Article 6 and Article 8. This section highlights what Ashworth has characterized as the ECtHR’s failure to support its conclusions with a consistent and coherent underlying principle. Building on the previous section, section 4.2 returns to the central enquiry that was posed at the beginning of this paper and highlights the shift towards “public interest” and “seriousness of the offence” as determinative factors.

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49 See eg Ashworth (n 2), Roberts (n 7) 186-190; Mavronicola (n 5); and J Jackson (n 40) 138-143; P Roberts, ‘Normative Evolution in Evidentiary Exclusion: Coercion, Deception and the Right to a Fair Trial’ in P Roberts and J Hunter (eds), Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions (Hart Publishing 2012).

50 Ashworth (n 2) 159-161.
Rationales for evidentiary exclusion

Each of the evidentiary exclusion principles presented below have been much debated by evidence scholars, however, given the huge and complex debate surrounding their relative merits or deficiencies, these issues will not be dealt with and are kept outside the scope of this section. Instead, a brief overview will be presented of each principle to determine whether a common theme or principle can be gleaned from the ECtHR jurisprudence.

Jeremy Bentham is regularly invoked as the standard bearer for the reliability principle.51 In short, for reliabilists, “impropriety in criminal investigations is one thing and the admissibility of reliable evidence at trial quite another.”52 The core Benthamite premise is that if “you exclude evidence, you exclude justice.”53 However,

51 Roberts & Zuckerman (n 39) 179.
52 Roberts (n 7) 172.
53 Roberts & Zuckerman (n 39) 180 (internal citations omitted).
this Benthamite approach “reverses the order of priority between fact-finding and justice.”

In contrast, the “deterrence theory” or “disciplinary principle,” which is still popular with some courts in the United States, holds that if a law enforcement officer knows that the evidence is likely to be excluded, they will be deterred from illegality and other investigative impropriety. Whatever the merits of this assertion, it is a rights-centred rationale, in that it regards respect for rights as the goal and selects deterrence as the means to achieve it.

Next, the separation principle treats each part of the criminal justice process independently. In other
words, if a wrong was committed during an investigation, the police officers who carried it out should themselves be punished, but this should have no bearing on the situation of the defendant. In contrast, the “moral integrity” principle takes a different approach. It holds that a breach of, for instance, someone’s right not to be tortured during the criminal process would undermine the authority of the state to punish a defendant.

Finally, the protective or remedial principle, in the context of human rights, holds that the only way to give significant force to a person’s right, for instance, not to be tortured is to exclude the evidence obtained in violation of this right, and that it is much more important to uphold this right than to convict the guilty defendant

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59 ibid 149.
60 ibid.
in such a case.61 This approach aims to vindicate individual rights.62

Support for the separation thesis?

Although the ECtHR has extended the concept of “fair trial” to cover pre-trial investigative techniques where “from the outset, the applicant was definitively deprived of a fair trial,”63 it has categorically rejected the proposition that the use of evidence obtained in violation of an accused’s privacy rights will necessarily result in a violation of Article 6.64 For instance, in Khan v United Kingdom,65 the ECtHR found a violation of Article 8, because the use of listening devices by the British police was not sufficiently governed by a legal framework at

61 ibid; Roberts & Zuckerman (n 39); and see also Roberts (n 7) 186-190.
62 Roberts (n7) 186-190 (internal citations omitted).
63 Roberts (n 7) 187; see also Teixeira de Castro v Portugal (1998) 28 EHRR101,[39].
64 Roberts (n7) 187.
the time, however, it found no violation of the applicant’s right to fair trial even though the only evidence against the applicant was obtained through the violation of his Article 8 rights. Judge Loucaides in a strongly worded dissent expressed the argument in favour of exclusion:

This is the first case which comes before the Court where the only evidence against an accused in a criminal case which also led to his conviction, was evidence obtained in a manner contrary to Article 8 of the Convention…[A] trial cannot be fair, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention.

66 Ashworth (n 2) 156.
67 Emmerson & Ashworth (n 44) 638.
68 Khan (n 65) supra, Judge Loucaides (dissent).
Despite the dissent’s strong arguments, the majority rested its holdings on its Schenk v United Kingdom\textsuperscript{69} reasoning that “Article 6 of the Convention…does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.”\textsuperscript{70} The Schenk reasoning, as developed by its progeny,\textsuperscript{71} holds that, where a defendant is permitted an opportunity to challenge the evidence and the trial court is permitted the discretion to exclude the evidence, as was the case in Khan, Article 6 will be satisfied.\textsuperscript{72} The majority adopted a similar approach in PG and JH v United Kingdom.\textsuperscript{73} In PG and JH, the Court found that the surveillance methods had violated Article 8 and found the facts to be analogous to Khan and, in fact, noted that the case was stronger than

\textsuperscript{69} Schenk v Switzerland (1991) 13 EHRR 242.
\textsuperscript{70} ibid [46].
\textsuperscript{71} Ashworth (n 2) 156 (noting that this reasoning was more recently repeated in Heglas v Czech Republic (2008) 48 EHRR 1018).
\textsuperscript{72} ibid; see e.g PG and JH v United Kingdom [2002] Crim LR 308, judgment of September 25 2011,[79].
\textsuperscript{73} ibid.
Khan because there was other evidence tending to confirm the applicant’s involvement. However, analogous to the rationale in Khan and Schenk, the Court proceeded to find no violation of the applicant’s right to fair trial since they “had ample opportunity to challenge both the authenticity and the use of the recordings.” These decisions are an express rejection of the “rights thesis” and “moral legitimacy thesis,” and suggest that they are underpinned by the “separation thesis.”

In contrast to the majority approach, the dissent endeavoured to give effect to the principle of effective protection in Articles 1 and 19 of the Convention, to ensure that all Articles of the Convention are safeguarded. Judge Tulkens’ sharp dissent questioned whether:

74 Emmerson & Ashworth (n 44) 639.
75 ibid (citing PG and JH (n 72) supra [71]).
76 Jackson (n 40) 138.
77 ibid; Ashworth (n 2) 157.
78 Ashworth (n 2) 157-161; Orakhelashvili, (n 10).
a trial can[not] be described as fair where evidence obtained in breach of a fundamental right guaranteed by the Convention has been admitted during that trial. As the Court has already had occasion to stress, the Convention must be interpreted as a coherent whole…The rights enshrined in the Convention cannot remain purely theoretical or virtual.\textsuperscript{79}

The dissent’s apparent rationale for exclusion is “a mixture of…the remedial theory [protective principle] and the moral integrity principle.”\textsuperscript{80} In any event, there is no faithful adherence to the “separation principle” by the majority in analogous cases. For instance, in contrast to \textit{Khan} and \textit{PG and JH}, in \textit{Allan v United Kingdom},\textsuperscript{81} the admission of evidence obtained by methods contrary to Article 8 was held to amount to a breach of Article 6,

\begin{footnotesize}
\begin{enumerate}
\item \textit{PG and JH} (n 72) supra (Judge Tolkens’ dissent)(emphasis-added).
\item Ashworth (n 2) 157; and Roberts & Zuckerman (n 39) 181-191.
\item \textit{Allan v United Kingdom} (2002) 36 EHRR143.
\end{enumerate}
\end{footnotesize}
where the unlawful recording was not simply of a spontaneous conversation but of a conversation manipulated by a police informant.\textsuperscript{82} By comparison, in \textit{Heglas v Czech Republic},\textsuperscript{83} where the unlawful recording of a conversation between the applicant and another person constituted a breach of Article 8, the ECtHR distinguished \textit{Allan} and found no violation of Article 6.\textsuperscript{84} Similarly, as discussed in the next section, in the context of Article 3’s relationship to Article 6, the majority’s approach has shifted between the separation principle and variations of the moral integrity principle.

\textbf{Support for the moral integrity or moral legitimacy principle?}

Having failed to find a consistent underlying principle in the Court’s Article 8 vis-à-vis Article 6 jurisprudence,

\begin{flushright}
\begin{footnotesize}
\textsuperscript{82} Emmerson & Ashworth (n 44) 640.
\textsuperscript{83} \textit{Heglas} (n71).
\textsuperscript{84} Emmerson & Ashworth (n 44) 640; see also Ashworth (n 2) 158.
\end{footnotesize}
\end{flushright}
the focus now shifts to the Court’s interpretation of Article 3 vis-à-vis Article 6. The ECtHR approach in *Jalloh* where it held:

Incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of…torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate…morally reprehensible conduct…[and]…afford brutality the cloak of law.\[85\]

This comports with the moral integrity rationale to justify evidential exclusion in cases involving torture.\[86\] Indeed, as highlighted by Judge Bratza’s concurring judgement in *Jalloh*, it was the central tenet of his argument that it should apply to *all* treatment covered by

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\[85\] *Jalloh v Germany* (2007) 44 EHRR 32, [105] (internal citations and quotation marks omitted).

\[86\] Jackson (n 40) 137.
Article 3, not just instances where the treatment rises to the level of torture.\textsuperscript{87}

The more recent case of \textit{Levinta v Moldova}\textsuperscript{88} took a similar approach to \textit{Jalloh};\textsuperscript{89} however, \textit{Gäfgen v Germany}\textsuperscript{90} exposes the limitations of appeals to the moral integrity principle.\textsuperscript{91} In \textit{Gäfgen}, the ECtHR reaffirmed that the prohibition on ill treatment of a person applies even in the event of a public emergency threatening the life of the nation and irrespective of the authorities’ motivations, be it to save a person’s life or to further criminal investigations.\textsuperscript{92} Yet, the Court immediately clouded its message by drawing a distinction between real evidence obtained directly from ill treatment violating Article 3 and the indirect

\textsuperscript{87} ibid, 137-138; see also \textit{Jalloh} (n 85) [0]-[18].
\textsuperscript{88} \textit{Levinta v Moldova} (2011) 52 EHRR 40 [63].
\textsuperscript{89} Jackson (n 40) 137.
\textsuperscript{90} \textit{Gäfgen v Germany} (2009) 48 EHRR 13, aff’d by the Grand Chamber, (2011) 52 EHRR 1.
\textsuperscript{91} Jackson (n 40) 141.
\textsuperscript{92} ibid 140.
evidential fruits of such violations.\textsuperscript{93} Further, the Grand Chamber also reasoned that the applicant could no longer be classified as a ‘victim’ for purposes of Article 34, if the officers responsible for his mistreatment were punished and he was able to pursue an action for damages, thus, implicitly endorsing the separation principle.\textsuperscript{94} The common thread connecting the Court’s Article 8 vis-à-vis Article 6 jurisprudence apply \textit{mutatis mutandis} to the Court’s Article 3 vis-à-vis Article 6 jurisprudence: there is no consistent adherence by the Court to a consistent set of underlying principles as its decisions shift between an implicit endorsement of the separation principle, to the moral integrity principle, and rest elsewhere in subsidiary arguments.\textsuperscript{95}

\textsuperscript{93} ibid.
\textsuperscript{94} Ashworth (n 2) 158.
\textsuperscript{95} ibid.
Support for the remedial theory or protective principle?

While there is no reference in ECtHR jurisprudence to variations of what has been called the “protective or remedial principle,” could the protective principle hitch a ride on what Roberts calls “the ECHR Caravan?” Judge Loucaides dissent in Khan, Judge Tulkens’ dissent in PG and JH, as well as Judge Spielmann’s dissent in Bykov, strongly hint at a growing minority that may lead an eventual shift to a mix of the remedial or protective principle. However, this does not mean the protective principle would necessarily neatly fit into ECtHR jurisprudence.

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96 Roberts (n 7) 186.
97 Ashworth (n 2) 159.
98 ibid (observing that the “minority appears to grow in strength”)
99 Roberts (n 7) 186-190 (noting difficulties).
ECtHR case law: does the Convention allow a conviction to be based on evidence obtained through inhuman or degrading treatment?

Recalling from the above discussion that the Grand Chamber in Jalloh left open the broader question of whether every breach of Article 3 should render evidence inadmissible at trial, the majority’s judgment when read in conjunction with Gäfgen betrays what Ashworth calls “pragmatism before principle.”¹⁰⁰ The two decisions dealing with the relationship between Article 3 and Article 6, especially when read in conjunction with the decisions dealing with the relationship between Article 6 and Article 8, reveal a shift to reasoning that varies based on the seriousness of the offence charged and public interest grounds.¹⁰¹

Returning to the majority’s decision in Gäfgen, the Court acknowledged that its previous case law had

¹⁰⁰ Ashworth (n 2) 158-161.
¹⁰¹ ibid.
not authoritatively settled the question whether the prosecution’s resort to evidence obtained through a violation of Article 3 necessarily rendered a trial unfair under Article 6.\textsuperscript{102} While the majority confirmed that exclusion may be a necessary remedy, its references to competing rights and public interest, hinted that not every violation of Article 3 necessarily leads to a violation of an applicant’s right to fair trial under Article 6:\textsuperscript{103}

The Court is further aware of the different competing rights and interests at stake. On the one hand, the exclusion of often reliable and compelling real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high

\textsuperscript{102} ibid 155.
\textsuperscript{103} Gäfgen (n 90) [175]; see also Ashworth (n 2) 155.
importance...\textsuperscript{104}

The Grand Chamber proceeded, through some tortured and, at points, questionable assessment of the facts, to hold that Article 6 had not been breached since:\textsuperscript{105}

\begin{quote}
[t]he additional evidence admitted at the trial was not used by the domestic court against the applicant to prove his guilt...[T]here was a break in the causal chain leading from the prohibited methods of investigation to the applicant’s conviction and sentence in respect of the impugned real evidence.\textsuperscript{106}
\end{quote}

The majority’s opinion failed to convincingly respond to, let alone engage, the challenges and questions raised by the dissent.\textsuperscript{107} The end result is that the ECtHR \textit{does} allow a conviction to be based on evidence obtained

\begin{flushleft}
\textsuperscript{104} Gärsten (n 90) [175], [178].
\textsuperscript{105} Ashworth (n 2) 158.
\textsuperscript{106} Gärsten (n 90) [180], compare dissent (B) [5]-[6].
\textsuperscript{107} Ashworth (n 2) 158-161.
\end{flushleft}
through inhuman or degrading treatment, *provided, however*, that such treatment does not rise to the level of torture, and *provided, however*, that the applicant has had a fair opportunity to challenge the authenticity of the evidence before the national Court and the “public interest” factors and “the seriousness of the offence” weigh in favour of inclusion of the evidence. On a broader plane, the absolute prohibition in Article 3 is implicitly weakened by the Court's rejection of the fruit of the poisonous tree doctrine and this rejection sits uneasily with any strict conception of fairness in Article 6.108 Furthermore, the Court’s reference to “public interest” and “competing rights” adds fuel to the “consequentialist argument that inhuman treatment can be justified when its ends justify its means.”109 For many, the Court’s consequentialist approach is self-defeating because inhuman treatment is seen as a

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109 ibid.
moral charged act, which affords no justification.\textsuperscript{110} However, the core problem with the decision in this regard “is its failure to lay down an unequivocal principle that can defeat the consequentialists \textit{ab initio}.”\textsuperscript{111}

**Consequences and conclusion**

As shown above, the Court’s recent case law has treated Article 3 as if it is “severable down the middle, so that torture on the one hand, and inhuman or degrading treatment on the other, may have different implications for the fairness of trials.”\textsuperscript{112} This has created an “impact loaded hierarchy”\textsuperscript{113} in the relationship between Article 3 and Article 6, and, most crucially, undermined the absolute nature of the rights in Article 3.\textsuperscript{114} However, the

\textsuperscript{110} ibid.
\textsuperscript{111} ibid.
\textsuperscript{112} Ashworth (n 2) 161.
\textsuperscript{113} Mavronicola (n 5) 33.
\textsuperscript{114} ibid.; see also Ashworth (n 2) 161; and Spurrier (n 108) 519.
ECtHR’s approach, not just in the context of Article 3’s relationship to Article 6, but also in the context of Article 8’s relationship to Article 6, reveals what Ashworth and others have observed is a shift towards malleable “public interest” and “public safety” factors as the determinative criterion in recent cases.¹¹⁵

Next, this essay highlighted the ECtHR’s failure to identify any consistent underlying principle to promote, at a minimum, consistency in its Article 3 vis-à-vis Article 6 and Article 8 vis-à-vis Article 6 jurisprudence, let alone articulate a coherent argument that would link the various Convention rights.¹¹⁶ Similarly, as noted by Ashworth, even the subsidiary arguments the Court has advanced in individual cases, for instance, the Schenk line of reasoning, fail to provide any consistency since the Court has found evidence

¹¹⁵ Ashworth (n 2) 158-161.
¹¹⁶ ibid.
inadmissible in entrapment cases,\textsuperscript{117} and in cases where evidence has been obtained in breach of Article 3.\textsuperscript{118} In a related vein, Ashworth has also criticized the Court’s frequent assertion that a trial may be fair overall if impugned evidence “plays a limited role in a complex body of evidence assessed by the Court,”\textsuperscript{119} since in other cases, where the disputed evidence is the lynchpin of the prosecution’s case,\textsuperscript{120} the ECtHR has nonetheless found no breach of Article 6.\textsuperscript{121}

For the ECtHR, in the context of criminal adjudications, clarity in articulating exclusionary rationales is a vital element to secure the compliance and respect of the rights guaranteed by the Convention.\textsuperscript{122} Progress towards greater clarity will require more sustained focus on the principles of fairness that underlie

\textsuperscript{117} Ashworth (n 2)160 (citing Teixeira de Castro (n 63); Ramausas v Lituanina (2010) 51 EHRR 303).
\textsuperscript{118} ibid (citing Jalloh (n 85)).
\textsuperscript{119} ibid.
\textsuperscript{120} ibid (citing Khan (n 65))
\textsuperscript{121} ibid.
\textsuperscript{122} Roberts (n 49) 179-180.
a fair trial and a clearer link between the use of such evidence at trial and the fairness of the proceedings. However, three additional points bear mention. These call for greater consistency and coherence in principle in ECtHR jurisprudence to overlook some major practical obstacles. First, as noted above, not all Convention rights are equal. Second, the Convention and ECtHR are ill equipped to deal with certain allegations by individuals or state parties. This point is thrown into sharp relief when set against the problem of systemic violations involving Article 3. Third, the Court’s shift to “public interest” and “public safety” factors can perhaps be seen as evidence of the Court’s attempt to retain flexibility and avoid opening up a Pandora’s box, potentially destabilizing the already

123 Jackson (n 39) 133 (citing S Summers, ‘Fair Trails: The European Criminal Procedural Tradition and the European Court of Human Rights’ (Hart Publishing 2007)).
124 Roberts (n 7) 186-190; Roberts (n 49) 179-180.
125 Aolain (n 24) 220-223, 225; Mavronicola (n 5) 4 (noting over 850 violations of Article 3 in the past 50 years).
tenuous political support enjoyed by the Court.¹²⁶ Imagine the public outcry in cases like Gäfgen, or in hypothetical cases involving a ‘ticking bomb.’ Third, while it is precisely in such “times of crisis that absolute values must remain uncompromised,”¹²⁷ the Court’s self-imposed unwillingness to develop a coherent and consistent set of concepts and principles to link its decisions across the various Convention rights, may reveal that the Court is less interested in shining as a “beacon in international human rights litigation,”¹²⁸ and more interested in adopting a pragmatic approach to its own self-preservation.¹²⁹

¹²⁶ ibid; see also Croquet (n 9) 351-353.
¹²⁷ Gäfgen (n 90) (dissent-(B) [3]-[9]).
¹²⁸ Ashworth (n 2) 160.
¹²⁹ Aolain (n 24)-220-223, 225.
Growth Without Institutions? The Case of China

*Horace Yeung*¹ & *Flora Xiao Huang*²

‘Crossing the river by feeling each stone’ refers to the pragmatic policy of Deng Xiaoping,³ to move ahead with economic reforms slowly and pragmatically. It appears that in the financial crisis, such a pragmatic approach, which reflects the conventional wisdom of a common Chinese; that is, conservatism, has saved China from crashing into a wall like its Western counterparts. The economic reform in China has been clearly one with

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³ Deng, the reformist leader of the Community Party of China, was in office between 1982 and 1987.
‘Chinese characteristics’. In contrast to those in Russia and Eastern Europe, there has not been any transfer of control from the state to the private hands. Whilst the separation of ownership and control have been viewed by commentary as the necessary feature of many Anglo-American corporations which dominate the world, the difficulty for China to make a clear break with its socialist past and leap into capitalism largely comes from the Chinese leadership’s rejection of privatisation. It appears the growth of China has followed a unique path of development. One notable example is that, although the economic reform started in 1978, a formal framework of company, financial and labour laws did not come until around mid-1990s. Moreover, only until mid-2000s were these laws then revised and polished to international standards. However, the growth of China

remained strong amid a fairly long period of ‘institutional void’.

This article first offers a brief explanation to the importance of re-considering institutions, especially after the financial crisis. Then, it discusses the role of these institutions in the context of China. One focus will be on the legal institutions in China. This article will consider different areas of law, for example, company, securities and labour laws, as well as their enforcement. Afterwards it goes on to discuss the role of other institutions such as politics, culture, as well as certain professionals. The final part concludes. This article seeks to present a comprehensive and contextual analysis of a spectrum of factors relevant to the growth of China, with the support of existing empirical evidence.

**Reconsidering institutions after the financial crisis**
There has been a very common assumption that financial markets are the cutting edge of institutional innovation and that countries without a highly developed system of financial markets are somehow backward or underdeveloped.\(^5\) From the experience of Japan and Germany, it appears that the two features of Anglo-American capitalism, namely dispersed ownership of companies and sophisticated financial markets are not necessarily the pre-requisites of prosperity.\(^6\) In fact, advocates of the continental system claim that this structure fosters long term planning, while a market-based system is said to encourage short term expectations of investors and responsive short term strategies by managers.\(^7\) Regrettably, the crash of the


\(^{6}\) According to the findings from Levine, the US, the UK, Germany and Japan have very similar long-run growth rates, see R Levine, ‘Bank-Based or Market-Based Financial Systems: Which is Better?’ (2002) 11 Journal of Financial Intermediation 398.

global financial markets in 2007-08 has given the world economy a painful lesson.

The scene of the credit crunch was set up by the subprime mortgage crisis. The fall in expectations of property prices led to the rising defaults in subprime loans in 2006. In the next year, the US government assisted the rescue of Bear Stearns, one of the largest global investment banks. This rang the bell of the liquidity strains of major financial institutions. During 2008, housing market problems were recognised as widespread in the US, UK and other countries. House prices fell and supply of credit dried up. The funding problem of major mortgage providers, for instance, Fannie Mae, Freddie Mac and Northern Rock intensified. From September onwards, massive loss of

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confidence materialised. The Bankruptcy of Lehman Brothers broke the traditional belief that some large institutions would be too big to fail. A mix of credit problems caused a chain reaction of collapse such as Washington Mutual, Bradford & Bingley and Icelandic banks. Exceptional government measures have then been deployed to prevent the problem from worsening. The Western world has ironically gone back to socialism whilst China is marching towards a market economy.

The original sin of Western capitalism revealed by the credit crunch is greed. Awards have not only been given to winners, but also to losers. For example, Fred Goodwin, the former chief executive of the Royal Bank of Scotland (RBS), who was stripped of his knighthood in 2012, was heavily criticised for taking a pension amounting to £700,000 per year.\textsuperscript{9} There is nothing

\textsuperscript{9} BBC, ‘Former RBS Boss Fred Goodwin Stripped of Knighthood’ (31 January 2012), available at \textless http://www.bbc.co.uk/news/uk-politics-16821650\textgreater . Although the recent outcry for better corporate governance should not be taken lightly, the very basic objective of executive remuneration to attract, retain and motivate the executives
wrong in an employee receiving a pension proportionate to his position, but the problem is that under Goodwin’s leadership, RBS suffered an annual loss of £24.1 billion, the largest annual loss in the UK corporate history. RBS had to be bailed out and nationalised by the government. Therefore, his pension would effectively be paid out of the pockets of all taxpayers.

While the Chinese still well remember the calamity that followed from the Maoist centrally planned economy, the desire for an orderly society is deeply ingrained in the mentality of all Asians. Indeed, according to some commentators, many of Asia’s most successful entrepreneurs are keen to retain family control of the business, which enables them to take a long-term

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view. But of course, the story of China is different. There is more than one Asian approach.

It all started in 1978, when gaige kaifang - the twin strategies of reform and opening-up the economy - was initiated. Reform first started from some rural areas, then to some small to medium enterprises in urban areas, and then to some larger state-owned enterprises (SOEs). The increasing economic prominence of China is clearly reshaping the international financial system. It has grown strongly over the last decade with averaged GDP growth at 9.1 per cent and almost unaffected by the financial crisis. Towards the new millennium, China’s state-owned sector looked like an economic disaster. In the aftermath of the Asian financial crisis, average profit margins in Chinese SOEs fell to close to zero. After ten years, in 2007, the combined profit of the 150 or so companies controlled by the state reached US$140

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billion. At the end of that year, out of the five largest companies in the world, three were SOEs including PetroChina, China Mobile and the Industrial and Commercial Bank of China (ICBC). As for the financial institutions, in 1999, Citigroup was the newly formed colossus. Ten years after in 2009, the top of the league table is dominated by China’s three largest banks: the ICBC, China Construction Bank and Bank of China (see Table 1 below). As for the stock market, the Shanghai Stock Exchange was at the time the fifth largest in the world, even above the London Stock Exchange. The development of China's stock market from 1991 to 2012 is given in Table 2 below. The demise of a dynasty brings about the rise of a new one. The surplus of state funds accumulates in the form of central bank reserves. China’s went up from nearly US$145 billion in 1998, to

almost US$3,300 billion in 2012.\textsuperscript{13} These are typically invested almost exclusively in apparently risk-free government bonds or government guaranteed bonds. From a political economy perspective, holding an abundant amount of US debts has given China the competitive edge over the power struggle with the US on various policy issues.\textsuperscript{14} China has become both an economic and political superpower.

\begin{flushright}
\textsuperscript{13} Data from the State Administration of Foreign Exchange, available at <http://www.safe.gov.cn>.
\end{flushright}
Table 1: Largest Financial Institutions in the World (Market Capitalisation: US$ Billions)

<table>
<thead>
<tr>
<th>Origin</th>
<th>Company</th>
<th>Market Cap</th>
<th>Origin</th>
<th>Company</th>
<th>Market Cap</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>US</td>
<td>Citigroup</td>
<td>150.9</td>
<td>China</td>
<td>175.3</td>
</tr>
<tr>
<td>2</td>
<td>US</td>
<td>Bank of America</td>
<td>112.9</td>
<td>China</td>
<td>128.7</td>
</tr>
<tr>
<td>3</td>
<td>UK</td>
<td>HSBC</td>
<td>93.7</td>
<td>China</td>
<td>112.8</td>
</tr>
<tr>
<td>4</td>
<td>UK</td>
<td>Lloyds TSB</td>
<td>72.0</td>
<td>US</td>
<td>94.5</td>
</tr>
<tr>
<td>5</td>
<td>US</td>
<td>Fannie Mae</td>
<td>69.6</td>
<td>UK</td>
<td>78.3</td>
</tr>
</tbody>
</table>

Source: PT Larsen and S Briscoe, ‘The Fearsome Become the Fallen’

Table 2: Development of China's Stock Market 1991-2012 (RMB in Million)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Listed Companies</th>
<th>Capitalisation</th>
<th>Annual Turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>52</td>
<td>105,000</td>
<td>92,177</td>
</tr>
<tr>
<td>1994</td>
<td>291</td>
<td>367,585</td>
<td>840,775</td>
</tr>
<tr>
<td>1996</td>
<td>540</td>
<td>943,981</td>
<td>2,128,478</td>
</tr>
<tr>
<td>1998</td>
<td>851</td>
<td>1,950,565</td>
<td>2,354,400</td>
</tr>
<tr>
<td>2000</td>
<td>1,088</td>
<td>4,809,100</td>
<td>6,082,700</td>
</tr>
<tr>
<td>2002</td>
<td>1,224</td>
<td>3,832,900</td>
<td>2,799,000</td>
</tr>
<tr>
<td>2004</td>
<td>1,377</td>
<td>3,705,600</td>
<td>4,233,400</td>
</tr>
<tr>
<td>2006</td>
<td>1,434</td>
<td>8,940,390</td>
<td>9,046,889</td>
</tr>
<tr>
<td>2008</td>
<td>1,625</td>
<td>12,136,644</td>
<td>26,711,264</td>
</tr>
<tr>
<td>2010</td>
<td>2,063</td>
<td>26,542,259</td>
<td>54,563,354</td>
</tr>
<tr>
<td>2012</td>
<td>2,494</td>
<td>23,035,762</td>
<td>31,466,741</td>
</tr>
</tbody>
</table>

A distinctive feature of China is its bank-centred system. Banks intermediate nearly 75 per cent of the capital in China, a significantly higher proportion than in other Asian countries (43 per cent in India, 35 per cent in Japan and 33 per cent in South Korea) and the United States (only 19 per cent).\(^{15}\) This is understandable since an efficient banking system is usually a greater priority to a developing economy. A stock market relies on an elaborate array of institutions that are difficult to establish at an early stage of economic development.\(^{16}\) However, the non-performing loans in China’s banking system have driven Chinese leaders to consider a shift away from the heavy reliance on the state-controlled banking system.


\(^{16}\) See for example, Allen and Gale (n 5).
The problem of the Chinese bank-centred system can be explained by several factors. First, state-controlled banks have continued to account for 83 per cent of bank assets in China since the new millennium. The state ownership of banks has reduced competition and lessened the pressure on banks to operate on a commercial, profit-oriented basis. Second, there is a lack of good internal credit assessment capabilities in many banks. The reason behind most of the non-performing loans in the past was the directed lending policies of the government to fund SOEs (state-owned enterprises) regardless of their profitability. Third, these state-owned banks have a decentralised structure. Lending decisions are made at the local branch level, which is susceptible to influence from local government and favouritism towards local SOEs. This diffuse structure of banks and many SOEs makes it difficult for banks to collect and

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share useful information to make an informed lending decision.

Other than the predominantly state-owned banking system, the SOE system is another product of the Communist regime in China. In 2003, the State Council approved to found the State-owned Assets Supervision and Administration Commission (SASAC) with a view to separating the government’s social and public management functions from the role as the investor of the state-owned assets.\(^{18}\) It is intended to push the reform and restructuring of the SOEs. Meanwhile, it also performs some substantive duties in relation to the operation of SOEs such as appointing, removing and evaluating the executives of the enterprises. In 2010, the SASAC oversaw over 120 large SOEs. The formation of the SASAC was regarded by the


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state as a centralised effort to improve the socialist market economy. Before that, its duties were carried out by different organisations such as the State Economic and Trade Commission, Work Committee of Enterprises of the Communist Party of China Central Committee, the Ministry of Finance as well as the Ministry of Labour and Social Security. For SOEs that are not managed by the SASAC, the local government established the Bureau of State Asset Management (BSAM) to manage the state assets. Although the SASAC and BSAM are tasked to separate government functions from enterprise management and relieve themselves from social and public duty burdens, government and political interferences continue to take place through them as they are still staffed with bureaucrats and Party Committee members.

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19 ibid.
Alternatively, it has been suggested that shifting the ownership of state shares from government agencies such as the SASAC and BSAM to the corporate form of SOEs may result in better monitoring of top executives.\textsuperscript{21}

It may not be easy to define the word ‘institution’.\textsuperscript{22} This article attempts to adopt a wide meaning of the word. A legal system is widely regarded

\textsuperscript{21} ibid. 176.
\textsuperscript{22} According to Acemoglu and colleagues, economists and historians have long emphasised the importance of institutions. The institutions hypothesis alleges that societies with a social organisation that provides encourage for investment will prosper. See D Acemoglu et al, ‘Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution’ (2002) 117 Quarterly Journal of Economics 1231, 1262. As put by North, ‘Institutions are the rules of the game in a society or, more formally, are the humanly devised constrains that shape human interaction.’ See D North, \textit{Institutions, Institutional Change and Economic Performance} (CUP 1990) 3. Whilst saying that ‘there is no unanimity in the definition of this concept [of institution]’, Hodgson tries to define institutions as ‘systems of established and prevalent social rules that structure social interactions’ and thus ‘language, money, law, systems of weights and measures, table manners, and firms (and other organisations)’ are all institutions. See G Hodgson, ‘What Are Institutions?’ (2006) 40 Journal of Economic Issues 1, 2.
as one of the foundations of economic growth. The Doing Business project of the World Bank provides objective measures of business regulations in 185 economies. According to the World Bank, governments around the world have reported more than 300 regulatory reforms that have been informed by Doing Business since 2003. Empirically, the importance of the legal institutions is supported by the ‘legal origins’ hypothesis that legal systems have a long-run impact on patterns of economic growth. It is claimed that

23 Doing business captures several important dimensions of the regulatory environment as they apply to local businesses. It provides quantitative measures of regulations for starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency. Doing Business also looks at regulations on employing workers. For more information, Visit the website of the Doing Business project at <http://www.doingbusiness.org>.

countries whose legal systems have a common law origin are more capable of fostering financial markets and hence economic growth than those with civil law roots.

However, Roe has indicated that a political economy based explanation seem stronger than the legal origins hypothesis. He argues that continental social democracies did not provide institutions that markets need, such that the markets in continental Europe have flourished to a lesser degree than their Anglo-American counterparts. While the work of the World Bank from a legal perspective and that of Roe from a political perspective have produced a great deal of discussions, the effect of culture appears to be relevant too. From a

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25 M Roe, Political Determinant of Corporate Governance (OUP 2003).

26 See for example, A Licht et al, ‘Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance’ (2007) 35
cultural perspective, laws and rules are used to prevent uncertainties in the behaviour of other people. Therefore, people will look for ‘a structure in their organisations, institutions, and relationships which makes events clearly interpretable and predictable’. Within a company, there are laws and rules, which can be either formal or informal, controlling the rights and duties of employers and employees.

Without doubt, the emergence of some private institutions, which often takes place in line with economic growth, is an essential part of a business environment. Reputational intermediaries, for instance, accounting firms, investment banking firms, law firms, and financial press have both the economies of scale and


scope to make them the suitable institutions to perform their roles.\textsuperscript{28} All the factors above can be considered as instrumental to growth. This article will examine each of these factors in the context of China one by one.

Legal dimension

The commencement of company law in China on 1 July 1994 was a milestone in developing a formal framework regulating corporate activities.\textsuperscript{29} Indeed, prior to that, many companies had already been established. This is a distinctive feature of Chinese law in which the formal legal framework is usually put in place at a relatively late stage. Likewise, even though both stock exchanges in Shanghai and Shenzhen were established in the early

\textsuperscript{29} The Chinese Company Law (‘the Company Law’ hereinafter) was adopted by the Standing Committee of the National People’s Congress on 29 December 1993, effective as of 1 July 1994, revised on 25 December 1999 and 27 October 2005, effective as of 1 January 2006.
1990s, the first set of securities laws did not come into effect until 1999.\textsuperscript{30} This pattern of development can be associated with the Chinese tendency to subordinate law to government authority and exercise detailed administrative control over economic activities rather than permitting activities within a range defined by law.\textsuperscript{31} Positive changes in the regulatory framework have recently been made through revisions to the Company Law and Securities Law, both effective on 1 January 2006. Investor’s rights have been further strengthened.\textsuperscript{32}

\textsuperscript{30} The Chinese Securities Law (‘the Securities Law’ hereinafter) was adopted by the Standing Committee of the National People’s Congress on 29 December 1998, effective as of 1 July 1999, revised on 28 August 2004 and 27 October 2005, effective as of 1 January 2006.


\textsuperscript{32} Investor’s rights are strengthened in the following ways: (1) allowing companies to use cumulative voting, if desired, thereby empowering minority shareholders to appoint directors and/or supervisors; (2) imposing a stricter duty of care on directors, supervisors and senior management; (3) granting shareholders the right to bring a derivative suit or direct suit against directors, supervisors and senior management; (4) granting an exit right to the
Another area of law that is relevant to entrepreneurship is labour protection. The Labour Law of China was adopted on 5 July 1994 and came into effect on 1 January 1995. In a decade since then, not much has been done to protect labour rights. A breakthrough came when the Labour Contract Law (LCL) was adopted on 29 June 2007 and came into force on 1 January 2008. To clarify uncertainties contained in the LCL, the State Council passed the Implementing Regulations for the LCL on 18 September 2008. This move has arguably been


33 These two pieces of legislation together form a comprehensive framework about a number of employment issues. There are quite a number of key areas of concern, but to name a few: signing a labour contract; remuneration; termination of labour contract and compensation; and labour disputes. To further strengthen worker protection, on 28 December 2012, the Standing Committee of the
consistent with the worldwide trend of recognising corporate social responsibility. Not only must companies take good care of their investors, but also respond to demands from their employees and their customers, as well as broader environmental and social concerns. Following the legal moves to enhance labour rights, the rising cost of China’s famously cheap labour, the very thing the country’s economic boom was built on, appears to be irreversible. A change, which should be welcome by workers, means soaring business costs.

Accompanying the laws is the regulators. The China Securities Regulatory Commission (CSRC) is the competent authority supervising the listed companies and securities markets in China.\textsuperscript{34} It formulates the relevant rules and regulations on the supervision and

\footnotesize
\begin{itemize}
  \item National People’s Congress issued a decision to amend the LCL. The new LCL will come into effect on 1 July 2013. This is the first amendment to the LCL since it was issued in 2008.
  \item Art 178 of the Securities Law.
\end{itemize}
administration of the securities market.\textsuperscript{35} It also carries out supervision on the issuance, listing and trading of securities.\textsuperscript{36} Issuers, listed companies, stock exchanges, organisations in the securities industry such as securities companies, clearing houses and stockbrokers as well as professionals such as auditors and lawyers are all under the supervision of the CSRC.\textsuperscript{37} It is empowered by law to investigate and deal with violations of the laws and regulations.\textsuperscript{38} The CSRC’s supervision over listed companies covers information disclosure, corporate governance, related parties transactions and mergers and acquisitions. For labour law, the Ministry of Human Resources and Social Security is the responsible government department.

Conceptually, the business laws should start from the mitigation of the agency problem and attainment of

\footnotesize{\begin{itemize}
\item Art 179(1) of the Securities Law.
\item Art 179(2) of the Securities Law.
\item Arts 179(3) and 179(4) of the Securities Law.
\item Art 179(7) of the Securities Law.
\end{itemize}}
efficient markets.\textsuperscript{39} For the former, the focus is placed on how shareholders and various stakeholders can be protected from opportunistic managers or some predatory controlling shareholders, whereas the success of the latter hinges on the disclosure duties of companies and their managers. On the face of it, today’s general regulatory framework of markets and companies in China seems no different from that of developed markets. For example, regarding information disclosure, under Article 164 of the Company Law, listed companies are required to establish a financial and accounting system that must comply with relevant laws and regulations. They are also required to prepare

\textsuperscript{39} In economic terms, the agency problem essentially involves the conflict between the company’s owners and its managers. The owners are the principals and the managers are the agents. Other two conflicts can also arise in business enterprises, such as the conflict between the majority and minority shareholders (majority-minority conflicts) and the conflicts between the company itself and stakeholders such as creditors, employees, and customers (insider-outsider conflicts). See R Kraakman et al, \textit{The Anatomy of Corporate Law: A Comparative and Functional Approach} (2nd edn, OUP 2009) 36.
financial statements at the end of each financial year.\textsuperscript{40} The information disclosed by issuers and listed companies must be authentic, accurate and complete and must contain no false or misleading statements or major omissions, as required by Article 63 of the Securities Law. Labour protection is also embodied in the Company Law. Article 17 requires a company to ‘protect the lawful rights and interests of its employees, conclude employment contracts with the employees, buy social insurances, and strengthen labour protection so as to realise safe production’, as well as ‘reinforce the vocational education and in-service training of its employees so as to improve their personal quality’.

\textsuperscript{40} Art 165 of the Company Law. Financial accounting reports must be prepared in accordance with laws and regulations, for example, the Accounting Law of China and the Enterprise Financial and Accounting Reports Regulations issued by the State Council. Such reports shall be audited by an accounting firm. According to Art 66 of the Securities Law, an annual report must include the following: (1) company profile; (2) financial accounting report and business report of the company; (3) profile of the directors, supervisors and senior management personnel and their shareholdings; (4) the actual controlling party of the company and others.
In relation to corporate governance, the Code of Corporate Governance for Listed Companies, which was issued in 2002, sets forth the basic principles for the corporate governance of listed companies.\footnote{The Code is applicable to all listed companies within the boundary of China. The requirements of the Code must be followed when listed companies formulate or amend their articles of association or rules of governance.} A listed company must introduce independent directors to its board of directors, and they should account for at least one-third of the board. Directors’ duties are also covered by law. For related-party transactions, timely information disclosure is required by the CSRC. Also, the director representing a related party is required to withdraw from voting when the board or the shareholders’ meeting is deliberating and voting on the related party transaction.\footnote{Art 125 of the Company Law.} With respect to market regulations, insider dealing, market manipulation and other securities frauds are banned. Any individuals or
institutions involved bears the civil and/or criminal liability depending on the severity of the crime. 43

Although the above has mentioned several shareholder and worker protection mechanisms in China’s legal framework, a feasible way to compare China with the rest of the world is to turn the law into numerical indexes. 44 Using a panel data set covering a range of developed and developing countries, Armour and colleagues have discovered that significant upward movement in the level of shareholder protection was made by China between 1995 and 2005. 45 It experienced a jump in its shareholder protection score from 5 to 6.5.

43 Prohibited trading behaviour is stipulated in Section IV of the Securities Law.
44 One argument against the use of numerical comparative law is that ‘law is special, complex and cannot be reduced to numbers’, despite its now popular use across various areas of law, see M Siems, ‘Numerical Comparative Law - Do We Need Statistical Evidence in Law in Order to Reduce Complexity?’ (2005) 13 Cardozo Journal of International & Comparative Law 521.
45 Armour et al (n 24). But the indexes constructed in the study refer only to the ‘law-on-the-books’ only. Separation investigations may be required to ascertain the quality of legal institutions.
According to their shareholder protection index of 2005, although the UK and US were the top performers (scores of slightly more than 7), China was more protective of shareholder interests than some developed countries such as Germany and Switzerland (see Figure 1 below). Likewise, according to the OECD Indicators of Employment Protection, China’s employment protection is the best among various countries (see Figure 2 below).
Figure 1: Shareholder Protection Index of 20 Selected Countries in 2005

Note: AR (Argentina), BR (Brazil), CA (Canada), CH (Switzerland), CL (Chile), CN (China), CZ (Czech Republic), DE (Germany), ES (Spain), FR (France), GB (United Kingdom), IN (India), IT (Italy), JP (Japan), LV (Latvia), MX (Mexico), MY (Malaysia), PK (Pakistan), US (USA), ZA (South Africa).

Figure 2: Employment Protection in 2008 in Selected Countries

Scale from 0 (least stringent) to 6 (most restrictive)

Source: OECD Indicators of Employment Protection
Although China seems to have improved its legal system, three points are worth noting. First, this ‘protection-on-the-books’ does not necessarily mean that shareholders and workers in China are in fact more protected in China, since the efficiency of courts also has to be taken into account. Thus, it is useful to consider a ‘rule of law’ ranking, which is based on the World Bank Governance Indicators (see Figure 3 below). In this context, developed countries remained performing better than developing countries. One explanation for this is that copying legal rules is easier than addressing more deep-rooted features of the court system.\(^4\) The substantive issues of enforcement, both public and private respectively, are to be further examined later.

Figure 3: ‘Rule of Law’ of 20 Selected Countries in 2005

Note: AR (Argentina), BR (Brazil), CA (Canada), CH (Switzerland), CL (Chile), CN (China), CZ (Czech Republic), DE (Germany), ES (Spain), FR (France), GB (United Kingdom), IN (India), IT (Italy), JP (Japan), LV (Latvia), MX (Mexico), MY (Malaysia), PK (Pakistan), US (USA), ZA (South Africa).

Second, the legal ideology between the East and the West might not necessarily be the same. ‘Rule by law’ refers to the instrumental use of law by the state to govern, whereas the ‘rule of law’ refers to a normative and political theory of the relationship of legal institutions and the political state focusing on a theory of limited government through the separation of powers among executive, legislative and judicial organisations.\(^4\) The current situation in China seems to be the former. Indeed, Tomasic has alleged that the privileges of incorporation and limited liability under the Company Law in China were ‘jealously guarded by the state’ and the state would closely monitor the actions of incorporated companies.\(^5\) Milhaupt and Pistor have further alleged that China’s commitment to the rule of


\(^5\) R Tomasic, ‘Company Law and the Limits of the Rule of Law in China’ (1995) 4 Australian Journal of Corporate Law 470, 473. According to Art 19 of the Company Law, a company must provide the necessary conditions for the establishment of the organisation of the Communist Party of China and the carrying out of party activities within a company.
law has been weakened by other governance mechanisms.\textsuperscript{49} For instance, while the Company Law 1993 stipulated the conditions under which a company could issue shares to the public, they were complemented shortly afterwards by a set of regulations promulgated by the State Council and the CSRC. MacNeil has confirmed this by indicating that there has been an extensive state regulation of company formation in the sense that approval must be obtained from the relevant government departments in addition to satisfying the requirements of the Company Law.\textsuperscript{50}

Third, there is a tension between the economic benefits of law and compliance costs. The manufacturing sector officially makes up about 50 per cent of gross domestic product in China and China’s coastal manufacturing belt has been better known as the workshop of the world. The additional costs involved

\textsuperscript{50} MacNeil (n 31) 302.
may not be a problem to large state-owned enterprise because of their capability to absorb the costs. However, smaller scale manufacturing is clearly struggling, especially amid a global recession.\textsuperscript{51} Millions of factories are being squeezed from all sides by rising costs, labour shortages, shrinking margins and a collapse in new orders from overseas. Many small manufacturers face the prospect of going out of business owing to government policies and immutable demographic and economic forces that make low-end production in China increasingly untenable. Pressures from the labour law may encourage factories to close rather than pay what they owe to workers under the law. Companies avoid paying claims by liquidating or by just disappearing without properly settling their business. In 2008, more than 15,000 enterprises in Guangdong, the manufacturing-heavy southern province, shut their

doors.\textsuperscript{52} For example, after their factory closed, workers from the Shatangbu Yifa Rubber & Hardware Factory in Shenzhen filed for the back pay and severance promised under a contract required by the law. The Hong Kong-based owner disappeared. That left many migrant workers stranded without enough money to return to their hometowns hundreds of miles away. Enforcement of the laws remains an imminent issue.

Laws in China are rapidly changing. For example, the Company Law, which came into effect in 1994, was revised in 1999, 2004 and 2005. Although undeniably the laws have been revised and improved, whether those enforcing the laws can keep up with the changes is questionable. To investigate the legal and

institutional conditions of China, one must look into the laws-in-action as well as the laws-on-the-books.\textsuperscript{53}

According to Tomasic and Fu, both the early Company Law and Securities Law were in many aspects almost immediately out of date after their passage, and it was left to the Supreme People’s Court to issue interpretations of these statutes and to regulatory bodies such as the CSRC to promulgate regulations, guidelines and interpretation to fill in the holes and gaps.\textsuperscript{54} The traditional emphasis of Chinese legal culture has been on administrative and criminal sanctions, but not on civil liability and procedural law.\textsuperscript{55} In terms of public enforcement, it is possible for the CSRC to bring

\textsuperscript{54} R Tomasic and J Fu, ‘Regulation and Corporate Governance of China’s Top 100 Listed Companies: Whither the Rule of Law’ (2005) Research Committee on the Sociology of Law Conference Paper, 15.
criminal or administrative actions against companies and their officers who have been engaged in market misconduct. In terms of private enforcement, investors have had much less success in seeking compensation through the courts by way of civil actions, despite the existence of legal provisions that seem to allow for such actions. In practice, Pistor and Xu have stated that the private enforcement of investor rights has been virtually absent in China, not because of a lack of demand for them, but because courts have restricted investor lawsuits. The sections below will examine the public and private enforcement of the laws in China.

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56 See Chapter XI of the Securities Law.
57 See for example, Arts 20 (for abuse of shareholder’s rights) and 152 (derivative suit) of the Company Law and Art 69 of the Securities Law (for civil liability of false recording, misleading statement and material omission made by issuers and securities companies).
Public enforcement

The enforcement of labour law is mainly in the form of private enforcement. So, the focus here will be corporate and financial law. The Chinese regulator has been inclined to seek mainly administrative penalties rather than criminal penalties via the court system.\(^{59}\) The CSRC uses three primary tools to sanction listed companies: correction orders, formal warnings or fines, and a bar from participation in the securities markets (although in theory directors, managers and even controlling shareholders can be subjected to criminal liability).\(^{60}\) The first administrative case of insider trading was announced in 1994, in which the violator, the Shanghai securities brokerage division of the XiangFan Trust and Investment Company, was fined by the CSRC.\(^{61}\) This


\(^{60}\) For a list of possible legal liabilities arising from securities market crimes and the resulting penalties, see Chapter XI of the Securities Law.

\(^{61}\) Chen (n55) 461.
was the first attempt to enforce securities market rules. Later, in 1996, the first administrative case against false disclosure and misleading statements in connection with securities trading was decided. However, there were concerns that the administrative penalties imposed were not effective. Managers and intermediaries responsible for misleading or cheating investors were not actually fined personally. It was usually the listed companies that were fined, so that ultimately the shareholders (state entities especially) bore the cost. In the case of state-owned companies, punitive fines might not provide the desired deterrent effect. This is because the payment would follow an essentially circular path: from the state to the state.

62 In this case, the DaMing Group (a listed company of ShengLi YouTian), and the underwriter firm, accounting and auditing firm, and law firm that each provided service to facilitate the IPO of the DaMing Group were prosecuted by the CSRC for misrepresentation of the listed company’s outstanding share structure, omitting material facts, and false statements in its IPO Prospectus.
A quantifiable approach to measuring enforcement is to focus on inputs and outputs. Generally, for inputs, the funding available to the regulator will be one of the focuses.\textsuperscript{63} Unfortunately, this information is not publicly available in China. For human resources inputs, according to the investigation by Huang, the number of staff in the CSRC was 2,512 and that of the comparable regulation in the US, i.e. the Securities and Exchange Commission (SEC), was 3,511 in 2008.\textsuperscript{64} Whilst the US looks stronger from the figures, the conclusion will be different if those figures are scaled with respect to the relevant stock market capitalisation. Quite surprisingly the ratio of staff to market capitalisation in China was more than four times that in


the US.\textsuperscript{65} The CSRC has a number of seasoned and highly experienced staff from other jurisdictions, for example, Laura Cha and Anthony Neoh from Hong Kong, and it has actively sought co-operation from regulators in the US and other parts of the world.\textsuperscript{66} Its close connection with Hong Kong has particularly facilitated the learning process.\textsuperscript{67} However the middle

\textsuperscript{65} ibid. The market capitalisation of the US at that time was about US$11,737 billion whilst that of China was US$1,778 billion. Also, it is worth noting that the CSRC had triple the number of regional offices than the SEC, despite having a substantially smaller market.

\textsuperscript{66} By the end of 2011, the CSRC signed 51 Memoranda of Understanding (MOU) with securities regulators from 47 jurisdictions. The MOUs facilitate information exchange, cross-border assistance and dialogue on policies and regulation. See CSRC, ‘Annual Report 2011’ (2012) 49. Also, in May 2002, IOSCO adopted the Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information (MMoU), the first multilateral international arrangement of its type among financial market regulators. The SFC (including other major markets such as the US, UK, Germany, France and Canada) was among the first signatories to have signed the MMoU in February 2003. The CSRC also became a party in April 2007. As of 20 February 2013, there were 92 signatories of the MMoU, and the instrument becomes the major basis of cooperation for the CSRC to work closely with fellow regulators.

\textsuperscript{67} According to the Securities and Futures Commission (SFC) of Hong Kong, over the years, the relationship between the SFC and the CSRC has been strengthened through consultation, co-operation
and lower executive levels often lack both expertise and experience. In general, it is argued that the CSRC is not very effective at identifying and prosecuting frauds.\footnote{G Chen et al, ‘Is China’s Securities Regulatory Agency a Toothless Tiger? Evidence from Enforcement Actions’ (2005) 24 Journal of Accounting and Public Policy 451.} Other criticisms include its susceptibility to political pressure. The CSRC is a ministry-level commission. It is financed by and answerable to the State Council. Therefore, it is common that a company chairman has a higher rank than a CSRC official and, as a result, it can be difficult for the CSRC to deal with the company effectively.\footnote{Tomasic and Fu (n 54) 24.} This largely reflects that the state may be committed to developing a financial market following

and exchange of personnel. The SFC and the CSRC conduct regular staff exchanges, which helps to foster better understanding of one another’s securities markets and regulatory approach and to strengthen regulatory co-operation. See E Fong, Chairman of the SFC, ‘Financial Regulation in Hong Kong: A Securities Regulation Perspective’ (26 May 2012) Speech at the Centre for Financial Regulation and Economic Development, Faculty of Law, CUHK and Duisenberg School of Finance, The Netherlands. See also FX Huang and H Yeung, ‘Regulatory Co-operation between Securities Commissions: A Reflection from Hong Kong’ (2013) 1 Chinese Journal of Comparative Law 112.
from Deng’s economic reforms, but the development of an investor-friendly regulatory framework has been paid less attention. The government has imposed politically motivated regulation to ensure state control of the market. It has neglected to establish the market-based regulation needed to ensure market efficiency.\(^\text{70}\) A strong market and high quality shareholder protection should co-exist.\(^\text{71}\) If the correlation is true, the state’s recent plan to develop Shanghai into an international centre of finance and commerce might not work.\(^\text{72}\)

For outputs, the CSRC initiates investigations based on a number of leads. These leads include complaints from investors and information from insiders or former employees of companies. The CSRC also


\(^{71}\) See the literatures in n 24.

conducts the on-going surveillance of listed companies and has a practice of regular reviews and random investigations. The results of these investigations are made public if wrong-doing is found. Between 1997 and 2001, the CSRC published 205 formal rulings in total, including 15 for market manipulation, two for the dissemination of wrongful information, nine for insider trading and 39 for violation of disclosure rules. This number is far lower than that of the US and UK, which often had more than 500 and 100 enforcement cases brought by the national regulator per year respectively. This can be partly explained by the size of markets. The size of China’s market and the number of listed companies were then still small. Yet, considering that the private enforcement of securities law in China remained uncommon, such a number of public enforcement alone might not be a strong deterrent to market misconduct.

74 Coffee (n 53) 269.
The number of enforcement actions in 2002 and 2003 were about double those of 1999 and 2000.\textsuperscript{75} The main violations were major failures to disclose information, false statements, a delay in disclosing information and inflated profits. According to a report compiled by the Shenzhen Stock Exchange (SZSE), in 2007 around 80 per cent of the enforcement actions were also related to information disclosure offences, whereas there were only nine cases related to insider trading and market manipulation.\textsuperscript{76} There can be two explanations for this. The investigation of insider trading and market manipulation cases is often complicated. Therefore, more time is required and a lot of cases were not published. Secondly, some cases were re-classified as

\textsuperscript{75} Chen et al (n 68) 466.
\textsuperscript{76} Shenzhen Stock Exchange, ‘Research Report: 2007 Securities Market Rules Violations’ (2008) <http://www.szse.cn>. This report appeared briefly on 16 July on the official website of the SZSE before being removed. An anonymous source at the SZSE told Caijing that exchange officials had asked the web manager to remove the report that night because ‘further review is needed about the content, and it will be published in the future when the timing is right’. See Caijing Magazine, ‘Shenzhen Bourse Report Blasts Regulators’ (in Chinese)(18 July 2008).
information disclosure offenses for the ease of prosecution. Although these explanations make perfect sense, it is doubtful whether the CSRC has the determination and resources to prosecute complicated but serious offences. According to the SZSE report, the CSRC’s administrative commands often hindered market mechanisms, and the poor implementation of regulations, including some laws flawed from the start, left the market open to exploitation.\(^7\)

A genuine threat of sanctions is required to deter market misconduct. It is still hard to say if the CSRC, which is empowered by the Securities Law to produce a single strong regulator, is experienced enough or whether its enforcement intensity (both \textit{ex ante} and \textit{ex...}

\(^7\) ibid. The report said the CSRC had expanded its jurisdiction with little oversight, and oversaw a wide range of issues including professional standards, business approvals, IPO regulation, and investor education. Meanwhile, CSRC gave itself the right to make rules and supervise the nation’s bourses, and assumed a bailout role during market troubles.
post) is sufficiently strong.\textsuperscript{78} However, as Pistor and Xu have rightly pointed out, it is difficult to interpret enforcement activities in the absence of comparative data.\textsuperscript{79} For instance, in 2003, when total enforcement procedures reached 51, there were 1,278 listed companies in China, implying that at most one in 25 companies was the subject of any kind of enforcement activities.\textsuperscript{80} To compare, in the same year, there were 175 enforcement cases brought by the Financial Services Authority (FSA) when there were 2,692 listed companies on the London Stock Exchange, implying a ratio of

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\textsuperscript{78} There has been a debate on the relationship between enforcement intensity and market competitiveness. The Securities Exchange Commission of the US and the Financial Services Authority of the UK have different regulatory philosophy, but both markets are successful. The former has taken a more proactive approach while the latter has had a more laid-back approach. Ferran has tried to explain the difference by suggesting that a successful principle-based regulatory strategy that relies heavily on \textit{ex ante} compliance may be capable of producing the desired deterrent effect. See E Ferran, ‘Capital Market Competitiveness and Enforcement’ (2008) <http://ssrn.com/abstract=1127245>.
\textsuperscript{79} Pistor and Xu (n 73) 195.
\textsuperscript{80} ibid.
\end{flushright}
around 1:15. In the US, the ratio was around 1:10.\textsuperscript{81} Unfortunately, the data is simply not comparable, because the FSA’s numbers for enforcement actions cover all aspects of the financial services industry, including banking, pensions and insurance. In 2008, the number of enforcement actions in China was apparently catching up with the US market. In that year, the SEC brought 671 actions, six times more than the CSRC (which took 107 actions), but with an understanding that the size of the US market was likewise around six times larger than that of China.\textsuperscript{82} But a comparison between that of the US and China is not conclusive either, because low public enforcement intensity can be complemented by other mechanisms. Enforcement actions done in an informal manner are not included. The raw data might not tell the whole story. This is particularly important in the context of China. The role

\textsuperscript{81} ibid. There were 6,159 listed companies and the number of enforcement actions was 679.

\textsuperscript{82} Huang (n 64) 334.
of reputation has a more plausible effect to deterring wrongdoing. It has been suggested that the public criticisms issued by the exchanges largely complement regulatory efforts by the CSRC.\(^{83}\) Besides, domestic media coverage of the sanctions of affected companies and individuals serves as an important mechanism of discipline. Reputational effects raise the cost of doing business and can damage careers. Both companies and individuals fear any exposure of wrongdoing and as a result this may deter them effectively from committing any offences in the first place. Also, there might be other functional substitutes such as private enforcement or the existence of professional institutional investors. In the UK, where both private and public enforcement is weaker than in the US, the role of institutional investors is large.\(^{84}\) Unfortunately, in China, institutional investors

\(^{83}\) Liebman and Milhaupt (n 59) 954.

\(^{84}\) Myners recognised the highly-developed equity culture and the professionalisation of investment in the UK as ‘key national assets’, see P Myners, ‘Institutional Investment in the United Kingdom: A Review’ (2001)
governed by the Qualified Foreign Institutional Investor (QFII) or Qualified Domestic Institutional Investor (QDII) schemes did not actually emerge until the new millennium. Therefore, there is a need to investigate the private enforcement situation.

Private enforcement

In addition to the functions fulfilled by public enforcement (i.e. justice and deterrence), civil remedies have the advantage of compensating the wronged. Unfortunately, the private enforcement of investor rights has been almost non-existent in China.  


the World Bank’s Doing Business studies once awarded China 2 out of 10 for a shareholder’s ability to sue officers and directors for misconduct.  

The first civil compensation attempt on account of false statements occurred in 1998. The case was dismissed by the court because of a lack of direct causal link between the false disclosure and the loss. However, it was suggested that the actual reason for this decision was because the court believed that the case should be standing to bring derivative actions. Also, shareholders’ right to take on private securities action was substantially restricted by the court system. Pistor and Xu shared similar opinion that private enforcement of securities cases have virtually been absent in China. See Pistor and Xu (n 58) 191.

86 Dam (n 24) 236.

87 N Li, ‘Civil Litigation Against China’s Listed Firms: Much Ado About Nothing?’ (2004) The Royal Institute of International Affairs: Asia Programme Working Paper No.13, 3. According to Art 77 of the Provisional Regulations on the Administration of Issuing and Trading of Stocks, the responsible directors, supervisors and/or mangers of the issuer or distributing securities company would be jointly and severally liable for any damages arising from false representation in the course of securities trading (Art 63 of the Securities Law 1998 and Art 69 of the Securities Law 2005).
referred to the CSRC to determine. This indicates the reliance on administrative measures, rather than formal legal mechanisms, in China. Private litigation began to take off only in 2001 in response to fraud at Guangxia Company. The Guangxia case is a benchmark case for private securities litigation in China, and is often referred to as ‘China’s Enron’. In total, 1,000 cases were filed in Wuxi, Jiangsu province, against Guangxia alone. This shocked the key government officials because they had always thought in terms of administrative sanctions instead of judicial remedies. These events evidenced the need for a drastic legal overhaul. Disappointed investors

88 ibid.
89 Located in Ningxia province, Guangxia was listed on the SZSE in 1994 as a manufacturer of floppy disks and related products. After experiencing poor and deteriorating performance for the first five years, the company reported unprecedented high earnings per share. Consequently, the company’s share price shot up from RMB14 to RMB76 in one year. Later, Caijing Magazine played the role as a whistle blower and the CSRS launched an investigation. It turned out that the reported earnings as well as many sales records and contracts were fabricated. See F Allen et al, ‘China’s Financial System: Past, Present, and Future’ in T Rawski and L Brandt (eds), China's Great Economic Transformation (CUP 2007).
90 Pistor and Xu (n 58) 192.
started to demonstrate in front of the CSRC building. Key officials from the CSRC initiated meetings with the Supreme People’s Court, urging the court to assume a more significant role in regulating the securities market through adjudicating cases.\textsuperscript{91} In September 2001, the Supreme People’s Court issued a notice directing all lower courts not to accept private securities lawsuits temporarily, until the further clarification of the appropriate judiciary procedures.\textsuperscript{92} In January 2003, a circular was issued setting out more detailed procedural rules for dealing with securities cases.\textsuperscript{93} From 1 February 2003, Chinese courts have been able to adjudicate private securities litigation on the basis of rules issued by the Supreme People’s Court in the circular. In the opinion of Zhu, these procedural rules, in conjunction

\textsuperscript{91} Chen (n 55) 464.
\textsuperscript{92} Notice Concerning Temporarily Not Accepting Civil Compensation Cases Related to Securities (issued by the Supreme People’s Court on 21 September 2001).
\textsuperscript{93} Several Regulations Concerning the Adjudication of Civil Compensation Securities Cases Based upon Misrepresentation (issued by the Supreme’s People’s Court on 9 January 2003).
with other relevant provisions of law, such as the Company Law, the Securities Law and the Civil Procedure Rule, have finally provided courts with the guidelines necessary to address claims from investors.  

China’s court system was undoubtedly slow to react to the demand for the private enforcement of securities cases, considering that both domestic stock exchanges commenced their operation in the early 1990s. There were two reasons for this, according to an insider of the CSRC. First, despite the general provisions set out in the Securities Law 1998, there were no specific rules and guidelines as to the implementation of private securities litigation. Second, given the huge

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94 S Zhu, ‘Civil Litigation Arising from False Statements on China’s Securities Market’ (2005) 31 North Carolina Journal of International Law and Commercial Regulation 377, 381-382. For example, Art 63 of the Securities Law 1998 expressly mentioned civil liability and compensation of losses caused by false statement and Art 17 of the 2003 circular specifies that a false statement on the securities market is defined as a false recording, misleading statement, material omission or improper disclosure.

95 Li (n 87) 4.
disparity in the quality of judges among courts nationwide and the lack of precedent, there would have been many inconsistent judgments, which might have made the situation more chaotic.

The effect of the circular was immediate; more than 900 private securities suits were brought by investors. This illustrated the demand for private securities litigation. In practice, the courts appeared to be uncertain about how to apply the rules. Even though actions could be initiated, courts tended to refuse to make a judgment, and none was settled by a court judgment in favour of the investors. The ban on all private securities cases in 2001 to 2003 showed that both the ex ante and ex post threat of private enforcement was weak. Furthermore, according to the 2003 circular, claimants can only sue in the court where the

97 Li (n 87) 10.
98 ibid.
headquarters of the listed company is located. Previously, according to the Civil Procedure Rule of China, investors had enjoyed the right to sue either in their own domicile or at the location of the company’s operation. The new restriction raised the concern of local protectionism. Judges and courts in China, especially at the lower level, often lack independence because governments at the same level control them through appointment and budgetary powers. The integrity of the legal structure can easily be undermined by political influence. In fact, this influence is very strong in China.

After the 2003 circular, the level of private enforcement in China might have been greater than ever before. Cheng has examined 26 cases and found that the new Company Law might have removed certain drawbacks in the first Company Law but the new law can protect interests of minority shareholders only to a

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99 Hutchens (n 96) 621.
certain extent.¹⁰⁰ Therefore, further amendments may still be needed. However, it is hard to say whether this trend will continue and even whether China will follow in the footsteps of the US.¹⁰¹ Indeed, the intention of the circular was not to encourage shareholder actions, but rather to limit the scope of cases that will be accepted by the courts and the eligibility of investors to receive compensation.¹⁰² Apparently, the state is still in the process of striking a balance between social stability, economic development and shareholder protection.

Private enforcement of labour law is particularly crucial for labour protection. When a contract of

¹⁰¹ During their investigations of the regimes of the UK and US, Armour and colleagues discovered that the shareholders in the US are far more litigious than the UK. The general reason may be, unlike the US where class actions and the use of contingency fees are permitted, the UK’s ‘loser pays’ fees rule has discouraged representative litigation. See J Armour et al, ‘Private Enforcement of Corporate Law: An Empirical Comparison of the UK and US’ (2009) 6 Journal of Empirical Legal Studies 687.
¹⁰² Zhu (n 94) 427.
employment can be considered as the cornerstone of employment law, then employment tribunals and/or other advisory, conciliation and arbitration services can be considered as its foundations. The idea is that employment disputes should be heard in an atmosphere far removed from the courtrooms, accessibly, informally, speedily and cheaply. One feature is that the importance of labour union is rising. According to the Chinese Company Law, employee representatives are required to be included on the board of supervisors in companies.\textsuperscript{103} Furthermore, companies are required to consult with trade unions and employees when deciding about significant operational issues. According to Article 18 of the Company Law, employees should organise a trade union to carry out trade union activities and safeguard the lawful rights and interests of the employees. The company is required to provide necessary conditions for its labour union to carry out these activities. However, \textsuperscript{103} Art. 118 of the Company Law requires that labour representation must not be less than one-third of the board.
labour unions have traditionally been controlled by management and local government. Foxconn, the contract manufacturer whose biggest customer is Apple, is preparing genuinely representative labour union elections in its factories in China for the first time. According to the press, this would be the first such exercise at a large company in China and is consistent with Beijing’s move to encourage collective bargaining as a way to help contain the growing worker protests.\textsuperscript{104} In the past, Foxconn’s labour union representatives were chosen under democratic processes, because there was no open and transparent nomination of candidates, and in the committees that run the union, more than half of the committee members were from management.

The new labour law in China has resulted in a big jump in labour disputes. In the city of Guangzhou, the local arbitration office received more than 60,000 cases

\textsuperscript{104} K Hille and R Jacob, ‘Foxconn Plans Chinese Union Vote’ \textit{Financial Times} (London, 3 February 2013).
in 2008, about as many as it handled over the previous two years combined.\textsuperscript{105} The fast-rising caseload has overwhelmed the system and the number of labour arbitrators is simply not sufficient. Before the labour contract law, most companies saw very little legal risks associated with employees. Now, they are beginning to see the risks as employees are increasingly likely to sue. Chinese employees have become keen litigants and it is expected that some companies may face exposure of up to US$20 million.\textsuperscript{106} Indeed, according to the figures from Ministry of Human Resources and Social Security, there has been a sharp rise in labour law cases since the Labour Contract Law came into effect in 2008 (see Table 3 below).

\textsuperscript{105} Canaves (n 52).
The characteristic of the Chinese legal system is that it emphasises administrative system prevailing over vertical authoritative control, than horizontal checks and balances.\textsuperscript{107} The authorities retain substantial administrative discretion with very weak judicial control over the exercise of discretion. Litigation is not encouraged for civil disputes. The court is mainly to deal with offenders who violate state law and policy. The

\begin{table}
\centering
\caption{Labour Disputes Cases in China from 1996 – 2009}
\begin{tabular}{cccccccc}
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1996 & 48,121 & 71,524 & 93,649 & 120,191 & 135,206 & 154,621 & 184,116 \\
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\end{tabular}
\end{table}

Source: Ministry of Human Resources and Social Security of China

\textsuperscript{107} S Lubman, \textit{Bird in a Cage: Legal Reform in China after Mao} (Stanford University Press 2000).
access to justice is very limited to individuals and there is a lack of protection for individual legal rights. Courts have been used to discharge all government functions including administration. Therefore, it comes as no surprise that as the global financial crisis hits the heart of the world's factory floor, labour activists say officials are turning a blind eye to the new labour requirements.  

Meanwhile local governments deny they are becoming lax, yet complaints against employers languish in huge backlogs as many are simply shuttering their factories. This means that the workers get no recourse even if they succeed in their claims. ‘The enforcement of the Labour Contract Law is facing new problems,’ said Hua Jianmin, chairman of the National People's Congress Standing Committee, China's top legislative body.

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108 Canaves (n 52).
109 ibid.
Final remarks

Both the company law regime and the stock markets in China were established from scratch in the early 1990s. Apart from the fact that market operation had already begun, a formal set of securities laws only came into effect in 1999. Undoubtedly, the laws-on-the-books have improved over the years, as evidenced in Armour and colleagues’ study.\(^{110}\) However, China’s commitment to building a market economy that respects private economic interests has been unconvincing. A conflict of interests persists between the state ownership of many listed companies and enforcement by the CSRC. As for private enforcement, shareholders’ rights to bring actions were banned in 2001-2003, despite the law clearly conferring such rights on shareholders. This clearly illustrates that the market, and indeed various economic activities in China, is not only governed by legal

\(^{110}\) See Armour et al (n 45).
institutions. Political considerations must also be taken into account.

As for labour protection, with reports emerging of layoffs preceding its implementation, and company closures or relocations to cheaper jurisdictions afterwards, it has been widely believed that the new law would add considerable burden to employers. There are undoubtedly comprehensive improvements to worker rights. However, all these represent costs to a company. The impact can particularly be devastating considering that labour intensive productions have been the major economic driver in China. After the new law coming into effect and the financial crisis, there have been epidemic closures of factories across the Pearl River and Yangtze River Deltas. The affected workers have limited recourse in reality and indeed been worse off, despite the improvements in law.
Political and cultural dimensions

The adverse effect of politics in China lies in the fact that the market has been dominated by state-owned listed companies. This has led to suboptimal enforcement and greater majority-minority conflicts. The reason why state-owned companies have paramount importance in China is because the state has been reluctant to let go of its control in these companies, as well as the economy. The compatibility of private economic activities and socialism has always been an ideological dilemma to Chinese leaders. Deng Xiaoping asked the following:

Are such things as securities and stock markets good or bad? Can they only exist under capitalism? Cannot they also be adapted to socialism?\footnote{Speech made by Deng Xiaoping during his Southern Excursion in 1992.}
There have been numerous concerns over reinterpreting Marxism and leaping into a ‘socialist market economy with Chinese characteristics’. Would the introduction of a capital market be consistent with socialist economic division and production? For Chinese leaders, the use of non-socialist development and the taste of capitalism are only the tools to get China into the ‘socialist utopia’. In this sense, capitalist means can be borrowed and utilised for the building of socialism. Would the state-owned nature of Chinese enterprises be changed? Would workers be exploited by profit-oriented companies? Responding to economic reforms, substantive changes were made to the structure of the legal system by learning from other developed countries. But socialism is still the basic system. Law has essentially been a tool for

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112 Based on this theory, the socialist system will evolve into four phases: from capitalism to the primary stage of socialism, then to the advanced stage of socialism and finally to communism. Y Hu, *China’s Capital Market* (The Chinese University Press 1993) 67.
the maintenance of state domination. As discussed before, according to Roe, labour orientation in social democracies might not be compatible with the shareholder wealth maximisation norms, which are important to entrepreneurship. Indeed, the new Company Law of China still has the feature of social democracies by requiring the presence of the representatives of workers on both the board of directors and the supervisory board. Zhu has noted that since 1987 two main themes have been running throughout the development of securities regulation in China: one is to ensure the primacy of socialist ownership and the other is to restrict foreign ownership in SOEs.

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114 Roe (n 25).
115 See Arts 45 and 51 of China’s Company Law 2005.
Heavy governmental intervention might not be desirable to the development of a strong market. The Chinese state has a high degree of control over market regulation. In addition, it can exert influence through its company ownership. A distinctive feature that separates China’s stock market from those in other countries is the phenomenon that two-thirds of the outstanding shares in China are not tradable. Any SOEs converting into a shareholding company has to divide up its share into three roughly equal parts. About one-third of shares can be publicly issued, owned by individuals and legal persons, and freely traded. The remaining two-thirds are

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118 H Yeung, ‘Non-tradable Share Reform in China: A Review of Progress’ (2009) 30 The Company Lawyer 340. About a third of equity will be transferred to state organs. These shares are either managed and represented by the Bureau of National Assets Management or held by other state-owned companies. The ultimate owner of state shares is the State Council. Another one third of every listed company’s equity will be sold to domestic institutions (securities companies and SOEs with at least one non-state owner). These shares which amount to two-thirds of the total shares issued are non-tradable. The remaining will be offered to the public.
allocated to state shares and legal person shares which cannot be traded on the stock market. Such shares have been issued to the founders of a corporation, business partners or employees and have served two main purposes: to keep the control of SOEs that were floated on the market, and to maximise IPO proceeds. All these arrangements have flowed from the rejection of privatisation by the Chinese state. Instead, corporatisation was adopted in which SOEs were converted to joint stock companies, featuring both state and non-state ownership. The goal was to improve managerial incentives by installing shareholders with incentives and the ability to monitor the managers.

As Clarke has rightly pointed out, these diagnoses and the implementation of corporatisation as a

\[119\] Art 36 of the Provisional Regulations on the Administration of Issuing and Trading of Stocks.

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solution are flawed.\textsuperscript{121} The chief purpose of corporatisation is to promote higher efficiency through better management. The goal of the state owner in the new system is assumed to be profits according to the traditional shareholder’s value maximisation norm. Indeed, the state owner is still the direct owner of companies in a number of sectors. It is simply too difficult for the state as the majority shareholder to exercise effectively its monitoring role.

The separation of ownership and management of control, as claimed by Berle and Means in 1932, has been viewed by Chinese commentators as ‘a positive good to be pursued for its own sake’, because it seems to be the necessary feature of a modern enterprise, as well as the feature of many Anglo-American corporations that now dominate the world.\textsuperscript{122} This requires a widely

dispersed shareholder base. In practice, a large number of corporatised SOEs remain dominated by a single state shareholder that exercises its control either through formal channels such as shareholder voting, or through traditional channels such as the appointment of key personnel.\textsuperscript{123} Ironically, the state as the majority shareholder plays an ineffective role in monitoring the behaviour of managers, because it is a collective body. There is no body within it with the sufficient and appropriate incentives to perform the monitoring function. Meanwhile, the holders of tradable shares are typically minority shareholders with limited power to affect management decisions. The problem is twofold. First, there is a majority-minority conflict. The interests of the state as the majority shareholder might not necessarily intersect with those of the minority shareholders, whose interests are purely profit-seeking. Second, there is a principal-agent conflict. With inadequate shareholder pressure, it is questionable

\textsuperscript{123} Clarke (n 121) 499.
whether trust can be placed in managers. In fact, many Chinese companies are characterised by excessive CEO power, insider control, collusion and weak transparency.\footnote{124 J Hua et al, ‘An Empirical Taxonomy of SOE Governance in Transitional China’ (2006) 10 Journal of Management and Governance 401, 413.}

On the other hand, culture is important in market development. For example, Black has suggested that a culture of honesty is one of the essential ingredients of a strong market.\footnote{125 B Black, ‘The Legal and Institutional Preconditions for Strong Securities Markets’ (2001) 48 UCLA Law Review 781.} Legal culture might also be relevant. However, in the context of China, political factors are apparently more influential than legal factors. Moreover, what China lacks is a well-developed investment culture. One of the major aims of corporate and financial law is to protect investors, but at the same time these investors are not completely innocent if they buy stock in
organisations of doubtful validity and practices.\textsuperscript{126} Although they do not have any obligations to conduct any research or investigation, such as reading the financial statements of a company, before putting any money into a company, the press describes the behaviour of Chinese investors as ‘betting’ or putting stock in ‘Lady Luck’.\textsuperscript{127} Other than the obvious explanation that people have limited alternative investment channels, share trading offers ordinary Chinese the chance to gamble. In fact, the stock market in China is like a casino. Xie has revealed that the chance for ordinary investors to profit from the Chinese stock market has

\textsuperscript{126} US Supreme Court Justice Louis Brandeis indicated that ‘there is no such thing as an innocent purchaser of stocks’, quoted in R Monks and N Minow, \textit{Corporate Governance} (Blackwell 2004) 127.

only been 40 per cent, even lower than the odds to win in a casino (48 per cent).\textsuperscript{128} ‘Seven lose, two even, one wins’ has been a favourite saying among China’s share investors.\textsuperscript{129} Standard legal protections are essential in a scenario where investors are too naïve to protect themselves.\textsuperscript{130} There can be both governance and regulatory strategies. However, both are problematic in the context of China, largely because of the dominance of state-owned companies. First, absolute control in these companies is still retained by the state. Second, enforcement, both public and private, against these companies has not been common as discussed.

In addition, the corporate culture of China is not compatible with the best corporate governance practices. The Western concept of separate legal personality can

\textsuperscript{128} Caijing Magazine, ‘The Chinese Stock Market or the Casino is the Place to Win Money?’ (in Chinese) (8 June 2007).
play a role in safeguarding investors’ interests, because there is a real separation between family/state and company.\textsuperscript{131} There is an impersonal pattern of possession in the UK, the US, Australia, Canada and New Zealand. However, the culture of a place can entail correspondingly different expectations of a company. Chinese companies, for example, show different characteristics. As opposed to the separation of ownership and control, professionalisation, bureaucratisation and neutralisation, they retain characteristics of small scale family businesses such as paternalism, personalism, opportunism and flexibility, even when conducting a very large scale of operations. There is not a culture of honesty. Corruption is widespread in China with excessive entertainment, embezzlement, bribery and moonlighting.\textsuperscript{132} Personal

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\textsuperscript{132} According to the 2012 Corruption Index released by the Transparency International <http://www.transparency.org>, China
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connections or *guanxi* have remained a key element of Chinese organisations. China’s traditional business culture is characterised by discretionary power, secrecy, a substantial government role in large-scale production and personal connections. Conversely, it is commonly asserted that securities markets depend on the rule of law, transparency and the interactions of private parties who are often strangers. Therefore, Hutchens has referred to the development of securities markets in China as a ‘cultural revolution’, where there has even been stimulating growth of professions and institutions previously unknown in China, such as accounting, legal professions and investment banks.\(^{133}\)

Hofstede conducted one of the most comprehensive studies of how values in the workplace are influenced by culture.\(^{134}\) His dimension framework was ranked 80 out of 176 countries. The perceived level of corruption in China remained high.

\(^{133}\) Hutchens (n 96) 622.

characterising culture is still the most influential and the most used in international management studies. In the 2010 edition of his book, scores on the dimensions are listed for 76 countries, partly based on replications and extensions of the 1991 study on different international populations. Whilst China is a highly long-term oriented society in which persistence and perseverance are normal, a low score on uncertainty avoidance may be a hindrance to development. The latter means that in China adherence to laws and rules may be flexible to suit the actual situation and pragmatism is a fact of life. This can explain the existence of corruption and backdoor guanxi.

In summary, from a political perspective, law has been used as a tool by the government to achieve its own agenda, instead of a tool to restrict the conduct of government. Within a company, the state as the controlling shareholder, has failed to perform an effective monitoring role. As a result, both majority-
minority conflicts and principal-agent conflicts are imminent. From a cultural perspective, laws and rules are intended to prevent uncertainties in the behaviour of other people. *Guanxi* and the advocacy of harmony in the Chinese society add a degree of uncertainty to the market. In China, people still tend to solve a problem through ‘informal channels’. Corruption remains widespread in China. Solving all these problems may not be easy and will involve a lot of efforts.

**Supporting professions and infrastructures**

The emergence of private institutions such as accountants, which often takes place in line with economic growth, is an essential part of market development. Ironically, China is actually one of the oldest countries using an accounting system. Well over 2,000 years ago, China was already applying a highly developed accounting and auditing system for financial
and economic activities.135 Under the rule of the communist party, the accounting system was a modified Soviet system called ‘state accounting’. This was used as a tool for the implementation of the state’s production quota and government budgets. Managers personally selected an accounting approach and decided on the content of accounting statements and even on the amounts of profits. Considering the absence of a sound accounting framework for a long period of time, an official with the Chinese Institute of Certified Public Accounting stated that Chinese accounting firms were lagging behind international standards regarding qualifications, services and management, even in this market economy era.136

Intermediaries in the Chinese financial markets have predominantly been state-owned. Securities and investment fund management firms were established by state-controlled companies or directly by government agencies in the 1980s. Most restructured in the 1990s into shareholding companies with a state organisation as the majority shareholder. Since government agencies remain in control of these firms, they have been vulnerable to administrative interference. Dozens of underwriters have been implicated in disguising the accounts of restructured SOEs with the assistance of local officials to allow it to list.\(^\text{137}\) Even though some of them are not state-owned entities, they are controlled by the CSRC in respect of licensing, capital adequacy and the conduct of business. The presence of intermediaries, in theory, should facilitate the operation of the market. For instance, the certification services performed by

accountants and lawyers can alleviate the information asymmetry by saving investors’ time and costs in verifying the information. Furthermore, the financial press allows the dissemination of information, both favourable and unfavourable, from companies to a large group of people in a short period of time. For this to occur, intermediaries must be independent of issuers and investors. In China, this might not be possible because intermediaries are often owned or controlled by the state, which is the most regular issuer of securities and is also generally the controlling shareholder in companies.\textsuperscript{138} Hence, the intermediaries are in an awkward position when performing their roles as ‘gatekeepers’.

Indeed, China has done particularly well in policy level reforms to foster development. One example is the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone. Following the State Council’s decision to develop Qianhai into an

\textsuperscript{138} MacNeil (n 31) 321.
international commercial centre, it has been widely
tipped to become the next ‘mini Hong Kong’.

The government grants pilot preferential development
policies in the financial, legal services, human resources,
education, medical and telecommunication sectors to
facilitate its development. For example, the joint
operation of law firms in Mainland China and Hong
Kong will be permitted in Qianhai. Similarly, the new
policy allows Hong Kong professionals with Chinese
Institute of Certified Public Accountants (CICPA)
qualifications to become partners of accounting firms in
the Mainland China, using Qianhai as a pilot district.

Apparently, it is an attempt to piggyback the institutions

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139 J Harper, ‘Chinese City of Qianhai could be “the Next Hong Kong”’ The Telegraph (London, 31 July 2012).
140 Following the State Council’s agreement in principle on ‘The Overall Development Plan for the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone’ in 2010, it officially approved preferential policies to facilitate the development of the zone on 27 June 2012. See the ‘Announcement on the Preferential Policies for Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone’ (2012) issued by the State Council (’Guohan No. 58’).
in Hong Kong, which is widely considered as one of the most developed markets in the region.¹⁴¹

In summary, there has been a continued need in China to strengthen the system of reputational intermediaries, including professionals such as accountants and lawyers as well as other financial services firms such as investment banks and securities analysts. Before the economic reform, there was little or no demand for them. However, considering the current market size, ensuring an adequate supply of high quality personnel is crucial to the future development of the Chinese market.

¹⁴¹ Indeed, the Chinese state’s decision to list many of its SOEs in Hong Kong has been an attempt to piggyback the legal system as well. As of the end of February 2013, there were 179 companies listed abroad, predominantly in Hong Kong. See Huang and Yeung (n 26); Huang and Yeung (n 67); and FX Huang and H Yeung, *Chinese Companies and the Hong Kong Stock Market* (Routledge 2013) (forthcoming).
Conclusion

The Chinese path of development and its associated rapid growth is puzzling to the West, because it seems to defy some conventional wisdom.\textsuperscript{142} Although China has adopted many of the policies advocated by economists, such as being open to trade and foreign investment and sensitive to macroeconomic stability, China’s reform succeeds without complete liberalisation, without privatisation and without full democratisation. These conditions are thought to be necessary for growth.

China, on its course to a more capitalist state, offers a promising investment opportunity to investors. At the same time, investors must be very cautious if they want to take advantage of this opportunity. In the early years of China’s open-door policy, foreign investors were put off by the lack of a functioning legal system. With eyes dazed by the promise of a market of over a

\textsuperscript{142} G Meier and J Rauch, \textit{Leading Issues in Economic Development} (OUP 2005) 46.
billion captive customers and a production base of cheap labour input, many multinational companies still eagerly invested in China even though they lost money. Capitalism is based on rational economic calculability, and capitalist development requires a legal framework of sufficient predictability to allow such calculability.

A reliable legal framework has been the assets of the Anglo-American system, but at the same time a moral hazard problem might have contributed to the backlash of Anglo-American capitalism, as seen in the financial crisis. Investors feel more comfortable in a protective jurisdiction and they are willing to surrender funds in exchange for securities, because they believe there is proper oversight on corporate and market governance. Nonetheless, this by no means implies that China should not develop a better institutional and regulatory framework. An effective economic system should involve the regulation of both companies and markets. To put it simply, in the company dimension, a
shareholder should have the right to receive information about the company, and to expect that there are adequate laws and other pressures to discourage expropriation by insiders. In the market dimension, there must be mechanisms to ensure an orderly operation of the markets, fair dealing and integrity. Also, there is a need to ensure that outsiders are adequately protected such that creditors will not be expropriated, workers not exploited and consumers not misled. By learning from the experience of the Western markets, revisions to the Company Law and the Securities Law of China in 2005 and the introduction of the Labour Contract Law in 2008 have reflected a convergence to the Western model. Institutions are constantly being built and fine-tuned. Undoubtedly, this will be an on-going process.