CLARE COLLEGE LAW JOURNAL

CLARE COLLEGE LAW SOCIETY,
UNIVERSITY OF CAMBRIDGE

VOLUME I: 2024

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CONTENTS

FIRST-CLASS LAW TRIPOS ESSAYS

INTRODUCTION

It is with immense pleasure that we introduce the inaugural edition of the Clare College Law Journal (CCLJ). Bringing the CCLJ to life has been a challenging but extremely rewarding journey; what started as a casual idea between the two of us in December 2023 has now become a 189 page-long journal, showcasing high-quality legal academic work, awarding an Access Prize sponsored by Matrix Chambers (the 'Matrix Chambers Access Prize') and featuring interviews with legal legends that we have always dreamed of meeting. From launching the call for submissions to adding the final design touches, each stage of the process has been focused on enabling the CCLJ to reflect the spirit of the community at Clare College: fiercely intellectual, relentlessly curious, and unwaveringly dedicated. Sharing these qualities with a global audience of students and legal professionals around the world is our ultimate objective; for this reason, we have made the Clare College Law Journal open to article submissions from everyone at an undergraduate-level and above. We are delighted to have received so many excellent submissions spanning so many different areas of law. We hope to see our growth and reach continue to increase across future editions.

In our inaugural edition, we are proud to present interviews with leading individuals in the legal sphere. Starting with Baroness Hale, Lady Arden, and Lady Black, the first three women to sit on the UK Supreme Court, we then move to Imran Khan KC, the leading lawyer on the Stephen Lawrence case. We then speak to Helen Drayton, CEO of top-ranked global law firm Penningtons Manches Cooper LLP, before moving to Nabil Khabirpour, founder of the 'Law Corner', a pro-bono organisation devoted to promoting access to justice. Next, we have curated a series of articles, spanning a variety of legal disciplines, ranging from international law, to equity law, to human rights law and many more. Finally, we are also pleased to have compiled an impressive series of first-class Cambridge Law Tripos essays, notably covering all mandatory modules of a qualifying undergraduate law degree. This diverse collection of legal topics exhibited in this edition will, we hope, inspire both the private and public lawyer, the seasoned lawyer as well as the bright-eyed student.

A particularly exciting aspect of our inaugural volume is the launch of the Matrix Chambers Access Prize. After partnering with the incredible team at Matrix Chambers, we announced the Matrix Chambers Access Prize, which would provide the author of the best article accepted for publication, who is from an underrepresented background in the legal sector, with a work placement at Matrix Chambers. An esteemed panel blindly judged the shortlisted articles to determine the winner of this year's prize, Harry Armstrong. A huge congratulations to Harry, for his remarkable work analysing the European Court of Human Rights' approach to protecting transgender parenthood. Lily Greenhough, Jake Pronger, and Phoebe Lee were rightfully recognised as our three runners-up for their impressive contributions and we congratulate them for producing such high-quality work so early on in their legal careers. A massive thank you to Matrix Chambers for partnering with the CCLJ on this endeavour and devoting their invaluable time and resources to this commitment. More information about this can be found on our Matrix Chambers Access Prize information page.

A huge thank you next goes to all contributing authors for entrusting us with the honour of showcasing your work in this inaugural edition. Your contributions are at the heart of this journal, and we feel privileged

to be able to provide a platform for your ideas. To the editorial board, encompassing all those involved in editing, design, or publicity, we cannot extend our gratitude enough for being such an incredible team to work with over the year. The fact that the entire journal team consists of past and present Clare students, makes this journal truly special. Finally, thank you to Dr Kirsty Hughes, for your incredibly kind words and your time, especially amid an exceptionally busy exam period, and to Darren Peterson, for your consistent guidance and advice from the launch of the journal early this year. This journal would not have been what it is without both of you.

As we look to the future, we look forward to seeing the CCLJ develop and grow, continually embodying the vibrant academic spirit of our community. We are excited to continue to lead and contribute to the development of future CCLJ editions and hope that this journal serves as a platform for legal scholarship, and also perhaps more importantly, that it inspires future generations of law students to engage with, and contribute to, the dynamic sphere of law. To our readers, thank you for being part of this journey with us, and we hope that you enjoy reading this inaugural edition, as much as we have enjoyed creating it.

Puja Patel & Sakshi Jha
Founding Co-Editors in Chief
Cambridge, June 2024

FOREWORD

BY DR KIRSTY HUGHES*

It is a great honour to be invited to write the foreword for the inaugural issue of the Clare College Law Journal. I am deeply impressed by the dedication and efforts of our students in bringing this to life and it has been particularly heart-warming to see past and current students and law students and non-law students come together in embarking on this new endeavour. Cambridge colleges for all their idiosyncrasies provide a unique environment in which such inter-generational and cross-disciplinary friendships can be forged. In this respect Clare College has long had a reputation as an academically rigorous, *and* (or perhaps it is *but*) friendly college. Although I find my eyes rolling at such stereotypes, I have to say that both those qualities are evident in abundance in the stellar team behind this journal. Particular thanks must go to the founding editors Puja Patel and Sakshi Jha. I had the great pleasure of supervising and directing studies for both of them during their degrees throughout which their academic commitment, passion, and perhaps most importantly the gracious and genuine ways in which they interact with staff, fellows and peers have shone. They have demonstrated to our community their prowess as leaders and I have no doubt that they will be ambassadors in their future careers. At Clare we can only hope that they will continue to feel the strong attachment to the college that is evident in this work and that they will visit us often.

Turning to the contents of this issue I am deeply impressed, astonished even, by the remarkable lineup the editorial team have put together for this inaugural issue. The 2024 issue contains contributions from no less than three senior judges alongside academics, practitioners and students; as an editor on several major law journals I am fully aware what a feat this is. The Matrix prize winning essay by Harry Armstrong, in particular, provides a truly rich and fascinating insight into the European Court of Human Rights' recent case law in respect of trans parenthood. It is an extraordinary piece of scholarship, particularly for a student who is still completing their undergraduate degree and I hope it will be read widely. It is also a testament to the vital importance of languages as Harry, currently on an exchange programme in France, has translated and provided a critique of cases not presently available in English, cases which had not received the attention that they deserve prior to Harry's essay. This issue also features three excellent essays from the runners-up for the prize, Lily Greenhough, Jake Pronger and Phoebe Lee, with contributions on mortgages, climate change and copyright law. The judges of the prize must certainly have had a hard time making their decisions. Alongside the prize-winning essays, the issue has an impressive array of contributions from students on a wide range of topics including discrimination, immigration, climate change, military use of cyberattacks, abortion, as well as private law subjects that provided a welcome opportunity for me, as a public lawyer, to return to topics that I haven't considered for some time. It is a reminder of the vast breadth of the degree programme and the range that law students must demonstrate whilst they are studying. Sadly, it is a time that passes too fast. My sincere congratulations to all involved in this issue, you have set the bar extraordinarily high for your successors.

Cambridge, June 2024

* Joint General Editor of the European Human Rights Law Review, Director of the Centre for Public Law, University of Cambridge, a member of Blackstone Chambers Academic Panel and Deputy Editor of Public Law.

MATRIX CHAMBERS ACCESS PRIZE

Alongside working hard to ensure that we are able to showcase high quality academic work and interviews, we have also strived to ensure that the Clare College Law Journal reflected our personal values of fairness and inclusivity. As women of colour, promoting inclusivity and accessibility – both within the academic sphere of the Clare College Law Journal and the legal profession more broadly – is a cause very close to our hearts, and therefore it is with great joy that we are able to say that the inaugural edition of the Clare College Law Journal includes the Matrix Chambers Access Prize!

We are thrilled to have partnered with Matrix Chambers in order to award the prize of a work placement at the prestigious Matrix Chambers to the author of the best article submitted for consideration. All authors from underrepresented backgrounds in the legal profession were eligible to submit their articles for the Matrix Chambers Access Prize.

The standard of the articles submitted was exceptionally high; many of the articles we received showcased talented and diverse perspectives, making the selection process incredibly challenging. We are honoured to have received such fantastic submissions; the winning article, alongside three runners-up, are all included within the 'Articles' chapter of the Journal.

We would like to offer our deepest gratitude to Matrix Chambers for their enthusiastic support in pioneering the Matrix Chambers Access Prize, which was designed in order to both recognise exceptional academic work as well as promote inclusivity and accessibility in the legal profession. We would also like to offer our heartfelt thanks to the esteemed Panel who judged the Matrix Chambers Access Prize: Professor Jonathan Marks, Sarah Hannett KC, Zoe Leventhal KC and Lindsay Lane KC.

INTERVIEWS

THE RIGHT HONOURABLE BARONESS HALE OF RICHMOND DBE

Former President of the Supreme Court and the first woman ever to hold this position

Interview conducted by **PUJA PATEL** and **SAKSHI JHA**
Edited by **MARCUS OVERD**

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Journey Into Professional Practice

You've had a remarkable career spanning decades within the legal profession, breaking barriers throughout. Going back to the very start, what motivated you to pursue a career in law?

My stock answer to that is that my headmistress thought that I was clever enough to go to Oxford or Cambridge, but not clever enough to read History. Basically, what she said to me was, "You're not a natural historian Brenda. So, what else might you read?". I suggested law, although there was no law in the family. There was no law in the school. It was probably about 1960. So there were very few women lawyers. My reasoning was that I had been very interested in the constitutional history of the 17th century, and all the exciting things that went on there. So it was my interest in the British constitution that led me into the law, not anything else.

How would you describe your time at Cambridge? Can you share some highlights or memorable experiences?

It was all memorable, of course - but remember that this is the mid-60s. I was an undergraduate from 1963-1966. All the colleges were single sex. There were three women's colleges and 21 colleges for men. So this was deeply unfair in terms of equity, but it did mean that one could have a pretty good social life if one wanted to. So I have lots of happy memories of Cambridge, both of the social aspect and of the course, which I enjoyed a lot, as I soon found out that I was actually quite good at law.

In your career, how did you find the transition from academia to sitting as a judge in the High Court?

That was very late in my career, because I spent 18 years teaching at Manchester University and then nine and a half years at the Law Commission, which was not exactly academia, because it was practical law reform. Then I went on the High Court bench having been a part-time judge for most of those nine and a half years. So I had quite a lot of judging experience. As an academic, you have to produce well thought-out arguments, in articles and books, and that's what you have to do as a judge: you have to be open-minded and you have to look at the principles and you have to try and apply them to the facts. Obviously there are differences in the environment, but I think if you spent 18 years dealing with people like you - very clever 18 to 21 year olds - you're quite good at spotting what's going on, who's telling the truth and who isn't telling the truth, things like that. So

I don't think it was too terrible a transition.

Did you have any role models or mentors who influenced your career path?

There weren't really mentors in those days. When I went to be an academic one had law teachers and more senior staff, some of whom were very helpful and some of whom were not at all. I'm sure you'll find the same. As for role models my mother was great, because she was somebody who had to give up work when she married my father in the 1930s. But when he died very suddenly when I was a teenager, she dusted off her qualifications, got herself a job and got back into the workplace, and generally showed a huge amount of resilience, determination and independence, which is what she always had as a person. I think that was very helpful for the sisters - especially my younger sister and me - to think that we'd better be resilient and independent and get ourselves qualifications as well. So she was definitely a role model. And then of course there were people like Rose Heilbron, who was one of the first women KCs and who had an enormously successful practice in the Northern circuit. So she was a role model to all the women who started out as barristers in the Northern circuit. And then there were other women who had gone on the bench - not very many of them, but some who could also count as role models, such as Elizabeth Butler-Sloss, the first woman in the Court of Appeal.

Are there any memorable cases that have particularly stood out to you, whether for their complexity, or consequence, that we may not necessarily know of?

You will probably know the case called *Yemshaw v London Borough of Hounslow*.[1] It comes to mind because that was one in which the Supreme Court held that the word violence was capable of having a wider meaning than simply hitting or threatening to hit. That's very important for women and it led to an understanding of something which we now call coercive control, which is dominating somebody by all sorts of abusive threats - a lot of it is what you'd now call gaslighting - rather than by hitting them. So that's quite an important case.

Another case that I tend to mention when I'm giving little talks about my life is a case that I had when I was in the High Court in the Family Division, because I don't think anybody has had a case like it either before or since. It was about what should happen to the mortal remains of a young man who'd been run over by a bus, at the age of about 26. There was a battle between his adoptive family and his birth family, who were Australian Aboriginals, as he had been removed from his mother at birth. She had signed a consent form, but it was the day after he was born, so we wouldn't consider that valid. He'd been placed for adoption with an English family, and they had eventually come back to this country, which is where he'd grown up. But when he was killed they were in a battle as to whether he should be cremated and his ashes buried next to his adoptive father's ashes, or whether his body should be sent back to Australia and his bones scattered on the ancestral homeland.

There was no law to govern this. He had a partner and a three-year-old daughter, I think. The part-

[1] [2011] UKSC 3

ner was the person with parental responsibility for the three-year-old daughter, and the three-year-old daughter was obviously entitled to be the administrator of his estate, but of course the partner stood in for the daughter, so the technicality was that I could displace the person entitled - that is the personal representative, the administratrix - if it was either 'necessary or expedient' to do so. It clearly wasn't necessary, but was it expedient? And there was nothing to guide that, so I decided that I had to take into account the interests of the English family, the interests of the Australian family and the interests of the daughter. I suppose it's not hard to guess which way I decided: he should stay in England. But the English family had already conceded that he shouldn't be cremated, which was important to the Australians, and they also said that the Australian family could come and perform some of their traditional rituals at the event. That's a very memorable case and I love talking about it because I had to make up the law.

Equality and the Law

You were 1 of 6 women, among 110 men in your class reading law at Cambridge, the first female Law Lord, and both the first female justice of the Supreme Court and the first female President of the Supreme Court. You're therefore often (correctly) described as a 'feminist icon'. This must have been quite a journey.

What challenges have you faced in breaking gender barriers within the legal profession?

I'm not sure that any of us thought of it as being such a big deal really. I mean, we were delighted to be at Cambridge and, unlike a lot of the men, we realised how privileged we were to be there. And I think most of us wanted to make the most of it in whatever way we could. I'm not aware of experiencing overt sexism either as an undergraduate or later on. I'm sure there was some of it. I was reminded by a contemporary man that our lecturer in criminal law refused to lecture on sexual offences, because there were women in the class. I didn't remember that but it did happen, because of course men didn't like talking about sex when there were women present, whereas women have never been shy about that. I can say that a lot may have been said behind our backs, but on the whole we just carried on regardless and I've always taken things one step at a time. When I was at school the object was to get to Oxford or Cambridge. When I was at Cambridge, the object was to get the best degree I possibly could and have a good time as well. Then when I went to Manchester, and I was combining being an academic and a barrister, I wanted to be as good as I could. When I decided to be an academic, I wanted to be the best academic I could, or at least the most entrepreneurial academic I could. But then I wanted to go to the Law Commission, and at the Law Commission I decided that I didn't really want to go back to academia. I wanted to become a judge. So I just took things one step at a time but it was always the case that once I got something under my belt, I was always looking for the next step. So that's the approach that I've taken to life, and if people regarded it as overambitious of me, or too pushy - as they may well have done – so what?

How can we continue this progress in inclusivity – not just for women in law today, but in dealing with biases going beyond gender - such as perhaps regional bias.

We're not doing too badly with women; in fact, there are now more women qualifying as solicitors than men. They're about even qualifying as barristers. The number of women in the judiciary has expanded dramatically this century. This is when the big changes have taken place.

There is still a problem of attrition. Obviously, there are some women who decide that they will take a career break for family reasons. I think there are just as many women who decide that they will step away from self-employed practice, which is not the same, so they go into employed practice. We need to recognise that that sort of experience is just as important as the experience of self-employed practice. That is something still to be worked upon for women in the legal profession.

We haven't made the progress that we should have made in ethnic diversity - especially in the case of people of African or African-Caribbean Heritage. People of South Asian Heritage on the whole are making good progress in the law, but it's not so good with the African Caribbean Heritage. That's something that's got to be worked on because it's really very important that the legal profession and the judiciary reflect the society which they are there to serve.

You're also right that we are beginning to realise that there's a socio- economic background issue, and that issue may have got worse. When I was your age, because we had the benefit of not having to take out huge loans in order to go to university, we did not need to have part-time jobs in order to be a student, whereas the pressures on students these days are a great deal more. So developments like apprenticeships are an important way of getting a wider range of people into the legal profession.

You may be right about regional issues too. I was born in Leeds, but I grew up in the very north of Yorkshire, about a hundred miles from Sheffield. No doubt I did have a Yorkshire accent when I was at school, but I probably lost most of it when I was at Cambridge. It's good to know that one hears a much greater variety of accents, and what gives me particular pleasure is to hear a strong regional accent in somebody of colour. We do need to embrace the variety of ways of speaking English which are around.

Domestic Legal Issues

Some of your most influential judgements, such as on the prorogation of parliament, led to some politicians saying there has been increasing judicial overreach in recent years. How would you respond to such criticisms, and how can we strike the balance between politics and law?

It's incredibly important to emphasise how important the law, the judiciary and the independence of the judiciary are. They are there to do a function, which is to apply the law impartially between individuals and enterprises, and individuals and the state, and that includes making sure that the Government is acting within the powers that it has. If we regard this incredibly important role as something that is inconvenient and gets in the way of the politicians wanting to do exactly what

they want, that is a slippery slope towards possibly anarchy, but certainly tyranny. And so people like you have got to stand up for it as much as you can. I was in Parliament yesterday listening to and taking part in the voting on the debate on the Rwanda bill. And the message that was coming over from government ministers was that it was really a terrible inconvenience that people might actually take cases to court to challenge what was being done to them. Of course, some claims are spurious, but some of them are not. People have got rights, which the courts are there to protect, and the whole message that was being put over was that the courts were an inconvenience and that the only people who were trying to use them haven't got a good case - both of which are manifestly wrong. So I look to you young people to carry on the important fight for the importance of law and justice.

Following on this note of the prorogation case, you did go viral at the time after your judgement declaring Johnson's prorogation of parliament as unlawful, being named 'Spider Woman' after your fantastic brooch, which of course is the name of your autobiography.

Reflecting on your judgement in the prorogation case, could you share your insights into the discussions that took place among the Justices behind closed doors?

I can tell you a little bit about it – obviously, it was an extraordinary experience. It was a case that we could not refuse to take, whether we wanted to take it or not, because there was a decision in England saying one thing and a decision in Scotland saying another thing, and they couldn't both be right. Either Parliament had or had not been prorogued. So we had to decide which it was. I can tell you that it was a huge benefit to have two completely different judgments from equally authoritative and respected courts. What people often forget is that we weren't making it up and that Scotland had played a really important part in this.

Obviously, we were aware that we had to hear and decide it much more quickly than we normally do, especially important cases like that. If we were going to agree that the Scots were right, there was no point in doing that if the five weeks had already elapsed, so we had to be as quick as we possibly could. Those are the big challenges, and especially doing it in a much more agitated atmosphere.

But basically, after the first two days of argument, I asked my colleagues to write down, preferably on one side, but maximum two sides, of a sheet of A4 our answers to the following questions. Is it justiciable? If it is, what are the principles? How do those principles apply to these facts? And what's the outcome? It became clear that we were going to decide that it was justiciable. We were more or less agreed on what the principles were. They needed some tweaking and some fine tuning on how they applied to the facts of the case. The one thing that we hadn't really had much argument about was what the outcome was. And so we concentrated in the reply arguments on what the outcome would be were we to agree with the Scots that the advice was unlawful. We didn't have to spend an awful lot of time discussing things by the time we got to the end of the hearing, because it was fairly clear how things were going to be. Then the deputy president and I spent the

weekend writing the judgment and circulated it to our colleagues on the Sunday. They suggested some improvements and then we were ready to go first thing on Tuesday.

As for the brooch, I didn't give any thought at all to it – had I thought about it, I probably would not have worn a spider. People read things into spiders that they don't need to!

The Effectiveness of International Law

Looking at current affairs globally, the effectiveness of international law has returned to the spotlight in recent months, due to calls that it protects certain groups and not others. Indeed, you recently signed an open letter calling for the government to act in accordance with its international legal obligations with regard to events occurring in the Gaza Strip.

We have the following two questions:

- **First, how can we tackle the influence political relations can have in undermining states' adherence to international legal obligations?**

I don't think you can separate international law and politics. I think international law has been one of the great achievements of the 20th century and we mustn't forget how much international law has got very little to do with politics. It's got to do with trade. We are parties to all sorts of treaties that govern transport. Actually, international law governing transport of goods by sea has been around for centuries. But there's a huge amount which is governed by international treaties where states do deals for their mutual benefit, just like contracts, and on the whole they work pretty well. But obviously there are some treaties which are more controversial because they do touch on political questions and in that I suppose I would include the human rights treaties. They're an invention of post-World War Two. The European Convention on Human Rights of 1950 came into force in 1953. But then the UN caught up with its own instruments. There was of course the Refugee Convention, which again was a human rights treaty. When it was first negotiated in 1950, it was very limited, and basically only applied to people who were European refugees as a result of World War Two. And then in 1966 the protocol came along and made it worldwide and not time limited. I don't know enough about how that came about, because it was a remarkably generous thing to do, and it didn't I think foresee the huge movements of people - some of whom of course are genuinely refugees within the meaning of the convention, and some of whom are not, and how you sort them out is a really difficult question.

So, I don't think you can separate the politics. But I think the politicians ought to be told what their obligations in international law are, so that instead of saying we are keeping to our obligations in international law, which is what our government tends to say, both in relation to the current Gaza situation and the illegal migration situation, I think it's a good idea to try and make it clear to them what the situation is. That way they can say, "We accept that what we are doing is not necessarily consistent with our obligations in international law, but we have the following very good reasons for doing it." I would prefer that. So, I think the job of the lawyers is to try and make clear what

the legal situation is, and then the politicians have to take the responsibility for the decision - and they also have to be prepared to take the flack for doing things that they really shouldn't be doing.

- **Do you think the existing international law framework is adequately equipped to address non-compliance from states, or are there any reforms you believe are necessary?**

It depends upon the treaty. So the European Convention on Human Rights does have an enforcement mechanism, it has the European Court of Human Rights, and parties to the convention have to agree to abide by the decisions of the European Court. There are people who say that the European court has overreached itself - and I must say that the Swiss decision[2] is not playing well amongst people who already don't like it very much. But there is an enforcement mechanism.

I was in the House of Lords yesterday, listening to the Foreign Secretary Lord Cameron answering questions. He was asked a question about the Council of Europe and the European Convention and Court of Human Rights and he said that they sometimes overreached and instanced the decision about prisoners voting. He said of course, there's nothing in the Convention about prisoners voting. This is true - I mean, that was arguably an extension.

I actually think it was much more arguably an extension in the particular example of the Hirst case[3] when they decided it rather than generally. They had already said that free elections mean universal suffrage and so they then had to work out what universal suffrage was. I think most of us would say yes - free elections do involve universal suffrage. So you mustn't have unjustified discrimination in access to voting. The question was is it justified to ban all sentenced prisoners from voting, and it is very difficult to suggest that an arbitrary ban like that is justified – it would prevent from voting a shoplifter who was serving a fortnight of a twenty-eight day sentence by a magistrates court, which happens to include polling day.

But Lord Cameron yesterday was saying that that was a terrible overreach (he had actually said when he was Prime Minister that the thought of prisoners voting made him feel sick). This is worth mentioning because it's such a good example of the whole purpose of human rights, whether you agree with the prisoners voting or not. Why should the people who were elected under the current franchise be entitled to say what that franchise should be? Women, until 1919, did not have the vote. So it was men saying that women shouldn't have the vote. In fact, had there been a human rights framework then, the human rights framework would have said that of course women should have the vote. You cannot discriminate against women. That's what human rights are for, from time to time to tell the people elected under the current system that people are not respecting their fundamental rights and not treating people equally as they should.

There is an enforcement mechanism for the European Convention. There isn't an enforcement mechanism for the Refugee Convention. There is no supernational body that can authoritatively lay down what the Refugee Convention requires and what it does. And this has been a problem for

[2] *Verein Klimaseniorinnen Schweiz* and *Others v. Switzerland*, App no. 53600/20 (ECHR, 9 April 2024)
[3] *Hirst v United Kingdom (no.2)*, App no. 74025/01 (ECHR, 6 October 2005)

quite some time. The Australians were aware that it was a problem for quite some time because of things their government has been doing, and it's obviously very clear now because of the things that our government is doing, that it would be very useful to have an authoritative source. The High Commissioner for Refugees can give guidance and of course does an great deal for refugees, but they're not an authoritative source of what the convention means so it varies from country to country.

Advice to Students

Finally, do you have any advice for law students attempting to build legal careers in the ever-evolving legal landscape?

I think it's very, very important that you enjoy studying the law. You won't enjoy everything – there are bits of it that are really too difficult or too boring, but you must find enough of it to enjoy so that you can work hard at it and be the best you can at it. When I was an academic I did encounter students who gone into law because they thought that their family wanted them to, or they thought it would lead to a good job, but who hated their law studies – and so of course they didn't work and so they weren't any good at it, and it was a vicious circle.

I didn't set out with a game plan of what I was going to do with my law. When I set out to study law I did so because I wanted to study law. And, as I mentioned earlier, the game plan developed bit by bit. I got one thing under my belt and then said, "what's the next thing?" and worked towards that and that's served me pretty well in the course of my career. I think it would have been very silly for me when I started out my legal career to say that I wanted to be the top judge in the whole United Kingdom, but as things developed it wasn't silly after all.

THE RIGHT HONOURABLE LADY BLACK OF DERWENT DBE

Former Supreme Court Justice and the second woman ever to hold this position

Interview conducted by **PUJA PATEL** and **SAKSHI JHA**
Edited by **ANANYA AJIT**

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Journey Into Professional Practice

Being brought up in a household of medical professionals, and being the first lawyer in your family, what caused you to go into the legal sector, and how would you describe your early professional journey?

It was even more extreme than just having two parents who were doctors. My whole family is made up of doctors. It was interesting that when I was doing family law towards my later years in practice, my silk cases tended to be medical cases because it's what I had heard around the lunch table during my childhood. But I realised that practising medicine myself just wasn't going to suit me.

So, I had to find something else. I had recently read a novel, similar to Sherlock Holmes, about Doctor Thorndyke. He had chambers in the Temple, so in my teens, I thought that he was a barrister and I wanted to do what he did, which was solving crimes by picking bits of cloth off barbed wire fences, examining footprints, and finding sand in shoes. As I now know, he was a sort of forensic examiner, of course, but I decided I was going to be a barrister. I got a fair amount of adverse reaction to the idea, but when you're a teenager, that really makes you determined. My parents were also very good and they took me to see what it was like in court and so on. So in the end, it was an accident that I went into law, I think, insofar as you can unscramble it and go back.

Upon entering legal practice, what piqued your interest in family law in particular?

I started my pupillage in London. My first six months in London was completely general, doing all sorts of work. Then I went up to the North Eastern Circuit and did my second six months, following which I started in practice there. I did all types of work at the start, but I lost my nerve after four years for two reasons. One reason was that I found it really difficult to believe that I could make the right decisions and do my cases properly. I thought that other people would be doing it all better than I could. The other reason was that it was just taking so much time because I'm what my daughter describes as a 'rabbit-holer'. I can't give a view about anything until I've been down every single rabbit hole to see what might be there and whether that might be the answer, and so on. It was taking over the whole of my life. I had other interests as well, and it just wasn't working, so I left and I was away for four years. I had decided that I was never going back to the Bar. Then a friend said, 'We're starting a new set of chambers. Why don't you come back?' And I agreed, but it had to be on terms which meant that I didn't get worried again by the responsibility of it all. I

thought that I needed to concentrate on one subject that I would learn to do properly instead of lots of subjects that I didn't have time to master.

The reason for choosing family law was because, in those days, it was work that women did, so it was the line of least resistance. Furthermore, if you specialised in only one subject on circuit, that was a really brave decision. You might just sink without a trace. In a way, I wouldn't have been sorry about that, because I only wanted to work three days a week due to having a child by then and having other things I wanted to do, but I did need to work and family law was a relatively safe thing to specialise in on circuit. I'd also written a book about divorce whilst I was teaching at Leeds Metropolitan University, so that helped.

So family law was an accident again, a bit like all of my career.

Growing up and in your early career, did you have any particular role models to which you looked up to?

No. I think that's an easy question to answer: no.

But I think it would have been helpful if there had been a role model who could have helped with the question of the "impostor syndrome". Nobody ever spoke of it then. Nobody said 'I'm frightened. I don't know what I'm doing. I think that everybody else does it better than me.' And so I think it's important for me - somebody who, actually by accident, got to where I did – to say that I did suffer from the impostor syndrome.

Judicial Career

As the author of one of the leading practitioners' texts in family law, and beginning your judicial career in the Family Division of the High Court, it's safe to say you're an expert in the field. Are there any areas of Family Law today that you think require reform, to better serve key stakeholders, and how might this take shape?

That's interesting but I think this isn't really a question for a judge.

If you're an academic lawyer, you're looking for areas that need to be changed and so on. But if you are a judge, your focus is much narrower. You are deciding the case that comes before you, and you tend not to have views about things that need to be changed because you make your decision on the basis of what the facts of the case are, what the arguments are, what the existing law is, and you work from there. As a judge, you don't have exposure to the whole legal field. I didn't have the ability to make a complete review of all of the factors which might come into play. So no, I don't really have any views about things which need changing, though I note that the Law Commission, for example, is working on financial remedies in divorce, and I can see why it might have decided to work on that. Another interesting and topical question is about the challenges and opportunities that AI brings. Could you, for example, simply put the facts of the matrimonial finances and the facts of the spouses' behaviour into a computer program and say that that was the answer in a division of assets on divorce? Would that be justice? Would it work? So there are definitely questions

for the future.

Are there any cases you faced while presiding as a judge that presented particular challenges that have stuck with you to this day?

There are just so many different challenges depending on the type of case you're dealing with. For example, there can occasionally be cases where you have a strong personal view, and the personal view doesn't tie with the law, so you have to put it to one side and apply the law as it stands - that's quite a challenging position to be in.

Your judgment in the case of *NHS Trust v Y*[4] brought attention to the legal and ethical complexities surrounding end-of-life care. As political and social support for assisted dying increases, as we can see in Scotland at the minute for example, who are debating an assisting dying bill, do you envisage any potential for greater expansion of assisted dying rights within the legal framework, albeit short of legalisation?

Well, it's always open to Parliament to do whatever it thinks is the right thing at the particular moment. I think that it is Parliament who can deal with this.

As a judge, I wouldn't formulate changes in the abstract. I would always wait until the case came along, examine the arguments and see how they tied in. And you never know what's going to come along in a case, particularly in Supreme Court cases. You never know what arguments are going to be advanced, and what will not be argued (sometimes rather surprisingly).

How would you respond to the increasing politicisation of certain areas of law, such as human rights, family law, and more?

Judges have the tools that have been entrusted to them by the law as it stands, by Parliament and so on. And it's a judge's duty to use those tools, but that's it. It comes back to having a personal view about things and whether you should speak about it. Even now, and I've been retired for over three years now, I won't speak about political things in any public forum because I maintain such a strong view about keeping the judiciary out of politics. So I think restraint still applies to me and probably always will.

Breaking Barriers

Being just the second woman on the Supreme Court is an incredible achievement and significant milestone in British legal history. How did you navigate the challenges that came with this?

We start this from the fact that I have never really thought about being only the second woman on the Supreme Court, and I'm not sure if it actually brought any particular challenges with it.

In considering any challenges that faced me during my legal career, it is hard to identify which (if any) derived from being a woman, and which derived from the sort of person I am. And, further-

[4] [2018] UKSC 46

more, I can't tell whether it's because I'm a woman, that I am that sort of person. I would always question my own view of things, as we're now seeing was a theme all the way through my career. Is that because I'm a woman? Do women question themselves more than men do, or do they just articulate more freely that they are questioning themselves? I don't know the answer to that.

I've been a woman among very few other women from the very start. In the set of chambers in London, where I did my first six months, it was a big smart set and I think they'd had one woman through the doors before me, but that was it. And then I went up to Leeds and there were a few more women around the place, but not that many. When I was appointed to the Family Division, and went off to London, I was in a much more female environment. Similarly in the Court of Appeal, by the time I was there, there were many more women coming through, and I liked that. I don't think I could have told you at the time that I liked it, but, looking back, I did.

Then I went to the Supreme Court where two things happened: first, I was one of only two women, and secondly, I was away from Legal London because it's in Westminster. Everything I knew, like many of my friends, and the Inns to visit for lunch and so on, was over in the Strand and I couldn't go there in my lunch hour. I suppose I just felt slightly apart, especially being very junior to some of the very senior people who were there. The three of us appointed to the Supreme Court at the same time came in at the bottom. Coming in as the bottom three reminded me of school days in which, when you're in the lower forms, you really feel the fact that you are in the lower forms. It's very difficult to unpick all of this and decide whether it's anything to do with being a woman or whether it's just to do with being in the hierarchy of a judicial system.

As a woman from the North of England, who spent a noticeable portion of her career in the North, we would be curious to hear if you have you ever experienced any regional bias within the legal profession, or if this has ever impacted your experience in the profession?

I think this is really important. When I saw the question, I read it to my husband, who is from Lancashire but lived a lot of his life in Legal London, and he said that it is just such a good question. And the answer, after we discussed it, was that there is definitely a London bias.

Going right back to my first six months pupillage, I was quite extraordinary to them in some ways because I was both a woman and from the North. They used to say things like 'let's have a cup of tea and a slice of lardy cake!' and I mean, lardy cake doesn't come from Yorkshire, not in my experience anyway. But they thought that it might.

London thinks that the legal world centres around Legal London and I'll give you some more specifics regarding how it is actually reflected in life as a judge.

High Court judges are, of course, based in London. Very few people from my circuit (the North Eastern), have taken jobs as High Court judges. I think some have been offered jobs, but said they can't leave their lives in the North East. In addition, taking a job as a High Court judge is quite expensive because you have to have somewhere to live in London during the week, and every week you pay for your own train fares to and from home to London. Nobody else pays for them, so you

go off on the train on Monday morning at your own expense and come back on Friday at your own expense. It is not really set up for a provincial person to take those jobs, so there is probably under-representation as a result.

My husband was saying that when he handed down judgments on circuit, which he did on a couple of occasions in really important cases, they didn't get picked up by the legal press because he was out on circuit at the time.

So yes, there is definitely a focus on London - not for any malign reason, but it's just the way it is I think. I think this is also a wider question because it feels as though many other national institutions exist for the South and not for outside London; it's not just law.

Moving forward, how best do you think we can continue to increase accessibility to the legal profession for underrepresented groups, given there remains much work to be done?

I think the North/South discussion that we just had actually ties into this. One of the challenges is to get people from all over the country involved in national institutions of all types, not just the law.

There are various practical ways to improve accessibility. My husband was the Treasurer of Lincoln's Inn at one point and he was really insistent about, for example, bringing Northerners in, and taking the Inn 'to the North', if you like. The other week there was a Lincoln's Inn equality and diversity seminar in Leeds with video links for people who couldn't attend in person. One of the initiatives that we heard about was that members of the North Eastern Circuit are going out into the schools and they're talking to pupils, and showing films of people who are from similar backgrounds to the kids in the schools, and are now barristers. It demonstrates to them that they can do this, that this is not an elite profession and not only for people who come from different schools from theirs. So there you can start right down at the beginning.

In regard to the North-South discrepancy, if organisations were helped to realise that they may be viewing things from rather a London-centric standpoint, they may then have to unpick their viewpoints and realise that there are people from other places who have phenomenal intellects and much to offer.

Advice to Students

To any budding legal professionals, do you have any advice, and is there anything you wish you had known when embarking on your legal career?

Just be very much aware that people think about things and approach things in widely differing ways. Peoples' brains work very differently. An example of this is the use of computers. Whilst I've been using computers pretty much since people started using computers, I still like to have my stuff on a piece of paper and I can read it much more effectively if it's on a piece of paper.

Differences in thinking are important. Some people are very logic-based whereas other people are very practical-based and logic is not as important to them. Their mindset is that if it's not wholly

logical, but it's sensible, let's do it anyway. I, on the other hand, will need to go through the logic and then work out whether I can cope with the fact that what I'm thinking is sensible isn't actually strictly logical. That's just different ways of thinking. Once you realise that (and I think I should have realised it a lot earlier) you start to make accommodation for people. As an advocate, you should do that when you argue a case. You should work out how this person's brain works and you can then tailor your answers and communicate them in a way that will suit their way of thinking.

Likewise, if somebody is not being very nice, you will realise that, sometimes, that's just because their brain is constructed differently. They see things differently, and they're not particularly directing it at you. That's the way they are.

So overall, just be very much aware of how differently people think about things and approach things. There are no rights and wrongs in it, but then you can accommodate that into your own view of the world and the way in which you deal with them. And I think that will help with a lot of things.

THE RIGHT HONOURABLE LADY ARDEN OF HESWALL DBE

Former Supreme Court Justice and the third woman ever to hold this position

Interview conducted by **PUJA PATEL** and **SAKSHI JHA**
Edited by **GEORGIA BARTLETT**

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Journey Into Professional Practice

What led you not to join your father's solicitors' firm and instead pursue a career at the Bar?

My father, who was a very supportive of both my brother and myself, had an ambition that the firm could be called "Arden Son & Daughter" because there was no firm that had that name – it was always someone's surname followed by "& Son(s)". So, I had that ambition, but I also felt, when I had been to Cambridge, that the barristers had much more fun in creating the law, so that's where I would go. But I didn't change until my last term at the end of four years. And he reconciled himself to it very quickly.

Not only did you read law at Girton College Cambridge, however you also completed a Master of Laws at Harvard Law School in 1970, a tumultuous time in America with the implementation of desegregation in schooling – how did this climate shape your character and influence the values which you took into legal practice?

Harvard was undergoing huge change in itself because of the civil rights movement but also due to the Vietnam War playing more of a part too, so the sort of change that happened was that all the courses were re-engineered so that you didn't have mortgage law, you had debtor's rights. So, in other words, it was all turned around to see the law as a way of protecting the individual's position in society. I benefitted from that change and in contrast to Cambridge, where I had been given 10 subject choices a year, there were 70 courses I could have joined. So, it was just extraordinary and a time of very lively, vigorous thinking. And it was a wonderful way to complement the four years at Cambridge. I enjoyed it hugely.

Upon entering legal practice, why did company law appeal to you as a practice area?

I did company law for the first time in my fourth year and we had a teacher called Ken Polack who is sadly no longer with us, but he was inspirational. You know the story – if you have a good teacher, you get to like that subject rather more. We had other good teachers, of course: people like Tony Weir, who also is no longer with us, and a great number of other people. But because I did company law in my fourth year, it was the subject upon which I applied to go to Harvard, and so I took all courses that were related to it. Then when I came back to the Bar, I thought I was going to have a head start when it came to applying to practice and company law, but I didn't realise that there was only one chambers which specialised in it, and they were pretty full! So it was a big problem when I got back, but that's what I wanted to do.

Law Reform

As the first female Chair of the Law Commission, you partook in projects on shareholder remedies and directors' duties, both of which fed into the Companies Act 2006. Were you wholly satisfied with the Companies Act 2006, or are there any areas of the Companies Act 2006 you would like to see re-addressed by Parliament in the coming years?

The Companies Act 2006 was the largest statute in British history. So obviously it would be difficult for me to agree with absolutely everything, but it is a very good piece of legislation, and it stood the test of time. It's the practice in the UK to legislate for company law at approximately forty-year intervals. So, you may have pieces of legislation in the meantime, but you need to make it user-friendly because it has to work for business and so it's usually consolidated every forty years, and that's been the pattern since the 1840s. It's an important subject. I think the Companies Act 2006 has been very successful, but there are bound to be areas in which company law evolves. The impetus may come from Europe. It may come from the fact that people are thinking differently. There's a lot of activism around modern slavery, human rights and climate change.

I gave a speech recently in Singapore in which I analysed directors' duties as occurring in three stages. You get the historical era when you have the South Sea Bubble and then directors' duties are very much focused on the shareholders. The South Sea Bubble case was where people scrambled to make money and in the end lost a lot of money. As a result of that Parliament created limited liability companies and created a situation in which shareholders could control the company absolutely. Then you get a second era, at the end of the 19th century, what I call the best interests era. Courts and directors start to look at the directors' duties in a wider fashion. They think that they're not solely focused on the maximum profits of shareholders, but they allow directors to choose to do something which they can say is somehow in the best interests of the company being seen to act as a good citizen. So, you'll find directors funding university scholarships, even though there's no tie on the holder of the scholarship to work for the company. So, it's looking into the larger interests of the company. Then you get the 2006 Act, which is a stakeholder model which says that the directors owe the duties to the company, for the benefit of shareholders, yes, but they have to take into account a lot of third-party interests. One of them is the impact of the operations of the company on the community and on the environment. So that's the third stage we call the enlightened shareholder era. But it is possible that the next time Parliament looks at this, it changes the duties and says there is a directly enforceable duty to employees or a directly enforceable duty to respect the environment. Parliament could change the responsibilities of companies quite considerably. And people are trying to push company law in this direction.

For example, Shell is the one of the biggest fossil fuel companies in the UK and people have tried to use shareholder litigation to make it desist from contributing to the damage to the environment caused by fossil fuels, but it was held that it was not possible to do that by using shareholder remedies[5]. But there is a new bill before Parliament on commercial organisations, whose purpose is to

[5] *ClientEarth v Shell Board of Directors* [2023] EWHC 1137 (Ch)

impose a duty on directors on companies not to violate human rights and not to cause damage to the environment[6]. That's a direct duty imposed on the companies. That would mean that directors would have to ensure that the company observed that duty. So, the subject of directors' duties is continuing to develop and the next Companies Act may reflect changes.

How best can we improve the dialogue between changing social needs and legislative reform? How can this process – which is characterised by slowness and unpredictability – become more efficient and reliable?

As a judge, I'm only looking to apply the law, not looking to create new law which Parliament hasn't authorised. And in company law directors' duties are now within the statute and have been since 2006. So, all I can do is interpret this. But if I'm looking in my capacity as a law reformer, as a chair of the Law Commission, then yes, there's a very well-hallowed process for there to be recommendations on change. But it's not, as it were, 'consumer-driven'; it's driven by the institution which is dedicated to law reform on behalf of society as a whole. So how does society drive law reform? I think we owe a lot to NGOs to pressure groups and to public-spirited individuals. And perhaps there could be, in the future, citizens' assemblies in which citizens could express views as to what they think are subjects which ought to be reformed.

The broad international exposure to overseas judicial systems that you have received through your work as Head of International Judicial Relations for England and Wales must have been extremely eye-opening. We have two questions pertaining to this:

- **First, how did your experience with overseas judicial systems influence your outlook and decision-making as a judge?**

Because I could see how other people were often facing the same issues as ourselves, I acquired an interest in comparative law to see what solutions they adopted. I then became much more aware of problems for the law and the problems for access to justice across the world. We are in a very good position here because the system has been going for a long time. There are things we could do better, undoubtedly, but at least we have a heritage of our legal system. Many countries do not have that. Trying to help them to decide what to do to make their justice system more accountable and more efficient was an exciting thing to do and it widened my perspective.

- **Secondly, do you think that such international legal experience should be a necessary component of judicial training given to prospective senior judiciary members, in order to enhance the diverse and comparative approaches taken by senior judges?**

You can't make it mandatory because there are many other responsibilities which the judiciary have to discharge out of court, for example sitting on bodies like the Sentencing Council and conducting inquiries. There's a huge range of things that judges have to do. I happen to think that I had the best job in the building, but many other people would not think that way. It happened to appeal to me, and I enjoy comparative law. I also became aware of how influential the common law

[6] Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill [HL]

was. If we look at international courts like the European Court of Human Rights, they have often adopted the common law method, and in many countries they have adopted English commercial law or the principles of English commercial law. So, it's important for us to exchange views with those sorts of countries and ensure that we learn from them now as well as give help or ideas to them as needed. But we have a responsibility as English lawyers, as common lawyers, to see that the common law continues in many countries, and that it is strengthened by keeping it up to date in our own country, because it is a model to the world; it's a way in which the rule of law is observed. So, we have a responsibility to promote it.

Cultivating Diversity of Perspective in the Judiciary

One of the great benefits of having multiple judges preside over a case is that they will all bring diverse perspectives. What is a case that really underscored the importance of this to you?

One case that I thought might be of particular interest to you arose from a case shortly after the Human Rights Act was introduced. It's called *Evans v United Kingdom*.[7] It involved a woman who sadly had cancer of the ovaries, and she knew that she wasn't going to be able to have any children of her own when she'd had surgery because she would lose her ovaries. So the question was how she was going to store them, and she stored them, as many people do, by freezing embryos. But she was advised that before they were frozen, they ought to be fertilised by her partner. She arranged for that to happen, and her were frozen fertilised by his sperm. But then, unfortunately, as life happens, the partnership didn't last, and when she was sufficiently cured and wanted to have the embryos that had been fertilised implanted in her, he withdrew his consent and under the statute, the implantation can only occur if it is treatment provided to those two people together. So, once he had withdrawn his consent, the implication was that she could no longer have access to her own fertilised eggs. She claimed that the statute did not mean that, and we said that it did. Then she said it violated her human rights because she had a right to her own eggs. The case went all the way to Strasbourg, but we did it in the Court of Appeal.

It never went to the House of Lords or Supreme Court here, and there were two men and one woman (me) in the Court of Appeal judgment[8]. The two men gave their judgment, but I thought it was really important that somebody should say, on behalf of women, how very important it is if a woman chooses to have children that she should be able to do so and that enabled me to say how much I was concerned about her, what she was saying, and why I thought it was very important that she should have the right, if we could possibly say that it existed, to have the eggs implanted in her. What I said was that parenthood is a very important matter to women even today[9]. That was something only I on that Court could say, from the point of view of a woman, and I said that. But I also went on to say that other systems dealt with this matter very differently, for instance, in the United States where IVF treatment was not regulated. Anyway, the case went to Strasbourg and the Grand Chamber held that there wasn't sufficient consensus in Europe that a woman should be able to use her own fertilised eggs, even if the other

[7] App no. 6339/05 (ECHR, 10 April 2007)
[8] *Evans v Amicus Healthcare Ltd & Others* [2004] 2 FLR 766
[9] *Evans v Amicus Healthcare Ltd & Others* [2004] 2 FLR 766 [91] (Arden LJ)

party did not agree or had withdrawn its consent. So there was no violation of Convention rights.

We are seeing increasing diversity in the legal profession thanks to trailblazers like you, who not only smashed glass ceilings but also pioneered initiatives to bring about lasting change, including in your work in ensuring the setting up of an independent judicial appointments commission as Chair of the Working Party of the Judges' Council on the Constitutional Reform Act 2005. Smashing the glass ceiling is such a crucial first step – but now how do we, moving forward, reach down and lift people through the gap that has been trailblazed? This is often a challenge as progress after the 'firsts' can be surprisingly slow:

- **E.g. after you were appointed as the first female High Court judge in the Chancery Division, it didn't happen again for 15 years.**

- **E.g. The first non-white High Court judge, Linda Dobbs, was appointed in 2004 but remained the only ethnic minority judge on the bench for another 7 years.**

There's always this problem that if you make a change and you widen access, people say, well, we've already done that once and they see it as though they have ticked the box and now don't have to do anything else. People have very different ways of reacting to change, but I think one just has to keep the pressure up. Role models I think are very important. I had a role model and that was Rose Heilbron, who was a very popular silk, eventually a judge, in the area in which I lived. So that was, for me, very important. I think role models are important and mentoring is important. And I also attach importance to making sure there are people in the pipeline. So I'm saying please don't lack confidence. Please go and put yourself forward and get into the pipeline so you are there to be considered, because when the mood changes, if there's no one in the pipeline, the change doesn't happen.

It's important to keep talking about diversity. I know a lot of people talk solely about promoting more women, and to me it's important to promote diversity of thought and hence diversity in all its aspects. That's how I see it principally. For me, it's all forms of protected characteristics and it includes people who are simply underrepresented in the judiciary. We do now have judges who are deaf and blind. That would never have been thought of twenty years ago. It's remarkable, and they're very successful.

Advice to Students

You have mentioned before that you were particularly inspired by a quote by Chelsea Clinton – 'speak up, rise up and dream big.' What did you 'dream big' about when you first sought to enter the legal profession – and what big dreams would you like to see the incoming generation of lawyers nurture and realise?

They need to have confidence, as I mentioned earlier. Too many people say I've been out of the law for two years because I've had a child and so I don't think I could get back in. Well, you've got to

be as confident as you can, and you have to make plans to make sure you're going to be able to do it. Confidence is a big factor in making people apply. I had a different sort of confidence coming out of Cambridge, I thought that it was easy to get on at the Bar and easy to get a job if I wanted to be employed. It turned out to be fantastically difficult. But you just have to keep going. That's why this Chelsea Clinton quote is so important because she's saying you just have to persist. Her book is about people who persist. It's about people who persist despite disability. And so that's what seems to me resilience. You have to have all the learning, of course, and all the ethical standards, the integrity, the honesty and everything else. But you do have to have resilience and you have to have curiosity about the law. Every day in the life of a practising lawyer is going to be different and it's probably not going to be the day you planned because something will come up. And it will. I continue to be curious about the law. Now, for instance, I'm working on new areas of law like AI and what it can mean in public law and in other spheres, and also on what I call global tax, which is when countries agree to have a minimum rate of tax so multinationals can't avoid tax by being resident in a low-tax jurisdiction. Law is constantly changing. You have to have that enthusiasm to go on and be a party to that changing process, as I hope you all will.

IMRAN KHAN KC

Leading criminal and human rights King's Counsel, Chair of the Board of the British Institute of Human Rights and law firm founder

Interview conducted by **PUJA PATEL** and **SAKSHI JHA**

Edited by **GABRIELLE SOLLY**

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Journey Into Professional Practice

What were your motivations for pursuing a legal career and specifically a human rights-based legal career?

I grew up in East London, which, in the 1980s, was pretty awful and full of racism. I became aware of community organisations that were fighting racism by fighting the police's actions in arresting and prosecuting individuals. This stirred something in me: a sense of injustice. They were looking for lawyers to represent them who could bring the fight against racism from the streets into the courtroom. And then I happened to go to the Old Bailey to see Michael Mansfield KC, Helena Kennedy KC, Rudy Narayan; the giants of the legal world. And I was blown away. I decided that this was what I wanted to do. I didn't know that it was going to lead to anything; I just wanted to be able to assist the community that I was living in in some way. And so my career ambitions became human rights law.

What was your experience of the Solicitor Advocate to KC pathway?

I always wanted to meet people, to be the one that's speaking to the client, to be the one rooted in the community. I felt that if you joined the bar, then you're one step removed from that. I certainly never intended to be a KC–it wasn't ever in my sights. When I started off as a solicitor, Gareth Peirce showed me how important it was to be the person who prepares the case, who dictates and controls how something goes into court. So being a solicitor advocate was what I wanted to do. I enjoyed it and I got to do the things that I wanted to, cross examining bad police officers. As time went on, I did more and more Crown Court work. I never felt a need for the stamp of being a KC, but it's a strange thing - judges respected you more. I'm not saying I didn't get respect beforehand, but these letters do make a difference. So I applied. I thought I was going to be rejected at the first hurdle and surprisingly, I wasn't. They called me in for an interview and I got it. And I'd like to think it was on the basis of the work that I was doing when I became a solicitor advocate, because I had references from some of the most senior judges in the country.

Could you tell us a little about your experience of building a business?

Founding a law firm is the most painful, yet most rewarding thing you could do. A high street practice said that they were setting up a criminal department close to Southall and I had the opportunity of heading it up and starting it from scratch. It felt exciting to me, as a young person who was

newly qualified. Rather than being one cog in a practice, this was an opportunity to do something exciting and build it up myself. So I took the opportunity. I worked – and I do not recommend this – 7 days a week, 365 days a year. I took no days off and worked around the clock for ten years, commuting in total four hours a day. But it is true that if you enjoy what you do, you don't work a day in your life. And none of this felt like work to me. I loved every minute of it.

Notable Cases

You famously represented the family of Stephen Lawrence during the private prosecution, inquest and public inquiry into Stephen's murder. Could you tell us how you came to represent Stephen Lawrence's family and what this experience was like for you?

I had been a lawyer for only 18 months when I took on the Lawrence case. Through free advice sessions that I was doing at the time in Southall, I was working with a barrister who gave free advice on immigration law. That barrister knew one of the political activists who had found their way into the Lawrence case, and since my day job was criminal defence work and suing the police, my name was put forward.

When I got the call on a Friday afternoon to take the Lawrence case, it was nothing new to me. I had seen cases like this before. In fact, I was reluctant to take the case, as it was geographically very far away from me – all the way in Southeast London. I decided to take the case in the end, but I never knew what that case would become. I never dreamed it would become the most important case I had ever been involved in, the case that has opened up many doors for me in my career and the case I am now best known for.

But behind this case is incredible sadness - the racist murder of a young man, and the shocking incompetence that followed in investigating that murder. The sheer magnitude of the incompetence is hard to comprehend. Stephen Lawrence was murdered in 1993 and it wasn't until 2012 that anyone was convicted. Even in 2012, only two of his killers were convicted.

The reason that the Lawrence case became what it was wasn't because of me. It was because of Doreen and the family and how they fought for justice. What they truly wanted to see was accountability and for Stephen Lawrence's killers to be sent to prison.

I am still in touch with Stephen's mother Doreen, a phenomenal person whom I consider my friend. I hope that she considers me the same.

The Stephen Lawrence case prompted the Macpherson Report to be published in 1999. In your opinion, how much progress has (or hasn't) been made since this monumental case about race relations?

Public inquiries give the appearance of change without there actually being much. They are good in that they will expose major wrongdoing, but they also prevent immediate accountability and closure for the families. But the one thing that Macpherson Report has achieved is that there are

more people from our community who are coming into the profession, and when racism occurs, it is called out. It is now accepted that racism exists, institutionally and otherwise.

What we haven't been able to achieve is the remedy and culpability for when racism happens - not enough has been done to hold people accountable for their actions.

Another high-profile case you dealt with was the judicial review claim pertaining to the Westminster Magistrates Court's refusal to issue summonses against Tony Blair, Jack Straw and Lord Goldsmith for the crime of aggression in relation to the Iraq war. Could you share with us what it was like to deal with this case?

This case was fascinating. It meant I had to get my head around international law, of which I knew nothing but the basics. Oddly, I had come to know Jack Straw in a personal capacity through Doreen Lawrence and her charitable trust after the MacPherson inquiry. But, as a lawyer, you have to put aside your personal view about things, and in this case I was trying to have him prosecuted.

One thing this case reminded me of is how the courts interpret the law. I thought the law was clear: you didn't have to invent a new law to have these individuals prosecuted. You should have been able to and there should be some accountability. One of the most heinous events imaginable has taken place and now they should have been held accountable in law and international law. We're recognising now particularly how important international accountability is, with what's happening in the Middle East; we are seeing that international law doesn't appear to apply as it should do. Quite frankly, I think that if we don't have universal values which we all abide by, then global society is not worth saving.

This case also brought home for me how important international law is. I think the world is now much smaller than when I was growing up with social media. With technology, we see everything that's happening in other parts of the world. We're connected in so many different ways, so I think the importance of international law is paramount because we can see what's happening. And if we, as a country, are to say that we are the birthplace of democracy and the epitome of the rule of law, then we should be applying it across the board and if we don't apply it to ourselves, we shouldn't seek to denigrate or criticise others who don't.

Charitable and Academic Work

Could you tell us about your work as a patron of the East London Law Clinic?

I studied at East London University and I was a terrible student. So I was incredibly surprised that they invited me back and gave me an honorary doctorate, and then, more importantly, asked me to be patron of the law clinic and I jumped at that opportunity. Not because it was in my place of degree, but because the University remained in the deprived community in which I grew up. At the time, legal aid was being taken away from people, so there were more and more people going to clinics and advice centres. And so I thought that it was a natural role for me, to provide as much support as I could to the clinic, and I'm still involved in it. I still go to events and provide whatever

support I can.

Could you tell us about your involvement in the British Institute of Human Rights?

I am now the Chair of the British Institute of Human Rights. The previous Chair was Sir Nicholas Bratza, who is a former President of the European Court of Human Rights. The thought of trying to fill his shoes was/is terrifying, but this prestigious institution is an extension of the legal work that I do, and it's about making sure that human rights is central to everything that we do.

Law Reform

If given the power to do so, what legal reform would you introduce?

I think we have in the Human Rights Act 1998 about a dozen rights that could become our Constitution. That's what I want to see. They're simple, they're clear and they're accessible. We should abide by them, and I think we should have them as enacted rights that cannot be changed. That's really what I want. That will form the basis of a fair, just and equitable society which upholds people's rights. So those rights should be written in stone.

Advice to Students

What advice would you give students trying to enter the legal sector?

You have to think about why things have happened. I was taught to look at the law holistically, not in a black and white fashion. Every judgment is imbued with a political opinion based upon the prejudices and outlook of the judges that are dealing with it, or in the context and atmosphere in which that judgment was made. And so I want students of law to query, to question, to look into and to invite criticism and scepticism about what they're reading.

Additionally, one thing that I was told to believe was that you need to be dispassionate and objective about the law, and that you can't get involved with your clients. But I want law students to be passionate; I want them to almost walk in the shoes of their clients. When Stephen Lawrence was murdered and his funeral took place, I was asked by his aunt to go and see his body, which seems like a bizarre, macabre thing to do. But the reason they did it was because they wanted me to understand that this was not just a case, this was a person.

You can make a good living out of doing pro bono work. And you're not doing work for free - the money eventually comes. Had I not been giving free advice, I would not have got the Stephen Lawrence case. So, when you put yourself in that position where you are accessible and you do the things that you want to, success will follow.

I think we all have an obligation to give back to society. And if we have passionate, fantastic, educated, intellectually bright lawyers wanting to do good work, then the new generation will meet this obligation perfectly.

HELEN DRAYTON

CEO of top-ranked UK and international law firm Penningtons Manches Cooper LLP

Interview conducted by **PUJA PATEL** and **SAKSHI JHA**
Edited by **HANNAH ZIA**

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Journey Into Professional Practice

What motivated you in the early stages of your life to pursue a legal career?

I didn't set out to be a lawyer or a CEO. I was a classic sort of student who didn't know what to do. I did law A level, which I genuinely enjoyed, but when it came to my A level result, I didn't get the grade I needed. That meant I didn't go to university when I originally planned to. So I re-sat my law A level and took another one to make up for doing a re-sit, and managed to achieve A grades in both.

Ultimately, I decided to do a law degree because I enjoyed the law A level I did, and I thought it would be a 'good' degree to do as I still wasn't clear on what I wanted to do as a career. Then came the challenges of trying to get work experience, which I found really hard. Trying to get a training contract without work experience is a vicious cycle, and it became quite depressing. To overcome that, after my degree ended I did a year of experience as a family law court clerk for Hunt & Coombs Solicitors, after which I succeeded in getting an offer for a training contract from both Hunt & Coombs and a firm called Hewitsons LLP (now HCR Hewitsons); I chose the latter as it was Cambridge-based so I could live at home.

How did you come to work in corporate law?

During law school, business law didn't click for me at all and I thought board minutes etc were a load of rubbish! But when I did a corporate seat at Hewitsons, I loved it. I like to read something, understand it, apply it, get a result – which is probably why I ended up being a transactional lawyer. But I also think a huge factor is the people you work with. We had such a great corporate team and it was extremely busy so I learnt a lot very quickly. We were often working long hours, (it wasn't unusual for us to be in the office from 7am until 10pm), but although it was hard work, it was also a lot of fun. I was at Hewitsons for nearly 13 years before joining PMC as a corporate partner in Cambridge in 2012.

Insights as a CEO

How has PMC achieved impressive growth through turbulent economic times, both during and after the pandemic?

Because we are a full-service firm, focused on niche areas and particular expertise or sectors, we are able to show consistent, sustainable growth in our financial performance. This means that

despite fluctuating market conditions, the firm's growth is not overly influenced either by sudden downward pressures or unsustainable upwards growth.

During my time with PMC we have also had successful mergers with Manches and Thomas Cooper, which have helped drive a significant increase in PMC's growth and revenue. We merged with Manches in October 2013 and the growth we've seen from that has been huge. We very quickly unlocked more client relationships and cross-selling opportunities. Then, in 2019 we merged with Thomas Cooper – a really strong shipping firm which complimented our existing disputes practices, as well as giving us an international platform. Thomas Cooper's high-performing fee-earners were taking on more and more management-related work, so by bringing that into our infrastructure they were able to really focus on their clients, meaning that PMC was a really good fit for them.

Was it always your goal to become involved with firm management?

No, I didn't set out to do that. I didn't even plan to be a lawyer – and I definitely didn't plan to be CEO. It's just about doing what you enjoy and taking opportunities when they come along.

I started getting into management because I used to be involved in recruitment for the Cambridge office. I then did that for the corporate team and then moved into a divisional role, which meant working with the teams in corporate, IP, IT & commercial, immigration, employment, pensions, tax and banking – all of the teams that you'd typically work with when you deal with corporate clients. I worked with them on their strategies and particularly on recruitment, bringing in good people.

I remember talking to David Raine, the CEO before me who led PMC for 14 years. As a firm, we had a succession issue to manage; David didn't want to appoint people who he wouldn't be working with in the long run. So, he thought if he stepped down a bit earlier, the new CEO could come in and be the one leading on these decisions for the future.

David asked me what I thought about taking on the CEO role. I answered in a classic female way, with a bit of impostor syndrome, because I think I had always envisaged myself as someone else's number two. I never saw myself as the one in the CEO role. But actually, on reflection, I realised that I could do that role. And as importantly, I realised that I wanted to do it. So I got my head around the idea, and once I was comfortable we started laying the groundwork. It was all planned in a very structured and clear way so that the partnership had as much confidence in me as possible in taking on that role.

I'm loving it, and I'm incredibly lucky to be in the position of CEO. It's hard to believe it's been 18 months already.

How would you characterise your personal leadership style?

I want to be accessible. I want people to know who I am and to feel comfortable coming to me to

have a chat. So, having as good a relationship as possible with as many people as possible in the firm is important to me. One way that I achieve this is by being in the office regularly. I think it's really important to be present. Whenever I'm in the London office, I try and sit on a different floor to the previous time so that I get to interact different teams and different people. I try and make sure that I regularly spend time in all of the UK offices, and I go to all of the international offices at least once a year.

What is the legacy you want to create during your time as CEO?

When I finish my time as CEO with the firm, I would like to look back and see that I have left a positive legacy in diversity and inclusion. For me, social mobility is really important and I'm involved, personally, with our Socioeconomic Committee. I was the first person in my immediate family to go to university. My dad worked in a newsagent and my mum was a nurse. I didn't go to a Russell Group University; I went to Nottingham Trent University. So, I absolutely believe in trying to be authentic and giving people opportunities.

We really do try and make sure that there is a place at the firm for everybody and, importantly, we're focused on being accessible and giving people the opportunity. In 2022, we launched our EMpower programme, which is designed to attract individuals who are Black or from an ethnic minority background. But the key thing with anything is to learn and improve it for the following year. The number of applications we had for EMpower this year were through the roof, in a really positive way. We've adapted the programme slightly this year to build in an assessment day. If participants are successful in that assessment day, they are invited to join one of our vacation schemes, which is where we identify a lot of our future trainee candidates. So if we keep improving on programmes like this we will hopefully get people in as trainees and beyond, and also help with their growth and development.

You have to have a baseline against which to measure change, so trying to gather statistics about where we can improve is crucial. Our initiatives around inclusion are referenced in our gender and ethnicity pay gap reports. You always want to see improvements and it's been great to see those changes coming through.

What are some of the ways you want to see PMC grow and improve as a firm?

One of the things I am actively trying to promote is the need to fulfil our potential as a firm. This means being confident in who we are, what we do for our clients and what we can do more of, and do better. We are a very flat-structured firm: I am one of approximately 140 partners. There aren't lots of layers. So, a key challenge when trying to unlock our potential is getting everyone in our firm to collaborate in a more focused, business sense. We are very collaborative and collegiate as a body of people but I think we can turn it up a notch. Starting with the partners, we could, for example, set out three clear objectives that we are each aiming to achieve this year for the business, and share those more proactively. If we have that knowledge, awareness and confidence in a cohesive and consistent manner throughout the firm, it will be easier to sell ourselves more effectively to

our clients.

Also, AI is a growing part of the industry; the impact that AI will have on the legal profession or any profession is uncertain. At PMC, we are not intending to develop our own GenAI, but we certainly want to harness the efficiency of AI across the firm. We have a legal technologist called Kathrin Shahroozi and part of Kathrin's role is to scan the horizon and look at where we can be more efficient in using AI. We are, therefore, constantly watching this space so that we see which AI products naturally evolve and become available on the market, and determine whether to bring them in, and in what capacity. When used in the right way, there is no doubt that AI can boost efficiency greatly.

You mentioned that partners collaborating more closely regarding specific business goals would enhance firm growth and productivity. How can those in more junior roles – such as trainees – also help to further this goal?

I always say two things to trainees when they join the firm. First, they should bring their ideas and suggestions to the firm, whatever they are. If we can do something better, we want to know. So I encourage all trainees to come forward and share their ideas. Secondly, I advise all trainees to get involved in things that they care about, whether that is from the perspective of a specific type of legal work or another firm initiative. Trainees need to make known what they are interested in and what they care about, so that they can be involved in relevant opportunities. So, trainees should find what they're passionate about and just put themselves forward for it. Importantly, don't do something because you think you should or you've been told to – do it because you want to.

Advice to Students

What advice would you give to students trying to enter the legal sector?

First, don't rule anything out. Take the opportunities that come your way and don't assume your likes and dislikes until you have actually tried things out. I thought I would hate my private client seat, for example, but I ended up loving it, and almost chose to qualify into it.

Secondly, if your heart's not in the work, you won't get the best outcomes or give the best you can give. Personal happiness means so much, and I think that well-being comes hugely to the forefront in a positive way in terms of changing behaviours and approaches. That balance between work and home is so important. Some people thrive on intense work with very long hours, but that's not for everybody. There is a space for everybody, so play to your own strengths and be true to your personal priorities, and be aware that both your strengths and priorities will also change over time.

Be authentic. Follow your heart and do what makes you happy.

NABIL KHABIRPOUR

Founder of the Law Corner and Fellow at Lucy Cavendish College, University of Cambridge

Interview conducted and edited by **PUJA PATEL** and **SAKSHI JHA**

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Journey into Law

How did you decide to pursue the study of law?

I spent my gap year serving in Israel at the Bah*á'í* World Centre, where one of my early morning tasks was to clean the Office of Public Affairs. Given that I would usually be the first person in the office, one part of my job was to fold newspapers and place them nicely upon a table in the atrium. However, I soon found myself very interested in the front-page stories and, when I had a spare moment between tasks, would start reading them. One day the head of the department came into the office very early and he asked me what I was reading. We started speaking about one of the current affairs and it turned into a very interesting discussion. I later learned that he was a lawyer and began to realise how many aspects of public life relate to law. It was, I think, also one of the first practising lawyers I had ever met. At this time, I was holding an offer to study Human Sciences at UCL, but this discussion really sparked an interest and I began learning more about the law. I did still proceed to study Natural Sciences at UCL, but I kept finding myself more drawn to legal issues and questions and so I decided to re-apply for law. Since this meant going through the whole UCAS process again, I applied to Cambridge, thinking I had nothing to lose - and after a difficult but enjoyable interview, I got offered a place.

How was your experience as an undergraduate Cambridge student?

My experience at Cambridge started with a lot of football. I have always loved playing and when I made the Blues team, it quickly became a priority that left little time for anything else. The training schedule was intensive and we had four to five training sessions a week. Looking back, I also realised that I took somewhat of a schoolboy approach to my work. I read what was required for supervisions but never made notes and relied on my memory. Unsurprisingly, this caught the attention of my Director of Studies, Dr. Stelios Tofaris, who (I still remember!) once remarked: 'Nabil, it seems you have come here to play football and do law as an extra-curricular activity!', he was right and this was the prelude to a longer conversation which inspired me to do better. Stelios said he believed I had far more potential than I was currently showing and that even though I was getting by okay, he had higher hopes for me. I remember that conversation to this and it chimes with two quotes that illustrate what he taught me. First, that 'good is the enemy of the great' and that 'the chains of habit are too light to be felt until they are too heavy to be broken.' Having taken Stelios' words to heart and not wanting to disappoint the faith he put in me, I re-adjusted my priorities and was pleased to see a marked improvement in my academic work! At this point I should say that, in addition to Stelios, Professor Albertina Albors-Llorens and Dr. Stephanie Palmer had

a very significant impact on my undergraduate studies and I will always remain grateful to them.

There is a particular sweetness in things having come full circle, now that I serve as Director of Studies to students at Cambridge. It is a hugely rewarding and fulfilling job, in which I see students through from their first day to graduation, being on hand to help and guide their academic development. While it of course means that I at times need to have difficult conversations, it is all for the greater good and my impression is that a student can always sense whether you care. I am not a parent, but I imagine that parenthood must feel at least a little like this.

Afterwards, you completed a Masters at Oxford University – could you tell us a little about this experience?

Towards the start of my final year, I applied to Oxford but did not harbour very high hopes of success. I knew that only a small handful of students get offers and although my grades were on an upward trajectory, I wasn't sure if it was going to be enough. Fortunately, I received an offer, which added a further impetus to my final year, and I was delighted – after many long days in the library – to have made the grades to gain admission.

I have wonderful memories of Oxford. It was also the place where I was to meet a particularly inspiring academic: Professor Stephen Weatherill. He was undoubtedly one of the most impressive lecturers I have ever come across in my life. He had this gift for making otherwise mundane cases seem exciting by weaving them into story, which immediately captivated your attention and kept you at the edge of your seat. I like to think that his style has influenced the way I teach as I strive to unfold the key narratives in any given topic. Professor Weatherill retired a few months ago and, if you allow, I will share some the words I wrote in his honour: 'It has been said that the greatest educators are like candles; they give unto others of their very essence to light the way. Of few is this more true than Professor Stephen Weatherill. I undoubtedly speak for – and from the heart of – all those who have had the honour and joy of being taught by him. All who remember the spell-binding suspense of his lectures; the symphony-like interweaving of case law and principles; and, above all, his gift to inspire your own search for those pearls of knowledge hidden in the ocean of learning'.

Insights from founding the Law Corner, a successful Pro-Bono Organisation

You are the founder of the Law Corner, a hugely successful organisation providing free legal advice to individuals in need. As it has recently has partnered with the Cambridge Law Faculty, it now provides these services and allows Cambridge students to assist as interns. How did you come to found the Law Corner?

This is a bit of a long answer, I hope you forgive me. So, I think that it has a lot to do with what I was taught about the importance of service and the value in building community, for which I am indebted to my parents and the Bah*á'í* teachings. Both during and after my university studies, I became increasingly involved in programmes which worked to empower young people in under-served neighbourhoods. When I was in the USA for a visiting research post, I remember the stark

contrast between the Harvard Law School and, just twenty minutes' walk away, neighbourhoods with considerable social and economic depravity. I therefore got involved with community building and educational activities which the local Bah*á'í* community was facilitating. As many people can probably relate to, I found a real sense of joy in serving others and particularly in the field of education. As such, when I started my career in London I knew that this aspect of life had to feature in some way. As I became more and more drawn into the life of the neighbourhood, Somers Town, and adjacent neighbourhoods, it became clear that, as in so many parts of London, lack of access to justice was a common concern among families, residents and local community centres. A source of particular concern was the asymmetry of knowledge between parties to legal matters owing to considerable differences in the means available to obtain assistance. The successive diminution of governmental legal aid schemes only served to exacerbate an already difficult situation. All this pointed to the reality that, much as a society turns it mind to developing its justice system, if many who it intends to serve have no realistic ways of accessing it, can justice in such circumstances truly be administered? With this in mind, and following consultations with a local community centre, I founded the Law Corner. The initiative is guided by a twofold founding vision. One is to offer those of limited means with high quality and timely legal advice. The other is to provide a point of access for students and volunteers to learn more about the field of law by gaining experience in practice and, in the process, build a network among like-minded peers. Central to the identity of the Law Corner is the belief that both dimensions of this vision can be realised by drawing on the skills, interests and good will of the Law Corner's members, collaborators and those whom it serves.

We have since grown to about 30 people and in addition to our case work, we also run several internship programmes, including one in partnership with the Cambridge Law Faculty. I think I am right in saying that this is the first time in the Faculty's history that students are able to assist qualified lawyers in actual case work, court facing matters and so on - what I call 'on-the-ground' pro bono casework. That's hugely exciting and I think holds a lot of promise for the future. I am also really glad that students become exposed to pro bono work at such an early stage in their career.

It is actually quite remarkable that most people cannot meet their legal needs. Imagine this were the case with healthcare. Change is needed, but in addition to a change in policy or indeed the law, we also have a role to play. We can do our part to balance the scales of social justice. Further into the future, one hopes that we won't have to rely on like volunteering to take care of these needs, but this is where we are now. And until we have the systemic changes, we need to raise awareness of this issue, and I think it can make a big difference if leading universities are at the forefront of that, because then the students will also be. Today's students are our future leaders, policymakers, lawyers etc – and so if they get involved with these projects alongside their degrees, they will carry this ethos with them into their future practice and the way they see the world.

Alongside helping to mitigate some of the challenges posed by people's lack of access to justice by founding the Law Corner, you are also involved with academic research about access to justice. Could you tell us more about this?

Access to justice is not only underdeveloped in practice, but also somewhat at the level of thought and theory. One strand of my current research, which covers the fields of EU and human rights law, looks at access to justice as a human right. One tenant of the rule of law is that laws should be knowable. Since this goes beyond mere promulgation of the law, it gives rise to an important question surrounding the means necessary for you to know what the law requires and what it enables. This question broaches the more general issue of the difference between having received a good and your ability to make use of that good. Thinkers like Amartya Sen and Marta Nussbaum have written very insightful contributions on this topic and developed what is known as Capability Theory. Their insights are highly relevant for access to justice. For example, let's say I give you a tennis racket. That doesn't mean you can serve. There are other things that need to be in place so that you can actually make use of the racket in its fullest sense. This is similar to legal rights. If I give you a legal right, notionally, but you cannot make use of it, what do you really have? This is the question. So, this is an area where the scholarship is continuing to emerge and I am excited to begin to contribute more to that and perhaps also get students interested in access to justice from an academic perspective.

Law Reform

If given the power to do so, what legal reform would you introduce?

As far as the human rights dimension is concerned, this falls under the scope of Article 6 ECHR which protects, under certain circumstances, your right to legal advice once proceedings are initiated or contemplated. This is because it locates itself within the meaning of a fair trial. What I am exploring in one of my current pieces is whether the protective ambit of Article 6 stretches to the point at which you are unsure of whether you have a case to bring, i.e. the stage at which you need legal advice. Although the current ECHR jurisprudence doesn't provide for such a right, I do think there should be a minimum threshold where an obligation on States to provide legal advice kicks in. I also find interesting that if you look at some of the early and foundational cases from the 1970s in this area, you see that in some of them the real issue was access to legal advice, not access to a court or a fair trial.

Advice to Students

What advice would you give students trying to enter the legal sector?

It is always difficult to give general advice but perhaps I can share some advice that I received from Professor Albertina Albors-Llorens. It helped me get through difficult spots in my undergraduate law degree and also in Oxford (ironically, in the EU exam!). She once told me that in the course of one's degree and indeed in the course of most exams, you will typically hit adversity. That is very likely to happen and also not always in your control. The most important thing is not to avoid adversity, but be the kind of person who can recover and develops the quality of resilience. During my EU exam in Oxford, I had a terrible mind-blank. I opened the paper and could not think of anything to write. I even had to leave the exam hall to splash cold water on my face. I must have

wasted nearly half an hour but also remembered Albertina's words. I had to keep any sort of panic at bay and overcome the adversity. Still unsure of what I was going to write, I decided I have to make a start and simply write an introduction to the first essay, hoping that I could actually unfold the thesis in the body. As I got going, the fog began to lift and I felt more and more confident. Since I had lost a lot of time I ended up writing for nearly 2.5 hours without break! Fortunately, the final mark was not too bad either and so, yes, while it may sound very cliché, when adversity hits, dig deep and you might just be surprised what strength lies within your mine of capacity.

ARTICLES

The In(trans)igence of the European Court of Human Rights: Undermining Trans Identity in the Birth Registration of their Children

Harry Armstrong*

Abstract: *Despite its previous contributions to the advancement of transgender rights, the European Court of Human Rights ('ECtHR') has recently shied away from taking a stand to protect trans parenthood. Described as seminal cases in the ECtHR's 2023 Annual Report, A.H. and Others v Germany[10] and O.H. and G.H. v Germany[11] addressed hitherto unresolved questions concerning the registration of transgender parents on their children's birth certificates.[12] With the linked judgments unavailable in English at the time of writing, they have received little attention in common law jurisdictions. This article seeks to plug this gap. It does so first by summarising the ECtHR's analysis of the German authorities' decision to record the transgender parents' status in contradiction to their recognised gender identities. It then exposes the court's unsatisfactory reasoning, particularly its deference to the margin of appreciation, inadequate weighing up of the Article 8 interests at stake, and the failure to scrutinise the purposes underlying the birth registration scheme. Using a comparative approach to jurisdictions such as Sweden and California, it will suggest that the purposes of birth registration would be supported by a more inclusive and flexible scheme which helps to uphold the parents' Article 8 rights and, importantly, represents social reality.*

Part I: Summary of the judgments

In German law, as in English law,[13] the birth-giver is automatically considered the "mother".[14] While the law generally protects against the use of deadnames and transgender people's sex assigned at birth in official documents, a recognised exception in the "public interest" is that any new recognised sex does not alter the relationship between a child and its parents.[15] It was this exception that gave rise to two important complaints in April 2023. In one case, a transgender man whose womb was still functional gave birth to a child through a sperm donation; he was recorded as the "mother", with his deadname written on the child's birth certificate.[16] In the second, a transgender woman, who could still produce male gametes, had a baby which was carried in her girlfriend's womb; similarly, her deadname was recorded and she was designated the "father" on her child's birth certificate.[17]

* Law Tripos Student, Clare College, University of Cambridge. Winner of the Matrix Chambers Access Prize.

[10] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023)

[11] *O.H. and G.H. v Germany* Apps. Nos. 53568/18 and 54741/18 (ECHR, 4 April 2023)

[12] Council of Europe, 'Annual Report 2023 of the European Court of Human Rights' (January 2024). <https://www.echr.coe.int/en/annual-reports> accessed 7 February 2024

[13] Human Fertilisation and Embryology Act 2008, s33

[14] § 1591 - Bürgerliches Gesetzbuch (BGB) tr

[15] § 5,11 - Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen (Transsexuellengesetz - TSG) tr

[16] *O.H. and G.H. v Germany* Apps. nos. 53568/18 and 54741/18 (ECHR, 4 April 2023) tr

[17] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023) tr

Having exhausted domestic remedies, Strasbourg heard the applicants' submissions that Germany had violated its positive obligations under Article 8 to uphold their right to a private life, encompassing legal recognition of their gender identity and their right to self-determination.[18] Family life was dismissed on the basis that family ties were strictly established, if not described in the way the applicants desired. The ECtHR accepted that the applicants' Article 8 rights were engaged but held that the German authorities' actions were supported by the legitimate aim of protecting the interests of others and that any interference was proportionate with that aim. In so doing, the court appealed largely to the decidedly wide margin of appreciation, noting the lack of pan-European consensus about approaching such sensitive ethical issues which involved weighing up both private and public interests. These interests included the child's right to know their origins and have a stable attachment to their family, the public interest in a coherent birth registration system, and the parents' interests in having their legal gender recognised. Given the wide margin of appreciation and the fact that only limited persons were entitled to see the full birth certificate disclosing the transgender status, no violation was found. Equally, the applicants' concurrent discrimination claim under Article 14 was declared to be "manifestly ill-founded"; while arguably meritorious, this claim falls outside the scope of analysis of this article.[19]

Part II: Analysis

i. Deference to the margin of appreciation

The deference paid to the margin of appreciation is highly disappointing and undermines the court's norm-influencing function. Its judgment is merely declarative of current social norms, failing to consider the normative questions of whether those are *right*. It is true that many countries adopt the same approach as Germany in, for example, designating the birth-giver as the mother. It is also true that questions of biology and parenthood raise particularly sensitive ethical and moral dilemmas. However, the court's mere declaration that there is a lack of consensus fails to scrutinise the evidence provided by the applicants. While there may not always be concrete legislation to reflect these social developments, the court overlooks that 78% of delegates in the Council of Europe voted in favour of Resolution 2239 (2018) which affirmed that "states must ensure the gender identity of trans parents are correctly registered on the birth certificate of their children".[20] This vote importantly signals movement towards acceptance of these evolving social norms. If the margin of appreciation is interpreted overly rigidly, the court will always remain a step behind such evolutions, deferring to national legislatures until it feels it is politically safe enough to affirm a pre-existing "consensus".

This deference is also at odds with the court's jurisprudence. Davis rightly highlights how, in *Goodwin v UK,*[21] the court underlined the importance of recognising "social reality", especially when failing to do so would result in feelings of "vulnerability, humiliation and anxiety" for the

[18] As established in *Hamalainen v Finland* App no 37359/09 (ECHR, 16 July 2014)
[19] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023) [142]-[144] tr
[20] Council of Europe Parliamentary Assembly, Resolution 2239 (2018) on private and family life: achieving equality regardless of sexual orientation <https://pace.coe.int/en/files/25166> accessed 7 February 2024
[21] *Goodwin v UK* (2002) 35 EHRR 18 [77]

applicants.[22] Just as gender recognition certificates provide legal certainty for transgender individuals, birth certificates too can play a symbolic role in empowering a transgender people in their important role as parents. Brunet and Mesnil highlight how the court in *B v France*[23] stated that it is no longer necessary to unwaveringly uphold the historical dimension of the birth registration system.[24] The court was less concerned with the *means* of resolving legal questions but rather looked for a tendency towards the socio-legal acceptance of trans people. Equally, in *YY v Turkey,*[25] the court took a more norm-prescriptive role by side-lining the need for European consensus when considering whether trans people should have to be sterilised before obtaining legal recognition of their gender. Its affirmation of the right of transgender people to personal development demonstrated the court's influence given that countries like France subsequently felt compelled to change their requirements for legal recognition of gender change.[26]

The ECtHR thus appears at a roadblock. It is willing to call out countries failing to fairly recognise trans people's identities in law. Yet, it overlooks how identity can extend to parenthood, particularly one which accurately reflects the social relationship between parent and child. A particular discrepancy raised by Brunet and Mesnil is that, having boldly decried the sterilisation requirement for transgender people and supported transgender people to reproduce using the reproductive organs assigned to them at birth, the court is unwilling to recognise a parenthood which respects that gender identity.[27] Of course, there is a difference in that birth certificates have implications on both the child and the parent, but as will be considered in section (ii), these interests are not diametrically opposed.

ii. Inadequate weighing up of interests

In both analyses of the supposedly competing interests at play, the court has rightly been criticised for effectively copying and pasting the evaluation carried out by the German Federal Court.[28] The court cites Articles 3 and 8 of the UN Convention on the Rights of the Child 1989[29] and *Mennesson*[30] which emphasise the overriding interests of the child, but this almost blinds them into viewing them as opposed to the parents' and public interest. The impact on transgender parents, overlooked by the court, cannot be understated. Transgender people may give up their dreams of parenthood in the absence of suitable recognition. In the English case of *McConnell*[31] regarding a similar fact pattern, the applicant argued that a man having to call himself "mother" is "deeply

[22] Liam Davis, 'Deconstructing Tradition: Trans Reproduction and the Need to Reform Birth Registration in England and Wales' (2020) 22 International Journal of Transgender Health 179, 181-182
[23] *B v France* App no 13343/87 (ECHR, 25 March 1992)
[24] Laurence Brunet and Marie Mesnil, 'La parenté trans devant la Cour EDH : vers de nouvelles limites au changement de sexe ?' [2023] Revue des Droits de l'Homme, 5
[25] *YY v Turkey* App no 14793/08 (ECHR, 10 March 2015)
[26] Laurence Brunet and Marie Mesnil, 'La parenté trans devant la Cour EDH : vers de nouvelles limites au changement de sexe ?' [2023] Revue des Droits de l'Homme, 6-7
[27] ibid 16
[28] ibid
[29] United Nations Convention on the Rights of the Child 1989
[30] *Mennesson v France* App no 65192/11 (ECHR, 26 June 2014)
[31] *R (McConnell) v Registrar General* [2020] EWCA Civ 559, [2021] Fam 77

distressing, subjectively traumatic and procedurally taxing".[32] Practically speaking, the authorities might interrogate the parenthood of transgender people when crossing borders. For instance, one transgender man in Germany stated that, given there is no internationally recognised way of proving his parental link, he would never fly abroad with his child.[33] Several countries require parents travelling with minor children to provide birth certificates. Had the court seized the chance to give some momentum to a pan-European progressive approach, it may have somewhat allayed these concerns. Claire Fenton-Glynn has previously argued that England and Wales' similarly gendered legal framework "violates" Article 8[34] and even Judge MacFarlane in the first instance hearing of *McConnell* stated that "the degree of interference in [the parent's] Article 8 rights is substantial".[35] Yet, here, the ECtHR seems unpersuaded from the outset. While it considers the impact of disclosure, it overlooks the internal, personal impact of being designated the wrong parental title and fails to consider the symbolic importance in shaping public opinion if birth certificates more accurately reflected the applicants' gender identity.

The child's right to know their origins under Article 8 constitutes the decisive factor in the court's mind.[36] As Brunet and Mesnil highlight, this right has gradually morphed from concerning general information about one's childhood, especially in the context of care leavers in *Gaskin v UK*[37]to more recently one's *biological* origins as emphasised in *Mifsud v Malta.*[38] The court therefore reduces family relations to biology, where each parent's reproductive function is the focal point. While the ECtHR shared the German authorities' concerns that calling the birth-giving man the "father" might hypothetically prevent the sperm donor one day establishing paternity in *OH and GH,*[39] they seemed unconcerned that the registration of the birth-giving mother prevented the establishment of a second maternity of the trans-female parent in *AH and Others*. Equally, the court overlooks the potential confusion for a child whose mother in their eyes is instead officially described as their father. It is not uncommon for there to be no record of the father on a child's birth certificate and sometimes the mother's partner is *deemed* the father by virtue of their marriage. In cases of surrogacy, mothers may be registered in light of their gestational role even without any genetic link to the child.[40] While the court accepts the obstacles to discovering the child's genetic lineage in these cases, the court refuses to extend the same understanding to transgender people.

Similarly, the supposed public interests lack thorough interrogation. The court, for instance, fails to question the German government's assertion of the importance of a quick, easy, and almost al-

[32] Daniela Alaattinoğlu and Alice Margaria, 'Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation' (2023) 21 International Journal of Constitutional Law 603, 606
[33] ibid.
[34] Claire Fenton-Glynn, 'Deconstructing Parenthood: What Makes a "Mother"?' (2020) 79 The Cambridge Law Journal 34, 37
[35] *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam), [2020] Fam. 45 [272]
[36] Laurence Brunet and Marie Mesnil, 'La parenté trans devant la Cour EDH : vers de nouvelles limites au changement de sexe ?' [2023] Revue des Droits de l'Homme, 9
[37] *Gaskin v UK* (1989) 12 EHRR 36
[38] *Mifsud v Malta* (2019) 69 EHRR 625
[39] *O.H. and G.H. v Germany* Apps. nos. 53568/18 and 54741/18 (ECHR, 4 April 2023) [20] tr
[40] Human Fertilisation and Embryology Act 2008, s33

ways fair link made between the mother and the new-born provided by the rule that the birth-giver, and no-one else, will always be termed the "mother".[41] Perhaps the phraseology of "almost always" gives away the fact that it is indeed sometimes unfair.[42] Given that human rights should be appreciated *in concreto*, this argument is unpersuasive. The state could easily retain the above rules as the *de facto* position, enabling trans people to request an *ex post facto* change from the initial, algorithmic approach that "birth-giver equals mother". Another legitimate interest put forward to justify this approach is preventing surrogacy.[43] Yet, again, creating an exception for transgender people in no way necessitates making exceptions for surrogacy if the birth certificate was altered *subsequently*. Most controversially, the German government suggests that using the parents' deadnames would enable the child to decide when and to whom they wish to reveal the transgender identity of their parents.[44] However, while the parents' identity is closely linked to their child's, the child should not have effective control of their parent's own Article 8 rights.

There is good reason to question the German government's rationale that birth certificates based on the parents' respective biological functions lead to a coherent registration system. As argued in response to *McConnell*, most would view "mother" and "father" as gendered terms.[45] Thus, if the law permits male mothers and female fathers, in light of the discrepancy between the parent's legal gender and their description on their child's birth certificate, there is vast potential for confusion.[46] As will be demonstrated in section (iii), using non-gendered terms such as "parent" still upholds a coherent birth registration system whilst respecting transgender people's Article 8 rights.[47] That a stable attachment between parent and child can only be established by reference to "unchangeable" biology rather than "malleable" social norms is a misconception. It is the will of the parents that creates the stable attachment. Biology cannot stop a father abandoning his child, yet the social ties created by conventions like adoption are potentially stronger given the drawn-out process required to establish them. Thus, the very tangible individual rights of transgender parents should outweigh the abstract and misjudged potential for incoherence in the birth registration system.

iii. Purpose

One surprising deficiency in the ECtHR's judgment is its failure to interrogate the underlying purposes and uses of birth certificates. The Ordo Iuris Institute, for instance, submitted that birth certificates must establish an "objective truth" and not be shaped by the will of the people.[48] But why again should the biological "truth" obscure the *social* "truth"? As Eekelaar argues, the "truth" is subjective. In fact, the "formal legal truth" can sometimes include "legal fictions", where the law

[41] *O.H. and G.H. v Germany* Apps. nos. 53568/18 and 54741/18 (ECHR, 4 April 2023) [94] tr
[42] ibid [98]
[43] *Paradiso and Campanelli v Italy* (2017) 65 EHRR 2
[44] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023) [99]
[45] Claire Fenton-Glynn, 'Deconstructing Parenthood: What Makes a "Mother"?' (2020) 79 The Cambridge Law Journal 34, 37
[46] Rob George, Sharon Thompson and Joanna Miles, '9: Supplementary Materials', Family Law: Text, Cases, and Materials (5th edn, Oxford University Press 2023), 2
[47] Claire Fenton-Glynn, 'Deconstructing Parenthood: What Makes a "Mother"?' (2020) 79 The Cambridge Law Journal 34, 37
[48] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023) [107]-[108]

deems things to be true for the advancement of justice or for practical reasons.[49] In this case, however, a trans male parent referring to himself as the "father" falls squarely within the social reality; the reality that underpins daily life. As Brown highlights, legal parenthood is not about describing an "objective truth"; its "narrower purpose" is the "determination of a legal status from which legal consequences and obligations derive".[50]

Maier helpfully traces the historical purposes of birth certificates.[51] In ancient times, they were used for conscription and social control in China, whilst being used to prove that children where "Roman enough" for citizenship in Ancient Rome. In England, they were introduced by Thomas Cromwell in 1538 for documenting lineal descent, inheritance and even the "legitimation of bastardy". In the United Kingdom today, they are designed to facilitate the parent-child relationship in encouraging parental responsibility[52] and can be used for applying for a driver's licence, visa and first adult passport. In fact, the *full* birth certificate which contains details about parenthood is required for registering for school.[53] It can therefore be deduced that birth certificates are useful *to the state* for quantitative and qualitative social, economic and epidemiological analysis. *To an individual,* birth certificates detail pertinent information regarding their birth but also permit the acquisition of further important documentation. While the ECtHR rightly highlighted that the *full* version of the birth certificate would not be easily accessible,[54] a fundamental prong of proportionality analysis is to consider "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective".[55] As will be demonstrated in part III, alternative measures which support the outlined purposes are available; an analysis of these possibilities should have featured significantly in the court's judgment.

Part III: The way forward

The finding of a violation of Article 8, while rejected by Strasbourg, was made in Sweden. Since 1995, the European Convention on Human Rights (ECHR) has been incorporated into Swedish domestic law, empowering the courts to consider the ECHR-compatibility of domestic legislation.[56] Therefore, when a transgender man gave birth to a child after legally changing gender, the court considered that it was a violation of Article 8 for the Swedish Tax Agency to register him as the "mother".[57] In its view, Article 8 entailed positive obligations to recognise the complainant's

[49] John Eekelaar, 'The Law, Gender and Truth' (2020) 20 Human Rights Law Review 797, 797
[50] Alan Brown, 'Trans (Legal) Parenthood and the Gender of Legal Parenthood' [2023] Legal Studies 1, 3
[51] Megan Brodie Maier, 'Parental Gender Designations on Children's Birth Certificates: The Need for a Modifiable Form ' (2019) 8 DePaul Journal of Women, Gender and the Law, 5-6
[52] Liam Davis, 'The Evolution of Birth Registration in England and Wales and Its Place in Contemporary Law and Society' [2023] 87 The Modern Law Review, 317, 318
[53] London Borough of Bromley, 'School Admissions Terms and Conditions' <https://www.bromley.gov.uk/schools-colleges/school-admissions-terms-conditions/2> accessed 7 February 2024
[54] *A.H. and Others v Germany* App no 7246/20 (ECHR, 4 April 2023) [130]
[55] *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700 [20]
[56] Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna
[57] Förvaltningsrätten i Stockholm, 24685-13 <https://academic.oup.com/icon/article/21/2/603/7194654> accessed 17 January 2024.

legal gender with full force and to avoid disclosing sensitive information to third parties.[58] Given the purposes behind birth certificates, the court saw no conflict between the interests of the public, parents and the child in registering the man as the "father". In fact, in a second case where the gender recognition occurred after the child's birth, the court considered that Article 8 was violated because, notwithstanding any conflict of interests, the *individual* rights of the transgender person were more important than the interests of the Registry.[59]

Even if Sweden retains the binary mother-father registration system, it can be praised for affirming that the less intrusive measure of recognising the parent's gender identity on their child's birth certificate is compatible with the socio-economic goals of birth registration. It is true, however, that Sweden still distinguishes between which parent gave birth and offers no third "parent" option. This latter approach is supported by Eekelaar who argues that more inclusive language choices such as "gestational parent" or "father (gestational parent)" would greater respect the parents' identities whilst enabling the child to discover their genetic origins.[60] Of course, this goes some way in recognising the gender identity of the applicants but denoting who is "gestational" could equally "out" the transgender parent.

Arguably, therefore, the Californian model, with some additional adjustments, is most apt. According to this model, there are three options to describe the parents' relationship to their child: "mother", "father" or "parent".[61] In addition, there are two further lines which simply read "name of parent". In this way, those who do not recognise themselves in the binary mother-father distinction may express their connection, socially and internally perceived, to their child. Equally, its flexibility enables any person, perhaps for reasons of privacy, to simply denote themselves as "parent", still importantly enabling parenthood to be recorded. In this author's view, information regarding which parent is "gestational" should be omitted from the birth certificate to protect against outing the parents. Instead, genetic considerations could be recorded on a separate register accessible principally to only the parents and child so that their right to know their origins, when such information is available, is protected. This could work in a similar way to adoption in England where children can solicit such relevant information at the age of eighteen.[62] This system is preferable because it fosters trust between parents and children who can choose when and how they might wish to reveal the circumstances of the child's birth.

It is true that some jurisdictions go too far. Such is the case with Ontario. According to the All Families Are Equal Act (2016), all parents are named "parents" *tout court*.[63] While this certainly guards against privacy concerns, we must be careful against completely de-gendering parenthood.

[58] Daniela Alaattinoğlu and Alice Margaria, 'Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation' (2023) 21 International Journal of Constitutional Law 603, 611
[59] Kammarrätten i Göteborg, Case No. 6186-14, Oct. 5, 2015
[60] John Eekelaar, 'The Law, Gender and Truth' (2020) 20 Human Rights Law Review 797, 809
[61] Megan Brodie Maier, 'Parental Gender Designations on Children's Birth Certificates: The Need for a Modifiable Form ' (2019) 8 DePaul Journal of Women, Gender and the Law, 16
[62] Adoption and Children Act 2002, s 60
[63] All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016, S.O. 2016, c. 23 - Bill 28

Both transgender and cisgender people may feel so strongly that they are the mother or the father that being merely designated "parent" fails to respect this gender identity. As Alaattinoğlu and Margaria argue,[64] until we "degender care" by ensuring that both motherhood and fatherhood are socially perceived to create equal caring responsibility, we must be careful not to risk "neutering mothering" by closing our eyes to the fact that it is largely mothers who undertake caring responsibilities. Ultimately, in a world where developing technology could promise novel methods of conception, a flexible birth registration system is required for our laws to be adaptable and future-proof.

Conclusion

Birth registration is more than just a banal administrative mechanism. Inapt description can create tensions, both internally and externally perceived. Regardless of the finding of no violation, the ECtHR failed to comprehensively scrutinise the underlying rationale and the balance of interests at stake. The margin of appreciation, perhaps designed as a political tool to appease states whose values may occasionally be only loosely shared, should not be deployed excessively at the risk of compromising the court's norm-influencing role. States should of course have leeway in deciding the *methods* used to comply with their Article 8 obligations, but where the fundamental administrative structure undermines those rights, readily implementable and compatible alternatives should be advocated. With increasing concerns about potential departures from the ECHR framework, the court must decide whether to take a stand or passively observe changes occurring independent of its structure.

[64] Daniela Alaattinoğlu and Alice Margaria, 'Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation' (2023) 21 International Journal of Constitutional Law 603, 622-624

Take a Walk on the Wild Side: How the Rights of Nature can Help to Combat the Climate Crisis

Jake Pronger*

Abstract: *Environmental law, in the main, proposes certain rules that require persons to not harm the environment, or at least, mitigate the extent to which they can harm it through their use of nature. In addition, the trend of the United Kingdom's legislation is one of sustainability; there are increasingly more and more regulations being placed upon individuals to not harm the environment through their expulsion of pollutants. Yet the earth, and humanity at large, remains on a collision course for climate disaster. It is quite clearly the case that the current legal framework is insufficient in dealing with the inherent complexities of environmental problems. This essay explores an alternative framework which the Government ought to implement in order to avert climate disaster. Within this framework, it is suggested that Scope 3 emissions, that is the downstream emissions of greenhouse gases from the end use by consumers of oil and gas as a fuel, ought to be included in Environmental Impact Assessments as well as the implementation of earth jurisprudential theory within primary legislation. The latter is what the essay is most concerned with as it suggests that the current framework is too anthropocentric and as such will never be able to adequately address the environmental issues facing humanity. Instead, as this essay concludes, it is necessary to incite a shift in the perception of humanity's relationship with nature by granting the rights of nature within a codified constitution.*

Introduction

This is a moment in human history like no other. A moment where the concern to do something to combat the irrevocable damage facing the planet is of global magnitude. With global temperatures on track to increase by 1.5°C within the next two decades [65], and a recent report finding that the Government is not on track to meet its targets outlined in the Government's commitment to Net Zero (an 80% reduction compared to 1990 levels by 2050[66]), it ought to be beyond contention that the Government's current approach to environmental governance is insufficient to meet the challenges of the climate crisis. Failure would render the planet inhospitable,[67] therefore, this essay explores an alternative course of action in the form of "Wild Law"[68] which places the rights

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[65] IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p 8.

[66] Institute for Government, 'Net zero: How government can meet its climate change target' (2022) p 15 <https://www.instituteforgovernment.org.uk/sites/default/files/publications/net-zero-government-climate-change-target.pdf> accessed 03 January 2024.

[67] Hoesung Lee and others, 'Synthesis Report Of the IPCC Sixth Assessment Report (AR6) Summary for Policymakers' (2023).

[68] Cormac Cullinan, *Wild Law*: *A Manifesto for Earth Justice* (Siber Ink 2002).

of nature at its heart through a codified constitution. This in turn gives effect to the principles of "Earth Jurisprudence"[69] which is the only way to instigate the much-needed shift in perception from an anthropocentric paradigm to an ecocentric one, allowing for far stronger environmental governance.

Part I: What is Wild Law?

The Government's failure to meet its targets stems from the fallacy of viewing the law as a "magic wand"[70] that when waved passes pieces of legislation that eradicate all of the issues previously faced. It is hard to express in sober terms just how erroneous such a sentiment is, since environmental law is best understood as the law of environmental problems. By disregarding this, one has not considered the inherently complex nature of them on both a physical and social scale. They are physically complex because ecosystems transcend the borders of nation-states, and socially complex because they confront humanity with the uncomfortable truth that humans are but one small part of a larger global ecosystem. This is something which the United Kingdom's anthropocentric legal system is keen to deny in the name of profit, since by placing humanity at its forefront, it too often legitimises the exploitation of the natural world.

Earth jurisprudence seeks to rectify this harmful notion by formally acknowledging the reciprocal relationship between humans and the rest of nature, something that countries with people who root their lives in nature are seeking to employ in their legal framework.[71] For example, in 2008, Ecuador became the first nation on Earth to implement the rights of nature (Pachamama) into its constitution, recognising that Pachamama has a right to exist, persist, maintain, and regenerate as an integrated system to which human beings belong and with which they must harmoniously co-exist.[72] As recently as 2021, these rights have been upheld by the Ecuadorian Constitutional Court's judgment in the case of *Los Cedros*.[73] The apex court revoked two mining concessions granted within the forest because said permits violated, amongst several others, Articles 10 and 73 of the Ecuadorian Constitution. The former provides that "nature shall be the subject of those rights that the Constitution recognizes for it"[74], whilst the latter empowers the State to "apply preventive and restrictive measures on activities that might lead to… the destruction of ecosystems."[75] It is clear that "based on the information received"[76], the court interpreted the mining activity as having an irreversible harmful impact[77] on Los Cedros' biodiversity which ran contrary to the rights of this

[69] Thomas Berry, *The Great Work: Our Way into the Future* (Bell Tower 1999).
[70] Elizabeth Fisher, *Environmental law: A very short introduction* (Oxford University Press 2017).
[71] Cormac Cullinan, *Wild Law*: *A Manifesto for Earth Justice* (Siber Ink 2002) ch 7.
[72] Constitución Política de la República del Ecuador, arts 71-74.
[73] Caso Nro. 1149-19-JP/21: *Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros* (2021). <http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB-1dWlkOic2MmE3MmIxNy1hMzE4LTQyZmMtYjJkOS1mYzYzNWE5ZTAwNGYucGRmJ30=> accessed 24 January 2024.
[74] Constitución Política de la República del Ecuador, art 10.
[75] Ibid, art 73.
[76] Caso Nro. 1149-19-JP/21: *Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros* (2021) [70].
[77] Ibid, [124].

specific ecosystem to exist and regenerate[78] (given effect by Article 10) and by extension sought to restrict this activity under Article 73. Therefore, the court's conclusion goes further than being a mere symbolic declaration, but instead is a concrete recognition of the fundamental and inalienable value of nature as a subject, bearing rights under the Constitution:

> This is not rhetorical lyricism, but a transcendent statement and a historical commitment […] these values are part of the constitutional preamble which presents the fundamental values of the Ecuadorian people.[79]

The UK Environmental Law Agency gave this instantiation of Wild Law an 'actual score' of "+17"[80] because this innovative legal framework obtains the highest level of environmental protection for nature by giving Pachamama a seat in court, and she is winning.[81] The artificial gap created by humanity, between itself and the nature which envelops it, is bridged by removing arbitrary legal distinctions between the two parties and realigning environmental governance in accordance with how the universe truly functions.[82] Such a shift in the perception of nature is necessary, as this would go far in diluting the complexity of environmental problems. By rejecting that nature is subordinate to humanity, Pachamama ceases to be "othered".[83] When this is the case, governments are far more willing to define positive responsibilities towards nature and accept restraints on human behaviours necessary to mitigate environmental problems. Ultimately, this attacks the root cause of all environmental problems, namely, the notion that man is omnipotent and can do as he wishes with the planet. In the West, this mindset is reflected in the very language that is used to refer to nature: "resources" and "stewardship", causing a loss of reverence for the natural reciprocal relationship between man and the Earth, which must be re-established if the Government is to meet current climate challenges.

Part II: The trend of UK legislation

Environmental problems often require individuals to predict the future and there is no better way of doing this than looking at the current trend. With global temperatures 50% more likely to reach or exceed 1.5 °C in the near term[84], rendering the planet inhospitable, it remains clear that a "tragedy of the commons"[85] is occurring. To take a more limited example, imagine a street with ample space for parking. Over time, as more and more individuals realise the abundance of availability

[78] Ibid, [70].
[79] Ibid, [31]-[32].
[80] Begonia Filgueira and Ian Mason, 'Wild Law: Is there any evidence of earth jurisprudence in existing law and practice?' (2009) 1(1) Wild Law Research Report, 45 <https://www.ukela.org/common/Uploaded%20files/Wild%20Law%20Research%20Report%20published%20March%202009.pdf> accessed 15 January 2024.
[81] *Richard Frederick Wheeler y Eleanor Geer Huddle c. Gobierno Provincial de Loja*, juicio 11121-2011-0010 [2011].
[82] Cormac Cullinan, *Wild Law*: *A Manifesto for Earth Justice* (Siber Ink 2002) 30.
[83] Kotzé LJ and Villavicencio Calzadilla P, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6 Transnational Environmental Law 401.
[84] IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA, p 15, doi:10.1017/9781009325844.
[85] Garrett Hardin, 'The Tragedy of the Commons' (1968)1 62 Science 1243, 1248.

of parking spaces, the more and more that these parking spaces become occupied and thus their availability will decrease. There will then come a time when there are far more cars looking for parking spaces than there are parking spaces available, leading to what Hardin called a "tragedy of the commons". Put simply, Hardin postulated that individuals, acting rationally, overuse a readily available resource, which for this essay are the resources provided by the environment (i.e. oil, water, wood, etc.), so that it is depleted and becomes unusable or even harder to find. Therefore, a way of avoiding such a tragedy would be for a government to introduce further regulations on individuals to stop the overexploitation of the resource.

In this case, the government could pass laws that limit how long an individual is allowed to park and, in an extreme case, where there are too many cars on the road, laws could be introduced to limit the number of cars allowed on the roads per day- as is seen in Mexico City with the "Hoy No Circula" programme[86]. In the UK, perhaps the best example of regulatory environmental legislation would be the Climate Change Act 2008 (CCA 2008) which in the very first section sets a target of 2050 for the UK's carbon account to be "100% lower than the 1990 baseline"[87]. In addition, s 1 of the CCA 2008 requires the Secretary of State to ensure that this target is achieved. In other words, it is their duty to introduce public policy and legislation that coincides with the act. For example, on the very same day that the CCA 2008 was passed, the government also passed the Planning Act 2008 (PA 2008), which in s 5 (8) requires a National Policy Statement to include an explanation of how the policy which it sets out accounts for the Government policy which relates to the "mitigation of, and adaptation to, climate change"[88]. Furthermore, s 10 (3)(a)[89] of the PA 2008 requires for the Secretary of State themselves to have regard for the mitigation of climate change. More recently, the government introduced the Environment Act 2021 (EA 2021)[90] which seeks to provide a legal framework for environmental governance in the UK by granting landowners (of which the Government is by far the largest)[91] responsibilities to improve the quality of the environment in relation to waste, resource efficiency, air quality, water, nature and biodiversity, and conservation. Even this piece of legislation can be said to be following the wider global legal framework as set out by article 2 of the Paris Agreement 2015,[92] which, despite being public international law and so not legally binding, points nonetheless to a clear trend: the overexploitation of the Earth's resources has led the government to introduce legislation that acts as a legal framework, which must be adhered to, in order to accomplish the targets which the government itself has set out or agreed to avoid a tragedy of the commons.

Nation-states must continue to play this pivotal role in the development of environmental laws, because they have the authority and capacity to develop suitable responses to the complex issues

[86] 'Hoy No Circula' (sedema.cdmx.gob.mx) <https://sedema.cdmx.gob.mx/programas/programa/hoy-no-circula> accessed 07 May 2024.
[87] Climate Change Act 2008, s 1.
[88] Planning Act 2008, s 5 (8).
[89] Planning Act 2008, s 10 (3)(a).
[90] Environment Act 2021.
[91] 'Who owns the UK?' (abcfinance.co.uk) <https://abcfinance.co.uk/blog/who-owns-the-uk/> accessed 05 February 2024.
[92] Paris Agreement 2015, art 2.

posed by environmental problems. Some environmental problems are local, such as contaminated land, whilst others are more far-reaching; when wildfires burn down an area of forest, for instance, it is often not just that piece of land that is affected. Rather, because of the way that ecosystems are interdependent, there is a huge knock-on effect, often on a global scale, on the environment at large as well as on human health. Therefore, the need for nation-states to step in and provide a solution to the problems is required. The only way that this can be achieved is by enacting legislation that places environmental responsibilities onto the landowner, which oftentimes is the government themselves or large corporations. Legislation, like those explored above, gives these parties the responsibility to not damage the environment by trying to exploit the natural resources that it provides. If, conversely, they are found to have done so, then they face prosecution – such as when BP had to pay $20.8 billion in 2016[93] after a U.S. District Court judge ruled that their gross negligence was the prime cause of the "Deep Water Horizon" spillage. However, this is not to say that the trend of the legal framework does not allow for any regress - after all, it is not a magic wand. This next section will explore some additional responsibilities which, arguably, should be placed on individuals but currently are not to a sufficient degree.

In the recent case of *R* (Finch) *v Surrey County Council* (Surrey CC)[94] before the Court of Appeal, the question was whether it was unlawful, under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the EIA regulations) and the Directive 2011/92/EU, for Surrey CC to not require the EIA for the project of crude oil extraction to include the impacts of Scope 3 emissions. These emissions are the indirect end-use emissions, not included in Scope 2, that occur in the value chain of a reporting company such as greenhouse gases produced by consumers from end use of oil and gas as a fuel. The appellant, Sarah Finch, attempted to argue that Scope 3 emissions should be considered in the EIA, because the end-use emissions should be considered in relation to the UK's net-zero target and, as Surrey CC had not included them, they had acted unlawfully by breaching the EIA regulations. Whilst the appeal was dismissed by a majority, the dissenting opinion given by Lord Justice Moylan, to my mind, was the correct verdict. All 3 presiding judges rejected Holgate J.'s legal test that stated it was not whether the environmental effects were inevitable but rather that the environmental effects were effects of the proposed project for which planning permission is sought. However, Lord Justice Moylan went further to add that it is the "essential character" of the project to extract oil for commercial gain and so the environmental impacts that are incurred once the oil is sold on to become petroleum should be acknowledged in the EIA.

Now, whilst the respondent may argue that it would be impossible to measure the potential environmental impacts incurred by the combustion of petrol, this does not bode well for the likelihood of meeting the UK's net-zero target and, if this is the case, then the law should not allow for those impacts to occur in any case. Perhaps this could be the very reason for which the Supreme Court

[93] *United States v. BP Exploration & Prod., Inc. (In re Oil Spill by the Oil Rig "Deepwater Horizon").*
[94] *R (on the application of Sarah Finch on behalf of the Weald Action Group) v Surrey County Council* [2022] EWCA Civ 187.

granted the appellant leave to appeal on the 9th of August 2022.[95] Therefore, the government should require parties to include Scope 3 emissions in the EIAs for any projects for which they seek planning permission and that they should coincide with the UK's legal framework and environmental targets as set out by CCA 2008, PPA 2008 and other pieces of legislation; this would go far in combating climate change considering that oil contributed over 605Mt in CO2 emission in 2021 alone.[96]

Additionally, in the case of *Plan B v Secretary of State for Transport*,[97] the Court of Appeal ruled that it was a failure of the government to be inconsistent with s 5(8) and s 10 of the PA 2008 by introducing the Airport National Policy Statement, as it was a violation of the duty for Government policy to promote the "mitigation of, and adaptation to climate change" with relation to more recent and more ambitious policy such as the Paris Agreement of 2015. In turn, these successive failures of Government as well as large corporations point towards a need to overhaul the existing legal framework as it has been shown to be unable to keep up with the global trend towards sustainability set out by the Paris Agreement of 2015, to which the UK is a signatory. This points to the fact that our present environmental law framework, based as it is on traditional legal concepts of property rights and responsibilities coupled with more recent developments in human rights, is not well equipped for addressing the relationship between humans and the environment.

Part III: Wild Law as the solution

What, then, can the UK learn from the Wild Law approach taken up by countries like Ecuador? Currently, the UK can be said to 'suffer' from an uncodified constitution, due to the fact that a codified constitution enables governments to integrate the rights of nature as inalienable and universal - thus creating a legal framework that is more readily equipped to mitigate climate challenges. This is down to the fact that in theory, any citizen is entitled to challenge any infringement of these rights in a court of law, in the same way that any American citizen can challenge the infringement on their right to freedom of speech.[98]

Instead, the UK's entirely anthropocentric legal system, as Simon Boyle puts it, "legitimises the unconstrained exploitation of the natural world with the (false) belief that our species rules supreme."[99] This massively weakens attempts to strengthen environmental governance given that statute law can never fully uproot the Anthropocene as it works within the confines that established the paradigm to begin with. For example, the recently legislated Environment Act 2021 allows for the creation of "environmental targets"[100] but it inhibits clear forms of accountability for environmental protection through its weak architecture. This is because the majority of the targets are set

[95] Shosha Adie, 'Supreme Court grants permission to appeal in legal battle over new oil drilling in Surrey Hills' *The ENDS Report* (London, 12 August 2022).
[96] IEA (2021), Global Energy Review 2021, IEA, Paris <https://iea.blob.core.windows.net/assets/d0031107-401d-4a2f-a48b-9eed19457335/GlobalEnergyReview2021.pdf> , License: CC BY 4.0.
[97] *Plan B v Secretary of State for Transport* [2020] EWCA Civ 214.
[98] U.S. Const. amend. I; *Texas v. Johnson*, 491 U.S. 397 (1989).
[99] Begonia Filgueira and Ian Mason, 'Wild Law: Is there any evidence of earth jurisprudence in existing law and practice?' (2009) 1(1) Wild Law Research Report, 2.
[100] Environment Act 2021, s 1(1).

at the discretion of the Secretary of State in the form of Environmental Improvement Plans, which are non-legal documents, meaning there is little legislative obligation that is enforceable. As such this does little in challenging historical legal concepts of nature as inanimate and the property of landowners. Therefore, wholesale constitutional reform, in accordance with Earth Jurisprudence, is required to ensure that there is explicit value placed on nature as all future legislation would necessarily have to have regard for the rights of nature enshrined within the constitution.

Whilst the Government may think such an approach hugely radical, facing huge climate crises renders it simply proportional. Not only does such a move go far in clarifying the already accepted rules of governance, streamlining it, but it would also definitively identify a myriad of rights to which the British public ought to be entitled. Some rights are 'partially codified' in the sense that they are defined in statute, the most prominent of which is the Human Rights Act 1998, which recognises the right to life.[101] However, at the current rate of global warming, it is unlikely that this right to life can be protected as the window of opportunity to limit global warming is rapidly narrowing,[102] meaning that the various rights of the UK population are null and void because they have a finite limit on the extent to which they can be enjoyed, contradicting the whole point of rights being inalienable. From a purely egotistical standpoint, then, it is necessary to recognise the rights of nature in a codified constitution as they are the rights from which all other rights flow.

Finally, while the law is anything but immutable, it was once the case that rights were the preserve of rich white men who met certain property thresholds.[103] However, by 1969, all persons over the age of 18 in the UK were enfranchised with the right to vote.[104] This demonstrates that the law has continued to evolve to extend rights to all humans regardless of their social standing and it has even granted rights to non-natural entities such as companies.[105] So why, then, should the law not continue to evolve to grant nature rights? Something which, unlike a company, is physical and tangibly envelops us.

The answer, one hopes, is simple. It should.

Conclusion

In a world that gets hotter by the day, the Government must strengthen environmental governance if it ever hopes to meet the challenges of this climate crisis. This essay has shown that this is only possible by inciting a shift away from the harmful anthropocentric paradigm by granting the rights of nature within a codified constitution. Once the law begins to regard humans as just one small part of nature, we cease to hold dominion over it and begin to treat it as an equal. After all, the rights of Man mean nothing if there exists no Earth upon which to exercise them.

[101] Human Rights Act 1998, ss 1 and 2.
[102] IPCC, 2022: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK and New York, NY, USA, p 29, doi:10.1017/9781009325844.
[103] UK Parliament, 'Second Reform Act 1867' (www.parlaiment.uk) <https://www.parliament.uk/about/living-heritage/evolutionofparliament/houseofcommons/reformacts/overview/furtherreformacts/> accessed 03 February 2024.
[104] Representation of the People Act 1969, s 1(1).
[105] Companies Act 2006, s 16.

The Role of Clarifying the Public Domain in Copyright Dispute Resolution

Phoebe Lee*

Abstract: *This article first argues that the vagueness of the public domain, in the context of copyright, is underpinned by an artificial translation of traditional Lockean and Hegelian conceptions of real property into the intellectual property regime. It then goes on to address a question which is left untouched by many academics – how does such vagueness practically inform copyright litigation? I argue that it affects not only (1) the determination of whether a subject matter can be copyrightable; but also (2) whether courts tend to favour author's individual rights over the rights of the public to have sufficient raw materials for future creations, especially under copyright infringement disputes. In so doing, it becomes clear that the borders of the public domain are left deliberately vague, so as to allow sufficient leeway for current law to encapsulate novel issues, e.g., the authorship of AI-generated content. Such flexibility also allows us to debate whether a subject matter is worth being reined into the private domain to the exclusion of all other users, and embraces what Habermas calls, a "deliberative democracy". The fluidity of the public domain can both be the greatest strength and weakness of copyright law.*

Introduction

The core tension between authors' individual rights and the public good in copyright law often manifests itself by asking one question: whether the piece of work deserves to stay in/outside of the public domain. Analogous to the Hegelian concept of the 'commons', the public domain contains intellectual creations that are not protected by IP rights. But there is not an agreed-upon definition of the public domain – Samuelson alone identified 13 conceptions of it.[106] The public domain remains a vague concept, but is important to the discourse of copyright law as it contains useful arts that should be preserved from undue privatisation. The academia is unsettled by such legal uncertainty. Lange went as far as to suggest that the public domain should be favoured by 'default' in difficult cases as a convenient and certain route to protecting public interest.[107]

I disagree that the vagueness could and should be rectified. This essay first explains the uncertain borders of the public domain, then argues such fluidity can be utilised to either justify propertisation of intellectual creations or support the preservation of 'raw materials' in the public domain for people to exploit. Drawing upon case law from different jurisdictions, it illustrates that whether the justifications are weak or strong depends on the dispute in question and the aim to be achieved.

As such, we should preserve the deliberative discourse to keep open the possibility to encapsulate

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[106] Samuelson, "Enriching Discourse on Public Domain" (2006) 55 Duke Law Journal 783, pp.101-169.

[107] Lange, "Recognizing the Public Domain" (1981) Law and Contemporary Problems 44(4), p.165.

novel creations in the modern age.[108]

Part I: Uncertain boundaries of the public domain

The public domain generally takes a negative construction of 'what it is not'.[109] As "the realm of materials undeserving of property rights",[110] its conceptual difficulties lie in the ambiguity of the notion of 'deserving' and boundaries of the 'realm'. It is "protean"[111] as it varies in size and boundaries across different IP rights and across jurisdictions, e.g., illustrations in the Peter Rabbit story are in the public domain of copyright, but are protected under trademark law: *Frederick Warne & Co. v Book Sales Inc*.[112] Its existence is justified by a utilitarian goal[113] that there must be enough inspiration and raw material left in the public realm for future creation.

On the other hand, there exists a private domain that contains copyrighted works. Originated from the Statute of Anne,[114] it allows authors to propertise their intellectual creations so that they can seek compensation[115] from derivative works without depleting ownership of the original,[116] and thus be incentivised to further create. Simply put, the public-private divide is a metaphorical representation of the conflicting rights between individual authors and the wider public. But disputes manifest in various forms – these abstract justifications cannot provide guidance in conflict resolution. Such vagueness is attributable to the following:

First, the artificial legal translation of tangible property rights to intangible intellectual creations. Unlike the traditional Lockean notion of ownership, where the 'mixing in of labour' justifies propertisation of a tangible item; intellectual labour is not excludable and the creative process lacks the "thingness" that is capable of being owned.[117] Besides, the scope of intellectual labour is also difficult to ascertain – the very notion of authorship is akin to recombination of existing works. Hardly anything is entirely new, as there might be unconscious forms of 'copying' that are impossible to identify in the iterative process of creation. These issues are particularly pertinent in joint-authorship works, where people contribute differently over time and ownership has to be apportioned. In

[108] Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities", (2003), Law and Contemporary Problems 66(147), p.170.
[109] Boyle, "The History and Theory of the Public Domain" (2001), at pp.69-74 (in response to E. Samuels, "The Public Domain in Copyright Law", 41 J. Copy. Soc'y USA (1993) pp.137-182, on p.150 who asked, "what is gained by reifying the negative and imagining a 'theory' of the public domain?").
[110] Litman, "The Public Domain" (1999), 39 Emory Law Journal 972, p.967.
[111] Dusollier, "The Public Domain in Intellectual Property Beyond the Metaphor of a Domain" in PL Jayanthi Reddy (ed.), Intellectual Property and Public Domain, Icfai University Press, Hyderabad, 2009, p.33.
[112] 481 F. Supp. 1191, 1196 (S.D.N.Y. 1979), part II "Defendant's Claim to Publish Freely".
[113] Ochoa, Trent, and Rose, "The Anti-Monopoly Origins of the Patent and Copyright Clause" (2002). 84 J. Pat. & Trademark Off. Soc'y 909, 2002, Santa Clara Univ. Legal Studies Research Paper No. 26-14, p.921. Retrieved at <https://deliverypdf.ssrn.com/delivery.php?
[114] Rose, "Authors and Owners: The Invention of Copyright", Cambridge, Massachusetts (1993) Harvard University Press, p.4.
[115] Landes and Posner, "An Economic Analysis of Copyright Law"(1989), The Journal of Legal Studies 18(2), University of Chicago Press, University of Chicago Law School, pp. 326. Retrieved at <https://www.jstor.org/stable/3085624> (last accessed 30 April 2024).
[116] (n 110) 970.
[117] (n 110) 971.

Kogan v Martin,[118] the issue was whether the plaintiff, who contributed mainly to the initial drafts of the screenplay can claim partial authorship rights in the final work. In considering her amount of contribution, the Court of Appeal considered two approaches: (i) to assess ownership on a draft-by-draft-basis; or (ii) treat the drafts and final work holistically as a single work that encompasses the totality of skills and labour.[119] The latter approach was held to be the appropriate one, but the reasoning behind is purely administrative – the parties have agreed to proceed with approach (ii) and hence it was "not open to [the court]"[120] to analyse the work according to approach (i). The Court even held that *"often the choice between these two approaches will not matter"*,[121] which arguably ignores the creative reality and is a waste of opportunity to clarify the law on the artificial dissection of collaboration process.[122] Indeed, as Litman pointed out, this is perhaps the very reason why copyright subsists automatically when formalities are met – the copyright office lacks the capacity to ascertain the sources of individuals' inspirations.[123]

Second, the public-private divide poses a false dichotomy. It juxtaposes the public's long-term goal of enhancing creativity and individual author's short-term interest in gaining exclusive control over his/her work;[124] and fails to consider that these respective goals may not be best protected by an unregulated public domain. An example on point is Linux's Open Source Software Movement. They relied on the GNU General Public License (GPL), a contractual agreement that creates a public-domain-like-sphere. Software licensed under the GPL is freely accessible on Open Source. In exchange, any derivative work from this GPL-ed software must also be circulated for others' use and development.[125] Their rationale is to prevent 'copylefts' from modifying programmes surrendered into the conventional public domain and claiming proprietary rights over something not entirely 'original'. As Benkler pointed out, such 'commons-based peer production' is the new modality of production and there can be multiple public-domain-like spheres, where free access and a selfless continuous circulation of intellectual creations can now be seen as "invitations for a [public] conversation, not as finished goods".[126] It also positively challenges the boundaries, singularity, and physicality of the public domain.[127]

Part II: Vagueness as a double-edged sword

I now use two main types of copyright disputes to illustrate how the deliberation of public domain boundaries informs conflict resolution practically – bearing in mind that depending on the facts, there could be different goals to achieve or interests to protect.

[118] [2019] EWCA Civ 1645.
[119] Ibid at [80].
[120] Ibid at [81].
[121] Ibid at [80].
[122] Simone, "*Kogan v Martin*: A New Framework for Joint Authorship in Copyright Law" (2020) Modern Law Review 83(4), pp.877- 892.
[123] (n 110) 975.
[124] Birnhack, "More or Better? Shaping the Public Domain" (2006), p.2.
[125] Chander and Sunder, "The Romance of the Public Domain" (2004) California Law Review 92(5), pp.1358-1361.
[126] Benkler, "Wealth of Networks" (2006) Yale University Press, p.180.
[127] Dusollier, "The Public Domain in Intellectual Property: Beyond the Metaphor of a Domain" (2009) in PL Jayanthi Reddy (ed.) Intellectual Property and Public Domain, Icfai University Press, Hyderabad, 2009, pp.31-69.

i. The 'Copyrightable' and the 'Uncopyrightable'

The first type of controversy is one of copyright eligibility. A copyrightable subject matter must (i) be a literary, dramatic, musical or artistic work,[128] (ii) satisfy the 'originality'[129] requirement, i.e. be an author's own "intellectual creation",[130] and (iii) be fixated,[131] i.e. recorded in writing or otherwise. Conflicts surrounding these formalities often arise, e.g., whether cinematographic films[132] that involve edited scenes which cannot be physically performed can receive copyright protection as 'dramatic works' under s.1 CDPA 1998: *Norowzian v Arks (No 2)*.[133]

The emergence of artificial intelligence (AI) authors has exposed a legal lacuna in the English copyright framework. It is unclear as to whether algorithmic creativity meets the statutory requirements of a copyrightable work, and if yes, who should be the copyright owner. An AI author does not fit into the EU *acquis* of the 'originality' test, which is used to determine authorship. The landmark *Infopaq* case has confirmed that copyrightable works must be "an author's own intellectual creation".[134] Advocate General Trstenjak's affirmed such view in his Opinion for the *Painer* case that "only human creations are … protected".[135] This is also the position in England & Wales: s.9(3) of the CDPA provides that the author for computer-generated works is the *person* who made arrangements necessary for the creation of the work. But it is silent as to whether AI-created works are 'underserving of property rights'[136] and thus should lapse into the public domain.

Here, we may draw upon China's experience in *Shenzhen Tencent v Shanghai Yingxun*[137] to see how the vagueness of the public domain offers leeway for discussion – the benefits of which, I argue, outweigh the legal uncertainty that may arise. In that case, an article generated by Tencent's robot *Dreamwriter* was held to be copyrightable.[138] In overcoming the general requirement for an 'author' to be a human, the Court emphasised that the article was indirectly authored by a team of programmers who controlled the settings and data input of the robot.[139] This is the first case regarding AI-generated works to be listed on the World Intellectual Property Organization's database,[140] and has arguably provided insights as to how AI works are to be regulated under the EU AI

[128] S.1, Copyright, Designs and Patents Act 1988 (CDPA).
[129] Art.2(5), Berne Convention.
[130] *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) EU:C:2009:465; [2012] Bus. L.R. 102, at [37].
[131] *Cala Homes v McAlpine* [1995] FSR 818.
[132] Under the meaning of s.5 CDPA 1998.
[133] [2000] FSR 363.
[134] (n 130) [35].
[135] *Painer v Standard VerlagsGmbH*, Opinion of A.G. Trsteniak (12 April 2011) (C-5/08) EU:C:2009:465; [2011] E.C.D.R. 13, at [121].
[136] (n 110) 967.
[137] Nanshan District People's Court, Shenzhen, Guangdong Province,Yue 0305 Min Chu No.14010 Civil Judgment (24 November 2019).
[138] Bonadio and McDonagh, "Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity" (2020) Intellectual Property Quarterly 2, pp.112-137.
[139] Zhou Bo, "Artificial Intelligence and Copyright Protection --Judicial Practice in Chinese Courts" WIPO exports, retrieved at: <https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/conversation_ip_ai/pdf/ms_china_1_en.pdf>.
[140] See https://www.wipo.int/about-ip/en/artificial_intelligence/strategy-search.jsp?territory_id&policy_id=2434.

Act 2024. Particularly, in its 2020 White Paper, the European Commission has picked up on this by recognising that any autonomous behaviours of AI tools are "largely defined and constrained by its developers".[141] This can be seen as a starting point for broadening the meaning of 'authors' under the domestic CDPA. However, if the goal is to enrich and diversify materials in the public domain as fertilisers for future innovation, English courts should refrain from granting copyright to the corporate owners of AI-generated works.[142] The difficulty in providing a definitive answer for the debate is underpinned by evolving perceptions of the costs and benefits of doing so – as we are unable to accurately measure them, the balance IP law is trying to strike "is as empty as it is powerful".[143] This adds to the value of preserving the discourse of boundaries deliberation – the deliberative democracy envisioned in the process will push for a rational consensus to be formed as to the oughtness of copyrighting a subject matter.[144]

ii. Copyright infringement

Another type of conflict that requires flexibility is copyright infringement cases. In *Sheeran v Chokri*,[145] the "Oh I" phrase in Sheeran's song *Shape of You* was held to be a pentatonic scale that is present in "countless songs"[146] and hence should be retained in the public domain. The demarcation of the reach of the public domain is especially important in musical works, given the limited numbers of musical notes available as opposed to words in language.[147] The propertisation of certain notes/musical phrases would "diminish [the] store of ideas on which to build [future] works"[148] and limit musicians' freedom of expression.[149] However, such reasoning would not have been possible had we adopted Lange's 'one-size-fit-all' approach, that copyright infringement cases should always 'by default' be ruled in favour of defendants. He assumed that all plaintiffs are copyright owners whose aim is to limit the resources available to the public, but *Sheeran* is already a counterexample wherein the claimant sought declaration on their entitlement to use an extremely common musical chord. This again illustrates how the mapping of public domain boundaries provides justifications for court rulings and hence should be preserved.

My analysis will not be complete without considering the defence of fair dealing to copyright infringement,[150] which grants 'allowance' for works in the private domain to be used for the purpose of parody, pastiche, or caricature; in addition to the list of 'permitted acts' under ss.28-76 of

[141] European Commission, "White Paper on Artificial Intelligence - A European approach to excellence and trust" (EC, 19 February 2020), COM (2020) 65 final, p.16.
[142] Lim, "AI & IP: Innovation & Creativity in an Age of Accelerated Change" (2018) 52 Akron Law Review 813, pp.857-862.
[143] Biagoli, "Weighing intellectual property: Can we balance the social costs and benefits of patenting?" (2019) History of Science 57(1), p.140.
[144] Jürgen Habermas, "Three Normative Models of Democracy" (1994) Constellations 1(1), p.9.
[145] [2022] EWHC 827 (Ch).
[146] Ibid at [43].
[147] *Ludlow Music Inc v Williams & Others* [2001] EMLR 155; [2001] FSR 271.
[148] *Oravec v Sunny Isles Luxury Ventures*, L.C., 527 F.3d 1218, 1225 (11th Cir. 2008).
[149] Cohen, "Copyright, Commodification, and Culture: Locating the Public Domain" in *The Future of Public Domain* (2005), pp.142 and 155.
[150] S.30A, CDPA 1998.

the CDPA. Here, it is important to recognise the economic justifications for allowing derivative works to be reproduced. The long list of fair dealing exceptions, albeit narrowly defined across the EU (*FA Premier League*[151]; *Deckmyn*[152]) and within England & Wales (*Shazam*),[153] exists to compensate meaningful derivate works, e.g., translation of *Les Misérables* or *The Brothers Karamazov*.[154] Their interests should not be neglected, even though there are legitimate reasons for protecting the interests of original authors, in light of modern technological advancements which makes transformation of copyrighted works easier and less costly.[155] As McDonagh pointed out, this is particularly true in areas where the revising of previous work is the norm, e.g. dramatic and theatrical pieces.[156] Being alive to the (necessarily) flexible boundaries of the public domain allows us to design qualified exceptions to the use of propertised materials – this is reflected by how fair dealing comes in the form of a defence that could only be made out in "special cases".[157] Had we unthinkingly adopted a rigid approach in seeing original authors' interests as paramount, the *raison d'être* of promoting cultural and creativity would be frustrated.

The above examples illustrate how copyright conflicts manifest in various forms. Favouring a domain 'by default' not only obstructs meaningful discourse on justifications for (not) granting property rights; it also stagnates the development and improvement of the copyright framework by rigidly adhering to traditional notions that no longer reflect modern creative reality. As the current statutory framework forces and reduces complex philosophies into a dichotomous framework, we must actively clarify boundaries of the public domain by rethinking how the interests of authors and the public can be better safeguarded.

Conclusion

The conceptual vagueness of the public domain is both the cause and result of the deeper tension between the public's entitlement to a Hegelian 'commons' and individual authors' proprietary rights to secure the produce of their intellectual labour. Copyright dispute resolution ultimately boils down to the balancing of a scale that is as empty as it is powerful. Whether the fluidity of public domain is perceived as a weakness or strength depends on where we stand under meta modernity, i.e., if we see novel cases as deviations from the traditional notions of IP law; or we embrace the dynamic nature of the public domain and constantly challenge the internal biases of the current system. I have argued for the latter. To mute deliberation is to forgo a precious opportunity to ascertain the way forward.

[151] Case C-403/08 & 429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others*, 4th October 2011 ECJ.
[152] Case C-201/13 *Deckmyn v Vandersteen* [2014] Bus L.R.1368.
[153] [2022] EWHC 1379 at [189].
[154] (n 115) 354.
[155] (n 110) 1018-1022.
[156] McDonagh, "*Performing Copyright*" (Hart, 2021), pp.98-147.
[157] Art.5(5) of EU Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.

Broken Scales: An Analysis of the Privileged Position Afforded to Mortgagees as Against Trust Beneficiaries who are Claiming Priority Against them

Lily Greenhough*

Abstract: *This article investigates the balance of interests between trust beneficiaries and mortgagees in the priority dispute. It argues that the mortgagee's interests are unduly privileged, and that reform is needed to create a more equitable balance. In order to reach this conclusion, this article has three sections. First, an analysis of select mechanisms governing the priority dispute is carried out, the focus being on overreaching and acquisition mortgages. Second, it turns to what happens after the priority dispute, contrasting the TOLATA 1996 and Law of Property Act 1925 regimes. Lastly, a more normative analysis of the policy concerns in the area is considered. Within this, it is suggested that a more human-focused approach to land law is needed.*

Introduction

When a mortgagee and a trust beneficiary are engaged in a priority dispute, the former occupies an incredibly privileged position. This article argues that the scales need to be reset to strike a better balance between the economic interests of the mortgagee and the often very human interests of the trust beneficiary. It is suggested that this is an area that Parliament should revisit, as the current law is a patchwork of statutory and common law provisions which inadequately protect those with a beneficial interest in property. The cases analysed focus on a dispute over the home, as it is suggested this is where injustice is most prevalent. Given the continuing cost of living crisis, and sadly more people defaulting on their mortgages, it is now more pertinent than ever to highlight the inequality of treatment between mortgagees and trust beneficiaries.[158]

To highlight the need for reform in this area, this article has three sections. Firstly, in section one, a sample of the applicable mechanisms governing the priority dispute are analysed, through which it will be highlighted that the mortgagee is offered significant protection. The focus will be on the doctrines of acquisition mortgages and overreaching. In section two, what happens following the priority dispute will be analysed. This contrasts, on the one hand, where the beneficiary has priority and thus the Trusts of Land and Appointment of Trustees Act (TOLATA) 1996 regime is used, and on the other hand, where the mortgagee has priority so the default powers of possession and sale under the Law of Property Act (LPA) 1925 are used. Within this section, the lack of opportunity for human rights-based challenges will be discussed. Lastly, in section three, it will be considered whether this prioritisation is justified. Contrasting social and economic justifications will be tabled, but overall, it is concluded that the scales are broken and need to be reset to create a more equal balance between mortgagees and trust beneficiaries.

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[158] Sonia Rach 'Mortgage default rates increased in run up to Christmas' *Financial Times* (17 January 2024).

Part I: The Mechanism Impacting the Priority Dispute

It is argued that when trust beneficiaries claim priority over a mortgagee, the latter's interests are privileged. The focus will be on the doctrines of overreaching and acquisition mortgages.

Before analysing the specific doctrines, a brief explanation of the priority dispute between trust beneficiaries and mortgagees, is required. The basic priority rule under the Land Registration Act 2002 (LRA) is the 'first in time' rule.[159] Thus, a trust beneficiary who has a right by virtue of an express or implied trust will have prima facie priority over any subsequent rights created in the property.[160] However, a properly created legal mortgage triggers s29, which allows the mortgagee's right to take priority, unless the beneficiary can prove that they have an overriding interest (schedule 3). The most relevant overriding interest is actual occupation (schedule 3 para 2). Yet, there exists a set of doctrines that alter this position to allow the mortgagee to regain priority.[161] It is to a selection of these doctrines that we now turn.

i. Acquisition Mortgages

The doctrine of acquisition mortgages essentially holds that when a property is bought with aid from a mortgage, neither the purchaser, nor any trust beneficiaries can argue that they had a pre-existing interest in the property that binds the mortgagee. Although Nair highlights the basic principles of the doctrine have their origins in the mid-nineteenth century,[162] the doctrine is most famously credited to the House of Lords Decision in *Abbey National Building Society v Cann.*[163] In *Cann,* a son bought a property for his mother and her partner to live in, it had been funded by both the mother and a mortgage from Abbey National (taken out by the son). When the son failed to pay the mortgage and it fell into arrears, Abbey National sought to evict the mother. In order to work out which party had priority, the courts had to determine whether the mother's or mortgagee's right was first in time. It was argued on behalf of the mother that there was a 'scintilla temporis' (slither of time) between the disposition and the creation of the charge, allowing her to be first in time. This argument was rejected by the House of Lords, with Lord Oliver stating 'the "scintilla temporis" is no more than a legal artifice'.[164] He thus found that the disposition and charge were part of the same transaction, given that 'the acquisition of the legal estate in entirely dependent upon the provision of funds' from the mortgagee.[165] This meant that the mother had no interest first in time that was capable of attaching to an overriding interest.[166]

[159] Land Registration Act 2002, s28.
[160] Implied trusts arise in a variety of contexts, including: resulting trusts (*Lloyds Bank plc v Rosset* [1990 UKHL 14, [1991] 1 A.C. 107) and common intention constructive trusts (*Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432).
[161] The focus will be on overreaching and acquisition mortgages, but other doctrines exist such as subrogation. See Matthew Conaglen, 'Mortgagee Powers Rhetoric', (2006) 69 MLR 4 for more examples.
[162] Aruna Nair 'Property, Priority and Apportionment: The Case of the Acquisition Creditor'[2022] 81(1) CLJ 139-164.
[163] [1990] UKHL 3, [1991] 1 AC 56, 93.
[164] ibid 92-93.
[165] ibid 92.
[166] Although it is noted on the facts, she that the mother was found not to be in actual occupation.

It is argued that this decision is based in policy rather than legal reasoning; as Smith suggested, 'the mortgagee wins because he is a mortgagee'.[167] Conaglen argues this is a justified position, as a mortgagor should not be able to claim priority where the property was only acquired due to the mortgagee's money.[168] Yet, as has been pointed out by Smith[169] and Nair,[170] this makes little sense as a justification given that the mother's money was also used to fund the purchase, so a causation-based argument falls flat. The harshness of the doctrine is further seen by the fact pattern in *Scott v Southern Pacific Mortgages Ltd.*[171] Although strictly obiter, the majority suggested that the principle in *Cann* applied to a fraudulent equity release scheme in which the vendor was entirely unaware of the mortgage. Lady Hale was clearly uncomfortable with this resulting stating 'there ought to be some middle way between the "all or nothing" approach of the present law'.[172] Looking at the cases of *Cann* and *Scott* reflect the clear prioritisation of the mortgagee's interest. It will be suggested below ways in which this doctrine can be reformed.

ii. Overreaching

Overreaching is an automatic mechanism by which certain equitable rights in land can be transferred from the land to the purchase money that has been paid. It requires a legal conveyance to two or more trustees (LPA, s2). Essentially, if the doctrine applies, a trust beneficiary loses their interest in the property and the interest is converted into a purely monetary interest instead. The injustice created by this doctrine can be seen by comparing the facts of *Williams & Glyn's Bank Ltd v Boland*[173] with *City of London Building Society v Flegg.*[174] In *Boland*, it was held that Mrs Boland's interest under a trust could take priority over the mortgage Mr Boland had secretly taken out as she was in discoverable actual occupation. In *Flegg*, money was paid to two trustees and thus overreaching occurred meaning the Flegg's beneficial interest could no longer bind via actual occupation. The Fleggs therefore lost the right to continue living in their home. *Boland* has been declared 'a resounding victory for women's rights' yet something so simple as having money transferred to two people can undermine it.[175]

Conaglen argues *Flegg* is a simple application of express statutory terms so cannot be used by courts to undermine the protection in *Boland* or stand for a broader policy point surrounding the preference of mortgagees.[176] It is suggested that although this may be true and the decision in *Flegg* was not policy motived in the way *Cann* was, the doctrine of overreaching still has a significant role in the protection and prioritisation of mortgagees. The merits of the doctrine in the commercial context where land is bought as an investment so there are potentially masses of beneficiaries

[167] Smith, 'Mortgagees and trust beneficiaries' (1990) 106 LQR 545, 548.
[168] (n 161), 595.
[169] (n 167).
[170] (n 162).
[171] [2014] UKSC 52, [2015] AC 385.
[172] ibid [122].
[173] [1980] UKHL 4, [1981] AC 487.
[174] [1987] UKHL 6, [1988] AC 54.
[175] Gray and Gray, Elements of Land Law (5th edn, OUP 2008), para 8.2.103.
[176] (n 161), 592-594.

is understandable. If the mortgagee (or subsequent purchaser) were required to deal with each of the beneficiaries, it would greatly hinder the alienability of land. However, overreaching, as seen in *Flegg*, also applies to domestic settings where there is as little as one beneficiary. When looking at the historical context of overreaching, it was designed in a time where assets held on trust were for investment purposes. [177] Whereas, in the modern era, trusts are commonly used in relation to domestic property.[178] Hopkins thus suggests there is inconsistency in the policy of legislation about the importance of the purpose of the trust.[179] It is thus suggested that the automatic nature of overreaching represents a clear prioritisation of the mortgagee's interests.

Part II: The Aftermath of the Priority Dispute

i. When the mortgagor/beneficiary has priority

Even when it is found that neither of the doctrines discussed above apply so the beneficiary has priority, the mortgagee's position is still privileged under the TOLATA regime.[180] TOLATA 1996 abolished the trust for sale and replaced it with a trust of land. Fox argues the shift to a trust of land was an acknowledgement that most co-ownership of property is for the purpose of providing a home rather than for an investment.[181] Yet despite this move, the application of the statute offers the mortgagee considerable protection. The mortgagee has the ability under s14 TOLATA to apply for the court for sale; The Court uses the s15 factors to evaluate whether a sale should be ordered. It is suggested that the courts have consistently favoured the interests of the mortgagee in this exercise. This is demonstrated by the leading case *of Bank of Ireland Home Mortgages Ltd v Bell,* where it was effectively held that it would be 'plainly wrong' for mortgagees to be kept out of their money indefinitely.[182] Dixon argues that *Bell* makes clear that a sale is very much the preferred option.[183] Yet as already emphasised, the purpose of TOLATA was seemingly to avoid this result. Even in cases hailed as a victory of the TOLATA approach, a sale was ordered, it became simply delayed. For example, in *Edwards v Lloyds TSB Bank* where the sale was postponed till the children reached majority.[184] It is also noted that the court has held it is not an abuse of process to sue the mortgagor i.e., the trustee on the personal covenant of the mortgage thereby making them insolvent meaning the far stricter provisions under s335A of the Insolvency Act apply.[185] Overall, case law suggests that even when the mortgagee has failed to obtain their priority (something

[177] Charles Harpum, Overreaching, 'Trustees' Powers and the Reform of the 1925 Legislation', (1990) 49(2) CLJ 227, 287-91.
[178] Given how you cannot co-own property without a trust, Law of Property Act 1925, s34.
[179] Nicholas Hopkins, 'Regulating trusts of the home: private law and social policy' (2009) 125 LQR 310, 320.
[180] This regime is used when the mortgagee does not have priority, when they have priority the default LPA rules apply.
[181] Lorna Fox, 'Creditors and the concept of 'family home': a functional analysis', (2005) 25(2) Legal Studies 201, 213.
[182] [2001] 2 ALL ER (Comm) 920, CA [31].
[183] Martin Dixon, 'To Sell or Not to Sell: That Is the Question, The Irony of the Trusts of Land and Appointment of Trustees Act 1996, (2011) 70(3) CLJ 579, 596.
[184] [2004] EWHC 1745 (Ch), [2005] 1 Fam CR 139.
[185] As directed by TOLATA s15(4). See *Alliance & Leicester v Slayford* [2000] EWCA Civ 257, [2001] 1 All ER (Comm) 1.

which is not difficult to do given how much the scales are tipped in their favour) - their interests are still privileged.

ii. When the mortgagee has priority

Given how extensively the mortgagees interests are considered under TOLATA, it could be assumed that the beneficiary's' interest would be given sustained consideration when the mortgagor has priority. However, this is not the case. There are several relevant statutory provisions in this area, but here the focus will be on the mortgagee's ability to achieve possession of the property once the mortgage has fallen into arrears. This reflects that the most common route for a mortgagee is to seek a sale of the property after acquiring it in vacant possession.[186]

The mortgagee has an immediate right to possession (LPA s87(1)). Although a mortgagee does not need a court order to obtain possession, they often do to avoid criminal liability under the Criminal Law Act 1977, s6. When the court is requested to make a possession order, the mortgagor of a home can seek to challenge this via the Administration of Justice Act (AJA) 1970, s36. Yet for two reasons, this offers little protection to a beneficiary. Firstly, a beneficiary is only entitled to make such a claim if they are the spouse of partner of the mortgagee (s30(3) of the Family Law Act 1966). This appears to represent a dichotomy Fox has highlighted between family home and home per se models. The former views the home in terms of the family unit, and thus reduces the beneficiaries – very often women – to their connection with their spouse/partner. The latter, the home per se, recognises autonomous individuals with their own legal right and personal connection to the property.[187] Secondly, it is possible to get possession without a court order, meaning there may be no ability for a beneficiary or the trustee to challenge this position. In *Ropaigealach v Barclays Bank*[188] it was held that s36 does not apply to out of court possession, and in *Horsham Properties Group Ltd v Clark*[189] it was held this was not against Article 1 Protocol 1 of the European Convention. This therefore indicates the limited rights beneficiaries have when a mortgagee has obtained priority.

iii. Human Rights

The limited ability for a beneficiary to challenge a mortgagee is highlighted by the very limited impact human rights law has had on this sphere. As Lees argued in the context of s36, human rights arguments have had no sway on the court's interpretation of statute.[190] Furthermore, given that we are dealing with a purely private and horizontal situation i.e., the state is not involved in the dispute between the mortgagee and the beneficiary, it is incredibly hard to argue that human rights are even applicable post the decision in *McDonald v McDonald*.[191] In *McDonald* it was held that in a purely

[186] Four-Maids Ltd v Dudley Marshall (Properties) Ltd [1957] All E.R. 35 "If it is desired to realize a security by sale, vacant possession is almost essential." [321].
[187] (n 181), 213-5.
[188] [1998] EWCA Civ 1960, [2000] QB 263.
[189] [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255.
[190] Emma Lees 'The Principles of Land Law (OUP 2020), 348.
[191] [2016] UKSC 28, [2017] AC 273.

horizontal repossession case, a proportionality analysis was not needed.[192] The judgement has been subject to extensive academic criticism,[193] in part for weakening the clear dictum of the Strasbourg Court in *McCann v UK* heralding that everyone facing eviction from their home has a right to challenge it. [194] Yet it was affirmed by the Strasbourg Court in *FJM v UK*.[195] Therefore, there is little hope for a beneficiary to argue that the inevitable loss of their home after the mortgagor defaults is a violation of their human rights.

Part III: Is the Favouring of Mortgagees Justified?

i. The Broken Scales

There an inherent policy tension between the prioritisation of a mortgagee versus trust beneficiariy's interest. The issue with favouring the mortgagee's interest is obvious; people lose their interest in their property. The issue with being too generous to the beneficiary is that banks may become more cautious with lending. As Cooke argues, protecting the mortgagee's interest has an overall net benefit, it makes loans less risky, bringing costs down and thus allowing 'countless underdogs, ordinary people buying their home'.[196] However, it is argued that it is not a given that land law must be based on economic efficiency. Fox argues that economic efficiency is only one aspect of the socio-economic context of conflicts involving the home.[197] Mallory argues that land law must also be embedded in social and community values which include respect for the home and the meaningful connection people have with it.[198] There is truth in this argument. Before the system of land registration, the key to title was possession i.e., people's actual connection to land.[199] The importance of possession is arguably at the root of the concept of adverse possession which is still permitted in a title by registration system.[200] Furthermore, it is suggested that the worry that a more balanced priorities process would lead to stagnation of the economy by reducing investment is not founded in legal history. *Boland*, the alleged high point of judicial activism in this area, did not have a substantial impact on mortgage policy. [201] Furthermore in the context of TOLATA, as Dixon points out, the bank has failed to obtain priority.[202] It seems unjust that despite this their interests are prioritised when the odds of the general law are clearly stacked in their favour in the priority dispute. When the default powers are used, the fact that a beneficiary who has no obligation to consent to a mortgage cannot challenge the position under AJA s36, nor are they likely to succeed in a human rights claim is unjust. Thus, it is argued that the privileging of mortgagees is not justified. A more human-focused, balanced approach should be adopted.

[192] ibid [40].
[193] See Sarah Nield 'Shutting the Door on Horizontal Effect: McDonald v McDonald' (2017) 1 Conv 60, 1-11.
[194] 19009/04, (2008) 47 EHRR 40.
[195] 76202/16, [2018] 11 WLUK 701.
[196] Elizabeth Cooke, Land Law (OUP 2006) pg 121.
[197] Lorna Fox, Conceptualising Home (Hart 2014), ch 3.
[198] Robin Paul Mallory, Law and Market Economy: Reinterpreting the Values of Law and Economics (CUP, 2000).
[199] Alain Pottage, 'The Measure of Land' (1994) 57(3) MLR 361, 361-3.
[200] See The Land Registration Act 2002, Schedule 6.
[201] Gray and Gray, Elements of Land Law (5th ed, OUP 2008), para 12.209.
[202] (n 183), 596.

ii. The Way Forward

A full analysis of all the options for reform is beyond the scope of this article, however, a way to reform each doctrine mentioned in this article is proposed:

- **Acquisition Mortgages** - Smith suggests a position that may operate as a compromise: according priority based on the sources of finance i.e., proportionate to their quantum.[203] Although he notes this seems to go against the general goal of the priority rules to entirely preference one rule over another, as Lady Hale alluded to in *Scott,* sometimes justice requires a middle ground.[204]

- **Overreaching** - There have been array of proposals to reform overreaching. The most realistic and in line with the general scheme of land registration is Owen and Cahill's proposal that trusts should be capable of protection by notice on the land register.[205] Alternatively, the Law Commission proposed in 1989 disapplying overreaching when there is a beneficiary in actual occupation who has not consented to the mortgage.[206]

- **TOLATA** - It is suggested that Parliament should legislate to prevent mortgagees from using the personal covenant to circumvent the statute, and perhaps reemphasise that the original purpose of TOLATA was to move beyond sale being the presumption.

- **Right to Possession** – It is put forward that there should be a mandatory requirement for possession and that beneficiaries should be able to challenge repossession under AJA, s36.

- **Human Rights** – As argued by Nield and Laurie, the applicability of article 8 to repossession cases should be possible in private, horizontal fact patterns.[207] Although, given the nature of the Human Rights Act 1998 the protection will not be identical, the current approach in McDonald is far too restrictive.[208]

Although these proposals may help reset the scales in individual circumstances, a more holistic project is needed to provide a substantive increase in protection to trust beneficiaries. It is suggested that there needs to be a Parliamentary debate about what the policy considerations are in this area and whether the current scheme adequately meets them.

[203] (n 167), 549.
[204] (n 171), [122].
[205] Dermot Cahill and John Owen 'Overreaching- Getting the Right Balance', (2017) 81(1) Conv 26, 25-44.
[206] Law Commission, *Transfer of Land: Overreaching: Beneficiaries in Occupation* (Law Com No 188,1989) Para 4.3.
[207] Sarah Nield and Emma Laurie, 'The Private-Public Divide and Horizontality in the English Rental Sector', (2019) Public Law 724, 724-26.
[208] HRA s6, creates the concept of a public body, thus implying there must be a difference in application. But the line of Strasbourg cases including *McCann* (n 37) appear to suggest human rights require some consideration in private cases.

Conclusion

This article has argued that Parliament needs to revisit the subject of the priority dispute between trust beneficiaries and mortgagees. The current state of the law allows the prioritisation of the mortgagee's interest at every stage of the process. It is suggested that on revisiting this subject, Parliament should focus on the normative policy decisions impacting the laws in these areas, focusing on the key dichotomy between economic and personal interests.

Intersectionality and the Law: Multi-ground Discrimination Claims, International Human Rights, and the Emancipatory Potential of Intersectionality in Law

Falyn Dwyer*

Abstract: *This paper analyses intersectionality and its implementation in the law. The paper begins with a brief history of intersectionality, highlighting its roots in Black, Indigenous, and Women of Color (BIWOC) feminisms and social movements, and follows with an overview of its institutionalisation in the law. Building off of Shreya Atrey's Legal Studies article, the paper engages different legal approaches to multi-ground claims of intersectional discrimination. While concurring with Atrey's assessment that American and British use of strict comparison in intersectional discrimination claims is untenable, the paper also counters her enthusiasm for the South African system's contextual approach. After discussing uses of intersectionality in the international human rights system, the paper concludes with suggestions for unlocking the emancipatory potential of intersectionality– namely, problematising the notion of legitimacy through incorporating feminist judging approaches and cultivating decoloniality in legal education.*

Introduction

Intersectionality, as Jennifer Nash explains, "has become a theory, method, and analytic used across the humanities and social sciences, and the primary way that so-called difference is theorised and described."[209] This "so-called difference" is too often used as a tool of discrimination. However, legal frameworks have yet to adequately address intersectional discrimination, thus far limiting the emancipatory potential of intersectionality. This paper analyses intersectionality and its implementation in the law. The paper begins with a brief history of intersectionality, highlighting its roots in Black, Indigenous, and Women of Color (BIWOC) feminisms and social movements, and follows with an overview of its institutionalisation in the law. Building off of Shreya Atrey's *Legal Studies* article, the paper engages different legal approaches to multi-ground claims of intersectional discrimination. While concurring with Atrey's assessment that American and British use of strict comparison in intersectional discrimination claims is untenable, the paper also counters her enthusiasm for the South African system's contextual approach. After discussing uses of intersectionality in the international human rights system, the paper concludes with suggestions for unlocking the emancipatory potential of intersectionality.

Part I: The History of Intersectionality

The history of intersectionality fundamentally centers on radically disrupting power structures. Coined by Kimberlé Crenshaw in 1989, intersectionality "stands for the idea that discrimination on the basis of multiple grounds signifies a distinct disadvantage which is both similar to and dif-

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[209] Jennifer Nash, 'Intersectionality and Its Discontents' (2017) 69 American Quarterly 117, 117

ferent from that based on individual grounds."[210] Focusing on the experiences of Black women, Crenshaw deployed intersectionality to explain that "sometimes, they experience discrimination as Black women– not the sum of race and sex discrimination, but as Black women."[211]

Though Crenshaw conceived the term, intersectionality took root much earlier. As early as 1851, Sojourner Truth's "Ain't I a Woman?" speech articulated BIWOC frustration with the erasure of their racialised experiences within liberal feminism.[212] The American social movements of the 1960s and 1970s, attenuated by the subordination of women of color, offered an ideal context for the elaboration of intersectionality's core ideas: social inequality, power, relationality, social context, complexity, and social justice.[213]

Frances Beal's 1969 essay, "Double Jeopardy: To Be Black and Female," provided key contributions to the idea of intersecting oppressions, critiquing patriarchy within the Black Power movement and racism within the women's liberation movement under capitalism. The Combahee River Collective's (CRC)"A Black Feminist Statement" in 1977 picked up on Beal's ideas while adding heterosexism as an intersection of oppression. It is recognised as the first document "to frame identity through an intersectional lens and to present identity politics as a vital tool of resistance."[214]

As Jens Theilen astutely observes, the use of intersectionality by the CRC embodied "their understanding of identity politics as a way of clearly setting their own political agenda based on their lived experiences as Black women as the basis of coalitional politics."[215] Coalitional politics are foundational to intersectionality– they recognise the contributions of women of color outside of Black feminism while centering the political nature of intersectionality and its indivisible relation to structural power. Yet, "intersectionality has increasingly been used in a depoliticised manner" to "speak of 'diversity' or even inequality instead of power relations or domination."[216] Despite its radical origins, "intersectionality has been invited to settle down within, instead of unsettling, the established frames of knowledge production and dissemination" in university and in the law.[217]

Part II: Strict Comparison: Multiple-Discrimination in the US and UK

Perhaps counterintuitively, the site of intersectionality's genesis is arguably the location of its most narrow legal application. In the US, the seminal test case of intersectional discrimination is *DeGraffenreid v General Motors*,[218] in which the District Court of Missouri "rejected that the 'last hired-first fired' policy of General Motors discriminated against Black women on grounds

[210] Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38 Legal Studies 379, 380
[211] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 U Chi Legal F 139, 149
[212] Sojourner Truth, 'Ain't I a Woman' (Women's Rights Convention, Akron, 29 May 1851)
[213] Patricia Hill Collins and Sirma Bilge, *Intersectionality* (2nd edn, Polity Press 2020) 73
[214] ibid 78
[215] Jens Theilen, 'Intersectionality's Travels to International Human Rights Law' 45 Michigan Journal of International Law (Forthcoming)
[216] Sara Salem, 'Intersectionality and its Discontents: Intersectionality as Traveling Theory' (2018) 25 European Journal of Women's Studies 403, 408, 406
[217] Collins and Bilge (n 213) 100
[218] *DeGraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976)

of race and sex."[219] Though GM did not hire Black women prior to 1964 and then laid off all Black women hired after 1970, the Court maintained that Black women "should not be allowed to *combine* statutory remedies to create a new 'super-remedy.'"[220] Applying strict comparison, by which it is necessary to find a comparator in order to show relative disadvantage in establishing discrimination, the Court ruled that because women– albeit *white women*– were hired before 1964, GM's seniority system did not perpetuate sex discrimination. The Court similarly found that race discrimination could not be construed differently for Black women and Black men, dismissing the matter in this instance. Thus, "the court refused to recognize the possibility of compound discrimination against Black women."[221] Since *DeGraffenreid*, US courts have admitted two-ground discrimination claims, but each ground must be proved individually.

The UK Equality Act 2010 seems to correct *DeGraffenreid*'s erasure of intersectionality, recognising "combined discrimination" in section 14.[222] However, not only is the provision "limited to direct discrimination based on an exhaustive list of protected characteristics, capping their number in a claim of 'combined discrimination'" to two, but the provision has never been brought into force.[223] Moreover, the UK uses the same strict comparison approach as the US, exemplified in *Bahl v Law Society*.[224] Dr. Kamlesh Bahl, a Black Asian woman who had served as the Vice President of the Law Society, alleged discrimination on the basis of race and sex in response to bullying complaints made against her. In parallel with the *DeGraffenreid* ruling, the England and Wales Court of Appeal chose to treat race and sex separately. Yet, in contrast to the *DeGraffenreid* ruling which evoked a comparator for each separate ground (white women for the sex discrimination claim and Black men for the race discrimination claim), Gibson LJ asked Bahl to show her disadvantage as a Black woman against a single comparator– a hypothetical white male in the position of Vice President. Ultimately, Dr. Bahl's complaint was dismissed "for failing to reveal discriminatory reasons for her treatment as either race or sex based."[225]

Despite their differences, both *DeGraffenreid* and *Bahl* failed in supporting intersectional claims. The salience of the similar and different patterns of disadvantage across intersecting identities is lost when claimants' group identities, through strict comparison, are considered separately. The judicial failure of strict comparison lies in disregarding the unique disadvantage experienced by multiply-burdened groups, as well as the possibility of recognising shared patterns of disadvantage across groups.

Part III: The Contextual Approach: South African Equality Jurisprudence

Atrey finds hope for the adjudication of intersectional claims in South Africa's contextual approach, which draws "on all relevant permutations of comparators" and examines "evidence…to

[219] Atrey (n 210) 385
[220] *DeGraffenreid* (n 218) 143 (emphasis added)
[221] Crenshaw (n 211) 148
[222] Equality Act 2010 (UK), s 14
[223] Atrey (n 210) 381
[224] *Bahl v Law Society* [2004] EWCA Civ 1070
[225] Atrey (n 210) 384.

draw conclusions about the nature of intersectional disadvantage suffered by the claimant."[226] Such an approach was employed in *Hassam v Jacobs*,[227] which challenged a statute excluding widows of Muslim polygynous marriages from intestate succession. The South African Constitutional Court compared widows in Muslim polygynous marriages to: widows married in terms of the Marriage Act, widows in monogamous Muslim marriages, widows in polygynous customary marriages, women/widows, Muslims, Muslim men, and persons in other kinds of relationships. The Court then "used comparative evidence in relation to these to establish similar and different patterns of group disadvantage leading to unfair discrimination."[228] In doing so, the "Court found that the impugned provisions constituted unfair discrimination under section 9(3) of the Constitution on the basis of gender, marital status and religion."[229] In contrast to the strict comparison approach, the use of comparison in *Hassam* provided comprehensive context, revealing similar and different patterns of group disadvantage "which are the crux of an intersectional claim."[230]

Atrey asserts that South Africa's success in employing a contextual approach to intersectional discrimination claims is rooted in its own legal context. Notably, section 9(3) of the South African Constitution prohibits the state from "unfairly discriminating *directly or indirectly* against anyone on *one or more grounds*." This recognition of direct and indirect discrimination on multiple grounds (that is, beyond the two-ground caps of the US and UK), is bolstered by a South African legal culture which considers "the right to equality and non-discrimination" to be "foundational to the broader transformative aims of the Constitution."[231] Going beyond "the equal treatment or equal opportunity model of discrimination law" contained in the US Civil Rights Act 1964 and the UK Equality Act 2010, the South African model "aspires to the equality of results."[232]

Yet, there is reason to temper Atrey's optimism for intersectional claims in the South African context. As Joel Modiri elucidates, two cases underscore a glaring lack of intersectional analysis in South African equality jurisprudence: *S v Makwanyane*[233] and *Prince v President of the Law Society of the Cape of Good Hope*.[234] In *Makwanyane*, the Constitutional Court found the death penalty to be unconstitutional. However, observing that the majority of those sentenced to death are Black and poor, the Court simply relegated race and class to part of the "myriad factors that *could* contribute to arbitrariness in the judicial application of capital punishment."[235] Such an analysis reduces the racial and class-based intersectional discrimination present in the application of capital punishment "to an aberration and inconvenience rather than an entrenched practice of

[226] ibid 393
[227] *Hassam v Jacobs* [2009] ZACC 19 (CC).
[228] Atrey (n 210) 390
[229] ibid
[230] ibid 389
[231] ibid 394
[232] ibid
[233] *S v Makwanyane* [1995] 3 SA 391 (CC).
[234] *Prince v President of the Law Society of the Cape of Good Hope* [2001] 2 SA 388 (CC).
[235] Joel Modiri, 'The Colour of Law, Power, and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 SAJHR 405, 425

subordination."[236] In *Prince*, the Court rejected the argument that Rastafarians, who use cannabis for religious observances, should be exempted from the general prohibition on the use of cannabis provided for in s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992. Prince, a member of the Rastafarian community, was thus barred from becoming an attorney. Notably, Rastafari is a religion practiced predominantly by Black people. Instead of recognising the intersectional racial and religious discrimination perpetuated by the cannabis prohibition, the Court upheld "systemic preference for values, belief systems and mores that correlate with…(white) western standards."[237]

Part IV: Intersectionality in International Human Rights Law

Limited recognition of intersectionality extends to an international scale. In *B.S. v Spain*,[238] a Nigerian Black woman employed as a sex worker in Spain was "insulted in anti-Black, sexist, and anti-sex work terms, and repeatedly physically assaulted" by police officers.[239] The ECtHR found a violation of Article 14 of the ECHR in its procedural aspect as "the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute."[240] Still, the Court refused to explicitly acknowledge intersectionality. More importantly, the Court failed to consider complaints of structural racism in the Spanish judiciary, naturalising "vulnerability as 'inherent' in the applicant's position," rather than something structurally produced.[241]

The ECtHR's decision in *B.S. v Spain* is paradigmatic of a general reticence to use the term "intersectionality" in human rights bodies' decisions on individual complaints. Though the Inter-American Court of Human Rights uses intersectionality more explicitly, most uses of the term in international human rights are found in treaty body recommendations and reports by expert groups and Special Rapporteurs. As Theilen observes, treaty bodies' recommendations engage with intersecting characteristics but fail to address the underlying discriminatory structures.[242] By contrast, expert groups and Special Rapporteurs tend to clearly cite power structures when analysing intersectional discrimination. For example, a 2019 report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, *Global Extractivism and Racial Equality*, explicitly notes that the extractivism economy "involves multiple intersectional social categories and structures of domination."[243] Notably, Achiume draws from the Zagreb expert group's report on intersectionality, which in turn relied on a background paper on intersectionality submitted by Kimberlé Crenshaw. Thus, we can trace the origins of Achiume's report, and its explicit engagement with intersectionality's scrutiny of interlocking power structures,

[236] ibid
[237] ibid 427
[238] *B.S. v. Spain* App no 47159/08 (ECtHR, 24 July 2012)
[239] Theilen (n 215) 26
[240] *B.S. v. Spain* (n 238) 62
[241] Theilen (n 215) 28
[242] See CERD Committee, General Recommendation no 32, para 7; CRPD Committee, General Comment no 1, para 35; CEDAW Committee, General Recommendation no 28, para 18
[243] E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Global Extractivism and Racial Equality*, para 18, U.N. Doc. A/HRC/41/54 (14 May 2019)

to the Black Feminist tradition.

Special Rapporteurs like Achiume are freer as *independent* experts to use intersectionality in challenging structural power relations. By contrast, treaty committees must work towards consensus when issuing general recommendations, and international courts like the ECtHR rely on domestic enforcement of their decisions. It follows that the human rights bodies less structurally engaged with intersectionality are those most constrained from challenging the legitimacy of established legal and epistemological frameworks. This constraint is similarly observed in the adjudication of intersectional discrimination cases in the US, UK, and South Africa discussed above. For this reason, unlocking the full emancipatory potential of intersectionality– that is, employing the concept to disrupt interlocking relations of domination– resides in problematising the notion of legitimacy.

Conclusion

To conclude, I offer two practical suggestions– first, incorporating Rosemary Hunter's feminist judging approaches; and second, cultivating decoloniality in legal education. Regarding feminist judging, it is particularly important to adjudicate *contextually*. Reminiscent of the South African Constitutional Court's approach in *Hassam*, Hunter urges judges to reason from context to "highlight the shortcomings of the current law" and incorporate "previously excluded experiences and perspectives."[244] Feminist judging also rejects the ostensible neutrality of the law in its creation and maintenance of power structures. Such disruption of legitimacy may begin prior to judging– that is, in legal education. Folúkẹ́ Adébísí emphasises contextualising legal knowledge's complicity in (re)producing oppressive structures embedded in the status quo.[245] Decolonial legal education requires recognising and challenging the intersectional "colonial matrix of power" reified by current, legitimised legal knowledge.[246]As long as impulses to work within legitimised legal and epistemological frameworks surround intersectionality, academic and legal institutions will "defer to power rather than [challenge] it, severely limiting intersectionality's transformative potential."[247] Though law may never be able to "dismantle the master's house," feminist judging and anticolonial legal education offer means to transform law from a tool of intersectional oppression to one of liberation.[248]

[244] Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), *Feminist Judgements: From Theory to Practice* (Hart Publishing 2010) 38
[245] Folúkẹ́ Adébísí, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (Bristol University Press 2023) 132
[246] ibid 129
[247] Theilen (n 215) 33
[248] Audrey Lorde, *Sister Outsider* (Crossing Press 1984)

Migrants' Rights in the United Kingdom – No Man's Land

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Abstract: *While the protection of migrants' rights exist on paper in the form of Article 8 of the European Convention of Human Rights, in reality, migrants have been actively otherised by the executive, and overlooked by a judiciary too afraid to counter the rhetoric of the executive. This article outlines the protective potential of Article 8, discusses the ways in which the judiciary has failed to protect migrants, and discusses what the path ahead may look like.*

Introduction

Immigration is one of the most politically charged aspects of human rights law. The political othering of migrants has long been evident in the rhetoric deployed by politicians – in 2011, whilst she was the Home Secretary, Theresa May highlighted the "absurd" consequences of the Human Rights Act 1998 for immigration,[249] while the UK Home Office has criticised "activist lawyers" for disrupting the Home Office's efforts to prevent migrants from remaining in the UK.[250] In 2022, then Home Secretary Suella Braverman asserted that there was an "invasion" of migrants on the South Coast of England.[251] The dehumanising language that lies behind exclusionary practices is founded upon the premise that migrants are a threat to society. Furthermore, as Colin Yeo argues, even in the rare instance where migrants are more accepted in society, they are often regarded as an "economic opportunity".[252] Whilst there is nothing inherently opposable in such framing, it often degenerates into treating migrants as a whole as a threat, with only the "exceptional" few being seen as a natural resource ready for exploitation.

In this context of political othering of migrants, it is easy to believe that the protection of migrants under Article 8 of the European Convention on Human Rights ('ECHR') was always illusory. This article will (i) challenge this claim, (ii) argue that courts are regressing from protecting rights and instead choosing to prioritise state sovereignty, and (iii) analyse the reasons behind this – while it is in part due to ability (as courts are limited by the legislation), an undeniable part is also the lack of judicial incentive.

Part I: Article 8

It is an overstatement to suggest Article 8 never provided a high level of protection for migrants.

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[249] Matt Zarb-Cousin, 'Theresa May caught lying about cats and immigration' (4 October 2011) <https://www.youtube.com/watch?v=qXM7DzeMLe4&ab_channel=MattZarb-Cousin> accessed 3 May 2024

[250] BBC, 'Home Office scraps 'activist migrant lawyers' clip' (London, 28 August 2020)

[251] The Guardian, 'Suella Braverman condemned for claiming asylum seekers engaged in 'invasion of south coast' – as it happened' (London, 31 October 2022)

[252] Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (1st edition, Biteback 2020) p.xxii

As Colin Yeo points out, discussing 'migrants' as a group is peculiar, as they are not a homogenous group.[253] While some migrants, particularly those who have committed offences, may indeed never have been offered a high level of protection, the same cannot be said of others, such as those regarded as "economic opportunity".

The potential degree of protection is evident from the way in which Article 8(1) has been interpreted. Should family life not be found to be established, the broader right to private life may be considered (*Slivenko v Latvia*).[254] In theory, this demonstrates the protective potential of Article 8(1) – should an interference be found, the question is whether the state can justify deportation. This recognition of private life is itself a significant novel development (Thym), corresponding to cultural-sociological findings about socially-embedded personal identities,[255] arguably making the ECHR more reflective of the lived experiences of migrants.

In family reunification cases, the European Court of Human Rights ('ECtHR') might also be prepared to find a positive obligation to grant family reunification when several circumstances are cumulatively present (*M.A.*).[256] For instance, although the applicant's residence may be unlawful (eg. *Nunez v Norway*),[257] consideration of multiple factors can allow courts to find a positive obligation. Thus, Article 8 did, at least on some level, offer migrants a high level of protection.

Part II: Regression

However, courts are regressing from the protection of rights. The prioritisation of state sovereignty is characterised as the Strasbourg reversal (Dembour), "[giving] pride of place" to state control,[258] which neither affirms human rights nor is in the ECHR itself. The court's prioritisation of state sovereignty is obvious from the way it unusually begins its reasoning with the principle that states have the right to control immigration policy and exclude migrants.

This can be seen in the court's at times absurd understandings of concepts related to migrants, particularly the narrow definition of family life, as previously outlined. The imposition of a Western view of the family (Peroni)[259] or culture with a different notion and tradition is indicative of the court's prioritisation of state sovereignty rather than the nuance of each individual applicant's case. In many instances, the family life provision is often found not to be engaged because of the ECtHR's (and domestic courts') narrow interpretation of 'family life'. Specifically, it has been

[253] ibid
[254] *Slivenko v Latvia* (App. No. 48321/99) (23/01/2002)
[255] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR' in Rubio-Marin (ed.), *Human Rights and Immigration* (OUP 2014)
[256] *M.A. and others v Lithuania* (App. No. 59793/17) (11/03/2019)
[257] *Nunez v Norway* (App. No. 55597/09) (28/06/2011)
[258] Marie-Bénédicte Dembour, *When Humans Become Migrants* (1st edn, OUP 2015)
[259] Lourdes Peroni, 'Challenging Culturally Dominant Conceptions in Human Rights Law: The Cases of Property and Family', 4(2) Human Rights and International Legal Discourse (2010)

restrictively interpreted as referring to the core or nuclear family. For instance, in *Savran v Denmark*, the applicant argued that his 'paranoid schizophrenia and low intellectual capacity' had left him particularly vulnerable, and he was dependent on his family in Denmark.[260] Nevertheless, the Grand Chamber refused to apply the family life provision, arguing that his family relations were merely 'normal ties of affection'.[261]

While the private life provision may potentially compensate for this narrow approach to family life (Thym),[262] the court's deference is evident in that in the absence of family ties, the state often succeeds at Article 8(2) in justifying interference (Desmond).[263] This deference to the executive indicates the courts' recession from rigorous protection of migrants.

This problem is exacerbated by the imposition of a domestic framework. *s*32 of the UK Borders Act 2007 allows automatic deportation if migrants are convicted of a criminal offence and sentenced to over 12 months, unless that would violate Article 8 (s33(2)(a)). Given the legislative desire to ride roughshod over migrants' rights, it is even more imperative for courts to protect migrants. The House of Lords retained a strong judicial role in early cases like *Razgar* (that courts will not simply defer to the executive)[264] and *Huang* (the courts' role is not a "mere reviewing function" but a "determination of legality").[265] However, this has receded. In 2012, the Immigration Rules purported to set out how Article 8 is to be assessed under s33(2)(a). *s*19 of the Immigration Act 2014 inserted the rules into the National Immigration and Asylum Act 2002. Following *Hesham Ali*,[266] courts have held these rules cannot be challenged as incompatible, The ECtHR has demonstrated similar deference, holding there must be "strong reasons" for them to intervene, such as if domestic authorities have not carried out the balancing exercise (*Unuane*)[267]; the decision is not sufficiently supported by reasons (*Savran*)[268] and there is inadequate reference to ECtHR caselaw (*Otite*).[269]

Although courts may have limited *ability* to manoeuvre, *incentive* of the courts may also be lacking. Rowe argues the judiciary have created a "zone of extreme deference", demonstrating "no backbone" against the government.[270] This is evidenced in *HA (Iraq)* where the Supreme Court held that the "weight to be given" to the *Boultif/Unuane/Savran* factors "falls within the margin of

[260] *Savran v Denmark* (App. No. 57467/15) (07/12/2021)
[261] ibid
[262] Thym (n 255)
[263] Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 European Journal of International Law 261-279
[264] *Huang v Secretary of State for the Home Department* [2007] UKHL 11
[265] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27
[266] *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60
[267] *Unuane v United Kingdom* (App. No. 80343/17) (24/11/2020)
[268] *Savran* (n 260)
[269] *Otite v United Kingdom* (App. No. 18339/19) (11/11/2022)
[270] Christopher Rowe, 'Falling into Line? The Hostile Environment and the Legend of the 'Judges' Revolt' [2022] 85(1) MLR 105, 107

appreciation"[271] – in favour of state sovereignty.

In the context of family reunification, courts have had the opportunity to find Appendix FM of the Immigration rules incompatible with Article 8 – only the relationship requirement has been deemed incompatible (*Quila*).[272] In *MM (Lebanon)*, the minimum income requirement was held compatible,[273] with the same pattern in *Ali and Bibi*[274] (language) and *Britcits*[275] (adult dependent relatives). The only migrants who are likely to succeed are those deemed to be "good migrants" (Yeo), with no need for recourse to public funds (E-LTRP.3.3(b)), and who can integrate thanks to their ability to speak English (E-ECP.4.1).[276] Even the exceptions to the rules are pitched at a high threshold, which Lady Hale held in *Ali and Bibi* to be indicative of a "balance".

Moreover, the ECtHR has been willing to find no violation as family life can continue at a distance (*Gül v Switzerland*),[277] or as the applicant had made a "conscious decision to live apart" (*Ahmut v Netherlands*).[278] These findings go against migrants' wishes, and at times, as in *Ahmut*, are so absurd as to raise a suspicion of discrimination (Judge Valticos' dissent).

The courts' deference to Appendix FM allows the state to curate 'deserving migrants', forcing others to make an "invidious choice" between moving elsewhere, conducting family life apart, or living illegally in the UK (Yeo).[279] Part of the reason for such deference is because the courts had previously been criticised (notably by Theresa May) for "sabotaging" immigration policy (following *Izuazu*). In *Agyarko*[280] and *MM*,[281] the SC thus deferred to the executive by assigning "constitutional responsibility" for immigration policy to the Secretary of State (Rowe).[282] As Kavanagh argues, this is because courts had to take into account 'adverse public reaction' and other prudential reasons. Given the legislation's stated aim of hostility towards protecting migrants' rights, and the court's deference to that, courts have regressed from the goal of protecting rights, in favour of state sovereignty.

Part III: The path ahead

Perhaps the deference is to ensure courts take a restrained approach to prevent political will in human rights from receding. However, the path ahead is bleak for migrants. Clause 8 of the pro-

[271] *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176
[272] *Quila v Secretary of State for the Home Department* [2011] UKSC 45
[273] *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10
[274] *Ali and Bibi v Secretary of State for the Home Department* [2015] UKSC 68
[275] *Britcits v Secretary of State for the Home Department* [2017] EWCA Civ 368
[276] Immigration Rules 2016, Appendix FM
[277] *Gül v Switzerland* (App. No. 23218/94) (19/02/1996)
[278] *Ahmut v The Netherlands* (App. No. 21702/93) (28/11/1996)
[279] Yeo (n 252)
[280] *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11
[281] *MM v Secretary of State for the Home Department* [2018] UKSC 60
[282] Rowe (n 270)

posed Bill of Rights will prohibit courts from finding deportation provisions are incompatible with Article 8 unless it results in "extreme manifest harm". The Illegal Migration Act 2023 will breach various international legal obligations (as Briddick[283] argued prior to the act receiving royal assent). Solomon describes it as "performative cruelty",[284] while Kavanagh suggests the government is being disingenuous with its claims of robust rights-compatibility.[285]

The courts' regression in favour of state sovereignty has allowed the state to ride roughshod over migrants' rights. Soon, it will be too late for courts to return to robust protection of migrants, even if they had the incentive to do so. Amidst this, one cause for celebration is that on 16 November 2023, the Supreme Court held that a controversial asylum policy, which would have sent asylum seekers to Rwanda, was unlawful.[286] While this is by no means unequivocal judicial support for migrants' rights, it suggests the appetite for change may be present. For Article 8 to truly protect migrants' rights, what is needed is a drastic shift in the way migrants are perceived in the legal system.

Part IV: An alternative approach?

Inspiration can be taken from the Inter-American Court of Human Rights, which actively adopts a significantly more pro-migrants' rights stance. Unlike English courts which proceed from the starting point of state sovereignty (the Strasbourg reversal discussed earlier), the Inter-American Court utilises a starting point of migrants' rights.[287]

Furthermore, apart from a reversal in its starting point, the judiciary also needs to be more willing to stand up to the legislature. Whilst it may be argued that the courts are unfortunately hamstrung by the tough line on immigration adopted by politicians, the Inter-American Court's decision in *Yean and Bosico*[288] shows it is possible for violations to be found even when a case is politically charged.

Taking reference from the Inter-American Court's approach, the Rwanda judgement might appear

[283] Catherine Briddick, 'Refugees, Deportation and Detention: The Illegal Migration Bill' (*Border Criminologies,* 10 March 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/03/refugees-deportation-and-detention-illegal-migration>, accessed 12 November 2023

[284] Rachel Solomon and Lee Marsons, 'How the Illegal Migration Bill Threatens Our Constitution' (*Public Law Project,* 15 June 2023) <https://publiclawproject.org.uk/blog/how-the-illegal-migration-bill-threatens-our-constitution/>, accessed 15 November 2023

[285] Aileen Kavanagh, 'Is the Illegal Migration Act itself illegal? The Meaning and Methods of Section 19 HRA' (*UK Constitutional Law Association*, 10 March 2023) <https://ukconstitutionallaw.org/2023/03/10/aileen-kavanagh-is-the-illegal-migration-act-itself-illegal-the-meaning-and-methods-of-section-19-hra/>, accessed 15 November 2023

[286] *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42

[287] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (IACtHR), 19 Jan 1984

[288] *Case of the Yean and Bosico Children v. The Dominican Republic* (Art 62(3) and Art 63(1) American Convention on Human Rights) Inter-American Court of Human Rights Series C No 130 (8 September 2005)

to suggest that judicial appetite for change is present. It is easy to celebrate the merits of that judgement, the significance of which should by no means be diminished. However, the militancy of the Inter-American Court's approach also comes with its own set of perils. In particular, judgements which are less deferential to the legislature may also further spark the ire of the legislature. For instance, one of the main institutional criticisms of the current legal system, according to Lady Hale (writing extrajudicially), has been the "mission creep" by the courts.[289] Given that governments often perceive enforcement and upholding of migrants' rights to be attacks on state sovereignty, following the Inter-American Court's approach would further heighten these existing institutional critiques against the human rights system. An overly expansionist approach to the ECHR may inadvertently reduce the amount of state consent to the system of human rights as a whole, as Bates argues.[290]

This tension gives rise to a wicked problem that lies at the core of migrants' rights, and broader still, the architecture of the entire human rights system – the protection of migrants' rights is often deeply politically unpopular. Where the legislature attempts to trample upon those rights, it ought to, in theory, be up to the judiciary to uphold the rights of the vulnerable. However, doing so may come at the expense of successful enforcement. At its heart, the legal issue plaguing migrants is the product of judicial deference to governmental policies intent on othering and excluding migrants. The best strategy, therefore, is one that requires courts to tap into the existing momentum in favour of migrant protection, to stand up to legislation and government policies.

[289] Rt Hon The Baroness Hale of Richmond DBE, 'Human Rights Act Reform: A Modern Bill of Rights' (2022) 3 ECHR Law Review 228

[290] Bates, 'Strasbourg's Integrationist Role, or the Need for Self-Restraint?' (2020) 1 ECHR Law Review 14-21

Rectification: Two Questions from a Civilian Perspective

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Abstract: *This article examines contract rectification from a civil law perspective. Two questions are explored: (1) Why are the grounds for rectification not addressed via interpretation? (2) When the terms of the written contract differ from the parties' common intention, what is the 'real' contract? It is suggested that contract interpretation differs between common law and civil law systems because they have unalike conceptions of what a contract is. This, in turn, helps to distinguish rectification from construction. While, under the common law, rectification covers grounds that have been excluded from interpretation, there seems to be little space for a similar remedy in civilian systems. Moreover, it is argued that rectification does not aim to extract the 'true' content of a contract but rather address particular scenarios where enforcing its terms would be unconscionable. This conclusion, in turn, exposes a tension within civilian contract law theory, where interpretation should not (but can) have the undeclared effect of modifying the terms of certain contracts.*

Introduction

To the civilian lawyer delving into English private law, there might be no more puzzling doctrine than rectification. A court-ordered modification of the terms of the contract seems, on its face, an oxymoron. A contract is the expression of the parties' common intention and the courts are required to enforce that intention through interpretation. The contract has normative value and its terms are binding upon the parties (*pacta sunt servanda*). Therefore, if the court is asked to modify the terms of the contract, it would be thought of as substituting the parties' agreement and exceeding its competence. That is why, perhaps, a civilian lawyer's first reaction to rectification is of reservation, if not shock.

Rectification, as defined by Leggatt LJ in *FSHC Group Holdings Ltd*, is 'an equitable remedy by which the court may amend the terms of a legal document which, because of a mistake, fails accurately to reflect the intention of the parties to it'.[291] The definition refers to 'documents' and not 'contracts' because wills and deeds can also be rectified. However, for the purposes of this article, I focus on contracts alone. In particular, I explore two questions that may help understand rectification better: (1) Why not resort to interpretation to correct such mistakes? (2) When the terms of the written contract differ from the parties' common intention, what is the 'real' contract? I do not aim to present a conceptual study of rectification nor delve into its grounds, bars, or consequences. Rather, I hope that it is an opportunity for the civilian and the common lawyer to better interrogate their theories by reflecting on their strengths and limitations. It is a way for both of us to see 'through the looking glass'.

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[291] *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365 [6]

Part I: Why not resort to interpretation?

If we acknowledge, as English courts have done for some time now,[292] that interpretation is not to be limited to the *literal* meaning of the words used in a contract, why should the court not 'correct' mistakes via construction? While this is indeed possible sometimes, as endorsed by Lord Hoffmann in *Chartbrook*,[293] there are at least two reasons why rectification is not subsumed by construction. A first, perhaps more 'substantive' reason, refers to the type of analysis the court is supposed to undertake in each case. A second, more 'pragmatic' justification, relates to the evidence that may be submitted in support of each choice of action. Although they are closely related, I will analyse each one in turn.

When construing a contract, a court is said to engage in an exercise of objective contextual analysis. According to Burrows, 'what is meant by the objective approach is that, *in general,* we are not concerned with what the person using the words actually (subjectively) intended by them nor with what the recipient of those words actually understood by them. (…) Rather, [English law] asks what a reasonable person in the position of the parties would have understood the words to mean.'[294] The relevance of this approach is that the court's interpretation may differ from what any (or all) of the parties had in mind when negotiating the contract. While the court should account for 'all the background knowledge which would have been available to the parties',[295] the *object* of inspection is not the parties' actual intention.[296]

The picture is not quite as clear for rectification. In *Daventry District Council*, the majority of the Court of Appeal seemed to endorse an 'objective' analysis of the mistake that may give rise to rectification.[297] However, in *FSHC Group Holdings* the court asserted that, in some cases, a 'subjective' test of the mistake should be applied.[298] Even though the distinction between these tests

[292] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896

[293] *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101. Citing from *East v Pantiles (Plant Hire) Ltd* (1982) 263 EG 61, Lord Hoffmann held that 'two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake' (at [22]). He added that 'in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context' (at [24]), as part of a broader exercise of construction.

[294] Andrew Burrows, 'Construction and Rectification' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007) 78

[295] *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [14]

[296] This approach to interpretation reflects the objective theory of contract in English Law: 'A significant emphasis laid on whether, when the facts are tested objectively, the parties can be said to have come to an agreement; and an objective assessment is made of the content of their agreement, and the interpretation to be put on the language by which it was constituted – whether through an objective interpretation of the communications between the parties which constituted the acceptance or an objective interpretation of the language of the document in case of a written contract.' John Cartwright, *Contract Law* (4th ed, Hart 2023) 70

[297] *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333. The majority's decision has been criticised for applying this sort of test, especially since it might have enforced a 'common intention' that was not really there because the parties did not agree upon what the court held was the rectified contract. See Gareth Stringer, 'Rectification: did the Court of Appeal get it wrong?' (*Thomson Reuters Construction Blog*, 7 Dec 2011) <http://constructionblog.practicallaw.com/rectification-did-the-court-of-appeal-get-it-wrong/>

[298] *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365

may be muddled,[299] it is not minor. Under a strictly subjective test, the court will try to identify what the parties understood the agreement to be, regardless of what a 'reasonable observer' would think of the words used.

Of course, the question is when the court will apply each test. It may be useful to briefly recall the ways that contract rectification can arise. On the one hand, (1) it can be grounded in *unilateral mistake*, where A was mistaken about the inclusion or exclusion of a provision in the contract and B, being aware of that, failed to correct A's understanding.[300] Alternatively, (2) it can arise from *common mistake*, where both parties had agreed upon one thing but the written contract recorded another. There seems to be an additional distinction within common mistake: whether (2.1) 'the document fails to give effect to a prior concluded contract' or (2.2) 'the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record'[301] (that is, in absence of a 'prior concluded contract').

Under the reasoning in *FSHC Holdings Ltd,* the court will undertake a *subjective* test in scenario 2.2 and likely also in scenario 1. To establish the existence of a (common or unilateral) mistake, it will scrutinise what the parties understood their prior agreements to be and compare them with the written contract. Conversely, in scenario 2.1, the court will *objectively* construe the previous contract and rectify the new one accordingly. While this explanation may seem like a puzzle itself, these criteria may not be that complicated. When a *contract* is being construed (whether it is a matter of interpretation *or* when rectification is based on the existence of a previous contract), the court will apply an objective contextual test. Meanwhile, when the court is looking at the parties' common (non-binding) intention, it will resort to a subjective analysis.

That is enough of the first distinction for now. The second reason why interpretation may not have engulfed rectification is more pragmatic but still closely related to the first. English courts, controversially, have refused to admit evidence of pre-contractual negotiations in proceedings regarding contract interpretation.[302] The reason was said to lie precisely in the objective nature of construction. If the parties *believed* a term to mean X, but the contract recorded Y, a 'reasonable observer' would not be swayed by their subjective opinions. Therefore, if a litigant is interested in having the judge see evidence of pre-contractual negotiations, she will want to pursue a rectification claim (either stand-alone or secondary to construction). It must be said, however, that it is not fully clear that admitting evidence of pre-contractual negotiations would necessarily be inconsistent with an objective contextual analysis.[303] Would such evidence not provide further 'context' for a rea-

[299] John Haydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths 2014) 934

[300] It is said that, for unilateral mistake to give rise to rectification, B's failure to correct A's mistake should come from *fraud* or *knowledge.* Although the orthodox view is that *actual knowledge* is required, some have argued that rectification should also proceed when B *ought to know* of A's mistake. See David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' [2008] 124 LQR 608

[301] *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365 [176]

[302] *Prenn v Simmonds* [1971] 1 WLR 1381 (House of Lords)

[303] For two different perspectives, see: Burrows (above note 4) and Paul S Davies, 'Rectification versus interpretation: the nature and scope of the equitable jurisdiction' [2016] 75 CLJ 62

sonable observer to establish the objective meaning of the text? Moreover, should the difference between two fundamental private law institutions be based on pragmatic concerns?

Upon this background, an insight from civil law may help. When construing a contract, the civilian lawyer is, first and foremost, searching for the 'true intention' of the parties. Legislation based on the Napoleonic Civil Code will usually contain a list of criteria that the court must follow to interpret a contract. These include a mix of subjective, objective, contextual, and literal analyses, from which (in an overly simplified way) the judge must 'choose' the most appropriate for each case. The first criterion is usually of the following sort: 'Once the intention of the contracting parties is clearly known, [the court] shall focus on it rather than on the literal meaning of the words'.[304] The most recent reform of the French Civil Code supplemented this rule with a subsidiary objective test: 'Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it'.[305]

There are other criteria: e.g., the contract's terms shall only be interpreted regarding its subject matter, the court shall prefer the sense in which a provision can produce effects over one where it does not, the contract's provisions shall be interpreted systematically upon each other, ambiguous clauses shall be interpreted against the party who drafted them and, residually, ambiguous provisions shall be interpreted in the debtor's favour. All of these are subordinated criteria since they either are meant to enlighten the parties' common intention or will apply when such intention cannot be clearly construed.[306]

It is possible to extract a preliminary conclusion from the foregoing. For the civil law tradition, there are *different valid ways* to interpret a contract but there is an order of preference among them. It is preferable for the judge to clearly establish the parties' common intention. If that is not viable (for example, if the terms are extremely ambiguous or there is no evidence of such 'real' intention), she can move further down the chain and apply other criteria to find the 'best possible' construction. Such a construction can be subjective, objective, or a combination of both. It should be noted, however, that the selection of criteria is not irrelevant. On the one hand, there is an obvious implication that choosing one over the other may result in different interpretive consequences and practical results, so litigants will dedicate significant effort to persuade the courts to adopt their preferred criteria. On the other hand, judges themselves may be inclined to choose the 'safer' (primordial) criteria, so that their decisions are less likely to be overturned by higher courts.[307]

By this point, the reader might also be able to guess that civilian systems would not bar the intro-

[304] Own translation. A version of this text is used in the French, Spanish, Chilean and Colombian Civil Codes, among others.

[305] Ordinance No. 2016-131, Art. 1188, New Provisions of the *Code Civil*, translated by John Cartwright, Bénedicte Fauvarque-Cosson and Simon Whitaker (Ministère de la Justice 2016)

[306] Council of State of Colombia, *Decision 21181* (24 May 2012) https://www.consejodeestado.gov.co/documentos/boletines/111/76001-23-25-000-1999-00272-01(21181).pdf

[307] For a controversial case on the matter, see decision SU-556/16 by Colombia's Constitutional Court. The court set aside an arbitral award where the panel residually interpreted an ambiguous clause in the debtor's favour after considering (incorrectly, according to the court) that other criteria did not provide a definitive interpretation: https://www.corteconstitucional.gov.co/relatoria/2016/SU556-16.htm

duction of pre-contractual evidence in favour of an interpretation claim. On the contrary, this type of proof is usually critical for its success. Taking into account the whole body of pre-contractual and contractual evidence, the litigants will attempt to show the court what the parties understood the language to mean in practice. In any case, the foregoing does not imply that evidence of the *internal* subjective intentions of a party will be pertinent for construction. Only *externalised* intentions are considered legally relevant given that contracts themselves are regarded as aggregations of externalised wills.[308]

From what I have mentioned it appears that rectification would play a very limited role in a legal system informed by the civilian tradition. The number of scenarios where the law of interpretation could not address what English law would consider to be grounds for rectification is extremely small – certainly small enough not to warrant a separate legal doctrine. However, this may not be a particularly interesting conclusion, as it is obvious that civil and common law systems have developed different theories to address relatively similar problems. A question would be more compelling. If, as argued by Dworkin, legal interpretation is always purposive,[309] the question should be: what is the purpose of interpreting a contract? The civilian lawyer might answer: to reinforce the parties' autonomy; to uphold a contract's normative nature; to avoid legal lacunas. Any of these may be the reason why interpretation rules aim to 'lift the veil' over the parties' 'true intentions'. I leave the question open to the common lawyer: *why* interpret a contract at all? The answer to this question might provide useful insight to support (or criticise) the common law's view on the extent and limitations of construction.

Part II: What is the 'real' contract?

This question might be more perplexing than the first. A contract is a contract, there should be no way around it. However, when there is a divergence between the parties' 'continuing common intention' before execution and the written contract itself, the question becomes relevant. Although he did not address this question directly, Lord Neuberger's dicta in *Marley v Rawlings* seemed to point to a similar dilemma when referring to the distinction between rectification and interpretation:

> '[I]t is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance)'[310]

[308] A different question is whether those *externalised* intentions must also be directly *communicated* to the other party. I do not delve into that discussion here. I am only distinguishing between an internal ('psychological') intention and one that is expressed somewhere. See Federico Arena, 'Intención, contratos e interpretación de textos jurídicos indeterminados' [2011] 35 *Isonomía* 53

[309] Ronald Dworkin, *Law's Empire* (first published 1986, Hart 1998) 58

[310] *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 [40]

It is perhaps useful to go back to the nature of rectification itself as an equitable remedy. As stated by Lord Briggs in *Guest v Guest*, 'one of the principal functions of equity is to put right injustice to which the law is otherwise blind, by restraining the rigid application of legal rules where their implementation would be unconscionable'.[311] Equity is said to supplement the rigidity of common law rules, or as put by Smith: '[l]aw is a first cut at guiding behavior, and equity is the fine-tuning – the ex post adjustment where the first cut doesn't work well'.[312] Rectification, as an equitable remedy, points to an area where the common law has been thought to be too rigid. In particular, rectification is usually based in that it would be 'unconscionable' (against good conscience) to enforce the terms of a written contract when either both parties had agreed to something else or one of them, being aware of the other's mistake, tries to enforce the contract as written.

The equitable nature of rectification is relevant to the question of what the real contract is. At law, there would be no point in distinguishing between the 'written contract' and the 'real contract', given that the 'written contract' is the only one there is. The common law does not recognise the subjective intentions of the parties as forming a contract that might differ from the written instrument. This is a consequence of the rule that an agreement, though necessary, is not sufficient to form a contract.[313]

Whereas this idea can be reasonably clear at law, it leads to a further question: would equity regard the original agreement as a contract? I venture a negative answer. Even though the practical effect of rectification may be to *enforce* the prior agreement, it implies a *modification* of the contract effected by the court. This view is supported by the fact that, like all equitable remedies, rectification is discretionary and thus may be refused by the court, e.g., when the mistake was caused by the claimant's carelessness.[314] When the court finds that it would be unconscionable to enforce the contract as written, it is not searching for its 'true meaning' but preventing a situation that it would deem to be substantively unjust because of a mistake.[315] Consequently, common lawyers have argued about what situations are unconscionable to warrant rectification. Is it taking advantage of someone else's mistake? Is it insisting on the enforcement of a written instrument knowing it differs from a previous agreement? Is it being forced to comply with a term you did not agree to?

Whatever way the common lawyer answers these questions, she might still be in a better position than the civilian lawyer. Indeed, asking 'What is the real contract?' reveals a tension within civilian theory. Contract formation is said to be relatively easy: for a majority of contracts, all that is required is an agreement upon an object; there is no need for consideration and most contracts have

[311] *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [4]
[312] Henry E. Smith, 'Equity as Meta-Law' [2021] 130 YLJ 1050, 1100
[313] Cartwright, *Contract Law* (4th ed, Hart 2023), 127
[314] *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333 [83] (Etherton LJ, dissenting)
[315] 'Unconscionability' has been given widely different meanings in English private law; using it as related to justice (as I do here) can be debatable. I do not defend a particular understanding of unconscionability, as long as it is agreed that its effect on this matter is to mitigate the applicability of common law rules when their full enforcement would be contrary to a particular moral standard (conscience, justice or something else). For a compelling take on the meanings of conscience, see Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' [2018] 77 CLJ 479

no formalities. Other elements, like capacity, legality of purpose and the existence of a 'cause' are regarded as *validity* requisites that would not strictly render the contract non-existent.[316] When this is the case, there is no problem with searching for the parties' true intentions outside of the contract's text.

However, the law can exceptionally regard a formality as *ad substantiam actus*: one that is necessary for a particular contract's existence (e.g. the sale of land). If this is the case, only the instrument that complies with the relevant formality is the contract and it can only be modified in such a way. Hence, a problem arises. As I have explained, when *interpreting* any contract, the judge will consider pre-contractual evidence in her search for the true intention of the parties. If, after doing so, she finds that such intention is clear and differs from the written instrument, the rules of interpretation would require her to uphold the former. This leads to having two rules clash against each other. The court would surely try to find an interpretation that can fit both, that is, a feasible interpretation of the written language that better reflects the intention of the parties. However, it would be difficult to affirm that only the written contract is the 'real contract' with the same confidence as in the common law. The true intention of the parties *is* the contract: for no other reason the judge would be tasked with finding it. So the civilian lawyer may be forced to concede that, at least in some cases, a solemn contract may exist outside of its relevant solemn form.

Conclusion

I have attempted to show how the equitable configuration of rectification and its differences with interpretation may stem from a particular idea of what a contract is. Equity needed a 'workaround' to the common law's rigid conception of a contract when its application would be unconscionable. Of course, one could question *why* the previous agreement should prevail over the written contract, awarding it a binding force that it supposedly did not have. Is it really unconscionable to rely on what was written on the contract? Is that not a contract's whole purpose? Civil law systems do not seem to face this problem because the idea of what a contract is, and therefore the role of the judge when interpreting it, appears to be broader. The judge will have to start from the text and then look for what the parties *really* meant. However, there is tension within this view. While the parties are only allowed to modify solemn contracts through the relevant formalities, they might not need to if their 'true intention' can be found somewhere else. Does any of this make either approach better? I doubt it. It does, however, reflect what each system regards as critical for the nature of a contract and the extent of its normative content.

[316] Henri Mazeaud et al, *Lecciones de derecho civil. Obligaciones* (trad. Luis Alcalá, Ediciones Europa-América 1969)

Procedure and Paradigm: Judicial Approaches to Climate Change in Greenpeace Norway and Smith v Fonterra

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Abstract: *This article will analyse differing judicial approaches towards the issue of climate change. It will compare the judicial approach taken in the case of Greenpeace Norway with the judicial approach adopted in the case of Smith v Fonterra. It will be posited that the approach in Greenpeace Norway focusses on procedural requirements set by the legislature and the Norwegian Constitution on the executive (the 'procedure' approach), whereas the approach taken in Smith v Fonterra revolves around how substantive legal principles can be developed to address climate-based injury (the 'paradigm' approach). It will be argued that whilst the procedure approach serves a useful role in holding the executive to broadly fair standards of good governance, where it cannot adequately protect citizens from climate-related harm, the paradigm approach, if available, must be adopted.*

Part I: Introduction

When faced with a crisis so polycentric and complex as climate change, it is hardly surprising that courts often defer either to the legislature and statutory regulation or to the executive and the realm of administrative decision-making. The underlying principle is often said to be the distinction between policy on the one hand, which involves a calculation of public costs and benefits best made by the legislature and the government, and principle on the other, which is to do with an individual's rights against others or against the state, and is best upheld by judges.[317] Decisions on how to approach climate change are, under this formula, the classic example of a policy choice, which invites increased judicial restraint – or, to use the language preferred by Lord Hoffmann in *Pro-Life Alliance*, the fact that an issue sits within the realm of policy makes it more likely that a court will determine it is within the province of the other branches of state.[318]

It follows that one of the major hurdles that climate litigants have to overcome is that of deference.[319] Recent cases demonstrate two possible ways in which this obstacle can be circumvented—or, more accurately, two contexts in which courts may more willingly set aside their restraint. The first, which could be termed the 'procedure approach', arises from the nexus of the *ultra vires* doc-

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[317] The classic exposition of this is in Ronald Dworkin, *Taking Rights Seriously* (2nd edn, Bloomsbury 1997) 38-45.

[318] "Independence makes the courts more suited to deciding some kinds of questions [matters of principle] and being elected makes the legislature or executive more suited to deciding others [matters of policy]. … when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law." *R (Pro-Life Alliance) v BBC* [2003] UKHL 23 at [76]. Whatever the idea of 'deference' connotes, it remains a useful shorthand for this pattern of judicial reasoning.

[319] This is also the case in derivative claims against corporations, wherein, provided a decision is not grossly irrational or taken in bad faith, judges prefer to leave decision-making to the directors, as I have argued elsewhere: Kaden Pradhan, 'Strategic Errors in Climate Litigation: *ClientEarth v Shell Plc & Others*' (2024) 1 Cambridge Climate Society Journal (forthcoming).

trine and institutional competence in procedure; the courts check administrative power by ensuring its exercise is undertaken in accordance with statutory process requirements. The recent decision of the Oslo District Court in *Greenpeace Norway*[320] is emblematic of this approach. The second context, which could be called the 'paradigm approach', involves fact-patterns which call upon the very highest courts to re-evaluate existing systems of common-law principle to accommodate the novel effects of the climate crisis. This is a far rarer species, but there are indications of this type of view in the recent New Zealand Supreme Court interlocutory appeal decision in *Smith v Fonterra*.[321]

Of course, deference can be circumvented in many other ways. The oft-celebrated *Urgenda* case adopted a rights-based approach to the adequacy of climate policy, driven by the ECHR.[322] The long-awaited *Advisory Opinions* from the International Court of Justice[323] and the International Tribunal for the Law of the Sea[324] will, it is hoped, clarify the position in international law and enable more judicial intervention in monist legal systems. The two approaches at hand, however, are useful in that they illustrate the broad compromise that prevails in this field. Whereas the procedural approach is readily adopted, as it is judicial review *par excellence*, it is often[325] restricted to modes of statutory interpretation that preclude substantive or merits-based review. Conversely, although the paradigm approach admits great flexibility in the evolution of existing principles, it is rarely available.

It will be argued in this article that both methods fulfil distinct and valuable functions, but that only the paradigm approach is capable of meeting the higher constitutional duty that the exigency of the climate crisis imposes upon the judiciary as an organ of the state.

Part II: The Decision in *Greenpeace Norway*

In 2021, Norway's net crude oil trade was -1,535.8 kb/d.[326] In other words, it effectively exported, on average, more than 1.5 million barrels every day. The same year, Norway was estimated to be the tenth-largest exporter of oil in the world.[327] Although the state has ratified the Paris Agreement, and the Norwegian Parliament has resolved to reduce emissions to net-zero by 2030,[328] it is far

[320] *The Greenpeace Nordic Association & Nature and Youth v The State (Ministry of Energy)* 23-099330TVI-TOSL/05. In this article, I will cite an unofficial translation of the judgment, procured by the plaintiffs: <https://www.greenpeace.org/static/planet4-sweden-stateless/2024/01/daf4fe59-oslo-tingretts-dom-og-kjennelse-18.01.2024-deepl-en.pdf> accessed 13 February 2024.
[321] *Smith v Fonterra Co-Operative Group Ltd & Others* [2024] NZSC 5.
[322] *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2006.
[323] *Obligations of States in Respect of Climate Change*, Advisory Opinion, ICJ Rep 2022-2023 (August 1) p 78.
[324] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Reports 2022, p 9.
[325] But not always—*Greenpeace Norway* itself hints at this; see (n 357) below.
[326] International Energy Agency, 'Norway Oil Security Policy' (IEA 2022)<https://www.iea.org/articles/norway-oil-security-policy> accessed 14 February 2024.
[327] Central Intelligence Agency, 'Crude Oil—Exports' (The World Factbook 2021) <https://www.cia.gov/the-world-factbook/about/archives/2021/field/crude-oil-exports/country-comparison> accessed 14 February 2024.
[328] International Institute for Sustainable Development, 'Norway Ratifies Paris Agreement, Promises to Go Carbon Neutral by 2030' (SDG Knowledge Hub, 2016) <https://sdg.iisd.org/news/norway-ratifies-paris-agreement-promises-to-go-carbon-neutral-by-2030/> accessed 14 February 2024.

from achieving that target.[329] It is safe to say that Norway's fossil fuels sector remains its greatest economic asset.

The industry is not, however, unregulated. According to the Ministry of Energy and the Norwegian Offshore Directorate, it is vital that "value creation from petroleum resources benefits Norwegian society as a whole. State management and control of the industry is therefore required".[330] This control is attained principally through the Petroleum Act 1996, which, along with its accompanying Regulations, detail a complex licensing framework that petroleum-oriented corporations must adhere to. Amongst other things, the Regulations impose a requirement that environmental impact assessments be carried out by the aspiring licensee.[331]

Section 22a outlines some of the necessary elements to a valid assessment, including the consideration of alternative solutions, emissions to air, sea and soil, licencing duties set by other laws, facilities for transportation and refinement, environmental monitoring, and emergency preparedness. These are designed to ensure that the Ministry of Energy is presented with a comprehensive and unbiased summary of potential environmental ramifications. The motive is good governance—if potential licensees are under a duty to evaluate and report possible issues, and are therefore prevented from concealing any risks associated with the project, those risks are less likely to come to fruition.[332] Following receipt of an impact assessment, the Ministry has the power within the Regulations to either approve or reject the application.

On June 29th, 2021, the Ministry sanctioned development of a major oilfield called Breidablikk. This was followed by approvals for the Tyrving and Yggdrasil oilfields in June 2023. In November of the same year, The Greenpeace Nordic Association and Nature and Youth (Young Friends of the Earth Norway) filed a lawsuit against the Ministry, claiming that all three decisions were invalid.[333] Their submissions included arguments based on the Petroleum Regulations, a relevant EU Directive, the European Convention on Human Rights, the Norwegian Constitution, and the UN Convention on the Rights of the Child.[334] The Oslo District Court heard the case, and Judge Lena Skjold Rafoss handed down her decision on January 18th, 2024. What is perhaps most striking about the judgment is that although plaintiffs' substantive human rights and constitutional contentions were detailed and rigorously argued, barely any attention is afforded to them.[335] Indeed, most of the decision is devoted to their procedural submissions[336]—which the Court ultimately upheld, declaring the decisions invalid on that basis.

[329] Sverre Alvik et al., *Energy Transition Norway 2021* (DNV AS 2021).
[330] Norsk Petroleum, 'The Petroleum Act and the Licensing System' (Norwegian Offshore Directorate and Ministry of Energy 2024).
[331] *Regulations to Act Relating to Petroleum Activities* (27 June 1997), Section 22.
[332] This logic is often used to justify the value of procedural fairness in administrative decision-making more generally: see, e.g., Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (OUP 1996).
[333] Greenpeace Norway, 'Media Briefing: The New Climate Lawsuit' (Greenpeace 2023) <https://www.greenpeace.org/norway/nyheter/klimaendringer/media-briefing-the-new-climate-lawsuit/> accessed 14 February 2024.
[334] *Greenpeace Norway* (transl.) (n 320) 21-27
[335] ibid at 3.8-3.9, principally.
[336] ibid at 3.2-3.7.

After summarising the background to the case and the relevant statutes, Judge Rafoss begins her material review with a restatement of the principle of deference: "The courts must be reluctant to overrule political considerations. The clear starting point is that it is the Storting [the legislature] and the Government that must make the political trade-offs and assess specific environmental measures".[337] Nevertheless, she remarks that "the courts, on the other hand, should not be reluctant to review the case processing [the procedure]".[338] In this case, this involves deciding whether the impact assessments were valid in law and could therefore lead to legitimate executive approval.[339]

In order to make this determination, the prior *Arctic Oil* case[340] is extensively referenced. That case consisted of a very similar challenge to *Greenpeace Norway*, but it failed before the Supreme Court on different grounds. Both the majority and the minority, however, made clear that any impact assessment made under s.22a of the Regulations "must include greenhouse gas emissions".[341] This arose from the public right to information relating to the environmental consequences of administrative decisions guaranteed by Article 112 of the Norwegian Constitution. The right in Art.112 thus requires that "the assessments … be objective and so comprehensive and complete that they are suitable for providing the public with real insight into the effects of the planned interventions".[342] This includes the combustion of fossil fuels outside of Norway: "if activities abroad that Norwegian [government decisions] have a direct impact on or can take action against cause damage in Norway, it must be possible to take this into account when applying Article 112 of the Constitution. One example is the burning of Norwegian-produced oil or gas abroad when it also causes damage in Norway".[343]

Importantly, although the Norwegian Constitution is used as an interpretative tool, the Court does not use it to found a substantive review of the decision: "the threshold for the courts to set aside a legislative decision or other decisions made by the Storting is very high … the Storting must in that case have grossly disregarded its duties under Article 112 … [but] The Court cannot see that these statements are of significance for the judicial review of the case management [sc., the procedure], which, on the other hand, must be thorough in this area".[344] As a result, Judge Rafoss concludes, "a real impact assessment must be carried out before approving a [development proposal], and … a real test must be carried out of whether approval would be contrary to Article 112 of the Norwegian Constitution. Such a real test requires that the consequences of combustion emissions and climate impacts are analysed".[345] Since no such analysis took place in any of the assessments, they were illegitimate.

[337] ibid at 42.
[338] ibid.
[339] Or legislative approval in the case of the Yggdrasil application, which was heard before the Energy and Environment Committee of the Storting.
[340] *Nature and Youth Norway & Others v The State (Ministry of Petroleum and Energy) ['Arctic Oil']* HR-2020-2472-P.
[341] *Greenpeace Norway* (n 320) at [68].
[342] ibid at 61, citing *Arctic Oil* at [255].
[343] ibid at 62, citing *Arctic Oil* at [149].
[344] ibid at 64-65.
[345] ibid at 69-70.

The Court also invalidated the assessments based on an EU Directive,[346] which "sets out assessment and information requirements for projects that may significantly affect the environment … It is specified that this includes 'air, climate (e.g. greenhouse gas emissions, effects relevant for adaptation)' … combustion emissions from petroleum extraction are such a significant and particularly characteristic consequence of such projects that they must clearly be considered indirect climate impacts within the meaning of the Project Directive".[347] The duties set by the Directive are also procedural ones, and do not invite the Court to undertake a substantive review. In fact, in this instance, the assessment obligations set in the Regulations and the Directive are practically identical. The Court's reasoning on both grounds was essentially the same, bar the constitutional input.

Part III: The Decision in Smith v *Fonterra*

An alternative judicial approach is revealed in the New Zealand Supreme Court's discussion of the climate crisis in *Smith v Fonterra*,[348] which involved a claim brought against a dairy cooperative at common law. The plaintiff, Michael John Smith, is of Ngāti Kahu and Ngāpuhi descent, and was the climate spokesman for the Iwi Chairs' Forum. He argued that the defendant, through its climate damage, was committing the tort of public nuisance, of negligence, or alternatively should be held responsible under a new ground of climate-related civil liability. His claim was struck out both at first instance and by the Court of Appeal, on the basis that it disclosed no reasonable chance of success. However, the Supreme Court allowed his appeal and held that he should at least be permitted a trial.

Noting that "real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue",[349] the Court considered four aspects of the claim: whether actionable rights had been tenably pleaded; whether an independently unlawful act or omission was required to engage public nuisance; whether the plaintiff had standing; and whether there was a sufficient causal connection between the alleged acts and the resulting harm.[350] In all four, the Court upheld the plaintiff's submissions—in many cases, diverging from the Court of Appeal's reasoning. The first three questions were dealt with quite briefly. Mr Smith had pleaded "the rights to public health, public safety, public comfort, public convenience and public peace", which were all tenable; the tort of public nuisance "can stand on its own two feet" and does not require an independent unlawful act; he had standing "because of his pleading of damage to coastal land at Mahinepua C in which he and others he represents claim both a legal interest and distinct tikanga interests".[351]

The most intriguing aspect of the judgment, however, comes from the Court's discussion of the final question, that of causation. This begins with a broad assessment of the evolution of the com-

[346] Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.
[347] *Greenpeace Norway* (n 320) at 80-84.
[348] *Smith* (n 321)
[349] ibid at [172]
[350] ibid at [144]-[145]; at [146]-[147]; at [148]-[152]; at [153]-[171].
[351] ibid at [145]; [147]; [152].

mon law. Although it "has not previously grappled with a crisis as all-embracing as climate change … in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents through the mechanisation of factories, transportation and mining. The law's response was a mixture of the flawed … and the inspired [citing *Donoghue v Stevenson*]".[352] This is followed by reference to several cases discussing the novel challenge of pollution and environmental damage through concurrent contribution,[353] concluding that "How the law of torts should respond to cumulative causation in a public nuisance case involving … newer [climate-related] harms … is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application".[354] The upshot of this analysis is that the plaintiff must be allowed a full trial where they can adduce further evidence to their claim. The merit threshold that must be crossed to defeat a strike out application is low—"the court may strike out all or part of a pleading if it 'discloses no reasonably arguable cause of action'"[355]—and that low bar is clearly met on these facts. What is more striking about this decision is the Court's discussion of how the common law develops to meet new threats. There is an acknowledgment that "The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge and change in a considered way … In this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application".[356] There is a strong sentiment that can be gleaned from these comments—that the New Zealand Supreme Court treats climate change as a justiciable challenge that the common law is capable of meeting through the evolution of established principles.

Part IV: Procedure and Paradigm

Greenpeace Norway and *Smith v Fonterra* therefore disclose two very different approaches to climate litigation and the climate crisis more broadly. Whilst the former is centred on procedural requirements set by the legislature and the Norwegian Constitution on the executive, the latter revolves around how substantive legal principles can develop to address climate-based injury. Both approaches — 'procedure' and 'paradigm' — are meritorious in distinct ways.

The procedure approach, for instance, is respectful of democratic principles, rooting any assessment of legality in the elected legislature and the Constitution, which is itself a democratically installed instrument. Moreover, it generally promotes consistency by ensuring that the assessment be made according to codified statutory terms and avoids imposing upon courts the difficult task of separating *ratio* from *dictum* in common law precedent.[357] Similarly, it keeps the judiciary within

[352] ibid at [156].
[353] ibid at [157]-[164].
[354] ibid at [166]
[355] ibid at [74].
[356] ibid at [172]-[173].
[357] With that said, *Greenpeace Norway* itself relied heavily on the interpretation of Article 112 in the *Arctic Oil* case. It is largely thanks to the clarity of *Arctic Oil* that the District Court could address the Article 112 point so confidently. It might be argued that the use of the Constitution as an interpretative tool supplies a substantive flavour to this

the bounds of its institutional competence,[358] as the conditions of lawfulness are set by a group with access to a broader range of expertise and information that allows them to make the public cost-benefit analysis for each measure more effectively—and the courts merely enforce those pre-determined conditions. Finally, it maintains the image, if not the spirit, of deference; whereas the courts would ordinarily afford latitude to the executive, under the procedure approach they can constrict or remove this flexibility by giving due regard to the legislative or constitutional will.

The power of this method is not to be underestimated. Indeed, it has been generally noted that procedural climate governance is on the rise in Europe.[359] This is hardly surprising in light of the advantages above. However, the scope of the procedure approach is still limited by the statutory or constitutional provision it is founded upon. The possibility of evolution or novel reasoning is slim, as these textual constraints will prevent the court from innovating, such that the role of the court is reduced to that of an enforcement machine labouring under the yoke of a supreme legislature.

It does not follow from democracy, or any other foundational ideal of the liberal state, that the judicial system should always act as a compliance mechanism and no more. Indeed, we return in this regard to the Dworkinian policy-principle divide.[360] In *Smith v Fonterra*, the plaintiff has a right not to suffer disproportionate harm in the exercise of his ordinary human freedoms. This right runs deeper than the surface policy considerations open to a legislative body. Even if that harm is closely related to a policy regime, the right to be absolved of it is still a matter of principle. If statute provides no route to vindicate that right, then the common law must rise to fulfil this function.

This is the value of the paradigm approach. Although it is, and will remain uncommon—the allure of deference can be overpowering to the ordinary judge, and often only the highest courts in non-civil jurisdictions can address novel situations in a paradigmatic way—the judiciary must not shy from its wider duty to protect the minority interest, manifest in the individual interest, especially where the fundamental right against injury is engaged. It is now considered axiomatic that climate change presents an existential threat to our species. It is therefore arguable that there is no greater issue of principle than this crisis.

Hence, I conclude that although the procedure approach will continue to play a useful role in keeping the executive to broadly fair standards of good governance, where it cannot adequately protect the ordinary citizen from climate-related harm, the paradigm approach—if available—must be

otherwise procedural example. The arguments on this issue are complex, and I cannot deal with them here. Suffice it to say that the margin of leeway that Constitution provides in terms of statutory interpretation is, in the Norwegian context, very limited, and so even if it exceeds the merely clarificatory realm and generates new legal principle, that principle would normally be a minor rider on the other conditions.

[358] Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2009).

[359] Kati Kulovesi et al., 'The European Climate Law: Strengthening EU Procedural Climate Governance?' (2024) J Envtl L. See also, in the British context, *R (Finch) v Surrey County Council & Others* [2022] EWCA Civ 187 on environmental impact assessments in the context of the aforementioned Directive (n 30), and *R (Friends of the Earth & Others) v SoS for Business, Energy, and Industrial Strategy* [2022] EWHC 1841 (Admin), enforcing the duties of the executive to report to the legislature.

[360] Dworkin (n 317).

adopted.[361] The common law is a vestige of authority in a rapidly diminishing sphere of judicial sovereignty, and the courts are under a constitutional duty to put this power to good use in urgent matters of principle. There is, I would argue, no better use than in climate litigation, especially where there is a demonstrable injury to an individual party.

To this end, the notion that climate change rests solely in the realm of policy is an illusion created by its complexity and polycentricity. Strip away the detailed carbon credits schemes, the intricate regulations of licensing protocols, the greenwashing and offsetting, and you are left with a person—a Michael John Smith; a Rikki Held[362]; a Kelsey Juliana[363]—suffering a harm that is as much an affront to their human dignity and integrity as any other rights violation. It would be unacceptable for that harm to remain unremedied because of deference. The duty of the courts is, in this regard, absolute.

[361] Where it is not available in the narrow sense of evolution of the common law, there may be other similar viable methods. The most striking successful claims come from human rights approaches, either derived from treaty obligations or from constitutional provisions: *Urgenda* (n 6); *Held v Montana* Mont Dist Ct CDV-2020-307; *Leghari v Pakistan* (2015) W.P. No. 25501/201. See further Annalisa Savaresi and Joana Setzer, 'Rights-Based Litigation in the Climate Emergency' (2022) 13(1) J Hum Rights and Envt 7-34. There is growing support for rights-of-nature approaches (*Declaration of Unconstitutionality: Law 406*, Panama Supreme Court, 28th November 2023), and, it is hoped, challenges founded in public international law (n 323; n 324).

[362] A plaintiff in *Held v Montana* (n 361).

[363] A plaintiff in *Juliana v United States* D Or 6:15-cv-01517.

The Dual-Use Dilemma: The Distinction Principle in the Military Use of Cyberattacks

Leo Lee*

Abstract: *The present article analyses the challenges of applying International Humanitarian Law ('IHL'), namely the principle of distinction to cyberattacks, particularly those that attack dual-use infrastructure. The article rejects the existing contention that cyberattacks post-date existing international legal regimes and should be exempt from the coverage thereof. Consequently, the analysis additionally discredits the notion that states should adapt strategies to accommodate cyber-technology and emphasises the importance of explicitly defining and protecting civilian infrastructure. Upon consideration of the dual-use dilemma, the author further clarifies the interpretation of an 'effective contribution' and 'definite military advantage' applicatory to dual-use objects in the principle of distinction. Ultimately, the author concludes that cyberattacks purely illuminate existing contention within these interpretative quandaries of distinguishing civilian and military infrastructure and emphasise the need to integrate technological advancements into existing customary values. Thus, the paper calls for normative monitoring by international organisations and advocates for states to establish a consensus on the minimum threshold of protection explicitly offered to civilian infrastructure.*

Introduction

With the advent of the "Information Age",[364] States that have become increasingly reliant on computer technology have also placed themselves in the predicament of technological vulnerability. As states depend on computing technology to efficiently facilitate civilian and military infrastructure, so have hostile actors taken advantage of the sophistication and capability of computer systems to mount attacks via cyberspace. Such operations are known as cyberattacks, which are frequently referred to for their dangerous potential against legitimate military installations, state systems, and most detrimentally, civilian infrastructure.[365] This is exacerbated by the interconnectivity between civilian and military assets in cyberspace, where military systems are cited to rely on commercial cyber-infrastructure notably navigation systems, energy production and telecommunication networks.[366]

This dynamic functionality of cyberattacks in warfare, infiltration and exploitation questions existing IHL, particularly the principle of distinction which governs state conduct on the battlefield in the event of an 'armed attack' by regulating the targets of warfare available to combatants. The principle has come into particular scrutiny when cyberattacks in current conflicts such as the

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[364] Manual Castells, *The Information Age: Economy, Society and Culture* (Blackwell 1997) 45.

[365] Scott Shackelford, 'From Nuclear war to Net War: Analogizing Cyber Attacks in International Law' (2009) 25(3).

[366] 'Questions and Answers: The EU Policy on Cyber Defence' (*European Commission - European Commission,* 10 November 2022) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6643> .

Russo-Ukrainian War are noted to target resources and services of fundamental importance to the civilian population.[367] Such frequent occurrences are of observable concern when international legal regimes are unable to differentiate between civilian and military infrastructure.

The "unsatisfactory reality"[368] of the situation thus arises where pre-existing archaic guidelines of the IHL must adapt to the characteristics of cyberattacks towards dual-use infrastructure. Given that civilian objects are ubiquitous in cyberspace, the majority of hardware and software used during conflicts, notably web browsers, operating systems and computer networks, are fundamentally civilian infrastructures.[369] Militaries utilise this existing civilian cyberinfrastructure for military use, creating 'dual-use targets' that serve civilian and military purposes.[370] This phenomenon has caused significant concern, provided that cyberattacks against digital services such as the internet or financial systems via non-physical avenues may similarly be as destructive as an attack that detriments physical civilian infrastructure.[371]

In light of this, this article contends that the principle of distinction nonetheless maintains the protection of civilian infrastructure, regardless of their involvement in the cyber domain. While the distinction principle faces its most significant challenge in adapting to the current technological evolution, namely dual-use networks, it successfully outlines the illegality of targeting protected civilian objects from harm through a reasoned interpretation of 'effective contribution' and 'definite military advantage'. Certain novel aspects of cyberspace however, do pose new and troubling quandaries, which is evident by the range of perspectives offered by existing cyberwarfare scholarship.

Part I: Identifying permissible objectives in the principle of distinction

Existing IHL treaties and customary law that establish the cardinal principle of distinction strictly limit belligerents to direct military operations against military objectives that are in nature contributory to a military purpose or a definite military advantage.[372] Codified by Articles 48 and 52 of Additional Protocol I of the Geneva Conventions, participants thus must respectively distinguish at all times between 1) civilian populations and military combatants, and 2) civilian objects and military objectives.[373] In the context of cyberattacks, the conduct of hostilities against the civilian population or infrastructure is particularly relevant. Under this principle, states ought to employ

[367] Kevin Woolf and Bryce Livingston, 'Dragos Analyzes Russian Programs Threatening Critical Civilian Infrastructure' (*hubdragos.com*, April 2023) <https://hub.dragos.com/hubfs/Dragos_IntelBrief_Russian-Programs-Threatening-Critical_Infrastructure.pdf>.
[368] Daniel B Silver, 'Computer Network Attack as a Use of Force under Article 2(4) of the United Nations Charter' (2002) 76 International Law Studies.
[369] Neil C Rowe, 'Challenges of Civilian Distinction in Cyberwarfare', in Ludovica Glorioso (ed), *Ethics and Policies for Cyber Operations*, vol 124 (2016).
[370] Zhixiong Huang and Yaohui Ying, 'The Application of the Principle of Distinction in the Cyber Context: A Chinese Perspective' (2020) 102 International Review of the Red Cross 335, 359.
[371] Winn Schwartau, Information Warfare: Chaos on the Electronic Superhighway (1994).
[372] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules* (Cambridge University Press, 2005).
[373] Protocols Additional to the Geneva Conventions of 12 August 1949 (adopted 8 June 1977) arts. 48 and 52.

cyberweapons that clearly distinguish between civilian and military infrastructure. Thus, by extension, indiscriminate cyberweaponry that is unpredictable or unable to distinguish civilian and military objectives is prohibited during *in bello* cyberattacks. It is established that the targets of a cyberattack are a discriminate concern stipulated by the IHL.

Nonetheless, when the means of cyberattacks target physical objects and cause physical damage on par with conventional kinetic weapons, there appears to be no significant controversy regarding the application of the principle of distinction.[374] For instance, cyberattacks from Russia that target a Ukrainian logistics transport and only cause military casualties,[375] with an assessment of its proportionality and legitimacy as a military objective, would be permissible under the principle of distinction without dispute. On the other hand, cyberattacks that target Ukrainian hospitals, places of worship, and installations containing dangerous forces (i.e Zaporizhzhia Nuclear Power Plant) or objects indispensable to civilian survival without any involvement with military combatants would clearly violate the principle of distinction.[376] From this line of analysis, cyberattacks against networks governing the functionality of these civilian objects are considered unlawful and violate the distinction principle. While cyberattacks that physically damage uncontested civilian infrastructure are distinguishable, the dual-use nature of cyberspace operated by a multiplicity of actors creates difficulty for IHL to continue upholding its distinction principle in cyberwarfare.[377] Civilian objects are given a negative definition: objects that are not considered military objects. Therefore, the notion of 'military objective' is critical as a direct determinate of a 'civilian object' pursuant to the principle of distinction.

i. Military Objectives

Military objectives are by nature valid targets and are considered legitimate targets as long as states have assessed the proportionality of the envisaged attack and have made necessary precautions for collateral damage. Military objectives are defined in Article 52(2) of the Additional Protocol I as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite advantage".[378] Military infrastructure and facilities that offer 'effective contribution' to the adversary and 'definite advantage' to the belligerent state in question are legitimate military objectives and therefore cyberattacks against them are thereby considered lawful. Nevertheless, it is frequently challenging to identify which objects, beyond these obvious examples, are used for military objectives.

The contention lies in ascertaining the nexus between the military object and the intention of

[374] Robin Geiß and Henning Lahmann, 'Cyber Warfare: Applying the Principle of Distinction in an Interconnected Space' (2012) 45 Israel Law Review 381.
[375] Grace B Mueller and others, 'Cyber Operations during the Russo-Ukrainian War' <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-07/230713_Mueller_CyberOps_RussiaUkraine.pdf?VersionId=BwNbsmkThLIPVpB0tctC59kwVpZ2aXeI> accessed 8 February 2023.
[376] Protocols Additional to the Geneva Conventions (n 373) arts. 39-41.
[377] Johan Sigholm, 'Non-State Actors in Cyberspace Operations' (2013) 4 Journal of Military Studies 1.
[378] Protocols Additional to the Geneva Conventions (n 373) art 52(2).

the adversary. The fundamental dilemma of determining the 'effective contribution' and 'definite advantage' is a crucial criterion to determine the legality of an object of cyberattack. The standard practice stipulates that compliance with the 'effective contribution' will generally result in a 'definite advantage', implying equivalent elements where one criterion effectively designates another.[379]

The limiting clause of 'effective contribution' notably requires that the prospective target aids in the execution of the adversary's military operations or otherwise directly supports their military actions. The International Committee of the Red Cross defines this clause narrowly and interprets 'effective contribution' as objects "directly used by the armed forces" (i.e. weapons and equipment), locations of "special importance for military operations", or objects intended for use.[380] For instance, denial-of-service attacks by Russia against Ukrainian command servers that overwhelm opposing coordinative capabilities to mount military operations would be assumed lawful.[381] In view of the limited collateral damage from a lack of access, the impact on civilians would be a minor inconvenience to civilian users.

Given the explicit reference to 'military action' as opposed to 'war-effort' or 'war objective', *one perhaps can consider articulating limiting principles in reference to the war-sustaining position for military action*. The article posits that energy or economic targets are therefore non-targets by this nature. The 'nature' of the objective requires that the material of the object is of actual military value to the adversary's military action. Thus, states must have verifiable and objective knowledge of the adversary's intention of making use of such a military object, to consider the object to be a legitimate target. The burden of proof, therefore, follows the cyber-attacker as they must present justification for attacking military objectives that 'effective[ly] contribute' to cyberinfrastructure indispensable to the survival of civilians.

ii. Civilian Objectives

Given its customary status, it is axiomatic that objectives that are only military in nature are susceptible to lawful attack in the course of an armed conflict. Contrarily, non-military objects are protected and afforded immunity from cyberattacks. The definition of civilian objectives thus follows a negative interpretation, and the prohibition of attacking such infrastructure is absolute. Specifically, Article 51(1) stipulates that "civilian objects shall not be the object of attack or of reprisals."[382] Additionally, the Hague Convention IV Article 25 prohibits the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings that are undefended.[383] The question of

[379] Claude Bruderlein, Yoram Dinstein and Bruno Demeyere (eds), *Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press 2013).
[380] 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (1986) 26(254) International Review of the Red Cross 279.
[381] Arie J Schaap, 'Cyber Warfare Operations: Development and Use Under International Law' (2009) 64 Air Force Law Review 121, 158.
[382] Protocols Additional to the Geneva Conventions (n 373) art 52(1).
[383] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land The Hague, 18 October 1907 art 25.

targeting civilian objectives, albeit seemingly transpicuous, upon closer inspection, is found to be subject to interpretation. As highlighted above, the permissive standards for discriminating civilian objects from military objectives are continuously a contentious point of analysis that obscures the distinguishing feature between civilian objects and military objectives.

This is particularly noticeable within the cyber domain where all civilian cyberinfrastructure has military potential. Civilian technology fundamentally exists within the larger infrastructural network that can be used interchangeably as a military resource.[384] This is contrasted with physical infrastructure where significant resources ought to be expended to adapt the civilian infrastructure for military use.

However, it is also notable that cyberspace is as highly resilient as it is adaptable. The interconnected nature of the cyberdomain means that there are various alternatives to attack. Considering this even in explicit scenarios where civilian cyber objectives contribute significantly to an adversary's military operations, their destruction would not offer a definite military advantage per Article 52(2) because it would not significantly impede the enemy's ability to conduct cyber operations.[385] The enemy can simply utilise other aspects of cyberspace to realise its military objectives; there is an insufficient detriment to military capability to attribute a military advantage to the attacker. States are thus limited from targeting civilian cyberinfrastructure that is individually inconsequential and replaceable. On the other extreme, if the sole destruction of civilian cyberinfrastructure (i.e. the internet) would completely decimate the opponent's military capabilities, the consequences of an attack are wide-ranging and are hardly measurable enough to offer a concrete determination of a military advantage. Hence, the customary prohibition of cyberattacks against civilian infrastructure is not exclusive to the magnitude of the operation but rather a consequence-based determination of adversarial intention.

The significant repercussion of this principled understanding is that the targeting of cyberattacks undertaking attacks with the primary intent of terrorising the civilian population, albeit via the destruction of infrastructure, is unlawful. Although the assailant has sufficient reasoning to expect that the terror campaign will offer a military advantage by demoralising the civilian population, the cyberattack would fail the 'definite' test since its established intention is to the civilian population rather than a military advantage.[386] At the most significant consideration, there is an indirect linkage between morale and the perseverance of adversary in its military campaign. The interdiction applies at all times when civilian-related objectives are the intended targets of attack. Dual-use infrastructure, while partially civilian, will be subject to further analysis below—but will nonetheless be primarily prohibited by intention.

Part II: Dual-use Infrastructure

In the circumstance where the dual-use object makes an effective contribution and a definite mil-

[384] "There simply is no difference between a military and a civilian computer" Geiß and Lahmann (n 374) 389.
[385] ibid.
[386] F Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed, Cambridge University Press 2011).

itary advantage, its secondary military use may redefine civilian objects as legitimate military objectives.[387] Consequently, the *sui generis* nature of dual-use targets complicates the principle of distinction, where the lack of distinguishable military objectives in cyberspace creates significant regulatory and interpretative issues.

In the traditional ambit of the distinction principle, the 'dual-use' label is primarily concerned with essential infrastructure such as electricity-generating installations and oil-refining facilities that simultaneously serve civilian and military purposes. Since the proliferation of cloud computing technology, which allows for the simultaneous storage of civilian and military data, civilian systems can be made use of even if only to facilitate a cyberattack.[388] Following this line of analysis, unless an attack originated from a military computer and has travelled solely over military communications to an enemy's military communications network, it will at some point be conducted by some medium that is civilian in nature and therefore, involves civilian objects. This dual-use character of informational technology raises key issues on the extent to which civilian infrastructure is to be considered military by nature.[389]

While cyberattacks are cited to be more humanitarian than kinetic military operations, the problem of abuse is evident. Due to increasing leniency given to the non-lethal nature of cyberattacks, illegal dual-use targeting would occur more frequently with cyberattacks than with traditional kinetic attacks, such as shutting down an entire communication network.[390] This is accentuated by the fact that the attacking state makes the assessment of whether the target is a legitimate military objective, rendering the military status of a target readily exploitable. This permissive understanding of Article 52(1)[391] thus invites an overemphasis on technology and would, as a result, be to the detriment of the distinction principle. Considering that military information and communications are military targets, cybernetworks themselves are subsequently military targets due to their communication capabilities. With the lack of technological capacity to distinguish between military and civilian objects, according to the general consensus one would have to assume that these objects are potential military objectives.[392] Without implicit prohibition against cyberattacks against civilian systems, scholars pragmatically assert a consequence-based test in tandem with the proportionality principle: as long as the final destination is a valid target, legal regimes will turn a blind eye to potentially impacted secondary targets.[393] It can be said that the IHL favours the cyber attacker, granting justification based on military contribution and advantage to the attacker

[387] Jeffrey TG Kelsey, 'Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare' (2008) 106 Michigan Law Review 1427.
[388] JP Terry, 'The lawfulness of attacking computer networks in armed conflict and in self-defense in periods short of armed conflict: what are the targeting constraints?' (2001) 169 Military law review 70.
[389] Eric Talbot Jensen, 'Unexpected Consequences From Knock-On Effects: A Different Standard for Computer Network Operations?' (2003) 18(5) American University International Law Review 1145.
[390] Schaap (n 381).
[391] Protocols Additional to the Geneva Conventions (n 373) art 52(1).
[392] Emily Haslam, 'Information Warfare: Technological Changes and International Law' (2000) 5 Journal of Conflict and Security Law 157, 172.
[393] D Fleck, 'Searching for International Rules Applicable to Cyber Warfare--A Critical First Assessment of the New Tallinn Manual' (2013) 18 Journal of Conflict and Security Law 331.

rather than its potential damage to civilian infrastructure and life. This contravenes Article 52(3), which stipulates that "in case of doubt whether an object which is normally dedicated to civilian purposes…is being used to make an effective contribution to military action, it shall be presumed not to be so used."[394] Where uncertainty remains, the belligerent state has the legal obligation to assume civilian status. Given the interconnective nature of dual-use infrastructure, one can assume that civilian objects 'normally dedicated to civilian purposes' that are simultaneously a military objective would be considered 'doubt[ful]' and thus be considered for civilian status. Nevertheless, it is acknowledged that the 'case of doubt' has not acquired the status of customary practice; in any case, if a state deems that the civilian cyberinfrastructure is undoubtedly an 'effective contribution' to military action, the principle is rendered inapplicable.

Considering these issues, this article submits that the distinction between dual-use infrastructure ought to be made on the basis of the object to be protected.[395] The principle of distinction is designed to prohibit attacks on civilian infrastructure. Therefore, attacking a dual-use facility if the anticipated tangible military gain is outweighed by anticipated civilian damage should be forbidden based on its civilian significance. Fundamentally, the aggressor has no obligation to delay its cyber operation until a civilian objective is used for military ends.[396] Consequently, the purpose of a cyberattack is frequently determined by the adversary's known intentions.[397] As a crucial indicator of intention, the threshold of harm is subsequently an element of assessing the military status of a dual-use object. For instance, a state's aim of shutting down an economy's communication network within minimal military presence is illegal given that its harm would amount to a much greater detriment to civilian function rather than a military benefit. One can utilise the results-based test to find that the objective would be heavily predicated on civilian morale rather than a legitimate military objective.[398] Thus, the establishment of an enemy's intentions should be a critical consideration of the legality of cyberattacks; simply speaking, to undermine political support via a series of generalised attacks would not amount to the threshold of legality. There is a delicate line between massively disruptive cyberattacks and those that result in death, devastation, or that have a negative impact on military operations.[399] During a commander's mission planning process, specific legal difficulties posed by particular dual-use targets should be considered on an *ad hoc* basis with sufficient intelligence indicating the actual and definite military benefit from a cyber operation.[400]

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[394] Protocols Additional to the Geneva Conventions (n 373) art 53(2).
[395] Haslam (n 392) 173.
[396] Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2.1 ed. 2010).
[397] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd eedn, Cambridge University Press 2016).
[398] Roger D Scott, 'Legal Aspects of Information Warfare: Military Disruption of Telecommunications' (1998) 45 Naval Law Review 57.
[399] David Turns, 'Cyber Warfare and the Notion of Direct Participation in Hostilities' (2012) 17 Journal of Conflict and Security Law 279, 296.
[400] ibid.

Conclusion and lex ferenda recommendations

Considering the existing contention amongst scholars, it has been argued in this article that deciding whether technical advancements call for a change in the law is a matter of legal interpretation. States need to accept the interpretative premises that challenge the traditional considerations of armed attacks and their consequences on military and civilian objects. The present analysis has individually addressed the different destructive effects of cyberattacks, notably their kinetic, economic and non-physical damage on physical and cyberinfrastructure alike. With this basis, this paper concludes that the consideration of cyberattacks is an objective determination under the consequence-based analysis of 'attack', 'effective contribution' and 'definite advantage' under the principle of distinction. Simply speaking, the international community must agree on the minimum threshold of protection afforded to civilian and dual-use objects. The issue of cyberattacks illuminates existing contention among the applicability of the distinction principle on dual-use objects (i.e. the precise definition of a 'definite military advantage').[401]

In this quintessential respect, there is no difference between cyberattacks and any type of military operation. The cyberattack must be considered through the threshold of 'attack' to be considered under the IHL and must distinguish between civilian and military objects that give rise to military advantage. The notion of using cyberattacks as a means to challenge existing customary norms and to render IHL irrelevant must be robustly and resolutely resisted. Without an agreed consensus on the applicability of the distinction principle, current customary humanitarian norms during armed conflict would be called into doubt. The problem of incoherency among nations is evident in the U.S. rejection of the 'case of doubt' principle attributed to dual-use objects. The non-applicatory nature of cyberattacks in the context of the principle of distinction would reveal a precedent for technological attacks sanctioned by international law. The present analysis hence argues in favour of applying the law of armed conflict to cyberattacks against those who submitted that cyberspace renders the IHL irrelevant.

[401] Haslam (n 392).

The Significance of Restructuring English Abortion Law in a Rights-Based Paradigm

Marno Swart*

Abstract: *The regulation of abortion in England and Wales is outdated; intended as a paternalistic instrument by which indigent women are spared the consequences of their indiscretion. This article argues that English abortion law – which is premised on abortion as a criminal act – should be reformed to articulate abortion regulation within a rights-based paradigm. Although it is conceded that the law currently does not impede considerably women's access to abortion, the legislative text should embody the values held by society which underlie access to abortion. The argument is made first with reference to international legal instruments, referencing the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on the Elimination of all forms of Discrimination Against Women, 1979, and the Council of Europe Resolution on Access to Safe and Legal Abortion in Europe, 1607 of 2008. Secondly, the importance of decriminalisation is argued from a social viewpoint, referencing women's autonomy, destigmatising abortion, and the importance of aligning the law with public opinion. This article does not evaluate the application or content of a proposed legal reform. Instead, only an argument for the decriminalisation and reframing of abortion law within a rights-based paradigm is put forward.*

Introduction

The moral and legal permissibility of abortion is a topic fiercely contested in medical law and ethics.[402] This article argues that English abortion law should be decriminalised and restructured in a rights-based paradigm. Although the application of the law, as it currently stands, does not impede significantly women's access to abortion, it is essential that the normative text embody the values held by society which underpin access to abortion.

First, the legislative framework regulating English abortion law is canvassed to contextualise the article's argument. Second, the relevant determinations of international human rights law – representative of the broad moral and legal beliefs held by nations akin to the United Kingdom (UK) and to which the UK is bound – are discussed and will indicate that English abortion law might comply with the letter, but it does not conform to the spirit of these provisions. Third, an argument is advanced on the social importance of reforming English abortion law in line with a rights-based approach.

It is important to note that the article does not suggest any substantive change to the application or content of the current legislative framework on abortion. It is outside the scope of this analysis to consider a full reform; instead, it is argued that the options currently available to women in regard to the termination of pregnancy ought to be decriminalised and reframed in a rights-based

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[402] Imogen Goold and Jonathan Herring, *Great debates in medical law and ethics* (2nd edn, Palgrave 2018) 149.

approach to the termination of pregnancy.

Part I: Abortion law in England and Wales

Statutorily, abortion has been regulated in English law since 1803.[403] Indeed, sections 58 and 59 of the Offences Against the Person Act, 1861 (OAPA) form the foundation of English abortion law by criminalising the procurement of abortion for the pregnant woman and any person that might assist her in that endeavour.[404] Laurie, Harmon and Dove point out that OAPA does not mention the value of foetal life and primarily was promulgated to protect women's health.[405] It is with the adoption of the Infant Life (Preservation) Act of 1929 (ILPA) that an offence of 'child destruction' for foetuses killed after reaching viability was created.[406]

Following the seminal decision in *R v Bourne*[407] where Macnaghten J first recognised certain exceptions to the criminality of abortion, the Abortion Act of 1967 (Abortion Act) was promulgated.[408] In the terms of the Abortion Act, a woman may procure an abortion lawfully provided that 'two registered medical practitioners are of the opinion, formed in good faith' that one of the four statutory exemptions is met.[409] It is conceded that the grounds of justification – especially section 1(1)(a) – in the Abortion Act are sufficiently broad to ensure that most women in England and Wales will be able to procure an abortion on request before 24 weeks gestation.[410]

Nevertheless, it is important to understand that English abortion law – in terms of OAPA and ILPA – views abortion *prima facie* as unlawful and thus is criminally sanctionable.[411] It is only as an exception to the premised illegality that abortions may be procured under the Abortion Act.[412]

Part II: International human rights law

Below, English abortion law as set out under section 2 is evaluated against the determinations of two significant human rights treaties, namely the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and the Convention on the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW). Thereafter, the Council of Europe's Resolution on Access to Safe and Legal Abortion in Europe is discussed briefly. It should be noted that these are not the only international human rights instruments supporting a rights-based approach to abor-

[403] Emily Jackson, *Medical law: Text, cased and materials* (6th edn, Oxford University Press 2022) 771.
[404] See sections 58 and 59 of OAPA.
[405] GT Laurie, SHE Harmon and ES Dove, *Mason and McCall Smith's law and medical ethics* (11th edn, Oxford University Press 2019) 310.
[406] ibid.
[407] *R v Bourne* [1938] 3 All ER 615.
[408] ibid at 617–619; see also the discussion in Laurie, Harmon and Dove (n 4) 311.
[409] Section 1(1) of the Abortion Act.
[410] The therapeutic and social grounds for abortion – recognised under section 1(1)(a) of the Abortion Act – account for most abortions and is a threshold easily met. See the discussion by Laurie, Harmon and Dove (n 4) 311 footnote 123.
[411] See sections 58 and 59 of OAPA and sections 1(1) and 1(2) of ILPA.
[412] Section 1(1) of the Abortion Act specifically creates an *exception* to the crime of abortion, as created by sections 58 and 59 of OAPA.

tion;[413] it is beyond the scope of the present analysis to analyse all instruments of international law applicable in this area.

It is argued, although English abortion law complies with the letter of the international human rights treaties binding upon the UK, it does not conform to the spirit. This distinction is important as these treaties represent the baseline of rights broadly deemed to accrue to persons by the international community of nations.

i. International Covenant on Economic, Social and Cultural Rights, 1966

The ICESCR is a multilateral treaty adopted on 16 December 1966 by the United Nations (UN) General Assembly.[414] The preamble to the ICESCR recognises that certain rights are 'inalienable to all members of the human family' and derive from their human dignity.[415] The UK ratified the ICESCR on 20 May 1976[416] and, in terms of article 2, undertook to take the necessary steps to ensure the full realisation of the rights contained therein.[417]

Article 12 of the ICESCR recognises the right to health and requires States Parties to take steps in order to ensure the full realisation of this right.[418] The Committee on Economic, Social and Cultural Rights (ESCR Committee) has indicated that reproductive health forms an integral part of the article 12-right to health.[419] The ESCR Committee declares that States Parties bear responsibility to ensure that medicines for abortions and abortion aftercare are readily available[420] and indicated that restrictive abortion laws and the criminalisation of abortion undermine women's autonomy and a right to equality.[421] The ESCR Committee further indicated that the criminalisation of abortion violates the article 12-right[422] and that States Parties are required to amend their legislation in line with their article 2-obligation.[423]

From the ESCR Committee's interpretation of article 12, accessing legal and safe abortions forms part of the right to health. English abortion law, therefore, must be reformed to articulate access to these services as a right and not as an exception to an otherwise criminal act. It is further submitted that the UK is in breach of its article 2-obligations in terms of the ICESCR insofar as English

[413] See for example Daniel Fenwick 'The modern abortion jurisprudence under article 8 of the European Convention on Human Rights' [2012] Medical Law International 249 and Rosamund Scott 'Risks, reasons and rights: The European Convention on Human Rights and English abortion law' [2015] Medical Law Review 1 for a thorough discussion of the right to abortion in terms of the European Convention on Human Rights.
[414] International Covenant on Economic, Social and Cultural Rights, 1966 UN GA Resolution 2200A (XXI).
[415] Preamble to the ICESCR.
[416] See the official status of ratification tracker of the UN Human Rights Office of the High Commissioner, available at https://indicators.ohchr.org/ [accessed on 4 May 2023].
[417] Article 2 of the ICESCR.
[418] Article 12 of the ICESCR.
[419] Committee on Economic, Social and Cultural Rights, 'General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22 2 May 2016 at para 1.
[420] ibid para 13.
[421] ibid para 34.
[422] ibid para 57.
[423] Article 2 of the ICESCR.

abortion law is concerned.

ii. Convention on the Elimination of all forms of Discrimination Against Women, 1979

CEDAW, a bill of rights for women, was adopted in 1979 by the UN General Assembly and ratified by the UK in 1986.[424] In terms of article 2, States Parties to CEDAW agree to take all appropriate measures, including adopting legislation, to ensure that women enjoy the rights enshrined in the treaty and are free from discrimination and prejudice.[425] Two articles in CEDAW are specifically relevant:

First, article 12 of CEDAW requires States Parties to take the appropriate steps to eliminate discrimination against women in the area of healthcare and to ensure that women have access to 'appropriate services in connection with pregnancy'.[426] In terms of this article, the Committee on CEDAW characterises the 'refusal of medical procedure that only women require, such as abortion, as sex discrimination'.[427] Second, article 16(1)(e) of CEDAW requires States Parties to take all appropriate measures to ensure women have '[t]he same right to decide freely and responsibly on the number and spacing of their children'.[428] As article 16 explicitly grants women the right to control their reproduction, it is often interpreted as granting a right to abortion.[429] Based on this provision, the Committee on CEDAW has indicated that the treaty protects the right to access abortions.[430]

Ngwena indicates that the criminalisation of healthcare required only by women confines women to serving as reproductive instruments.[431] In *LC v Peru*,[432] the State's liberalisation of restrictive abortion laws – such as the Abortion Act – was not considered sufficient.[433] Abortion must be articulated as a right within healthcare to ensure that women's autonomy is respected and that States Parties conform to their treaty obligations in terms of CEDAW. Maintaining the *status quo* means that women are discriminated against on a basis of their sex and are denied rights owed to them by the UK through its treaty obligations.

iii. Council of Europe Resolution on Access to Safe and Legal Abortion in Europe, 1607 of 2008

The Council of Europe – founded in the aftermath of the Second World War – is an important

[424] See the official status of ratification tracker of the UN Human Rights Office of the High Commissioner, available at https://indicators.ohchr.org/ [accessed on 4 May 2023].
[425] Article 2 of CEDAW.
[426] Article 12 of CEDAW.
[427] Rebecca J Cook and Bernard M Dickens 'Human rights dynamics of abortion law reform' [2003] Human Rights Quarterly 1, 6.
[428] Article 16(1)(e) of CEDAW.
[429] Kate Hunt and Mike Gruszczynski 'The ratification of CEDAW and the liberalization of abortion laws' [2019] Politics & Gender 722, 729–730.
[430] ibid 730.
[431] Charles Ngwena 'A commentary on *LC v Peru*: The CEDAW committee's first decision on abortion' [2013] Journal of African Law 310, 316–317.
[432] *LC v Peru* Comm No 22/2009, CEDAW/C/50/D/22/2009 (2011).
[433] ibid.

international organisation that strives to uphold human rights, democracy and the rule of law in Europe.[434] The UK was a founding member of the Council and continues to be a member. The Parliamentary Assembly of the Council is empowered to pass resolutions, usually indicating policy areas where future work is foreseen.[435] Although these resolutions have no legal force, they are guiding documents in terms of the general objectives for human rights in Europe and are authoritative as they require a two-thirds majority of all the representatives in the Assembly to be passed.[436]

In 2008 Resolution 1607 on Access to Safe and Legal Abortion in Europe was adopted.[437] In terms of this Resolution, abortion should be decriminalised within reasonable gestational limits if Member States have not already done so.[438] Explicitly, abortion is articulated as a right in the Resolution[439] and as an expression of women's freedom of choice.[440] Moreover, Member States are required to lift restrictions that hinder access to an abortion.[441] The UK thus far has failed to fulfil these objectives.

It is clear from the above that English abortion law is out of step with generally held views of human rights and specifically those of Europe. It is argued that the UK is obliged to decriminalise abortion and regulate it in terms of a rights-based approach.

Part III: Social importance of a rights-based approach to abortion

From the discussion in section 3 English abortion law is not in keeping with the obligations enshrined in treaties of which the UK is a Member State. At best, the UK complies with the letter of the law but does not conform to the spirit. In addition, some argue that English abortion law in fact breaches international law.[442] In comparable jurisdictions, the decriminalisation of abortion does not seem to have led to an increase in access to abortion – at least not insofar as statistics on abortion uptake indicate.[443] Nevertheless, from a societal viewpoint, reforming the English abortion law is essential.

Critics of the *status quo* state that English abortion law is 'characterised by archaic language, overlapping offences, inconsistencies in available sentences and clinically unwarranted restrictions on best practice'.[444] It is submitted that it is cardinal to recognising women as autonomous moral agents and to ensuring their equality in broader society that the abortion law in England and Wales

[434] See article 1 of the Statute of the Council of Europe, 1949.
[435] See the powers of the Parliamentary Assembly (formerly called the Committee of Ministers) under chapter IV of the Statute of the Council of Europe, 1949.
[436] Article 20 of the Statute of the Council of Europe, 1949.
[437] Council of Europe, 'Access to safe and legal abortion in Europe' Resolution 1607 of 16 April 2008.
[438] ibid para 7.1.
[439] ibid para 7.2.
[440] ibid para 7.3.
[441] ibid 7.4.
[442] See for example Fenwick (n 413) and Scott (n 413).
[443] See the informative discussion by Laurie, Harmon and Dove (n 405) 322–323.
[444] Sally Sheldon 'The decriminalisation of abortion: An argument for modernisation' [2016] Oxford Journal of Legal Studies, 346.

is reformed.

i. Recognising women's autonomy

Jackson notes that the motivation for the promulgation of the Abortion Act in 1967 was not a recognition of a woman's autonomy over her body but rather a concern in regard to the high mortality rates from illegal abortions.[445] Abortion was medicalised in response so that a 'highly skilled and dedicated' [predominantly male] physician could intervene in the poor choices of 'downtrodden' women who were 'driven to desperation'.[446] The Abortion Act, it is argued in fact, is intended as a paternalistic instrument by which indigent women are spared the consequences of their indiscretion.[447]

Sheldon argues that the criminalisation and medicalisation of abortion decision-making runs against the principle in contemporary bioethics that a patient's autonomy is paramount.[448] It does not grant women the authority to decide freely on their reproductive health, instead it requires certification by two physicians that an abortion – in their *bona fide* opinion – is justified.[449]

From the above discussion it may be concluded that reframing abortion in accordance with a rights-based approach will give effect to women's autonomy – a foundational principle of contemporary bioethics.

ii. Destigmatising abortion

The criminalisation of abortion adds to the stigmatisation of a personal decision already charged with emotion, religious influences and political beliefs. Sheldon convincingly argues that the stigmatising impact of criminal sanction – together with the unwarranted limitation placed on abortion through its medicalisation – underscores the need to reform English abortion law.[450] Cook explains that when a State criminalises abortion – or fails to decriminalise it – it constructs a social meaning that abortion inherently is wrong.[451] It not only is women who procure abortion who suffer from stigmatisation, but also the service providers.[452] This circumstance is an impediment to the provision of safe abortion services.

Requiring women to formulate a request to have an abortion in a criminalised legal framework perpetuates the stigma they face.[453] Decriminalisation and the articulation of abortion as a right

[445] Jackson (n 403) 774.
[446] Sally Sheldon 'A missed opportunity to reform an outdated law' [2009] Clinical Ethics 3.
[447] ibid.
[448] Sally Sheldon and Kaye Wellings, *Decriminalising abortion in the UK: What would it mean?* (Policy Press 2020) 44.
[449] Section 1(1) of the Abortion Act. See also the discussion by Sheldon and Wellings (n 448) 7.
[450] Sheldon (n 444) 337.
[451] Rebecca J Cook, 'Stigmatized meanings of criminal abortion law' in Rebecca J Cook, Joanna N Erdman and Bernard M Dickens (eds), *Abortion law in transnational perspective: Cases and controversies* (University of Pennsylvania Press 2014) 347.
[452] Sheldon (n 444) 347.
[453] Patricia A Lohr, Jonathan Lord and Sam Rowlands 'How would decriminalisation affect women's health?' in Sheldon and Wellings (n 448) 45.

assists in creating an environment which is beneficial to women's wellbeing.[454]

iii. Aligning the law with public opinion

In a liberal democracy it is held that the legislative framework accurately should represent broader public opinion.[455] Incongruencies are viewed as leading to a break in the social contract which underlies a contemporary legal system.[456]

From the discussion on international human rights law adopted by democratic fora (in section 2 above), it is posited that broader public opinion trends in favour of a woman's right to self-determination and autonomy and, thus, a right to abortion. The question of public opinion foremost is empirical. A rigorous analysis of the available research on public opinion on the decriminalisation of abortion in the UK by Gray and Wellings indicates a significant shift to a permissive stance on abortion in recent decades.[457] Simply put, decriminalising abortion aligns with the broader sentiments of the public in the UK.

Thus, it is concluded the public supports restructuring English abortion law in the form of a rights-based system and is against criminalisation, and that Westminster ought to align the law to a democratic mandate.

Conclusion

The decriminalisation of English abortion law is overdue. Indeed, the basis for the law (OAPA) is a regulation that was passed in the middle of the reign of Queen Victoria – seven decades before the attainment of female suffrage in the UK.[458]

To give effect to women's right to autonomy, in line with the UK's international law obligations and public opinion, abortion law in England and Wales should be decriminalised and be reformed to embody a rights-based approach. This change not only will promote women's rights and confidence in the legal system but also lessens the stigma associated with abortion and ensures improved access by women to healthcare in the UK.

[454] ibid 45–46.
[455] See the discussions of 'social contract theory' in, among others, Tracy Humby and Louis Kotzé (eds), *Inleiding tot die reg en regsvaardighede in Suid-Afrika* (Oxford University Press 2013) 1–2 and Bernard Bekink, *Principles of South African constitutional law* (2nd edition, LexisNexis 2016) 22–23.
[456] ibid.
[457] Anne Marie Gray and Kaye Wellings 'Is public opinion in support of decriminalisation?' in Sheldon and Wellings (n 448) 17–35.
[458] Sheldon (n 444) 334–335.

Unravelling the Trust Puzzle: Is Lord Upjohn's 'Vandervell' explanation Adequate for Understanding Automatic Resulting Trusts?

Marta Stępniewska*

Abstract: *This article critically examines Lord Upjohn's argument in the Vandervell case regarding the operation of 'automatic' resulting trusts. Lord Upjohn suggested that these trusts arise in two scenarios: 'presumed resulting trusts', based on the intention behind an apparent gift, and 'automatic resulting trusts', which occur independently of intent when an express trust fails. This article posits that while Vandervell's decision may not be flawed, its rationale does not adequately explain the nature of 'automatic' resulting trusts. It argues that the explanation presented in Vandervell is based on a fallacy, failing to accurately describe how these trusts operate. In contrast, this piece will draw on the perspectives of Chambers and Birks, advocating that the concept of automatic resulting trusts is more coherently explained through the lens of unjust enrichment, rather than the intentions or failures in trust formation. This approach offers a more robust understanding of the automatic resulting trust mechanism, challenging the traditional views presented in Vandervell.*

Introduction

The argument presented by Lord Upjohn in the famous *Vandervell*[459] case was that resulting trusts respond not to one, but to two different events. Indeed, there are two types of resulting trusts: 'presumed resulting trusts,' which respond to the intention of the person who made an apparent gift, and 'automatic resulting trusts,' which have nothing to do with intention and arise automatically whenever a trustee has a proprietary gain after an express trust fails. One example of such automatic resulting trust may be provided by the failed purpose trust. *In Re the Trusts of the Abbott Fund*[460] seems to be an example of this, where the court decided that the trust was not valid for absolute benefit of testator's sisters, but rather it was the trust for the purpose. This had the effect of returning any remaining funds, in the absence of a beneficiary, to the testator's estate under a resulting trust.

To provide a proper definition, in *Vandervell* Lord Upjohn assumed that resulting trusts which arise from the failure of an express trust do so automatically. In the overturned first instance decision of *Re Vandervell's Trusts (No.2)*,[461] after a detailed analysis of the speeches of Lords Upjohn and Wilberforce, Megarry J said that the case showed that the failed resulting trust did 'not depend on any intentions or presumptions,' but was 'the automatic consequence of [the settlor's] failure to dispose of what is vested in him'.[462, 463]

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[459] *Vandervell v Inland Revenue Commissioners* [1966] UKHL 3, [1967] 2 AC 291

[460] [1900] 2 Ch 326

[461] *Re Vandervell's Trusts (No.2)* [1974] Ch 269, [1974] 1 All ER 47 (Ch); overturned by Court of Appeal in [1974] Ch 269, [1974] 3 All ER 205 (CA)

[462] *Re Vandervell's Trusts (No.2)* [1974] Ch. 269, 294

[463] William Swadling, 'Explaining resulting trusts' (2008) LQR 72, 98

This piece will argue that even though nobody is suggesting that *Vandervell* was wrongly decided, it cannot stand as an explanation of 'automatic' resulting trusts. Its reasoning is based on the fallacy of explaining how trust works. To contrast this, the analysis will be based on Chambers and Birks'[464] approach to automatic resulting trusts that can be better explained based on unjust enrichment.

Part I: From the orthodox viewpoint, even though the last thing the settlor wants is to receive a beneficial title in the option, the court may decide to establish an automatic resulting trust

The *Vandervell* case is the most well-known example of automatic resulting trusts. Vandervell arranged for shares to be transferred to the Royal College of Surgeons, with the dividends from those shares used to support a pharmacology chair. Vandervell also arranged for an option to repurchase the shares to be issued to a trustee business he had set up, Vandervell Trustees (VT), since he thought it may be advantageous to reclaim control of the shares after the chair had been constituted. The plan appears to have been for VT to keep Vandervell's shares in trust for his children. By a bare majority, the House of Lords decided that VT's holding of the option was not intended to be beneficial. Rather, it was held on trust. The problem, however, was that the trust's beneficiaries had not been recognised.

The court tried to explain the creation of this trust. Lord Wilberforce claimed that the 'equitable, or beneficial interest, cannot remain in the air'[465] so it consequently must remain as settlor's. titleThe solution is simple: if A has failed to effectively dispose of the beneficial interest, it must automatically revert to him as a resulting trust. Unlike the presumed resulting trust, which was based on the presumed intention to create it, the automatic resulting trust was simply the consequence of failing to dispose of the entire beneficial ownership of an asset.[466] This distinction, earlier emphasised by Megarry J, was for years perceived as the orthodox legal standpoint. Yet, the argument of so-called 'proprietary arithmetic'[467] has been challenged on the basis that it does not accurately represent how resulting trusts work.

The position of *Vandervell* was questioned by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale*.[468] Here, his Lordship was not fully convinced by *Vandervell's* rationale. He said that if the 'settlor has … abandoned any beneficial interest in the trust property, there is … no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia'.[469] The *bona vacantia* approach, whereby trusts arise because this is what the parties intended, asserts that the language of 'automatic resulting trusts' is inapposite. In summary, there are no different types of resulting trust; rather, there is a single type of resulting trust that can arise in a range of situations.

[464] Peter Birks, 'Restitution and Resulting Trusts' in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem 1992), 335-373; Robert Chambers, *Resulting Trusts* (OUP 1997); Robert Chambers, 'Resulting Trusts in Canada' (2000) 38 Alberta LR 378

[465] *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, [1966] 11 WLUK 108 (HL) [15] (Lord Wilberforce)

[466] Robert Chambers, 'Resulting Trusts in Canada' (2000) 38 Alberta LR 378

[467] Robert Chambers, *Resulting Trusts* (OUP 1997), 51

[468] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12, [1996] AC 669

[469] ibid, 708

Many scholars and judges, however, have questioned *Westdeutsche'*s approach, stating that there is no solid rationale and no authority for considering B's intention to be relevant to the creation of the resulting trusts. Lord Browne-Wilkinson seemed to assert that if A really does not intend to retain the beneficial interest, he can abandon it. However, as Hudson has pointed out, it is debatable whether a beneficial interest can be successfully abandoned in the way Lord Browne-Wilkinson claims.[470] Hudson's analysis demonstrates that *Westdeutsche* failed to respond to the issues raised by *Vandervell*.

Part II: The fallacy of *Vandervell*'s proprietary arithmetic argument is that it confuses the way resulting trusts and other equitable property titles work

The fundamental objection to *Vandervell* logic is that where A has legal beneficial title to something, there is no equitable title to it, and hence A does not have such equitable title. Instead, as *Westdeutsche* infers, an equitable title arises for the first time upon the creation of a trust. Of course, one can argue, as Professor Penner argues, that in substance, the settlor who benefits from a resulting trust is retaining something that he or she held before.[471] Yet, it is quite inaccurate to speak about retaining a beneficial title that never existed before. Indeed, the resulting trust creates a new equitable property right for the settlor, which differs from the property right he or she had before the transfer to the trustee. It cannot be described as the inertia of a pre-existing beneficial interest because it is a new right.[472] This was also explained by Jeffrey Hackney who asserted that 'The beneficial owner at common law has no equitable interest. The Chancellor has nothing to do with him; the common law gives him all the protection he requires.'[473] The retention argument also appears to be normatively inert. As a result, if it is conceded that the settlor is receiving new rights, distinct from those he previously held, and has given up, the retention idea loses its central premise, and it does not appear that the argument can be saved by rhetoric about substance and form.

As Chambers has argued: '*Vandervell v. IRC* can be explained satisfactorily without resort to the theory of the automatic resulting trust.'[474] The decision to grant the option to the company in trust for undefined beneficiaries indicated that he did not wish for the company to profit from the option itself. This absence of intention to benefit the company invites equity to intervene by establishing a resulting trust. If, as explored in the following section, this same situation also triggers the resulting trust commonly linked to an apparent gift, then there is essentially only one type of resulting trust, rather than two.

[470] Alastair Hudson, 'Is Divesting Abandonment Possible at Common Law?' (1984) 100 LQR 110
[471] James Penner 'Resulting Trusts and Unjust Enrichment: Three Controversies' in Charles Mitchell (ed), *Resulting and Constructive Trusts* (Hart 2010)
[472] Robert Chambers, 'Resulting Trusts in Canada' (2000) 38 Alberta LR 378
[473] Jeffrey Hackney, *Understanding Equity and Trusts* (Toronto: Carswell, 1982), 149 CLR 431 at 474
[474] Robert Chambers, 'Resulting Trusts in Canada' (2000) 38 Alberta LR 378, 390

Part III: A better explanation for automatic resulting trusts is based on the rationale of unjust enrichment

As alluded to above, the alternative, and perhaps more favourable, explanation to the automatic resulting trust is to reverse the unjust enrichment.[475] Interestingly, the proponent of the theory, Professor Birks, explained that if his 'experimental' view of the 'nature and mission of the resulting trust is wrong, it is important that this error should be exposed before a 'heresy' takes root'.[476]

Birks'[477] and, later, Chambers'[478] reasoning was that in circumstances where the law currently recognises resulting trusts - that is, cases of gratuitous transfers and failed express trusts - it does so because A did not intend B to benefit from the property. As a result, a trust is formed to avoid or reverse B's unfair gain at the expense of A. Yet it is evident that there are many instances of unjust enrichment in English law where no trust is recognised, the claimant instead having only a personal right to recover the value of the property transferred. Both scholars hence argue that when a defendant unjustly benefits from a contract's failure to provide adequate consideration, or because of a mistake, each time a resulting trust should be created.[479]

Such argument was put forward, but nonetheless rejected in *Westdeutsche*. The House of Lords denied that existing categories of resulting trust should be explained by unjust enrichment and preferred the view that they arise to give effect to A's (and B's) intention to create a trust. In effect, the potential of using the resulting trust case law as a stepping stone to further the use of trusts in unjust enrichment cases was ruled out. Chambers has criticised their Lordships' decision, stating that '[w]ith no examination of the underlying unjust enrichment, the case reveals little about why proprietary restitution was unavailable'.[480]

Yet, according to Chambers,[481] contrary to Lord Browne-Wilkinson's approach, unjust enrichment-based explanation can account for the decision in *Vandervell*. Indeed, the court needed to ensure that VT would not unjustly benefit from Vandervell. Chambers asserts that Vandervell's lack of intention to benefit the company was what led to the imposition of a resulting trust and the intervention of equity.

To add some support to the theory, Webb and Gardner[482] both argued that proprietary arithmetic and unjust enrichment arguments may be in fact regarded as mutually supporting. Proprietary

[475] Peter Birks, 'Restitution and Resulting Trusts' in Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem 1992) 370
[476] ibid, 373
[477] ibid
[478] Robert Chambers, *Resulting Trusts* (OUP 1997), 50
[479] Peter Birks, Restitution and Resulting Trusts' in Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992), 257
[480] Robert Chambers, 'Resulting Trusts' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006)
[481] ibid
[482] Charlie Webb, 'Property, Unjust Enrichment, and Defective Transfers' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); Simon Gardner, 'Reliance-based Constructive Trusts' in Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010)

arithmetic complements the unjust enrichment approach as it asserts that because A started as the owner of the property, it was up to him, and him alone, to decide who should receive and benefit from it. Furthermore, in the absence of A having effectively disposed of his interest, A should be able to retrieve the property because that is what having an interest in property entails: it is yours until you give it away.

Conclusion

Despite some discrepancies in the reasoning, both *Vandervell*, and especially *Westdeutsche*, have done a lot to clarify the law on presumed and automatic resulting trusts. After all, it is now known that an automatic resulting trust will arise where A transfers property to B to be held on express trust, but the intended trust fails in whole or in part. My analysis of both cases has shown that the unjust enrichment argument – although rejected by Lord Browne-Wilkinson in *Westdeutsche* – does appear to offer a better explanation of the operation of automatic resulting trusts. The piece began with the conventional concept of resulting trusts and demonstrated that the rise in popularity of the theory, which is largely founded on an incorrect understanding of the historically determined nature of equitable titles, has been the main cause of misunderstanding among lawmakers. Eventually, the author tried to prove that the unjust enrichment explanation seems best to avoid the orthodox 'heresy'.

Hung(a)ry for Justice: Why the EU Needs a More Sustainable Solution for Upholding the "Rule of Law"

Miller Hookem*

Abstract: *In recent years the European Union (EU) has faced a rule of law 'backslide, with Hungary and Poland being the culprits. The EU has sought to remedy this by enforcing the rule of law as a legal principle in enforcement proceedings and as a tool to control EU finances. There is no issue with enforcing the procedural aspects of the rule of law but attempts to enforce a wider definition of the rule of law is a power the EU does not have. Attempts to do so disregard the fundamental understanding of democracy as a mode of participation and are a form of democracy by values. Most issues in attempting to define the rule of law and democracy arise from the EU lacking a unifying philosophy which prevent the European people from feeling a sense of ownership in the EU. The fact the EU might be making the law better cannot fill this legitimacy deficit. If the EU does not find a more sustainable solution to dealing with this backslide, it risks undermining its legitimacy even further, especially in light of far-right support growing across Europe.*

Introduction

The rule of law is a yardstick by which to measure the efficiency and success of a legal system; it is largely accepted as forming part of the backbone of modern-day society[483] – with its importance pushing the European Union (EU) to declare it a founding principle of their legal order, embodied in the Treaty of the European Union (TEU).[484] History is plagued with examples of even the most reputable states breaching the rule of law,[485] but such cases have often fallen short of bright line distinctions modern states draw with dubious past identities, that existed in a time when the rule of law was a pre-nascent constitutional principle.

This makes the recent – and blatant – breaches of the rule of law committed by Hungary and Poland even more surprising. The EU has no doubt attempted to keep this problem under control and might give the appearance that it has. The purpose of this article is to warn that the EU's responses are unsustainable as they rely on a false consensus as to the definition of the rule of law and fail to accommodate other founding principles of the EU. Both issues are exacerbated by the European people lacking a sense of ownership over the EU and the principles it enforces, which stem from

* Law Tripos Student, Lucy Cavendish College, University of Cambridge. I offer special thanks to Nabil Khabirpour for supervising me in EU law, offering comments on this article, and always believing in me.

[483] Constitution of The Republic of South Africa 1996, Chapter 1 s.1(c); Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 (Federal Law Gazette I p. 2478), Art. 28(1); Canada Act 1982, Schedule B, part 1 (Canadian Charter of Rights and Freedoms)

[484] Consolidated Version of The Treaty on European Union [2012] OJ C326/13, art 2; art 6(3)

[485] Tom Bingham, *The Rule of Law* (Penguin 2011), ch2. The chapter offers a historical analysis of the breaches of the rule of law throughout English history and includes a discussion of the monarch using his power in the *Five Knights Case* to directly discriminate against certain knights and force them into providing him with a loan. The rest of the book also includes examples from other countries. *Ch11* includes an analysis of the rule of law and its place in counterterrorism.

the EU lacking a unifying philosophy to legitimise its actions.

The article will be split into 3 parts: 1) will provide a history of the rule of law backslide in Hungary and Poland, 2) explains why the EU's response was unsustainable, and 3) places the unsustainability of such responses in contemporary politics, and suggests that Hungary and Poland are only the beginning of this poor saga – that could prove to be the downfall of the EU.

Part I: What Went Wrong in Hungary and Poland?

Hungary. In 2010 Viktor Orbán was elected Prime Minister of Hungary and to this day remains PM; Orbán is affiliated with Fidesz, a right-wing populist party. Within the first year of being elected, Orbán had amended the constitution, thereby reducing the number of seats in Parliament, and introduced a new voting mechanism that operated to transfer votes from the losing party to the winner – increasing the seats Fidesz had in Parliament and cementing Orbán's position in Government.[486] This allowed Orbán to enact radical legal change which was clearly motivated by anti-foreign sentiment: exemplified in *Commission v Hungary (Usufruct Over Agricultural Land)*[487] where the Court of Justice of the European Union found that a law which prevented non-Hungarian nationals from owning land breached the right to property, set out in the EU Charter of Fundamental Rights,[488] as Hungary had failed to explain how such a measure was justified on public policy grounds or why it only applied to non-nationals. This anti-foreign sentiment also underpinned *Commission v Hungary (Higher Education)*[489] where the Court of Justice of the European Union (CJEU) found a breach of the right to academic freedom[490] and the right to conduct a business,[491] by requiring foreign universities to have international agreements with Hungary before they can be established.

The fundamental issue the EU faced in combatting Hungary's wrongdoing lied in the fact that Hungary was acting entirely compatibility with its own constitutional law,[492] offering some sense of lawfulness to Orbán's wrongdoing, and creating the possibility that Hungary may resist EU intervention by relying on its constitutional identity.[493] Any rejection of such an identity would arguably be damaging to the EU considering they had allowed such an argument from Germany some years earlier – albeit the latter was not found to be breaching the rule of law and was relying on longstanding principles of their written constitution.[494]

[486] Robert Benson, 'Hungary's Democratic Backsliding Threatens the Trans-Atlantic Security Order' (*Center for American Progress*, 22 January 2024) <https://www.americanprogress.org/article/hungarys-democratic-backsliding-threatens-the-trans-atlantic-security-order/> accessed 31 January 2024

[487] Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)* [2019] ECLI:EU:C:2019:432

[488] EU Charter on Fundamental Rights [2012] OJ C326/391, art 17(1)

[489] Case C-66/18 *Commission v Hungary (Higher Education)* [2020] ECLI:EU:C:2020:792

[490] EU Charter on Fundamental Rights [2012] OJ C326/391, art 13

[491] ibid, art 16

[492] Robert Benson, 'Hungary's Democratic Backsliding Threatens the Trans-Atlantic Security Order' (Center for American Progress, (22 January 2024) < https://www.americanprogress.org/article/hungarys-democratic-backsliding-threatens-the-trans-atlantic-security-order/> accessed 31 January 2024

[493] As it already has, see Nóra Chronowski and Attila Vincze, 'Full Steam Back' (*Verfassungsblog*, 15 December 2021) <https://verfassungsblog.de/full-steam-back/> accessed 3 February 2024

[494] Re Lisbon Treaty Ratification, BVerfG, 2 BvE 2/08, 30 June 2009

The EU's response was to bring proceedings against Hungary under arts 7, 258 TEU,[495] suspending Hungary's voting rights in the EU, and requiring Hungary to pay fines. This had little effect, as there were doubts as to Hungarian judicial independence,[496] making it difficult to ensure EU law was enforced nationally, not to mention the fact that the consequences of art 7 are merely political – resulting in Hungary simply ignoring them. A solution was finally found when the EU enacted legislation allowing it to withhold funding from Hungary until the latter began complying with the requirements of the rule of law (the *Conditionality Regulation*).[497] The CJEU endorsed this response and rejected arguments that the rule of law is too vague or variable between member states for it to be an enforceable legal criterion,[498] reiterating that the rule of law as enshrined in the treaties is judged by that conception member states agree to when they join the EU[499].

Poland. In 2015 the Law and Justice Party (PiS) was voted into the Polish Government and, unlike Hungary, lacked the legislative power to amend the Polish Constitution. This provided no normative shield for PiS to hide behind when it began interfering with how judges were disciplined, appointed, and retired – all of which raised doubts as to judicial independence. The Commission, as it did with Hungary, initiated enforcement proceedings against Poland. However, unlike the proceedings against Hungary, the CJEU did not find a breach of rights in the EU Charter, but rather the rule of law. The court for the first time explained the connection between arts 2 and 19(1) TEU when they recalled that "the [EU] is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU…such as the rule of law, which are common to the Member States"[500] and that "[a] Member State cannot … amend its legislation in such a way as to bring about a reduction in the protection of … the rule of law, a value which is given concrete expression by … Article 19 TEU".[501] The CJEU effectively paved the way for the rule of law to become a stand-alone yardstick that the Commission could rely on in enforcement proceedings – as can be seen in *Re Conditionality Regulation*.[502] This was influential both from a symbolic perspective, as the EU moved away from relying on values like academic

[495] Consolidated Version of The Treaty on European Union [2012] OJ C326/13

[496] European Commission, '2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary' SWD(2023) final

[497] Council Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ LI433/1. The regulation gives the Commission of the EU powers to withhold funding for non-compliance with principles of the EU and, most notably, the rule of law. It was written amidst the rule of law crisis and appears to eb a response to the actions of Hungary and Poland.

[498] Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97

[499] See for example art. 2 of the *Conditionality Regulation*. It states that the rule of law is judged by reference to the definition set out in *art. 2 TEU*. As has been established on numerous occasions, it is the CJEU who has primacy in interpreting the treaty, not member states. That is a general principle of the supremacy of EU law. The interpretative primacy on matters relating to the rule of law is also spelt out in *Commission v Poland (Independence of Supreme Court)* where the CJEU reaffirms that states are bound by art. 2 TEU and the values therein.

[500] Case C-791/19 *Commission v Poland (Independence of Supreme Court)* [2021] ECLI:EU:C:2021:59 [50]

[501] ibid, [para 51]

[502] Court of Justice of the European Union, Press Release No 28/22 (Luxembourg, 16th February 2022). The press release dismissing actions from Hungary and Poland against the European Parliament and Council which sought to challenge the validity of the *Conditionality Regulation* on the basis that the "rule of law" is not capable of concrete definition with the result that the regulation lacks legal certainty

freedom and towards powerful constitutional principles; as well as from a practical perspective, as the EU would not have to indirectly uphold the rule of law through other rights.

Part II: What Was Wrong with the EU's Response?

Perhaps the biggest issue with the EU's solution to the rule of law backslide lies in the fact the rule of law is a yardstick which varies in length across member states. I must emphasise, whilst there is no doubt that the rule of law was expressly undertaken by all member states, there is no consensus as to what the rule of law entails. I do not dispute that there is some inner core of rule of law principles which states are largely in agreement on which can form the content of article 2 TEU*:* such as that the law must be clear, precise, non-retroactive and applied by impartial adjudicators.[503] However, outside of this core there is a tension between "thick" and "thin" notions of the rule of law[504]; the former viewing the rule of law as entailing substantive rights which can stand up against other constitutional principles and, at the extreme, amounting to a trump card over such principles too. In contrast, the latter would allow even the most abhorrent and discriminatory of laws – the typical example being legislation that criminalises all blue-eyed babies – to be permissible provided it complies with the procedural requirements of the law.[505]

The EU could ignore this dissensus and power through as it enforces its own notion of the rule of law. Indeed, for some time this might be sustainable, provided breaches fall within the inner core of the principle - as the judicial independence cases did. Equally, it might be thought that the dissensus can be policed through dialogic interactions between the EU and member states, with the CJEU providing a forum where both can present their arguments and establish common ground.[506] This has been called constructive conflict by Bobić[507]; with Hungary and Poland disregarding the constitutional pluralism[508] that underpins this dialogue. The existence of this dialogue is no doubt apparent in the *Solange* jurisprudence,[509] as well as the identification by the Bundesverfassungsericht of the EU as a Staatenverbund.[510] Although, this dialogic approach provides no solution to the situation where the EU and member states plainly cannot agree on what the rule of law entails and fails at a more basic level to accommodate another principle in art 2 TEU: democracy.

It ought to be reiterated that it is not just member states that must comply with the TEU but also the EU itself. Consequently, even if the rule of law was "thick" it is arguable a democracy could

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[503] Tom Bingham, *The Rule of Law* (Penguin 2011) chapter 1
[504] Tom Bingham, *The Rule of Law* (Penguin 2011) chapter 7
[505] Tom Bingham, *The Rule of Law* (Penguin 2011) chapter 1
[506] Ana Bobić, 'Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU' [2020] 22 Cambridge Yearbook of European Legal Studies 60
[507] ibid
[508] The idea that the EU is made up of multiple distinct but interacting constitutions which influence one another. These constitutions are not wholly distinct as a result of the aforementioned interactions and might be described as multiple different constitutions which are individual spheres that overlap and sometimes align. see ibid
[509] BVerfG, 2 BvL 52/71, 29 May 1974
[510] Re Lisbon Treaty Ratification, BVerfG, 2 BvE 2/08, 30 June 2009; Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' [2009] 46 Common Market Law Review 1795

properly enact laws that contradict the substantive requirements of the former. This was the very dichotomy that the Commission faced when it sought to bring enforcement proceedings against Hungary, considering the latter had amended the Hungarian Constitution in a way that complied with all the necessary procedural requirements.

Sceptics might suggest that if the rule of law does not have substantive obligations, then democracy does, and from this flows rights of non-discrimination, freedom of expression, and privacy. Although, this is a defective argument for two reasons. Firstly, democracy in layman's terms is typically characterised as participatory: entailing the basic right to vote for the legislature and the executive. To stretch democracy beyond these agreed limits would be to create a disparity between what society claims ownership of and what the law says ought to be. This will be returned to later, what matters for present purposes is that this dissensus as to democracy's contents would face the same criticisms that plague the uncertainty of the rule of law. Secondly, to argue that democracy entails rights and freedoms that cannot be subject to amendment by popular vote would be to contradict this settled understanding of democracy, which contains as a bare minimum the right to vote on legislation. What is effectively being advocated for is democracy by values. The very issue with this understanding of democracy has been identified by Sumption, who states that to place some values on a higher pedestal, untouchable by popular consensus, fails to identify the source of such rights in the first place,[511] which must itself be justifiable as a limitation on democracy. Furthermore, democracy by values has already been trialled, and failed, throughout history: the communist values that underpinned the Soviet Union providing a perfect example[512] (whose consequences pushed Poland to join the EU in the first place).[513] Upon reading this, I no doubt expect one will say, "but the principles advocated for by communism are very different to those in issue". Yet, it ought to be remembered that hindsight is a dangerous thing, and history is plagued with examples of situations where the state thought it had "got it right" but subsequently condemned its past conduct, just as the EU thinks it has got it right.

That is not to say that I approve of the atrocities currently faced by the Hungarian people, rather, it is submitted, the fact the EU would be making things "better" is not enough.[514] Legitimacy does not come from things being better; indeed, the argument is self-serving and presupposes that what the EU would be doing is right in the first place – which requires us to determine the contents of,

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[511] Jonathan Sumption, 'Trials of the State: Law and the Decline of Politics' (Profile 2019), *ch3, particularly p48-49*

[512] Ibid, ch3, particularly p-69-71. Describing the Soviet Union as a democracy is not to condone, legitimise or endorse the events that took place under Soviet control. Rather it seeks to cut at the heart of a fundamental issue identified by Jonathan Sumption concerning how to properly define democracy. Sovietism fits what might be called democracy by values. This form of democracy sets certain values and rights beyond debate from the electorate and states that democratic participation is limited by the values that the state believes underpins its democracy. A full-scale debate of how to characterise the Soviet Union is beyond the scope of this article, but it is broadly submitted that the underlying values of Sovietism – namely the idea that the state and individual rights should be regulated in accordance with communitarian and socialist understandings of politics and society – falls within the definition of democracy by values.

[513] Tomasz Koncewicz, 'How to Rebuild Poland's Rule of Law' (*Verfassungsblog*, 24 June 2023) <https://verfassungsblog.de/how-to-rebuild-polands-rule-of-law/> accessed 5 February 2023

[514] Jonathan Sumption, 'Trials of the State: Law and the Decline of Politics' (Profile 2019), ch3, particularly p65-68

and interactions between, the rule of law and democracy. Rather, what is necessary for law to be legitimate is for society to feel a sense of ownership over such laws.[515] Improvements in social conditions[516] would no doubt contribute to the legitimacy of the law, but that contribution would be subsidiary to the feeling of ownership which is necessary for a person to feel the law has been improved in the first place. It is submitted that this feeling of ownership is the essence of democracy[517] and provides an explanation as to why the EU cannot superimpose its own definition of the rule of law on member states. Such an imposition would lead to a disparity between what the rule of law is, and how it is received. Koncewicz has rightfully argued that the rule of law "as a lived experience"[518] never had the chance to take root in Poland and appears to hint at the need for ownership when he urges a bottom-up approach to building the rule of law. Perhaps Koncewicz is best interpreted as meaning that the rule of law, in Poland and Hungary, carries no normative weight. It is not the right their citizens have reached to for hundreds of years, as the English did when we invoked Magna Carta to resist monarchist power and demand equality before the law.[519]

At the heart of all the issues above lies an even bigger common theme, one that prevents the EU from saying "place your ownership in me", one that denies them the authority to be final arbiter of the values in art2 TEU, and what prevents it from being a fully formed democracy (putting aside the weakness of the European Parliament and the unequal voting into that body). It is submitted that the EU has no established philosophy,[520] no aspirational values that people can place their faith in. It began as a "common market, not … a political union"[521] and its attempts to shift towards policing humanitarian values has been overshadowed by this, with states and their citizens simply not accepting what the EU claims to be, viewing it no more than "a political experiment".[522] Contrast

[515] ibid, 65-68; see also Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law" [2009] 29 Oxford Journal of Legal Studies 549, p 550. Williams does not use the word "ownership" but discusses the belief that the EU lacks a clear set for values or clear purpose, it has sought to develop a legal system which runs well but does not necessarily explain what the object of that legal system is. It does not appear to have an 'endgame' with the consequence that the European people cannot measure the actions of the EU against a certain yardstick to determine whether it is doing what it set out to achieve.

[516] Defined as general improvements to the conditions and quality of life in a society. Examples include better rights for employees under employment law, improved social benefits, a reduction in the inequalities felt between certain individuals who have characteristics that are normally protected under equality legislation

[517] Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law" [2009] 29 Oxford Journal of Legal Studies 549, part . Part 1 provides a discussion of the need for a philosophy that individuals can place their faith in, without such a philosophy an organisation appears illegitimate, in particular where it polices matters which are uncertain, as the organisation itself lacks any real certainty as to its objectives.

[518] Tomasz Koncewicz, 'Thinking and speaking about the Union and membership in times of constitutional reckoning: On the language and the narrative that still matter in December 2021' (*Reconnect*, 12 December 2021) <https://reconnect-europe.eu/blog/thinking-and-speaking-about-the-union-and-membership-in-times-of-constitutional-reckoning/> accessed 5 February 2024

[519] Tom Bingham, *The Rule of Law* (Penguin 2011), ch2, which provides an analysis of the lengthy history of the rule of law in England.

[520] Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law" [2009] 29 Oxford Journal of Legal Studies 549

[521] Nigel Farage addressing the European Parliament (29 January 2020), available at < https://www.europarl.europa.eu/plenary/en/vod.html?mode=unit&vodLanguage=EN&playerStartTime=20200129-17:22:52&playerEndTime=20200129-17:26:53#> accessed 30 January 2024

[522] ibid

this with the European Convention on Human Rights (ECHR), which at its conception and ever since has claimed to be a treaty for the enforcement and protection of human rights.[523] It provides a framework by which to determine authoritatively the scope of such rights, and even when there is a dispute between what the Convention says rights demands, and what states think it should say, states eventually accept the authority of the ECHR.[524] The high contracting parties of the ECHR not only voluntarily ratified it, but they also never doubted what its philosophy was. This contrasts to the EU, who have incrementally advanced their power to protect rights through the enactment of the European Charter and the expansion of the CJEU jurisprudence, but did so without ever saying why they had a right to advance their power. The EU began policing rights because that would make rights "better" but never explained why it had the authority to make things "better" in the first place. At best, according to Williams,[525] the EU's philosophy is to create a legal order whose laws are complied with, but this gives no normative authority to its actions, as discussed above.

Part III: Unsustainability in Contemporary Politics

One might think that all the issues in Part II are minor; what has happened in Hungary and Poland are isolated events that would not occur in the more developed legal systems of the EU; the far-right views advocated for by those states are a one off. Indeed, Poland now has a new PM who is pro-European integration,[526] and the Rule of Law Report for Hungary 2023[527] shows improvements in Hungary. Such an argument, however, fails to recognise the growing strength of the far right across Europe. In the Netherlands, the Party for Freedom has already been voted into the executive and previously advocated for the banning of mosques and the Quran.[528] In France, the

[523] Indeed, the convention was a joint effort of the member states of the Council of Europe. It was motivated by a unified desire to improve the quality of human rights protection across Europe. There has been much disagreement as to the scope of human rights and issues concerning the interaction of the different rights. Equally, there have been criticisms made to its individual doctrines such as the margin of appreciation, positive obligations, and the living instrument doctrine. However, at its core it has always been a convention for the protection of rights; its scope has not been expanded beyond this area – albeit there have been disagreements as to what amounts to a right and minor expansions throughout the protocols to the convention. Its purpose remains unchanged, however. This ought to be contrasted with the EU who does not necessarily have a clear free-standing purpose that can be dissociated from the European Coal and Steel Community, then the European Economic Community, and then European Community which all appear to have influenced and fed into each other. The underlying theme would appear to be one of economy building, not rights building.

[524] This assertion should not be taken to its limits - one must not forget that Russia was eventually forced to leave the ECHR for its failure to comply with the obligations set out therein. However, even in the most notorious of debates it appears that many of the high contracting parties to the ECHR eventually accept its authority and its interpretation by the European Court of Human Rights. For an interesting discussion of this area, which is beyond the scope of this article, see *Connor Gearty 'On Fantasy Island: Britain, Europe and Human Rights'* (Oxford University Press 2016), ch7 which provides an in depth analysis of the prisoner's voting rights jurisprudence and, eventually, the acceptance of the prisoner's right to vote by the UK in spite of its many years protesting the contrary.

[525] Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law" [2009] 29 Oxford Journal of Legal Studies 549, part 3.

[526] David Maddox, 'Ex-Polish PM warns EU will 'implode' over Brussels power grab: 'Now I understand Brexit!' *Express* (London, 14 January 2024) <https://www.express.co.uk/news/politics/1855247/brexit-poland-prime-minister-eu-power-grab> accessed 29 January 2024

[527] European Commission, '2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary' SWD(2023) final

[528] 'Dutch election winner Geert Wilders scraps mosque ban proposal' Euronews <https://www.euronews.

right-wing party the National Rally, headed by Marine Le Pen, is expected to finish first in the 2024 elections,[529] and there is evidence to suggest that the far right will grow across Europe with young people attributing the cost-of-living crisis to the prioritisation of immigrants instead of state nationals by national governments.[530] The fact that anti-foreign sentiment has been on the rise for some years has almost normalised the phenomenon and means there will be many coming of age voters who feel less discomfort in their far-right views.[531] Germany, too is at risk of falling to the far right with the, until recently, growing popularity of the AfD party.[532]

It is one thing for the EU to police the uncertain boundaries of the rule of law in a smaller state like Hungary, it is another for it to go head-to-head with the illiberal policies of France, Austria, or Germany – the latter already having proved its ability to resist the EU's attempts to go beyond its settled jurisdiction. It is not submitted that such states will blatantly breach what has above been called the inner core of the rule of law, but rather such states pose a risk of acting illiberally by imposing anti-foreign measures: measures which – thanks to the CJEU – have been moved from the language of rights to academic freedom and rights to property and into the realm of the rule of law and democracy.

Conclusion

This article may give the impression that the author is entirely opposed to the EU, but it is quite the opposite. Rather, this article submits that the EU as it currently stands lacks the legitimacy necessary to make it guardian of the rule of law. Had it from its conception been a body for the advancement of the moral rights of humanity, with all states knowingly accepting that, it would undeniably have authority. At present, however, states do not view it as such, and this legitimacy deficit deprives the EU of the prerogative to be final arbiter of the principles enshrined in art 2 TEU. It is not sustainable for the EU to ignore this reality, to do so would be destructive to the EU's identity which has already came under fire as it was labelled bully and new wave sovietism. This could push states out of the EU entirely, depriving their citizens of any protection against oppres-

com/2024/01/08/dutch-election-winner-geert-wilders-scraps-proposal-banning-mosques-and-quran> accessed 5th February 2024

[529] Editorial, 'The Guardian view on Macron v France's radical right: dangerous liaisons might backfire' (*The Guardian*, 28 January 2024) <https://www.theguardian.com/commentisfree/2024/jan/28/the-guardian-view-on-macron-v-frances-radical-right-dangerous-liaisons-might-backfire?CMP=oth_b-aplnews_d-5> accessed 5 February 2024

[530] John Henley and Pjotr Sauer 'Why are younger voters flocking to the far right in parts of Europe?' (*The Guardian* 1 December 2023) <https://www.theguardian.com/world/2023/dec/01/younger-voters-far-right-europe> accessed 5 February 2024

[531] Ibid. "[A]nti-foreign sentiment" is a description of the opinions expressed within the article, it does not necessarily amount to racism. Many of the interviewed individuals who expressed these opinions were firmly against racism, however they felt that immigration should be better controlled, and that increased expenditure of resources on non-home state nationals resulted in home-state nationals being less provided for by the state. This included feelings that there was less housing for home-state nationals, that hospitals were overcrowded and a general feeling of economic instability which voters believed to be caused by increased immigration.

[532] Nette Nöstlinger, 'Support for Germany's far-right AfD reaches six-month low after protests' (*Reuters* 30 January 2024) <https://www.reuters.com/world/europe/support-germanys-far-right-afd-reaches-six-month-low-after-protests-2024-01-30/> accessed 5 February 2024

sion.[533] This article hopes to offer a fresh perspective on the rule of law backslide which may be used to improve the legitimacy of the EU in this area.

[533] Tomasz Koncewicz, 'How to Rebuild Poland's Rule of Law' (*Verfassungsblog*, 24 June 2023) <https://verfassungsblog.de/how-to-rebuild-polands-rule-of-law/> accessed 5 February 2023

'Is the Arbitration Act 1996 Fit for Purpose?'

Periklis Agalopoulos*

Abstract: *The article scrutinises the current legal framework of the Arbitration Act 1996 and examines whether it pragmatically meets its core objectives, which summarily can be referred to as being the minimisation of court intervention and the preservation of privacy among parties. It provides the initial historical context on the modern formulation of the legislation while it emphasises the analysis primarily on sections 44, 67, 68 and 69 of the Act by seeking to elucidate their respective natures by establishing their positive and negative characteristics in relation to the ordinary function of arbitration. Lastly, reference is made to confidentiality and its potential integration in the statutory regime and prospective remedies are proposed in order to ameliorate the inadequate state of the statute in the modern commercial world.*

Introduction

The Arbitration Act 1996 (AA 1996) had been initially described as 'a remarkable piece of legislation',[534] which incontrovertible introduced a 'new era' for the 'modus operandi' of arbitration. However, there have been neoteric remarks from both academia[535] and practitioners[536] that the AA 1996, has failed not only to sustain compatibility with the continuous expansion of the commercial globalisation sphere,[537] but ultimately raised disparity and possible injustice to prospective users. Therefore, it is imperative to examine whether the AA 1996 provides adequate protection by scrutinising its relevant provisions, as well as to propose solutions to its present deficiencies.

Part I: Definition of Arbitration and Historical Restrospection

Arbitration is a mechanism alternative to litigation, with the main objective being the resolution of a legal dispute via the consensual approval of an impartial[538] third party; the arbitrator, who has the authority to issue legally binding awards[539] upon finalisation. It bestows a substantial degree of independence and flexibility upon parties, as they are capable of accommodating their personal needs and preferences[540] through a private, confidential and viably accessible route. The decisions are expeditiously reached, thus circumventing the traditional and ordinarily prolonged[541] rulings of courts.

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[534] Thomas Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1997) 22 Tul Mar L J 131.

[535] Kyriaki Noussia, 'The Arbitration Act 1996: Time for Reform?' (2019) 2 J.B.L. 140.

[536] Shantanu Majumdar, 'What Difference Does 25 years Make? The Arbitration Act 1996 in 2022' (2022) 172 NLJ 7970.

[537] Sumaiya Firoz Nomani and Mantasha Tamheed, 'International Commercial Arbitration: Preference of the Changing World' (2022) 5 IJLMA 1234.

[538] Arbitration Act 1996, s33(1).

[539] ibid s58(1).

[540] ibid s3.

[541] Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) para 1.

The sophisticated method of arbitration was subject to numerous alterations[542] due to the incremental increase of court interference, a position which undermined the core principle of party autonomy in arbitral disputes.[543] The formulation of the AA 1996 purported to combat the aforementioned 'creeping effect' which posed a major threat in compromising London's renown as an arbitral seat. This resulted in the recommendations issued by the Departmental Advisory Committee on Arbitration Law (DAC) which concluded that the AA 1996 should not embed Model law,[544] as it was proposed[545] that the 'architecture' of the common law was sufficient to receive the prerequisite adjustments. It has been argued[546] that the beginning of the 'downfall' of the AA 1996 started via the segregation of the national framework from a universally adapted system[547], which contributed to the erosion of the 'hallmark' foundation of the legislation.

Fundamental parts of the AA 1996 are sections 67, 68 and 69 respectively which set out the circumstances under which a party is eligible to challenge an arbitral award by making an appeal to the national court. The objective of these provisions[548] is to curtail and safeguard parties from arbitral injustice, procured by a tribunal, which can consist of members of non-legal background.[549] This interference may lead the courts to exceed the appropriate boundaries that must be present in order for the core principles of arbitration to remain intact. The efficiency of the AA 1996 is invariably linked with the constant evaluation of the powers shared between the courts and the arbitral parties.[550]

Part II: Section 67

S67 allows a party to challenge an award on the premise that the arbitral tribunal either lacked 'substantive jurisdiction'[551] and the award should be rendered invalid or the merits of the award can be questioned based on lack of jurisdictional authority. The former prescribes the courts with the power to 'confirm, vary or set aside the award' whereas the latter grants the right to partially or in totality, 'oust' an arbitration award as ineffective.

On this note, s67(1)(b) and s67(3)(c) have been criticised for creating an incomprehensible situation between the role of the courts and tribunals in respect to the aftermath of the court's deci-

[542] Taner Dedezade, 'Are You In? Or Are You Out? An Analysis of Section 69 of the English Arbitration Act 1996: Appeals on a Question of Law', (2006) Int ALR 57.
[543] AA 1996, s15.
[544] Lord Hacking, 'Arbitration Law Reform: The Impact of the UNCITRAL Model Law on the English Arbitration Act 1996' (1997) 63(4) Arbitration 291.
[545] The Departmental Advisory Committee on Arbitration (DAC) Report on Arbitration Bill 1996 para 108.
[546] Noussia (n 535) 140, 142.
[547] Julian Lew and Loukas Mistelis, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 26.
[548] Report of The Departmental Advisory Committee on the Arbitration Bill 1996, Department of Trade and Industry, Chaired by Lord Justice Saville (London 1996), 285.
[549] Dedezade (n 542) 57, 58.
[550] Jessica L Gelander, 'Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations' (1997) 80 Marquette Law Review 625, 626.
[551] AA 1996, s30.

sion on the fate of an award. Albeit the decision in *Hussman*[552] where it was found that there is no apparent distinction between the two remedies, Noussia points out[553] that there is a discernible inconsistency, as the former 'grants a declaration determining the jurisdictional question and thus, resolving the dispute, whereas in the latter, the court has no express power to grant such a declaration and can only set aside the tribunal's award'.[554] There is no clear delineation as to the 'award implementation system', where the court under jurisdictional grounds, rules to either vary the award or set it aside, leaving the tribunal's final authority 'in limbo'. Another significant issue is the courts' demand for a full re-hearing,[555] thereby, protracting the dispute and the subsequent expenses. It has been established[556] that a court 'should not be placed in a worse position than the arbitrators for the purpose of determining a challenge', which may promote fairness for the claimant, but has exacerbated the issue of inequality between tribunals and the judiciary. This is because not only does the 'tribunal's decision and reasoning have no legal or evidential weight'[557] but new evidence can be submitted,[558] which jeopardises the finality and binding powers of arbitration.[559]

Part III: Section 68

S68 allows parties to challenge an arbitral award suffice that there is pertinent 'serious irregularity' procured by the tribunal. Its successful utilisation has been impeded by the high threshold that has been imposed by the judiciary,[560] recently reiterated by Popplewell J,[561] where he stated that 'the tribunal must have egregiously and unreasonably misconducted itself'. The exhaustive and comprehensive list under s68(2) combined with the consolidated and immutable judicial stance to severely restrict permissions on these types of challenges[562] reflect the supplementary role of the courts in promoting the independence of parties and the essence of arbitration. In contrast, Noussia argues[563] that this is inadequate, as the numerous reported caselaw examples indicate that parties, despite the minimal chances of success, tend to overuse this mechanism in order to temporarily hinder arbitral proceedings, which overall compromises the tribunal's authority.

Part IV: Section 69

A salient difference between Model Law and the AA 1996 which has raised controversy over the latter's judicial interpretation[564] is s69, which is a non-mandatory provision that can be waived

[552] *Hussman (Europe) Ltd* v *Ahmed Pharaon* [2003] EWCA Civ 266.
[553] Noussia (n 535) L 140.
[554] ibid 140, 145.
[555] ibid 140, 144.
[556] *Azov Shipping Co* v *Baltic Shipping Co* [1999] 1 All ER 476.
[557] Ravi Aswani and Valya Georgieva, 'The Arbitration Act 1996: A Reflection at 25 Years (Pt 2)' (2022) 172 NLJ 7985, 13.
[558] *Central Trading & Exports Ltd* v *Fioralba Shipping Co (Kalisti)* [2014] EWHC 2397 (Comm) [29].
[559] *Jiangsu Shagang Group Co Ltd* v *Loki Owning Company Ltd (The Pounda)* [2018] EWHC 330 (Comm).
[560] *Lesotho Highlands Development Authority* v *Impregilo SpA* [2005] UKHL 43 [26].
[561] *Terna Bahrain Holding Co WLL* v *Al Shamsi* [2013] EWHC 3283 (Comm) [85].
[562] Khawar Qureshi, 'Arbitration Act 1996: Key Cases in 2016' (2017) 167 NLJ 7738, 17.
[563] Noussia (n 535) 140, 149.
[564] Roger hael O'Reilly, "Appeals from Arbitral Awards: Should Section 69 be Repealed?" (2003) 69(1) Arbitration 1.

by the parties[565] and facilitates an appeal to the courts for disputing an arbitral award on a point of law.[566] S69 has two legal facets, each adjoined with comparatively different hurdles. These can be distinguished with occasions where parties have explicitly agreed[567] to excluding this right of appeal[568] but regardless desire to enforce it, or with parties that allowed it as a recourse. The legislature[569] and the courts[570] have introduced a high, arguably untenable threshold[571] for parties that are classified in the former category. They are required not only to gain court approval for an appeal application, but must simultaneously, surpass the rigorous[572] and discretionary obstacles under s69(3) as a prerequisite in order to be capable of making an appeal.

This 'version' of s69 depicts a restrained judicial approach to subdue party 'sovereignty' which promotes the supervisory role of the courts in securing the integrity and perseverance of arbitral principles. Albeit the plethora of academic literature,[573] there has not been a definitive consensus on whether s69 is desirable and consequently, there is contention on whether it should face alteration. According to Matthews,[574] s69 forms a 'double edge sword': its limited use and success[575] may enhance arbitration's scope of finality and autonomy, but it may contravene the notion[576] which suggests that minimisation or extinguishment of court intervention is incompatible with the wishes of parties involved in commercial disputes as it exponentially decreases the chances to redress an arbitral legal error.

Another viewpoint[577] in support of s69 is that it functions as a 'pole of attraction' for parties to use London as an arbitral seat because it renders the AA 1996 to be within the few international legislations[578] that allow appeals in points of domestic law; a factor which amplifies the efficacy of the current regime. In converse, it has been contested[579] that its restrictive nature stagnates the development of the common law, as precedents are established by appeal judgements, consequently

[565] AA 1996, s69(1).
[566] AA 1996, s82(1).
[567] *National Rumour Co SA* v *Lloyd-Libra Navegacao SA* [1982] 1 Lloyd's Rep 472.
[568] AA, s69(2)(a).
[569] AA, s69(3).
[570] *Reliance Industries Ltd* v *Union of India* [2018] EWHC 822 (Comm) [57].
[571] Richard Liu, 'A Balancing Act: Section 69 of the Arbitration Act 1996' (2018) 21(1) Int ALR 18.
[572] Majumdar (n 536) 22.
[573] Paolo Esposito, 'The Development of Commercial Law Through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress?' (2008) 74(4) Arbitration 429.
[574] Duncan Matthews, 'Sections 68 and 69 of the Arbitration Act 1996' (2021) 3 JBL 259, 264.
[575] Commercial Court Users Group: Minutes of 22 May 2022.
[576] Queen Mary University of London and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2021).
[577] Fulya Teomete Yalabık, 'The Impact of the Seat of Arbitration on Judicial-Interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 Regarding Challenges of Awards Make London an Attractive Hub?' (2021) 70 Annales de la Faculté de Droit d'Istanbul 253, 264.
[578] Maximillian Evans, 'Appeals on a Point of Law: A Comparative Survey and Regulatory Competition' (2013) 79(4) Arbitration 357.
[579] Lord Thomas of Cwmgiedd, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship between the Courts and Arbitration' (2016) The Bailii Lecture.

diminishing the commercial courts' capability in engaging with contemporary issues and creating legal uncertainty. Holmes[580] supports that s69 should be repealed because it is a frequent source of confusion,[581] as there is ambiguity and judicial discretion to the classification of 'points of law', which may be inextricably intertwined with factual elements of the case. Lastly, as Andrews emphasises,[582] s69 is another potent source for exposing confidentiality, a focal point of arbitration. This is also indicated by rules of various institutional arbitration authorities[583] which automatically exclude it as a remedy. A counterargument that rebuts this presumption is made by Liou,[584] who qualifies the appeal application process in stages and verifies that a satisfactory part of confidentiality is retained because of the 'fortified' judicial mechanisms that 'cement' commercial secrecy.

Part V: The Significance of Confidentiality

Confidentiality[585] is an integral part of arbitration[586] as it incentivises parties to commit to arbitral proceedings in lieu of litigation because of the minimised public exposure; a vital 'ingredient' for the commercial world. Confidentiality is related to the 'information used or stated during the proceeding'[587] and despite not being expressly defined in the AA 1996, it is implicitly incorporated as a requirement in arbitral proceedings.[588] The lack of a 'codified' version may derogate arbitration, because of the unforeseeable judicial interpretation that can be constituted via the broad nature of confidentiality.[589] Andrews argues[590] that despite other jurisdictions having adopted a statutory definition,[591] the current regime provides versatility to judges who are eminent in both judicial and arbitral posts and therefore, qualified in exercising proportionate discretion. The notion of appropriately balancing parties' rights against the public interest, was illustrated in *Halliburton*[592] and *Manchester City*.[593] In the former, the Supreme Court ruled that impartiality and the right to disclose information does not negate the legal duty of the appointed arbitrator to preserve confidentiality.[594] In the latter however, as Ahmed emphasises,[595] the courts successfully exercised their

[580] Holmes and O'Reilly (n 564), 6.

[581] ibid 1, 3.

[582] Neil Andrews, 'Improving Arbitration: Responsibilities and Rights' (2018) Legal Studies Research Paper Series University of Cambridge Paper No 41/2018, 18.

[583] London Court of International Arbitration (2020) Arbitration Rules, Article 26.

[584] Liu (n 571) 22.

[585] *Michael Wilson & Partners Ltd* v *Emmott* [2008] EWCA Civ 184 [61].

[586] Hans Bagner, 'Confidentiality- A Fundamental Principle in International Commercial Arbitration?' (2001) 18 Journal of International Arbitration (No2) 243, 249.

[587] Mo Egan and Hong-Lin Yu, 'Intersecting and Dissecting Confidentiality and Data Protection in Online Arbitration' (2022) 2 JBL 135, 138.

[588] *Ali Shipping* v *Shipyard Trogir* [1998] 2 All ER 136.

[589] *Oxford Shipping Co Ltd* v *Nippon Yusen Kaisha* [1984] 2 Lloyd's Rep 373 [379].

[590] Andrews (n 582) 25.

[591] Arbitration (Scotland) Act 2010, Schedule 1, Rule 26.

[592] *Halliburton Co* v *Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

[593] *Manchester City Football Club Ltd* v *Football Association Premier League Ltd* [2021] EWCA Civ 1110.

[594] Karim El Chazli, 'The UK Supreme Court on Arbitrator's Apparent Bias and Disclosure: Some Clarifications and Missed Opportunities: Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48' (2021) 40(2) C J Q 75, 80.

[595] Masood Ahmed, 'Manchester City v Premier League: Transparency Triumphs' (2022) 172 NLJ 16.

powers to disclose the judgement to the public domain, whilst adequately evaluating whether the information and the facts at issue posed a material risk to jeopardising the core element of confidentiality.

Part VI: Section 44

The decision of *A* v *C*[596] reinvigorated another preponderant issue that stigmatises this area of law in respect to the usage of s44 AA 1996. The case was associated with whether a court could under s44(2)(a), make an order for the taking of evidence by deposition from a non-party witness in aid of foreign arbitration. The Court of Appeal's interpretation resulted in the inclusion of third-parties, with the outcome being 'hailed' with both polemic[597] and positive[598] remarks. Although it extended the court's proactive role[599], it failed to resolve the discrepancy that arose in respect to the cases of *Cruz City*[600] and *DTEK*,[601] which had established that the remainder subsections were not applicable to third parties. The evasion of elucidating whether this new approach was exclusive to s44(2)(a), combined with the decision in *Gerald,*[602] which was condemned[603] as restricting the ability of the courts to urgently provide interim relief to parties due to pre-existing institutional rules,[604] has led Justice Sara Cockerill[605] to characterise s44 as a 'judicial hot potato'.[606]

Part VII: Remedies

In light of the issues identified within AA 1996, it is crucial to examine the availability of prospective remedies that could clarify and ameliorate the aforementioned remainder problems.

An endeavour to disentangle the adhesive nature of the AA 1996 was showcased by the Law Commission[607] which released some recommendations on areas in which the legislation can be altered. One of these areas is related to the provisions for challenging an award. In respect to s67, Noussia[608] and Aswani[609] propose the elevation of the 'review methodology' whilst courts face substantive jurisdiction challenges, as it would enable judges to summarily dismiss unmeritorious claims; an approach recently endorsed by the judiciary,[610] thus stupendously accelerating the

[596] *A* v *C* [2020] EWCA Civ 409.
[597] Sara Cockerill, 'Orders in Support of Arbitration: Section 37 Senior Courts Act, Section 44 of the Arbitration Act 1996' (2021) 3 J B L 246.
[598] Masood Ahmed, 'Taking Evidence from Non-Parties in International Commercial Arbitration' (2021) 24(1) Int A L R 57.
[599] ibid 57, 59.
[600] *Cruz City 1 Mauritius Holdings* v *Unitech Ltd & Ors* [2013] EWCA Civ 1077.
[601] *DTEK Trading SA* v *Morozov* [2017] EWHC 94 (Comm).
[602] *Gerald Metals SA* v *The Trustees of the Timis Trust and others* [2016] EWHC 2327 (Ch).
[603] Cockerill (n 597) 246, 250.
[604] *Gerald Metals SA* (n 602) [51].
[605] Cockerill (n 597) 246.
[606] ibid 246, 247.
[607] Law Commission, 'Review of the Arbitration Act 1996'.
[608] Noussia (n 535) 140, 145.
[609] Aswani and Georgieva (n 557) 15.
[610] The Commercial Court Guide, O84-O86.

resolution of arbitral disputes. Majumda[611] disputes the efficacy of this contrivance, as he argues that hearings are promptly administered and do not involve rigorous examination of oral evidence, thereby rendering such a mechanism redundant. S68 has been chiefly found[612] to be an amenable provision because it encompasses a symmetrical balance between judicial interventionism and arbitral independence which according to Matthews[613] should remain intact.

Liou[614] supports that s69(3)(c)(ii) is too stringent and should be replaced with the requirement of 'general doctrinal importance or of general importance to the industry concerned'. This would potentially result in an increase of appeals, 'fixing the lacuna' of the underdeveloped common law, whilst a concurrent imposition of criteria to parties that incorporated s69 in an agreement would counterbalance the 'opening of the floodgates' argument. Moreover, the legislature should bolster the utility of s45, which functions similarly to s69 but on a preliminary basis, as this not only would increase precedence but would also maximise the tribunal's legal precision and performance.[615] Additionally, the 'demystification' of s44 would only be achieved by legislative amendment as the prospects for a relevant arbitral case to reach the Court of Appeal are sparse.

Lastly, according to Aswani,[616] an unequivocal addition would be the incorporation of statutory rules regulating online hearings, evidence and awards in order to be in conformity with technological advancements and equivalent arbitral regimes that have obviated difficulties arising from the Covid-19 pandemic. A fortiori argument[617] is that the AA 1996 should be modernised and inaugurate a harmonising 'apparatus' between confidentiality and data protection rules with the ultimate aim being the protection of a prudential arbitral proceeding.

Conclusion

In conclusion, the AA 1996 has some corrosive 'traits', aggravated by its 'obsolete' identity and immediate amendments should be adopted to demarcate 'the thin fictional line' between the rights of the 'judicial gatekeepers'[618] and the arbitral parties[619] in order to revitalise English arbitration and position it at the forefront of the dynamic commercial world.

[611] Majumdar (n 535) 20.
[612] Aswani and Georgieva (n 557) 18.
[613] Matthews (n 574), 272.
[614] Liu (n 571) 28.
[615] Shantanu Majumdar, 'Arbitration vs Litigation... Never the Twain Shall Meet?' (2020) 170 N L J 7879, 20.
[616] Aswani and Georgieva (n 557) 17.
[617] Egan and Yu (n 587), 137.
[618] AA 1996, s70.
[619] AA 1996, s1.

A Deceptively Simple Solution to English Law's Problem with Consent

Zahra Lahrie*

Abstract: *The current consent model underpinning English Law's approach to sexual offences is muddled, confused, and lacking in principle. This article focuses on the approach to deceptions contained within Section 74 and 76 of the Sexual Offences Act 2003 (SOA 2003) and as developed through the case law, to highlight the incoherence and uncertainty generated by a categorical stance. Instead, this article proposes that all deceptions, so long as they are material to the victim's consent and the defendant has knowledge (or ought to have knowledge) of the victim's mistake, should vitiate consent; this approach, which is based on fully protecting negative sexual autonomy, is presented as both a practically and morally sound alternative to the present position under the SOA 2003.*

Introduction

The extent to which deception should vitiate sexual consent has proven a nebulous area for the law and academics alike. It involves a determination of which acts (or omissions) linguistically constitute a deception; a distinct question from what the law should recognise as a deception. Furthermore, the law must resolve whether all forms of deception vitiate consent, or if only deception as to certain facts are relevant to the issue of consent. If the law decides to differentiate between different types of deception, what guidelines does it employ to draw that distinction? This article will begin with an examination of the case law surrounding Section 76 and 74 of the Sexual Offences Act 2003 (SOA) to reveal that the failure of the law to answer these questions has created legal uncertainty and arbitrariness that reveals the gendered prejudices of the law.

Learning from the lessons of the SOA and drawing from the work of Herring, Pundik and Gibson, this article will suggest that all deceptions should vitiate sexual consent under the law.[620] Where the defendant has actively or passively deceived the complainant as to a fact, which is material to her consent, and this deception induces sexual activity which the complainant would otherwise not consent to, this deception vitiates consent. The material nature of the fact to the complainant's consent is for her determination alone; so long as the defendant knew (or ought to have known) of the materiality of the fact, then the defendant is guilty of a sexual offence.[621]

It will be argued that this approach to deception not only ensures the coherence of the law, preserving the principle of fair warning, but maximises sexual autonomy. In light of statistics suggesting there exists a high-level of sexual offending, yet proportionally low instances of rape being reported, and police-recorded rapes resulting in sexual offences charges, this article does not engage with

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[620] See Johnathan Herring, 'Mistaken Sex' (2005) Crim LR 511; Amit Pundik, "Deception about What? Subjectifying the Criminalisation of Deceptive Sex" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023); Matthew Gibson, "Deception, Consent and The Right to Sexual Autonomy" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023)

[621] Sexual Offences Act 2003 s 1-4

objections to the subjectivist approach based on overcriminalisation.[622] Rather, this article defends the subjectivist approach against objections based on public policy, through the lens of the uniqueness of the right to sexual autonomy.

Part I: The Current Legal Framework

S.76 is the only provision in the SOA framework that explicitly provides for the vitiation of consent by the defendant's deception. Under S.76, where it is proven that the defendant has intentionally deceived the complainant as to the nature or purpose of the relevant act or intentionally induced the complainant's consent by impersonating a person known personally to the complainant, then it is conclusively presumed that the complainant did not consent to the sexual activity and the defendant lacked reasonable belief in the complainant's consent.[623] A defendant's deception only attracts the operation of S.76 where he has intentionally misled the complainant (active deceptions) as opposed to where he knowingly exploits a mistake made by the complainant (passive deceptions).

The reason for drawing a line between active deceptions as to identity and the nature and purpose of the act, and other deceptions, can be gleaned from pre-2003 cases on deception. In *Flattery,*[624] the defendant had sexual intercourse with the complainant under the guise of required surgery. In *Tabassum,*[625] the defendant examined the breasts of multiple women for the false purposes of a breast cancer survey, and in *Williams,*[626] the defendant suggested to the complainant that he was performing a singing technique to perform sexual intercourse with her. The extremity of these scenarios, combined with the fact that S.76 only covers active deceptions and the potential risk to the defendant in using conclusive presumptions, suggests that S.76 was only to be employed rarely for cases where deception clearly vitiated consent.[627]

However, the application of S.76 SOA 2003 has deprived the provision of practicable force. The only notable case where the courts have found that there was deception as to the nature and purpose under S.76 is *Devonald*,[628] where the defendant posed as a woman online to induce the complainant to masturbate in front of a webcam. However, the Court of Appeal has subsequently criticised its application of S.76 in this case.[629] S.76(2)(a) did not apply to either *Assange*[630] (deception as to use of condom) nor *Lawrance*[631] (deception as to vasectomy), despite it being unclear in the reasoning of the court why the facts did not go to the "nature and purpose" of the sexual act, beyond the decision to give S.76 a "stringent construction".[632] While *de jure* the law takes a clear stance on which

[622] Amelia Handy and Maxime Rowson, "Breaking Point: the re-traumatisation of rape and sexual abuse survivors in the Crown Court backlog" (Rape Crisis England and Wales (2023))
[623] S.76(2) Sexual Offences Act 2003
[624] *R v Flattery* [1877] 2 QBD 410
[625] *R v Tabbassum* [2000] 2 Cr App R 328 CA
[626] *R v Williams* [1923] 1 KB 340
[627] *R v Jheeta* [2007] 2 Cr App. R. 34, [23]
[628] *R v Devonald* [2008] EWCA Crim 527
[629] *R v Bingham* [2013] 2 Cr App R 28, [20]
[630] *Assange v Sweden* [2011] EWHC 2849 (Admin)
[631] *R v Lawrence* [2020] EWCA Crim 971
[632] *Assange* (n 630) [87]

deceptions vitiate consent under S.76, the incredibly high threshold for S.76 renders it without force. This has forced deceptions to be considered under S.74 SOA 2003, a provision that provides a general definition of consent, thereby overstretching this provision which was not explicitly designed to deal with deceptions. The treatment of deceptions through this non-sensical interaction of S.74 and S.76 of the SOA circumvents legal certainty.

The treatment of most deceptions under S.74 SOA 2003 has left the determination of which deceptions vitiate consent unclear, as the courts have failed to draw clear lines between the cases. The court has simultaneously stated that "some deceptions… will obviously not be sufficient to vitiate consent",[633] while leaving the development of the approach to deception to "common-sense",[634] rather than explicitly stating which factors influence the court's determination of which deceptions vitiate consent. This has proven detrimental to legal certainty. First, it remains unclear whether active and passive deceptions equally vitiate consent, or whether it depends on the type of fact the deception goes to. While *Dica*[635] and *B*[636] established that non-disclosure of HIV and STIs will not vitiate consent, these cases left open the question of whether intentional deception as to HIV/STI status can vitiate consent.[637] Second, the court has drawn arbitrary lines between seemingly similar cases, as demonstrated by the cases of *Assange*[638] and *Lawrance*;[639] while deception as to the use of condoms in the former vitiates consent, deception as to a vasectomy did not in the latter case, despite both cases revolving around deceptions to use of contraception. Lord Burnett's decision to distinguish *Lawrance* from *Assange*, and rather treat it similarly to *B*, because deception as to a vasectomy was a deception "which related not to the physical performance of the sexual act but to risks or consequences associated with it",[640] is artificial. Regardless of whether the deception is as to HIV/STI status, use of a condom, or a vasectomy, all these conditions on the claimant's consent are concerned with the consequences of the ejaculation.

Moreover, the court's arbitrary approach seems worryingly underpinned by gender prejudices. In *McNally*,[641] the Court of Appeal held that deception as to one's gender is capable of vitiating consent. The defendant in McNally presented as a boy, wore a dildo underneath trousers, and went by the name Scott., but was biologically a female.[642] Despite acknowledging that not all deceptions will vitiate consent, Leveson LJ still held that the complainant's consent was vitiated as the complainant "chose to have sexual encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the defendant's deception."[643] Deceptions as to identity, including gender, suggest a contrast between a defendant's rep-

[633] *R v McNally* [2013] 2 Cr App R 28, [25]
[634] Ibid.
[635] *R v Dica* [2004] 3 ALL ER 593
[636] *R v B* [2007] 1 WLR 1567
[637] *McNally* (n 633) [25]
[638] *Assange* (n 630)
[639] *Lawrence* (n 631)
[640] Ibid [37]
[641] *McNally* (n 633) [25]
[642] Ibid
[643] Ibid [26]

resentations and the reality of the facts.[644] However, in gender fraud prosecutions like *McNally*,[645] there is no division between the representation and reality; the defendant's gender expression is their 'ontological truth'.[646] Yet, the defendant's genuine gender expression is treated as a deception. Where no reasoning is given for the treatment of a gender non-conforming individual's expression of gender as a deception, beyond that of its effect on the complainant's freedom of choice, it becomes apparent that the court's approach is influenced by notions of a fixed gender binary of man and woman. By singling out deceptions as to gender as capable of vitiating consent, the law not only harmfully represses the gender expression of gender non-conforming individuals, but reproduces gender and sexual hierarchies, whereby transgender men are not seen as "real men".[647]

Part II: All Deceptions Vitiate Consent

In determining whether a deception that induces sexual activity (which would have otherwise not have happened) vitiates consent, it is important to bear in mind the lessons from the failures of the SOA. The failure of the courts to explain the distinctions it has drawn between deceptions in different cases, has not only led to arbitrariness and unclarity that hinders the public's ability to ensure their sexual encounters are in conformity with the law, but such arbitrariness has allowed for the court's approach to be shaped by underlying policy considerations. Therefore, the determination of the circumstances in which deception that induces sexual activity, which would have otherwise not have happened, vitiates sexual consent needs to have due regard to two principles: coherence and desirability in policy terms.[648]

Considering both coherence and public policy, this article suggests that a subjectivist approach be taken, whereby all deceptions that induce sexual activity which would otherwise not have happened, should vitiate sexual consent under the law. First, this means there should be no distinction as to active and passive deception. Active deceptions occur where a defendant intentionally or recklessly misleads the complainant as to a fact, to induce her consent to sexual intercourse. Passive deceptions arise where the complainant is mistaken through no initial fault of the defendant, but the defendant knows of the complainant's mistake and still fails to disclose the truth. Both forms of deception ought to be treated identically, for the defendant is equally blameworthy in both scenarios. Through his superior knowledge of the facts, the defendant exercises power "over the creation of V's belief in deception", manipulating and exploiting the complainant's beliefs.[649] Even where the complainant's false beliefs arise independently from the defendant, the latter will be equally culpable if he fails to disclose information upon realising that the complainant's consent

[644] *Devonald* (n 628)
[645] *McNally* (n 633)
[646] Alex Sharpe, "Preliminaries" in *Sexual Intimacy and Gender Identity 'Fraud'* (Routledge 2018), p. 22
[647] Ibid 9-10
[648] Rebecca A Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2007) 124 Law Quarterly Review 132
[649] Matthew Gibson, "Deception, Consent and The Right to Sexual Autonomy" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023)

is founded on a false belief; failure to disclose in this case is equally exploitative.[650] Both types of deceptions are to be distinguished from mistakes; mistaken belief not only arises independently from the defendant, but the defendant has no ability to exploit the mistake as he is either unaware of the mistake or the impact of the mistake on the complainant's consent. Criminalising active and passive deceptions, but not mistakes, means a defendant will not be criminally liable where the defendant does not know the complainant's consent is founded on a false belief, and where the defendant does not know, or it was not reasonable for them to have known, that a fact is material to the complainant's consent.

Secondly, a subjectivist approach asserts that there should be no distinction as to which facts the deception goes to, so long as the characteristic is material to the complainant's consent and the defendant has knowledge (or ought to have knowledge) of the victim's mistake. A subjectivist approach means that deceptions as to characteristics associated with an individual, rather than the sexual act, like wealth and race, are also capable of vitiating consent. The fact over which the complainant has a false belief does not have to be "an issue which would be regarded as material to the reasonable person, if it was a pre-requisite to consent for the particular victim."[651]

While the proposed conception of deceptions that vitiate consent may initially appear uncomfortably broad, the application of this conception within the context of the broader test of the materiality and knowledge of the complainant's conditional consent illustrates that the subjectivist approach is not overly and inappropriately expansive. Suppose that A has intercourse with B only because A had seen B driving an expensive car and therefore believed that B was a millionaire, but B is actually poor and was merely acting as the valet for the car. Under the subjectivist approach proposed, B would not be criminally liable so long as B does not realise that A held a false belief about his millionaire status and did not know or ought to have known that his millionaire status was material to A's consent. By way of a second example: suppose that A, a cisgender female, has sex with B, a transgender male. A did not know that B was transgender, instead believing him to be a cisgender male, and if she had known that B was transgender, she would not have engaged in sex with him. Even under the subjectivist approach, B would not be criminally liable as long as B does not realise that A held a false belief about their gender identity, and he did not know or ought to have known that the exact contours of his gender identity was material to the A's consent. The expansiveness of the subjectivist approach is fettered by an objective, negligence standard as to the defendant's knowledge of both the complainant's false belief and the materiality of the condition to the complainant's consent.[652]

Some commentators, including academics that embrace the ability of all deceptions to vitiate consent, have expressed concern that allowing such deceptions to vitiate sexual consent is "poten-

[650] Ibid
[651] Johnathan Herring, 'Mistaken Sex' (2005) Crim LR 511, 518
[652] Ibid 517

tially socially undesirable"[653] and that "we should not readily give it legal effect".[654] Moreover, requiring individuals to disclose personal information, on potentially sensitive topics like gender expression, undermines the defendant's right to privacy.[655] Even if the defendant's deception as to gender causes harm to the complainant, such harm is outweighed by the damaging intrusion into the defendant's privacy that results from criminalising all types of deceptions.[656]

However, appreciating the impact of a deception on a complainant's consent and their ability to exercise sexual autonomy, aids in understanding why all deceptions, passive or active, to whatever fact, vitiates consent and why that vitiation should be given legal effect. Sexual autonomy is a right distinct from the general notion of autonomy. Contrary to critics of the consent model for sexual offences, the right of sexual autonomy collapses the mind-body dualism: violations to one's will, are experienced through the corporeal.[657] The fact that lack of consent underpins both the *actus reus* and *mens rea* of sexual offences, demonstrates not a disregard of bodily violations that arise from an infringement of sexual autonomy, but rather that infringements to sexual autonomy violate both the mind and body.[658] Beyond an appreciation of the unique recognition of sexual autonomy, it is important to recognise the two dimensions of sexual autonomy: the right to determine one's engagement in sexual activity (positive sexual autonomy) and the right to refuse sexual relations (negative sexual autonomy).[659] Although both positive and negative elements are important aspects of an individual's right to sexual autonomy, when the two are in conflict, the negative right to sexual autonomy trumps the positive as there "is nothing unjustifiable in refusing to have sex with another and such refusal does not unjustifiably harm another."[660]

Having clarified the scope of sexual autonomy, it is now easily observable what form of understanding of consent and deception enables the full protection of sexual autonomy. In order to preserve sexual autonomy, a full-rich understanding of consent is required. What is necessitated under this strong conception of consent is that "the decision-maker is aware of the key facts involved in making the decision."[661] Therefore, if the defendant has deceived the complainant as to a fact that is material to her consent, that prevents the complainant from exercising fully informed consent. The materiality of the condition should be assessed by the complainant, not objectively, in recognition

[653] Rebecca A Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2007) 124 Law Quarterly Review 132, 141

[654] Ibid. Also See: Amit Pundik, "Deception about What? Subjectifying the Criminalisation of Deceptive Sex" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023), 86

[655] Alex Sharpe, "Preliminaries" in *Sexual Intimacy and Gender Identity 'Fraud'* (Routledge 2018), 22

[656] Ibid 15-16

[657] For discussion of the mind-body dualism see: Tanya Palmer, "Distinguish Sex for Sexual Violation: consent, negotiation and freedom to negotiate" in Alan Reed, Michael Bolander, Nicolas Wake and Emma Smith (eds.) *Consent: Domestic and Comparative Perspectives* (Routledge 2016)

[658] Nicola Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1997) 8 Women: A Cultural Review 143, 152

[659] Matthew Gibson, "Deception, Consent and The Right to Sexual Autonomy" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023), 47

[660] Jonathan Herring, "Rape and the Definition of Consent" (2014) 26 National Law School of India Review 62, 66

[661] See (n 651) 518

of the particularised harms caused by deceptions to the conditions established by a particular complainant. As acknowledged by West, the harms of non-consensual sex are unique from coercive, unwanted sex: the "experience of rape is shot through with an unwilled invasion of the body, fear for one's own imminent death, and the pain of non-consensual physical touching".[662] Similarly, the harms of counterfactual non-consensual sex are distinct. In shaping her positive sexual autonomy and agency, the complainant lays down conditions on her consent, only to realise that the defendant's deception has not only impeded her exercise of positive sexual autonomy but reversed her right to refuse sex.[663] The shame, worry, distrust and bodily violation experienced retrospectively in counterfactual non-consensual sex justifies including counterfactual non-consensual sex within the definition of non-consensual sex, even if there is a lack of immediate fear. Different conditions will be material to different complainants and giving weight to a subjectivist approach enables the protection of a personalised conception of sexual autonomy.

Part III: Balancing the Claimant's Sexual Autonomy against the Defendant's Right to Privacy

It is acknowledged that under this approach to deceptions, parties may have to disclose sensitive information. However, parties can equally choose to exercise their negative sexual autonomy and refuse to have sex if it requires them to disclose sensitive information. Therefore, criminalising all deceptions does not inherently violate the defendant's right to privacy. The law simply prohibits the defendant from exercising their positive sexual autonomy without disclosing relevant information. While this generates a conflict between a defendant's right to privacy and the defendant's positive sexual autonomy, this is not an issue for two reasons. First, the complainant's negative sexual autonomy justifiably trumps the defendant's positive sexual autonomy, as where a conflict arises, the exercise of positive sexual autonomy is potentially more harmful.[664] Secondly, rather than the law resolving the conflict between a defendant's right to privacy and positive sexual autonomy, it allows the defendant to make that individual assessment in accordance with their own situation and with a clear understanding of their obligations under the sexual offences legislation.

As recognised by Pundik, a fully subjectivist approach to deception not only preserves a woman's right to sexual autonomy by recognising "characteristics that are crucial to her"[665] but also satisfies the rule of law as it is sufficiently clear: under the subjectivist approach, people must disclose "every characteristic that their potential partner communicates to be crucial".[666] While a person may not expressly communicate every condition that is material to their consent due to nervousness or 'heat of the moment', a deception will vitiate consent even where the defendant ought to

[662] Robin West, 'Sex, Law, and Consent' [2009] The Ethics of Consent 221, 239
[663] Matthew Gibson, "Deception, Consent and The Right to Sexual Autonomy" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023), 50
[664] See (n 651)
[665] Amit Pundik, "Deception about What? Subjectifying the Criminalisation of Deceptive Sex" in John Child and Jonathan Rogers (eds), *Reforming the Relationship Between Sexual Consent, Deception and Mistake* (Criminal Law Reform Now Network 2023), 86
[666] Ibid

have known that a condition was material to the complainant's's consent; this objective negligence standard not only protects the complainant by accommodating for situations where they have not expressly stated the conditions on their consent, but also by preventing the defendant from relying on their recklessness and ignorance to escape liability. For example, suppose A has sex with B on the condition that B is a member of the same religion as A. B knows A holds this false belief, that A strictly follows their religion and B knows that sexual acts are only permitted between members of the same religion. Even though A has not expressly mentioned the materiality of the condition on their consent, under the subjectivist approach, B ought to have known that it was material on A's consent and therefore his deception vitiates A's consent. As explained and illustrated by the provided example, the subjectivist approach satisfies both the criterion of coherence and desirability in terms of public policy, by not only fully protecting the complainant's negative sexual autonomy and accommodating for the impact of nerves and impulsivity on the claimant's ability to express their conditional consent, but also by giving clear guidance to the public on how to regulate their behaviour.

Conclusion

At first glance, it may seem morally reprehensible to allow a complainant to harbour potentially prejudicial beliefs and allow mistakes as to those beliefs to vitiate consent, where such mistakes are the result of an active or passive deception by the defendant. However, through understanding the unique features of the right to sexual autonomy, and the parallelly unique harms that arise from an infringement of that right, it becomes apparent that a fully subjectivist approach to deceptions is required to ensure the protection of the right to sexual autonomy. The clarity and the coherence of the fully subjectivist approach also acts as an improvement on the current legal framework under the SOA 2003.

CAMBRIDGE LAW TRIPOS
FIRST-CLASS ESSAYS

CRIMINAL | 75%

Wei Ling Chloe Kwan

Shak and Faisal agree to burgle a house together. Faisal insists that one of them should be armed. Shak lends him a hammer, but insists that 'it should not be used' and that it should only be displayed in order to deter any resistance that they might meet. Shak hopes that Faisal will obey this instruction, though he has some doubts. During the burglary, the middle-aged householder, Peter, unexpectedly returns home. Faisal reaches into his pocket for the hammer. Shak notices that Peter seems frightened. Shak judges that Peter is unlikely to resist, and he preemptively tries to indicate to Faisal not to produce the hammer. Faisal notices but ignores Shak's gestures and brandishes the hammer. Peter collapses from shock. Shak and Faisal leave the premises. Faisal attempts to summon help for Peter very soon afterwards, but his English is poor, and the ambulance operator cannot understand him. Shak, whose English is very good, makes no effort to summon assistance at all. Peter dies. Had an ambulance been promptly summoned, he would (medical experts agree) have survived.

Discuss any potential criminal liability which arises.

2022 Tripos, Question 7

D1: Shak, D2: Faisal

Offence 1: Conspiracy to commit burglary

Shak and Faisal are likely liable for conspiracy to commit burglary.

Per s1 CLA 1977, the actus reus of conspiracy is to make an agreement (Hawkesley) for a common purpose (Shillam), and that agreement must be to pursue a course of conduct that will, if carried out in accordance with the parties' intentions, necessarily involve the commission of an offence. Evidently, they reached an agreement to burgle the house, and it necessarily involves the commission of offence of burglary. It is irrelevant that Shak insisted the hammer not be used. Note that, even if the plan was carried out in accordance with Shak's intention, the mere act of entering the

building by trespassing with intention to steal already leads to the commission of burglary under s.9(1)(a) TA 1968. Thus, Shak and Faisal's conditional agreement relates to an unequivocally illegal end; according to O'Hadhmail, the conditional agreement will always amount to conspiracy.

The mens rea of conspiracy requires the parties to (i) intend to commit the offence (Saik's more recent ruling preferred over Anderson), (ii) intend/know any relevant circumstances necessary for the offence shall exist (Saik), and (iii) to play their part in the agreement (McPhillips). Intend to commit the offence is obvious, and they know they are trespassers since they have no permission to enter the house. The parties' intention to play their parts is manifest: they would burgle the house together, while Faisal is armed a hammer (at least apparently) to be displayed to deter any resistance.

Therefore, they are likely guilty of conspiracy to commit burglary.

Offence 2: Burglary

Shak and Faisal are likely liable for burglary as joint principals under s.9(1)(a) TA 1968.

The actus reus of burglary under s.9(1)(a) requires Ds to enter a building by trespassing. Jones and Smith held D would be a trespasser if D enter V's house with permission but exceeds that permission by stealing/attempting to steal. Shak and Faisal's status as trespassers is even more clear than Jones and Smith, given that they had no permission to enter Peter's house in the first place.

The mens rea for burglary is D's knowledge or recklessness as to the fact that he was a trespasser, and D commits the AR with intention to steal, cause GBH or do damage to the building or anything inside. Shak and Faisal must know they were trespassing. As to the element of intention, Faisal possesses at least conditional intent to inflict GBH if resistance was met, since he insisted that 'one of them be armed' and readily brandishes the hammer upon seeing Peter return home. Meanwhile, the both of them must be inferred to have intent to steal from Peter's house.

As such, they might be convicted of burglary.

Offence 3: Assault occasioning ABH

Faisal is likely liable for assault occasioning ABH (s.47 OAPA 1861).

The AR of this offence requires assault or battery causing ABH. Assault is made out as Faisal brandishes the hammer, causing Peter to apprehend immediate and unlawful personal violence. Peter was obviously extremely frightened of immediate and unlawful violence (Smith). As Peter was directly confronting him, it satisfies the immediacy requirement. The harm resulting from Faisal's assault constitutes ABH, which is defined as "more than merely transient and trifling". Since Peter collapses from shock, he likely suffered serious psychiatric injury, which is held to be covered by ABH in Ireland and Burstow.

The mens rea of the s.47 offence requires intention or recklessness as to the assault or battery. This is satisfied: Faisal had direct Moloney intent to cause Peter to apprehend immediate and unlawful violence.

Faisal would be convicted be assault occasioning ABH.

Shak would likely be acquitted of accessorial liability for assault occasioning ABH.

The actus reus for accessorial liability requires D to encourage or assist P. Arguably Shak achieves this through aiding. By lending the hammer to Faisal, Shak renders actual assistance (Robinson).

The mens rea for accessorial liability, however, might be satisfied. On the one hand, Shak insisted that the hammer 'should not be used', indicating Shak does not intend to encourage or assist Faisal to commit the offence. On the other hand, Jogee requires that D intends for his act to encourage or assist P to commit the offence. This could potentially be established: Shak had doubts as to whether Faisal would obey this instruction. His foresight is cogent evidence that he had conditional intent for Faisal to use the hammer and commit a s.47 offence. According to Lord Morris in Lynch, if the driver knew the plan and intentionally drove the car in execution of the plan could be held liable as a secondary party even though he regretted the plan. Similarly, Shak may have regretted the plan, reflected in his pre-emptive attempt 'to indicate to Faisal not the produce the hammer'. Finally,

Shak satisfied the 3rd MR requirement of knowledge of the essential elements of the offence as he was present at the crime scene.

Assuming that Shak had the MR for accessorial liability for the s.47 offence, he could rely on a defence of withdrawal. By pre-emptively trying to indicate to Faisal not to produce the hammer, he manages a voluntary, real and effective withdrawal (Jogee). Adopting the proportionality test proposed in O'Flaherty, Shak did little to encourage or assist P (simply lending a hammer), thus Shak only needs to do little to effect withdrawal. Shak already brought his objection to the attention of Faisal, yet Faisal ignored his gestures and proceeded with the assault. Shak should be acquitted of accessorial liability to the s.47 offence committed by Faisal.

D: Faisal

Offence 1: Murder

Faisal is unlikely to be liable for murder of Peter.

The actus reus of murder requires causing death (Coke). It is submitted that Faisal cannot be said to have caused Peter's death for two reasons. First, by brandishing the hammer, Faisal merely caused Peter to collapse from shock, whereas the death is too remote from Faisal's positive act of assault. The failure to summon an ambulance was a supervening cause that severed the causal chain. Faisal's act thus provided only the historical setting for Peter's death, not a more than de minimis cause (Hennigan). Second, arguably liability can be imposed on Faisal for omission to summon an ambulance promptly, since he created the danger by assaulting Peter, analogous to Miller who set fire to the carpet. Applying Miller, Faisal is under a duty to take steps to remedy the danger. The facts however demonstrate that Faisal did take such steps, attempting to summon help for Peter very soon afterwards. Peter eventually not because Faisal breached his duty, unlike the sister in Evans who failed to seek medical assistance, but because the ambulance operator could not under Faisal's poor English, for which Faisal cannot properly be blamed.

Faisal did not cause Peter's death; therefore, he would likely be acquitted of murder.

Offence 2: UDAM

Faisal is unlikely to be liable for UDAM.

UDAM requires an unlawful and dangerous act that causes death. Faisal's act of brandishing the hammer is unlawful (s.47 offence) and dangerous (Church), yet causation of death cannot be established (see above).

D: Shak

Offence: Gross Negligence Manslaughter

Shak is unlikely to be convicted of GNM.

It is contentious whether Shak owed Peter a duty of care. Unlike Faisal, Shak was a by-stander and did not himself create the danger, excluding a Miller-style duty. Meanwhile, it could be argued that by being aware that Peter collapsed from shock, Shak assumed responsibility to ensure Peter's physical safety, giving rise to a duty. Assuming that a duty is established, Shak clearly breached it. Adomako provides that the breach would be 'gross' if it fell below the standard of a reasonable person in D's shoes. It is submitted that a reasonable person would at least demonstrate some effort to help Peter by (a) calling the ambulance, or (b) simply to assist Faisal in communicating with the ambulance operator with his 'very good' English. Shak's breach is therefore 'gross'.

Furthermore, there was in fact a serious and obvious risk of death at the time Shak and Faisal left the premises, and it was reasonably foreseeable to Shak that there was such a risk, satisfying the 2 requirements in Singh. Distinguishing Broughton, where V might not have been saved had D sought help in a timely way, medical experts found Peter would have survived had the ambulance promptly arrived. Shak's breach evidently caused Peter's death, therefore justifying his liability for GNM.

CONSTITUTIONAL | 72.5%

Conall Fowler

When, if at all, should Parliament be able to legislate to remove the power of the courts to review decisions of an administrative body, or a tribunal?

2023 Tripos, Question 8

Parliament should never be able to legislate to completely oust the power of the courts to review decisions of administrative bodies or tribunals. However, they should still be able to remove some of the power of the courts to review these decisions, in certain circumstances. Judicial review is an essential requirement of the UK's constitutional system; judicial review is a necessary corollary of parliamentary sovereignty, and fundamental in upholding the rule of law, and the separation of powers. Further, the courts are prepared to limit themselves where it is appropriate.

In demonstrating why Parliament should not be able to completely oust judicial review, past case law is a valuable resource. In practice, courts have repeatedly rebuffed attempts to oust judicial review, including in the cases of Anisminic, Cart and Privacy International. In Anisminic, Lord Reid argued that judicial review is a fundamental part of our constitution, and thus the courts must (where possible) give statutes a meaning which fits within the rule of law, which in this case necessitated disregarding the ouster clause, due to its impact on the rule of law. Webb suggests the rule of law was safeguarded in Anisminic, by preventing the illegality and injustice which would arise if the tribunal was allowed to act ultra vires, with no one to constrain their power. The House of Lords Select Committee on the Constitution argued that the proposed ouster clause in the UK Internal Markets Bill (s47), in preventing independent courts from adjudicating on the lawfulness of ministerial action would be 'an unacceptable breach of the rule of law'. This is supported by obiter dicta in the Jackson case, in which Lord Hope and Lady Hale both implied that the rule of law necessarily sets hard limits on Parliament's authority, hard limits which are ultimately interpreted by the courts. As Lord Carnwath in Privacy International argues, the overview of inferior courts and tribunals by higher courts is necessary to maintain legal certainty, a fundamental aspect

of the rule of law. Without judicial oversight, there is no one to protect the rule of law, which risks inconsistent and unfair outcomes, and a violation of individual's rights.

Feldman argues that the decision in Anisminic undermines parliamentary sovereignty as the courts are substituting their views for those of the administrators, who derived their discretion from Parliament. However, Lord Pearce's view is more convincing. Lord Pearce argued that judicial review is conceptually necessary to maintain and protect Parliamentary sovereignty, as without judicial review, a tribunal could arbitrarily decide to expand its jurisdiction, beyond the powers given to them by Parliament. Thus, without the courts holding executive bodies to account, there would be no practical limits on the powers of tribunals and administrative bodies, and they'd be free to subvert Parliament's will. I believe the judges reasoning in Anisminic was somewhat of a façade, and that their real reason for disregarding the ouster clause was to prevent the Executive from growing too powerful and abusing their power in the future, free from judicial oversight. Judicial review is clearly a 'necessary corollary of the sovereignty of Parliament' (as expressed by Laws LJ and Lord Lloyd-Jones in Privacy International), the judiciary are essential in interpreting and enforcing Parliament's will, and without them, laws wouldn't be enforced. In the UK, Parliament is dominated by the Government of the time. Thus, Parliament should not be able to remove the power of the courts to review decisions of an administrative body or tribunal, as in doing so, the Executive would be able to become so powerful as to undermine parliamentary sovereignty, and in the process, to violate the rule of law. This was clearly demonstrated in the UK Internal Markets Bill, where they aimed to prevent the judiciary from striking down delegated legislation, even where it blatantly and severely violated the rule of law, and international human rights principles. Although elected as MPs, individual ministers do not have the democratic mandate to implement such serious changes without the direct approval of Parliament, and thus should be unable to do so. While Parliament is able to legislate to reverse the decisions and actions of executive bodies, or to limit their powers, they are unable to effectively scrutinise the vast amounts of delegated legislation which are enacted. The courts are able to combat this weakness of Parliament, by reviewing decisions and actions, and protecting the rights of those negatively affected.

It is also of note that the courts already place limits on themselves. For instance, they do not typically review errors of fact, unless the stringent conditions laid out in E are satisfied. Additionally, the courts are aware of their limitation when it comes to determining what the 'correct' outcome is, and even in cases of legal errors, where the case involves subjective judgement, the court tends to defer to official's interpretation of the statute (South Yorkshire Transport). However, when it there are serious concerns, for instance where a power interferes with someone's liberty, they can be prepared to substitute their own decisions (Khawaja), in order to protect the rights of the individual. Further, the courts accept that an ouster clause such as that in Anisminic excludes jurisdictional factual errors, although it is notable that the courts are prepared to manipulate the boundary between errors of law and errors of fact, particularly where a power interferes with someone's liberty (Jones). Cart is another case in which the courts accepted that although their jurisdiction was not fully ousted, given that tribunals were judicial bodies, given discretion by Parliament, to allow all decisions to be appealed to the High Court would be judicial overreach. Thus, they held that where a tribunal an error of law, only raising serious rule of law issues would be reviewed by the High Court. This demonstrates the willingness of the courts to ration their powers, because 'judicially curated constitutional principle' is 'in the driving seat when it comes to such matters' (Elliot, 2018). Thus, I agree with Lord Carnwath's obiter comment in Privacy International, that 'it is ultimately for the courts […] to determine the limits set by the rule of law to the power to exclude review'. The courts will restrain themselves, and Parliament shouldn't have limitless power to do so.

In Allan's view, overriding or dispensing with the rule of law would be abandoning law itself, and thus the courts should disapply any Acts of Parliament which offend the rule of law. Allan's view has traditionally been seen as a more extreme view, but in recent cases, such as Privacy International, this is precisely what the courts have done, albeit under the guise of the creative interpretation of the meaning of words (and thus statutes), thus distorting their true meaning in order to uphold the role of law. Judicial review is also essential in enforcing the separation of powers. Without the courts' interventions, there's a risk of executive bodies encroaching on the powers of

both Parliament, and the courts, as explained by Lord Pearce in Anisminic. Political accountability can certainly play a role in helping to restrain the executive, and Parliament, however ultimately, legal accountability, through judicial review, is necessary in a democratic society, and to uphold fundamental constitutional principles.

Thus, Parliament should be able to legislate to remove some of the power of the courts to review decisions of administrative bodies or tribunals, however only in limited circumstances, circumstances which should be determined by the courts. For instance (as Craig suggests) where Parliament has intentionally reallocated judicial supervision to a new statutory body, operating in a judicial capacity, and has used extremely clear and precise language. However, even in these cases, the courts should still be able to subject the statutory body to a basic level of scrutiny.

TORT | 74%

Macy Chung

One weekend earlier this year, Storm Donoghue blew through the UK; once the worst of the winds had died down, the country was hit by heavy rainfall and severe flooding. Unfortunately, because their meteorologists had not been paying enough attention to the data, the Met Office failed to extend their severe flood warning to certain parts of the country. Bolton, an elderly man with severe arthritis, consulted the Met Office's website, which did not mention the possibility of floods in his area, so he set off to the shops on his mobility scooter.

Calliope, an agency nurse who had occasionally provided care for Bolton in his home, was dashing along the same pavement, eager to get home to enjoy her day off work. Calliope recognised Bolton on his mobility scooter and realised he was about to drive into a deep flood from the road that had engulfed the pavement, but did nothing to alert him. Bolton's mobility scooter drove into the flood; in a panic, Bolton activated the accelerator instead of the brake. The scooter skidded off the pavement, into the path of a bus driven by Froom. Froom was a newly-qualified bus driver, who had lost concentration for a moment looking for the bus's windscreen-wiper controls; a more experienced driver would probably have been able to swerve to avoid Bolton. Bolton suffered serious leg injuries as a result of the collision. Mortified by what had happened, Calliope called for an ambulance to help Bolton, and Emeh answered the call. Emeh told Calliope that the service was over-stretched, and suggested Calliope should transport Bolton to hospital herself. In fact, the air ambulance was free, and could have reached Bolton within 15 minutes, but Emeh had carelessly failed to check. It took Calliope an hour to drive Bolton to hospital, longer than the 30 minutes that the drive would normally take, because of floodwater on the roads. Despite impeccable medical treatment, both of Bolton's legs had to be amputated. The evidence suggested that patients with comparable injuries to Bolton who received medical intervention within 15 minutes had a 75% chance of a full recovery, but that percentage fell to 40% with a 30-minute delay before

treatment. Bolton was traumatised by the incident, but was happy to be free of the arthritic pain in his legs that he had previously endured.

Advise the parties as to their rights and liabilities in tort.

2022 Tripos, Question 7

B->M (negligence)

M's failure to report severe floor warning constitutes omission. The common law does not normally impose liability for omissions for a failure to prevent harm caused by the conduct of third parties (here the natural disaster) unless there's a creation of dangerous situation (Vellino, Smith v Littlewoods). M did not create a dangerous situation, so M is not liable. This rule applies to public bodies like M as well (Stovin v Wise). If M had assumed responsibility, liability may arise in respect of the wrongdoing of others where the defendant is held to have undertaken a duty of care specifically to the plaintiff (Stansbie v Troman). It was ruled in Stovin v Wise that public authorities do not assume responsibility based on "general reliance" placed on it by public or the fact that they had statutory power, so unless the reporting was made particularly for B, M would not be liable.

B->C (negligence)

C's failure to save B was an omission (Smith v Littlewoods) and as mentioned common law generally does not impose liability on omissions. B may argue that liability may arise in respect of the wrongdoing of others where the defendant is held to have undertaken a duty of care specifically to the plaintiff (Stansbie v Troman), that C assumed responsibility by being B's nurse and occasionally provided care to B. Indeed, C can assume responsibility without the claimant relying on the defendant (White v Jones), as in the case here, but the better view is C only assumed responsibility at B's home for B and not on the streets. There was no mention that B escaped from B's home under C's care; the evidence from the question suggest C was not working for B at the time of the accident. C does not owe B a duty, hence not liable to B.

B->F (negligence)

Initial leg injury:

F has a duty of care to other road users as driver (Nettleship v Weston), hence F has a duty against B, another road user. It is debatable whether F breached such duty. Indeed, the learner drives are held up to the standard of an ordinary driver (Nettleship v Weston), so F cannot dispose his liability by arguing that he is newly qualified. Given that a more experienced driver would have been able to swerve to avoid B, and all drivers are held to standard of ordinary driver, F would have breached. However, it is important to note that F was placed in a position of peril and emergency – F was faced with the sudden appearance of B on the road. As such, the F should not be judged by too critical a standard when he acted on the spur of the moment to avoid an accident (Ng Chun Pui v Lee Chuen Tat), account should be taken of the conditions with which the defendant was faced (Greene v Sookdeo). It is submitted that F has breached, as F was not acting on the spur of the moment, nor intend to avoid the accident – he lost concentration as he was looking for the controls. F has breached the duty. As B would not have suffered the initial leg injury but-for the swerve (Barnett v Chelsea Hospitals), causation on the initial leg injury is established. F can hold B contributory negligence, as B failed to take reasonable care for his own safety and B's failure to take reasonable care, by rushing onto the driving path, contributed to the damage he suffered. The courts would conduct a rough exercise of apportionment taking into account the moral blameworthiness and the causative potency of C's failure to take reasonable care for himself under the Law Reform (Contributory Negligence) Act 1945 when determining the distribution of damage.

Subsequent amputation:

The subsequent delay in rescue does not reach the threshold in establishing novus actus. Negligent medical treatment will not break the chain of causation unless it is grossly negligent (Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust). The reasoning is mistakes in hospitals are relatively frequent, and so there must be something 'egregious' and a high degree of unreasonableness is required to break the chain of causation (Wright v Cambridge Medical Group). It is sub-

-mitted that the problem is grossly negligent, as the hospital did not send ambulance when its available, and instead advised taking private transport. Such 45-minute delay amount to the gross negligence threshold, hence such constitutes NVI and F would not be liable.

B->Bus Company (BC) (vicarious liability)

BC is vicariously liable for F's negligence, as BC is obviously the employer of F (Catholic Child Welfare Society v Various Claimants), and F's negligence in driving is directly linked to his employment as a bus driver. It would be just and fair to have BC vicariously liable (Lister v Hesley Hall), especially when BC sent a junior, newly qualified driver to drive during the heavy rainfall. F may seek a contribution from BC under s1(1) of the Civil Liability (Contribution) Act 1978.

B->E (negligence)

It is debatable as to whether E has duty to B. Fire brigades are not under a common law duty of care to answer emergency calls or take reasonable care (Capital & Counties v Hampshire CC), so by analogy E would not have duty as an emergency rescue service to take reasonable care. Indeed, once an ambulance service accepts a call for assistance, it assumes responsibility for the particular patient and a duty of care arises to those to whom it is summoned to assist (Kent v Griffins), but Kent can be distinguished here as E did not accept the assistance nor duty to particular patient, instead E told them to use their own means of transport. Arguably E should not be liable for the delay of medical treatment.

But if Kent is seen is the prevailing doctrine as the nature of ambulance and NHS is more aligned to the current case, E has a duty to B. E has breached by not sending the available air-ambulance. In determining causation, the loss of a chance claim in medical negligence is irrecoverable (Gregg v Scott), where the chance of survival dropped from 42% (below 50%). Here, B can rely on the balance of probabilities claim – here, E's negligence made it more likely than not that B's leg cannot be cured, as the risk of amputation fell from 75% (above 50%) to 40% (Gregg v Scott), so causation is established. The worsened leg condition is a reasonable foreseeable consequence of

medical negligence (Wagon Mound No 1).

E may argue that the natural cause of floodwater may be a novus actus leading to the delay of rescue. The natural cause has indeed increased the likelihood that B will suffer damage because of delay in treatment – given the extraordinary, unprecedented natural events, especially as M failed to report the poor weather, the event can act as NVI in relieving E's liability (Carslogie Steamship). However, it is submitted that the NVI fails, as the air-ambulance was available at E's disposal and it failed to employ it. Hence, where there are two successive torts separate in time, the second tortfeasor 'takes the victim as he finds him' and is only liable for additional damage (Wright v Cambridge Medical Group), so E would only be liable to the additional damage and not the initial leg injury. The fact that B is happy to be free of arthritic pain is irrelevant.

If Kent prevails such that E does not owe B a duty, only the bus driver is liable to the extent of the leg injury (not amputation) damage, shared with BC (s1 CLCLA).

If Kent departed such that E owes B a duty, E will be liable for the additional damage (amputation), the bus driver and BC will share the initial leg injury responsibility (s1 CLCLA).

CIVIL | 70%

Vivek Bilous

To what extent was the potential of stipulation to be developed into a general law of contract realised in Roman law? What factors aided or hindered this development?

2022 Tripos, Question 2

This essay will examine the prevalence of stipulatio in order to show how Roman law did not exhibit a general law of contract, due to the increased favourability of newer and more convenient contracts. Factors contributing to the hindrance of stipulatio included its strict formalities, the unfairness towards the less privileged in society, and an exclusion of non-Roman citizens, both of which would not facilitate socioeconomic progress – in turn, the alternatives provide solutions to this issue.

The *stipulatio*

Stipulatio was the oldest of the nominate contracts – it involved a formal promise made between two parties, capable of governing any content desired to be contained within the contract. Although stipulatio was stricti iuris, that is, it carried with it stricter expectations regarding formalities, it arose from the ius civile and it imposed unilateral obligations, it was generally used quite prominently since even before the Twelve Tables as a way to effect an agreement between two parties. The ability for it to apply to any context certainly presented it as a favourable mode to convey interests, given that there was little dispute required to decide which contract would need to be used for each situation (an issue which modern systems of contracts are forced to grapple with and, admittedly, the developed Roman system) – so, quite contrary to the question asked, it could be argued that Roman law certainly could have been a law of contract, at least before the Republic.

Exclusion of less privileged, and foreign, people

However, the formalities of this contract must be assessed before a conclusion can be drawn regarding its demise. It required a fixed and specific utterance of particular words, in one continued

transactional conversation – substantial intervals could invalidate the contract (D.45.1.137pr). This immediately excludes deaf people nonetheless worthy of being able to ratify agreements – this would be a drawback to the contract even prior to the introduction of other contracts, showing how it could not have substantiated for an appropriate law of contract in the Archaic and early Empire periods. Then, also, only Roman citizens could convey this contract, due to the ius civile imposition of the stricti iuris contracts. This is a major drawback as we understand that this essentially excluded much of the foreign affairs with which Rome engaged, particularly during the endeavours for economic progress in the Republic and classical periods. This contract was clearly ill-suited to territorial, cultural and economic expansion, so its alleged generality was extremely exclusive. Even beyond that, although disputed by Nicholas, Borkowski claims that it took until the late Republic for the strict use of the words "spondesne? Spondeo" to be relaxed, in order to make way for other languages and more colloquial, varied expressions. As a result, it can be made very clear how there could never have been a general law of contract exhibited through the stipulatio.

Being a stricti iuris contract, stipulatio was also used less as it neglected good faith considerations, which are intrinsic to the bonae fidei contracts. This means that, for instance, there was no protection against the other party in a stipulatio in the case that a defect arises in the product being conveyed through the contract, or duress on the promise was present. The drawbacks of this can again be tied to the ius civile characteristics of this contract – the patricians did not wish to generalise from the strict and narrow framework of the formulary system for this contract, even if it meant that the plebeians suffered as, obviously, they would be likely to be affected financially more through such things as a materialisation of a defect, or an instance of fraud, through the contract. So, not only did the stipulatio jeopardise foreign interaction, but also unfairly persecuted the less wealthy even within Roman society.

The newer nominates and their advantages

Lawson argues that much of the developing Roman commercial world was governed by the four consensual contracts, along with pledge and mutuum. This essay agrees with Lawson, insofar that these contracts largely resolved the issues that the stipulatio presented. For example, with the ex-

ception of mutuum, all of these were bonae fidei contracts. This means they were bilateral, were centred around good faith, required considerably less formality, and were governed under the ius honorarium. As a result, there was greater protection against fraud, duress, and mistake – displaying an improved furthering of the plebeian interests. The ius honorarium governance meant an enabled expansion to non-Roman citizens, and the lack of verbal/written form required for these contracts, particularly the consensual ones, meant that deaf people could now be included too.

Watson argues that there was a general system of contract through stipulatio as each of the newer contracts were created as an offshoot from the stipulatio. Furthermore, it was often used to tie up loose ends of nominate contracts, e.g. by attaching a stipulatio dublae requirement in a formula in case of a breach, or a buyer using a stipulatio to force the seller to make an express undertaking as to the quality/fitness of the subject matter of the sale. However, stipulatios clearly evolved to serve merely accessory purposes – as Lawson has argued, stipulatio and its inherent strictness were side-lined due to its incapacity to provide for gratuitous agreements between friends for instance, something which mandatum aptly facilitates. The very concept of 'consensual' contracts relying on mere agreement for ratification of the contract, without stipulations as to time, place, form, delivery, explains the hindrances of the stipulatio.

Nevertheless, it could be contended that the argument that the newer contracts facilitated socioeconomic progress is flawed given that the very specific definitions of the nominate contracts meant that, if an agreement fell outside of the expectations required for each of them, no contract could be found between the two parties whatsoever. Justinian gives an example, at J.3.24.1, where a person gives clothes to a tailor to be mended, and agreeing that the sum to be paid shall be subsequently agreed upon. In both sale and in letting and hire, there is a requirement that the price to be paid was certain – so, in this case, the agreement between the two parties was just that, an agreement. This shows the drawbacks of the essence of a 'consensual' contract – more is still required than merely an agreement as to the subject matter.

However, it can be rebutted that this is a price to pay for the greater clarity that the nominates offer – it is extremely easy to ascertain the resulting actions available for the newer nominate contracts.

For instance, the contract of sale, emptio venditio, results in an actio empti – yet, with stipulatio the action can vary dramatically, given that the content of the contract itself could vary dramatically too. So, the condictio was unpredictable, harming the economic sanctity that the stipulatio is often purported to have protected through its strict formalities.

The fact that the nominate contracts could be easily identified too, within its larger system of facilitating general commercial life, reflects the modern English system and the benefits of it where, although there is a law of contract, there is increased context-based specialisation for different 'contracts'. Ultimately, there was never an evolution towards a greater system of contract through stipulatio, due to numerous hindrances regarding inequality and undue formality (without even considering Nicholas's argument that stipulatio served only in situations of mancipatio), and, if there was any such general system of contract, it would be most aptly explained through the facilitation of the 6 main contracts that Lawson argues, analogous to the English system.

CONTRACT | 74%

Evi Brachimi

Amil wanted to start up a business selling coffee outside the local station. He inquired of Bet, who rented out mobile food trucks in the locality and knew the area well, whether she had a suitable truck from which he could operate his business. Bet showed him a large coffee truck, and said:

The equipment in this truck can make coffee for up to 100 customers per hour. You will need that to cope with the commuters rushing to the station, particularly at rush hour. Parking is no problem: you will be able to park the truck outside the station for £10 a day.

Amil entered into a written agreement to rent the truck from Bet for 5 years at £2,000 a month, with the first year's rent payable immediately. The agreement contained a clause which said 'The hirer shall not be entitled to rescind the agreement for any reason except in the case of fraud on the part of Bet.'

Amil drove the truck to his chosen spot outside the station, where he discovered that the parking charges were actually £15 per day. However, he decided to continue, and opened up his business. On the second day, three large coach loads of tourists arrived at the station all wanting to buy coffee. Amil discovered that the equipment in the truck could only make coffee for 90 people in an hour.

Amil's business continued to thrive, serving coffee to the tourists who came to the station to look at the blue plaque there commemorating the first woman train driver. He rarely sold coffee to commuters, who were in too much of a hurry to buy hot drinks.

After nine months, Amil discovered that Carlo was renting out coffee trucks at £1,500 a month. He wrote to Bet saying 'Because of your lies I am cancelling the contract. I refuse to make any more rent payments and I demand that you pay back the money I have paid you.'

Amil returned the truck to outside Bet's office and rented a truck from Carlo, which he has

been using ever since to sell coffee outside the station.

Advise Bet, who cannot find a replacement customer to hire the coffee truck.

2023 Tripos, Question 4

A may prima facie be entitled to rescind the contract on grounds of misrepresentation.

B's statements with respect to (1) the truck's capacity to make coffee, (2) the customer base of commuters, and (3) the parking fee are all proven false. These statements do not amount to contractual terms as notwithstanding the fact that B is more knowledgeable than A in the mobile catering industry (cf. Dick Bentley Productions Ltd), it is not clear that B's statements were so important that the contract would not have been made but for their making (Couchman v Hill), and the statements appear to be omitted from the contract itself (Inntrepreneur Pub Co). This suggests that on an objective interpretation of the parties' intentions (Heilbut, Symons v Buckleton), the parties did not view the statements as contractually binding. However, all three statements qualify as misrepresentations. Statements (1) and (3) are clearly false statements of fact (Brennan v Bolt Burdon), whereas statement (2) is a misrepresentation due to B's special knowledge relative to A, which implies that B knows facts which justify his opinion about the rush of commuters (Smith v Land & House Property Corp). A reasonable person in A's position would consider a statement about the frequency of customers important as it qualifies their understanding of the business' profitability and capacity to operate, so it could not be said the falsity of statement (2) was trivial (Avon Insurance plc v Suire Fraser Ltd).

A would have to show that the statements which were clearly addressed to him prior to the agreement (Roscorla v Thomas) induced him to enter the contract. The test he would have to satisfy differs depending on the nature of B's misrepresentation. If B was fraudulent in that he made the false representations knowingly, recklessly or without belief as to their truth (Derry v Peek), there is a strong factual presumption that A relied on the misrepresentations to enter the contract (BV Nederlandse), and A would only have to show he was materially influenced by the misrepresentation in that it was actively present in his mind (Edgington v Fitzmaurice). B's statements were arguably material considerations which would induce the reasonable

person to contract so that the onus of proof would shift to B to disprove reliance, which would be unlikely (Museprime v Adhill).

Alternatively, if B's misrepresentations were negligent, A would have to show that the statements were a decisive reason in that he would not have entered the contract but for the misrepresentations (Raiffeisen Zentralbank Österreich AG); A would not have to show they were the sole or main reason for contracting (Dadourian Group International v Simms). It is likely inducement would be found if the misrepresentations were negligent as well. Prima facie therefore, B would be liable for actionable misrepresentation.

The 'no rescission' clause has been validly incorporated into the contract by signature (L'Estrange). The clause would not take effect if B's misrepresentations were fraudulent as it expressly provides for this contingency. However, it is likely it would also not be valid if B's misrepresentations were negligent. Under s3(2) MA 1967, a misrepresentor cannot exclude a remedy available to another party of the contract via a contractual term unless it satisfies the reasonableness test under s11 UCTA 1977. The clause will likely fail this test as, despite the fact that neither A nor B are sophisticated commercial parties, B has relatively greater bargaining power than A (Sch 2(a)) and the clause would otherwise force A to keep alive a contract which he would not want. Consequently, the clause would not take effect and A would be entitled to rescind the contract.

A would be entitled to both rescind the contract and claim damages, either under the tort of deceit if B's misrepresentations were fraudulent, or under s2(1) MA 1967 if the misrepresentations were negligent. With respect to rescission, B could argue that A had affirmed the contract (Allcard v Skinner) as A had discovered the true state of affairs with respect to the business and its customers but continued renting the truck for nine months, carrying out a profitable business as opposed to trying to keep afloat a failing one (cf. Street v Coombes). It is possible this argument will succeed, as it ultimately appears that A was content with the business before discovering a cheaper opportunity to carry it out in the same area. Consequently, A would be barred from rescinding the contract, but could still claim damages. If rescission was held not to have been barred, then the contract would be rendered void once A exercised his right to rescind and the parties would be restored to their position before entering the contract, so that B would have to pay A back his rent

for the first year and A would have to return the truck (which he already did).

If B's misrepresentations were fraudulent, A would also be able to claim damages for all loss flowing from the transaction (Smith v New Court), including loss of profits or opportunities. If B's misrepresentations were negligent, A could claim damages under s2(1) MA 1967, which creates a fiction of fraud that renders the misrepresentor liable as if the representation had been made fraudulently so that A would be able to claim consequential losses under statute as well (Royscot Trust Ltd v Rogerson). Under statute, B would have a defence if he showed he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true, but it is unlikely he will be able to establish this (Howard Marine Co v Ogden) as given his knowledge of the locality, the business as well as his own equipment, his statements could have been easily verified. Consequently, B would be liable to pay for the expenses A incurred in operating his business, including the greater parking fees, the rent for the first year that was payable immediately (if rescission is not barred), and the profits that he would have made if he had rented out the cheaper truck from C from the outset (East v Maurer).

Note that if rescission is barred, the court cannot award A damages in lieu of rescission under s2(2) MA 1967 as the award is contingent on rescission being available in the first place (Salt v Stratstone). If rescission was not barred, the court could opt to award damages under s2(2) MA 1967 if it found it equitable to keep the contract subsisting, bearing in mind the parties' respective losses and the nature of the misrepresentation. Given the relatively minor losses incurred by A and the fact that the falsehood of the representations did not severely affect the running of business, contrasted with B's difficulty in finding a replacement customer to hire the truck if A rescinded, it may be possible that the courts will award damages in lieu of rescission instead under the contractual measure of expectation (William Sindall plc v Cambridgeshire CC), whereby A would be able to claim losses as if the misrepresentations were warranties and therefore true.

Ultimately, there is a high chance that A will not be able to rescind the contract so that B will be able to keep the agreement alive, and A's renunciation of the contract would give him the right to sue for breach, subject to a counterclaim in damages for misrepresentation either under the tort of deceit or under s2(2) MA 1967.

LAND | 70%

Constanza Meade

'The courts' difficulty in navigating between an expectation-oriented and a detriment- oriented approach to the remedy in proprietary estoppel cases suggests that the whole proprietary estoppel doctrine is fundamentally unsound.' Discuss.

2022 Tripos, Question 10

The doctrine of proprietary estoppel is based on the Court's intention to award relief to claimant's who have relied on assurances to their detriment. However, the doctrine is permeated with conceptual unclarity in relation to the notion of unconscionability and the remedy it provides. This essay will argue that the Court's approach to the remedy in proprietary estoppel is indicative to the unsoundness of the doctrine and that instead, PE should be assimilated with the doctrine of Common Intention Constructive Trusts.

When the four elements of assurance, detriment, reliance (Thorner v Major) and unconscionability (Gillet v Holt) are fulfilled and a claim under proprietary estoppel is established, the Court is tasked with the ambiguous duty of "satisfying the equity" (Jennings v Rice). In Jennings v Rice, Lord Walker LJ distinguished two cases: quasi-bargain cases and cases with uncertain expectations. In the former he postulated that such case "fit fairly comfortably into [the view that the aim is] to vindicate the claimant's expectations as far as possible, and if possible by providing the claimant with the specific property which the benefactor has promised. In the latter, he stated that "the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way [rather than by fulfilling the claimant's expectations]." This dichotomous approach between an expectation-oriented and detriment-oriented approach has led to confusion in the doctrine of PE.

These two approaches left the Court which little clarity in affording a remedy for a doctrine which is itself not very clear-cut. Arden LJ held in Suggit v Suggit that "the question is: was the relief

that the judge granted out of all proportion to the detriment suffered?" This line of reasoning was followed in James v James, holding that PE "is a doctrine which … focuses on expectations created rather than losses suffered … [however] it is also an equitable doctrine, and therefore tempered by conscience." Henderson LJ was wary of the latter method, stating that "the need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search because …. Any summary formula is likely to prove to be an over-simplification." A second method adopted by the courts was to calculate B's right in reference to B's detriment. In Davies v Davies Lewison LJ aptly stated that "there is a lively controversy about the essential aim of the exercise of this broad judgmental discretion" advocating for this proportionality exercise. In the case, it was held that all approaches led to the same conclusion on the facts. Tattersall evidences the fundamental unsoundness of such advances, arguing the case "demonstrates the somewhat heavy handed and blunt nature of equitable remedies arising from proprietary estoppel."

A third approach advanced by the Courts has been to award a remedy which is proportionate to the detriment and expectation. This is justified by Aldous LJ in Jennings, roughly stating "The task of the court is to do justice." This is opposed by Mee who argues that "the only appropriate role for expectation is as a cap on a remedy determined on the basis of other factors." These lines of reasoning evidence the incoherence within the judiciary as to how to approach awarding a remedy within PE, rendering the doctrine conceptually unclear.

However, it is not only this convoluted approach to remedy in the realm of expectation and detriment approaches that has made PE unsound. The Court has also advanced the award of a remedy on the basis of unconscionability. This was established by Lewison LJ in Habberfield v Habberfield and followed in Guest v Guest where Floyd LJ stated that "the objective of the remedy is certainly to avoid a result which is unconscionable." Dixon argues that unconscionability is a reason for bypassing all of the formality rules required for the transfer of land. However, this is contrasted by Agnew, who argues that this analysis seems somewhat artificial and rather unconscionability is best viewed as explaining why equity responds to the combination of A's assurance and reliance

and detriment to B.

This notion of unconscionability is also seen in the case of common intention constructive trusts. PE and CICT doctrines are distinct and have developed along different lines of authority. However, they sit closely and answer problems of a very similar nature. The distinction between them based on the different remedy they award. As outlined, PE awards an equity by estoppel whilst a CICT awards compensation with reference to the party's contribution to a trust. This distinction complicates the law, rendering the PE doctrine fundamentally unsound. For a long period judges assumed that the doctrines would collapse into one. However, this is yet to occur and instead It led to a duplication of cases and situations where barristers do not plea PE because since Stack v Dowden, everything domestic is pleaded as a common intention constructive trust. Both doctrines seem to be founded upon the notion of unconscionability, which "permeates" all the elements of the doctrine of PE (Gillet v Holt). At their core, both doctrines concern the abuse of formalities. Ultimately, the PE doctrine is fundamentally unsound due to its closeness with the doctrine of Common Intention Constructive Trusts.

PE has been criticised as subverting the contractual formality provisions of the LP(MP)A 1989 s.2 which requires contracts to be signed in writing (e.g. Yaxley v Gotts). However, there is a notable lack of criticism against CTCTs due to the exclusion of constructive trusts from s.2(5) of the LP(MP)A 1989. These exemptions further support the argument to assimilate both doctrines. Whilst Mee argues that CICTs have "proven to be remarkably durable and still governs certain disputes between the grandchildren of the Pettit and Gissing generation", Maniscalco highlights that "CICTs respond to the fact that the circumstances make it unconscionable for the D to insist that the parties failed to comply with the applicable formalities, they are not trusts established by the parties' common intentions themselves … the failure to correctly identify the basis of CICTs in unconscionability has led the law to develop on an inconsistent and needlessly uncertain footing." This inconsistency and uncertainty is mirrored in the remedy awarded in PE cases.

Thus, whilst the complex approach taken by the Courts in swerving from expectation and detriment-oriented approaches to the remedy in proprietary estoppel cases highlight the conceptual incoherence within the doctrine of PE, it is the reluctance of the courts to assimilate the doctrines of PE and CICTs which renders PE fundamentally unsound. The courts should advocate for this reasoning, which would lead to a more coherent approach in addressing cases of unconscionability.

EQUITY | 78%

Roshni Ranasinghe-de Silva

'We routinely assert that a private express trust cannot exist unless the beneficiary principle is satisfied, and yet we make nothing of this important idea in describing the nature of a beneficiary's rights under a trust. We must be missing something in describing the distinctive rights of beneficiaries, but it is not clear what.' Discuss.

2022 Tripos, Question 5

Understanding the importance of the beneficiary principle necessarily depends on the conceptualisation of the distinctive rights of the beneficiaries. This essay will (1) discuss the beneficiary principle (2) outline theories purporting the distinct nature of beneficiaries' rights and (3) outline whether the "missing element" from these theories can be justified on policy grounds. Overall, since no theory can convincingly construe the beneficiaries rights as distinctive, the beneficiary principle is undermined.

Beneficiary Principle

The beneficiary principle, originating in *Morice*, stipulates that a trust can exist only where the trustee holds certain property subject to a duty, and that duty must be capable of enforcement. Consequently, the court will not uphold any alleged trust that cannot be effectively supervised and sanctioned by the court at the behest of someone in whose favour performance can be decreed.

A soft construction of the beneficiary principle posits that there is simply a need for an enforcer of trust duties, but this does not necessarily have to be the beneficiary of the trust itself. In contrast, a hard conceptualisation of the beneficiary principle necessitates the existence of beneficiaries, as the ideal enforcers of the trust due to their self-interest as rights-holders in the trust assets. However, the nature of these rights are somewhat elusive, undermining the strength of the principle.

Theories of Rights

There are three broad theories conceptualising the nature of beneficiaries' rights under the trust.

Firstly, proprietary theories emphasises the *in rem* nature of equitable rights and this theory is most consistent with the description of equitable rights in case law (Lord Sumption, *Akers*). **Nolan** recognises that one of the core proprietary rights involves "primary, negative right to exclude non-beneficiaries from the enjoyment of trust assets". Arguably, this analysis of the beneficiaries' rights corresponds to the hard conceptualisation of the beneficiary principle. A trust needs to involve a disposal of property from one person to another – T cannot have unfettered ownership nor can she take B's interest. If there are no beneficiaries to enjoy the property in substance, the trustee will essentially be the owner of the property – this undermines the theoretical concept of a trust. The very essence of the trust lies in the conferral of equitable property rights to B. However, this theory weakens under the consideration that beneficiaries are sometimes given very limited rights, and may not be notified of their rights at all, for example under discretionary trusts. This may point towards a missing element in the distinctive nature of B's rights.

Secondly, obligational theories purport that the rights of beneficiaries are personal only, binding only the trustees, and **Maitland** provides a defence of this theory. The obligational theory of beneficiary's rights similarly helps justify the beneficiary principle. Obligations cannot exist without corresponding rights. If the trustee has obligations, this necessitates the existence of a beneficiary to gain rights from this. Consequently, as Roxburgh in *Re Astor* noted, a trustee would not be expected to be subject to an equitable obligation unless there was someone who could enforce an equitable right. However, it leaves many areas untouched – it does not explain the nature of a beneficiary's right against an innocent volunteer, nor the beneficiary's priority in insolvency against unsecured creditors. Crucially, it does not explain why the beneficiary's right is distinct compared to a mere enforcer and necessary to uphold the trust.

Thirdly, it may be possible to categorise beneficiary's rights as a form of sui generis rights, which form a hybrid of both personal and proprietary rights (**Pettit**). This analysis has been advocated

by **McFarlane** and **Stevens** who categorise a beneficiary's right as a 'right against a right'. This is a convincing argument, explaining why beneficiaries enjoy weaker rights under discretionary trusts, as the trustee owe other duties in respect of their property right. It also solves why a beneficial interest can bind certain third parties but not others, which is where obligational and property rights theories fall foul. Yet, some find this reasoning unconvincing, such as **Penner** and the theory is alien to English law. This theory is unlikely to be accepted in Courts, let alone advanced as a justification for the existence of the beneficiary principle.

On balance, these theories still do not fully explain why beneficiaries are conceptually mandatory for the operation of a trust – there seems to be 'something missing'.

'Missing Element'

One possibility is that this 'missing' element to doctrinal clarity is merely fulfilled by the practical positives of the beneficiary principle. There are several policy justifications against enforcing private express trusts which justify retaining the beneficiary principle, even without a clear description of the distinctive rights of the beneficiaries. Firstly, trusts withdraw wealth from the market, making the money illiquid. It is unsatisfactory to have large funds devoted to non-charitable purposes, with no democratic oversight, to be taken out of circulation. Having beneficiaries allows the possibility of collapsing the trust (through *Saunders v Vautier*), allowing the money to be liquid and in circulation. Secondly, without a beneficiary principle, money can be locked within one person for life. Upon death, the money is trapped, allowing people to manipulate the wealth beyond the grave in the absence of a beneficiary to enforce the trust. Moreover, this contradicts the policy of the perpetuity rules, which is to prevent tying up property for too long. Under *Saunders v Vautier*, however, beneficiaries can collapse a trust to combat these dynastic tendencies. These reasons suggest that doctrinal clarity may be overlooked in favour of market efficiency when concerning the existence of the beneficiary principle.

Beneficiaries' Rights are Not Distinct

Alternatively, the contention that "we must be missing something" may suggest that the rights of beneficiaries are not distinct at all, and it may be possible to adopt an 'enforcer' principle instead. **McFarlane** indeed argues that, on the soft construction of the principle, there is no need for anyone to benefit from the performance of trustee duties. Charitable purpose trusts conform with this principle (with the Attorney-General as enforcer). An enforcer principle would permit private purpose trusts, and would bring English law in line with other countries and make it a more competitive trusts jurisdiction (**Hayton**). There are many existing situations where individuals may enforce a trust without having any distinctive rights in the trust property. For example, in certain circumstances, the object of a power may be entitled to information, irrespective of their beneficial interest (*Schmidt v Rosewood*). Likewise, intended beneficiaries under a will (who do not have equitable interests in the estate) can enforce duties of deceased's personal representatives (*Commissioner of Stamp Duties v Livingston*). Given that the theories above cannot convincingly differentiate a beneficiaries' right as distinct from others, it may be possible that a beneficial interest is not necessary at all and an enforcer principle can thus be accepted instead.

Overall, there is no theory which adequately captures the distinct nature of the beneficiaries' right. Consequently, this weakens the beneficiary principle which contends that beneficiaries are crucial within a trust. Without a clear idea of the distinct nature of beneficiaries' rights under a trust, it is not clear that their existence is necessary for the operation of a valid trust other than for policy reasons, perhaps allowing for an enforcer principle to replace the current beneficiary principle.

EU | 72%

Ellie Mullett

'Citizenship of the Union promised much more than it has delivered.' Discuss.

2020 Tripos, Question 3

Formally introduced by the Treaty of Maastrict, Union citizenship promised to increase the rights of the economically active and create rights for the economically inactive. From the wording of Art 20 TFEU itself, it was perhaps deductible that rights would also be provided for static economically inactive citizens. This essay will argue that regarding both of these promises, citizenship has failed to deliver. Citizenship rights are only exceptionally available to citizens who have never exercised free movement rights, and only to the economically inactive who are self-sufficient.

It should be noted at the outset that citizenship did achieve its promise of increasing benefits for the economically inactive. Little more needs to be said on this matter, as the economically active can rely on the superior rights protection offered in Directive 492/2011, which overlaps significantly with citizenship rights.

Rights for the static?

Though derived from MS nationality, Baumbast held that, prima facie, citizenship rights are only effective once movement has been exercised. This was not a necessary condition under Art 20 TFEU itself, where it is simply stated that all MS nationals 'shall be a citizen of the Union', and as such, it may mean that citizenship has indeed promised more than it has delivered.

Advocate General Sharpston in Ruiz Zambrano postulated against the requirement for movement, considering that Art 20 TFEU should create standalone rights. However, the Union is not yet in a position to ordinarily interfere in wholly internal situations, as is demonstrated by their judgment in Walloon Government v Flemish Government. Not only are such situations not a typical matter of union law, they can also be political dynamite. As such, though citizenship may appear as a promise of stand-alone rights, broadly speaking, this has not been delivered.

But, the Baumbast requirement is not an absolute one, and has been diluted. Where there is the risk of depriving a citizen of the 'genuine enjoyment' of the substance of their citizenship rights (Ruiz Zambrano), citizenship acts as a safety net of last resort, to protect the citizen who has not exercised their right of free movement.

It was thus held in Rottmann that an assessment of proportionality must be undertaken before the individual could be deprived of his German nationality, and thus his union citizenship, with the latter thus showing itself to be a powerful privilege indeed. The court went a step further in Chen, with the third country national (TCN) parent able to derive residence rights by virtue of her daughter's union citizenship, movement having been exercised. Then, the high watermark of static citizenship came in Ruiz Zambrano, where it was held that TCN parents of citizen children, who had never exercised their right to free movement, must be granted leave to remain, else the children would be deprived of their 'genuine enjoyment' of the substance of their citizenship rights. At that point, perhaps Union citizenship delivered everything that was promised, and perhaps even more.

But, while the outcome of Ruiz Zambrano was welcomed by some, it was chided by others, exemplified by the fears of the Netherlands' Freedom Party that the case would lead to a spate of 'anchor babies'.

Unsurprisingly, the court quickly recanted. In McCarthy, it was held that mere dual nationality, without having exercised free movement, was not enough for citizenship protection, where refusal to permit her TCN husband would not oblige her to leave her home MS, and in Dereci, it was further held that infringement of genuine enjoyment required the applicants to compelled to leave the union altogether. The mere desirability of keeping a family together was not enough. Building on this, Iida held that there will be no deprivation where a child is not dependent on the TCN parent. Determining dependency is to be determined through legal, emotional and financial evaluations (O, S & L), and the risks to the child's equilibrium, should the TCN parent be removed (Chavez-Vilchez).

So as the high tide of Ruiz Zambrano ebbs away, citizenship once more has promised much more

than it has delivered. By focusing on the 'genuine deprivation' test, Article 8 ECHR went without notice McCarthy and Dereci, even though Shiubne highlights how if proper note of the facts had been made by the court, such consideration could have made a difference. Rights for static citizens are available only exceptionally. Indeed, it is 'seismic' (Shiubne) for the court to intervene in wholly internal situations even to this extent, however, citizenship clearly does not offer the absolute protection that it perhaps promised.

Rights for the economically insufficient

All economically inactive citizens have the right to reside in another MS for up to three months, under Art 6 of the Citizens Rights Directive. During this time, no recourse may be made to social assistance (Art 24(2) CRD), and while access to social advantages is prima facie available (Vatsarous), this can be curtailed through legitimate impositions of 'habitual residence' requirements (Collins). Indeed, those who chose to reside in the UK may find they are straightforwardly barred to any social assistance without any valid justification under the new benefit rules, as O'Brien demonstrates.

For the economically inactive to remain resident after three months, they must possess sufficient resources, so as to not become an unreasonable burden on the host state (Art 7 CRD). 'Burden' is vague term (Thym), such that a case-by-case assessment is to be made of individual resources (Art 8(4) CRD), and it is not automatically fulfilled by recourse to social assistance (Art 14(3) CRD; Grzelczyk).

However, the requirement of sufficient resources is taken seriously. Under the previous case law of Martinez Sala and Trojani, the benefits of citizenship under Art 20, 21 and 18 TFEU could be obtained merely by being lawfully resident in another MS under national rules. But Dano reversed this, and held that the economically inactive must be lawfully resident under Art7(1)(b) before citizenship rights could be obtained. So, without sufficient resources, they will not be lawfully resident, and thus cannot access citizenship rights.

Such a narrow reading contravenes Chen, where it was said that Art7(1)(b) must be interpreted as broadly as possible, and for Thym, the case marks the end of any meaningful concept of citizenship. It is submitted that this is correct. Citizenship was intended to introduce rights for the economically inactive, but the enjoyment of this promise is now contingent on sufficient resources to enjoy lawful residence in the first place. Even the vagueness of 'burden' cannot provide a saving grace, for in Dano and Thiele Meneses, it was held that an individual evaluation of 'burden' was to be undertaken, rather than the applicant-favouring systemic approach, as Thym has shown.

Further evidence for the fact that citizenship promised more than it has delivered is persuasively expounded by Tryfonidou, who has shown how the Ritter-Coulais line of case law entails a reverse of the Werner principle by decoupling the requirements of the economic freedoms in this way. The limitations of citizenship means the court sought to distort the economic freedoms to ensure the applicants would benefit from a level of protection unavailable under citizenship.

So, the economically inactive can only benefit from citizenship if they are also economically sufficient, creating a worrying class divide within citizenship, against the idea that all are equal.

Conclusion

Aside from the promises made to workers, citizenship has indeed promised more than it has delivered. The economically inactive can only benefit if they are self-sufficient, and the rights typically only become effective once movement has occurred. McCrae has shown there is little enthusiasm from the MS to move forward, and as such, citizenship rights may indeed be stuck in this incomplete limbo for some time.

INTERNATIONAL | 80%

Nefeli Poulopati

A non-state armed group called 'Foremost Organisation for World Loathing' (FOWL) has seized control of some parts of the state of Apathetica. From this territory, it has launched a series of terrorist attacks against the civilian population of Apathetica and against UK citizens on UK territory. In May 2019, the group took responsibility for driving a van into a crowd of pedestrians in the UK, which killed several people and injured many others. In October 2019, it took responsibility for a series of knife attacks in popular UK tourist destinations. Finally, on 8 November 2019, it claimed responsibility for a thwarted bomb attack in Apathetica.

On 12 November 2019, after intense discussion at the UN Security Council, the Council adopted a resolution that contains the following paragraphs:

> ***The Security Council***
>
> **'1. *Unequivocally condemns* in the strongest terms the terrorist attacks perpetrated by FOWL.**
>
> **2. *Calls upon* Member States that have the capacity to take all necessary measures in compliance with international law, in particular the United Nations Charter, on the territory under the control of FOWL, to coordinate their efforts to prevent and suppress terrorist acts committed by FOWL.'**

Two days later, the UK Attorney-General gives a speech to the Cambridge Law Society, in which he stated:

> **'As the Security Council has made clear, the UK was and continues to be entitled under international law to use force against FOWL. States must be able to respond in self-defence against terrorist attacks committed by non-state actors where the host state is unwilling or unable to deal with threats emanating from its territory. We know**

that another attack —whether against the citizens of Apathetica or the UK-is right around the corner. If the law on self-defence does not allow us to respond with force, then it would amount to little more than a suicide pact.'

You have been asked by your international law supervisor to write an essay discussing the above statement by the UK Attorney-General.

Give your answer.

2021 Tripos, Question 7

The prohibition on the use of force (Art.2(4) UN Charter, reflecting CIL, as the attitude of States towards GA resolutions, particularly Resolution 2625 demonstrates (Nicaragua)) permits self-defence as an exception to it. However, there are deep divisions between states and between scholars as to whether this right is wide or narrow (Corten). In light of the UK Attorney-General's statement, the various justifications for use of force in self-defence against non-state actors advanced and the extent to which such a right is actually established in international law will be considered.

Security Council (SC) Resolution

The UK Attorney-General argues that the SC has 'made clear' the UK has a right to use force against FOWL. Under Art.39 UN Charter, SC can determine the existence of any threat or breach to the peace and then decide measures under Art.41 and 42.

This Resolution calls upon measures 'in compliance with international law and in particular the UN Charter'. However, it is not necessarily clear that the right of self-defence against non-State actors under Art.51 extends this far. While the Court in Nicaragua extended 'armed attacks' beyond those by a State's armed forces to include attacks by armed band, irregulars and mercenaries (relying on GA's Definition of Aggression), it also set a threshold for attribution, requiring the attacks to be sent by or on behalf of a State. Similarly, in Wall Opinion, the court held that since Israel did not assert the imputability of attacks launched from the West Bank to another state, Art.51 had no relevance. On this basis, individual self-defence against FOWL is not a viable justification

for use of force in self-defence, as FOWL did not act by or on behalf of the 'host state'.

However, the revolutionary challenge the 9/11 attacks by Al-Qaeda brought to the doctrine of self-defence may suggest a lower threshold of attribution is sufficient. For Operation Enduring Freedom, the USA relied on the right of self-defence under Art.51. Although it is difficult to place the operation within the Nicaragua framework, it received virtually universal approval as self-defence. This perhaps reflects a move towards more flexibility regarding the state involvement necessary to constitute an armed attack (Moir).

However, the SC Resolution the UK Attorney-General refers to is quite different from SC Resolution 1368. Both explicitly condemn the relevant terrorist attacks, but the latter was adopted the day after 9/11 and does not identify the perpetrators, while the former 5 days after FOWL's last attack (when already two other incidents had taken place) and explicitly refers to FOWL. This, in combination with the fact that while Resolution 1368 reaffirmed the right of self-defence, this Resolution calls for action ('to coordinate efforts and prevent and suppress terrorist attacks committed by FOWL') but without especially referring to the right of self-defence, may suggest that the SC does not wish Member States use force in self-defence. The existence of a 'threat to international peace and security' is not mentioned (as in Resolution 1368) and he adoption of measures under Art.41 could be referred to (which do not involve the armed use of force).

Unwilling/Unable Doctrine

The UK Attorney-General mentioned that use of force in self-defence should be used against terrorist attacks committed by non-state actors where the host state is 'unwilling or unable to deal with threats emanating from its territory'.

Similarly, since 9/11, the USA has developed a wide doctrine of self-defence in counter-terrorism operations, seeking to justify its interventions by relying on the unwillingness/inability of States like Syria to act against terrorists. Australia, Canada and Turkey gave their express support to the 'unwilling/unable doctrine' in relation to military operations in Syria. Russia also invoked this

justification for responding against Chechen rebels in Georgia.

In DRC v Uganda though, the ICJ held that Uganda's lack of control of rebels in the region did not amount to 'acquiescing' to their activities. However, perhaps this justification implies that attribution as per Nicaragua would no longer be necessary for a terrorist attack to constitute an armed attack, as Judge Simma believes – the inability to prevent its occurrence would justify intervention.

This doctrine, however, is problematic. There is no indication the 'host state' is unwilling to act against FOWL, which means the satisfaction of the requirement of necessity is questioned. Furthermore, the inability of a State to act does not mean it is not possible to seek its consent for military intervention against terrorists on its territory. This is a subjective doctrine that does not impose effective constraints on a State's use of force, and It also runs the risk of re-introducing a hierarchy of states (Tzouvala).

Therefore, this doctrine is hard to reconcile with the prohibition on the use of force (Gray) – it widens the right of self-defence far beyond Art.51 and in an incompatible way with CIL. Thus, it cannot be a reason for which states 'must' be able to respond in self-defence against terrorist attacks by non-state actors, as advocated by the UK Attorney-General.

Anticipatory Self-Defence

The UK Attorney-General also states that another attack by FOWL is 'right around the corner', which justifies use of force in self-defence.

The existence of a right of anticipatory self-defence is controversial, with the ICJ explicitly leaving the question unanswered (Nicaragua) and states often preferring to rely on other claims, e.g. an extensive notion of 'armed attack' (Oil Platforms). Invocation of this right before 9/11 was rare and often condemned (e.g. Israel's attack on a nuclear reactor in Iraq in 1981). However, it has since been relied on by the US in relation to 'imminent' ISIS attacks in Syria, taking a wide view on the meaning of 'imminence' by focusing (apart from imminence in time) on factors like the attack's scale and the resulting injury. However, while it seems that an attack that in progress can

be intercepted, it is not clear that a wider view of 'imminence' has crystallised into CIL. After all, as Gray argues, the fact that absence of specific evidence as to the location or nature of an armed attack does not preclude the conclusion that it is imminent means that the State has extremely wide discretion to use force in self-defence, as Gray argues, which is potentially undesirable.

Lastly, there is also the 'Bush' doctrine of pre-emptive self-defence that arguably goes further and intends to prevent threats from existing. However, there is little support for this doctrine, with the UK Attorney-General explicitly stating this is not the UK's position in a speech in 2017.

Collective Self-Defence

The UK Attorney-General suggests that another attack may occur 'whether against the citizens of Apathetica or the UK', potentially suggesting a justification of UK's use of force on the doctrine of collective self-defence. The UN Charter testifies to the existence of the right of collective self-defence in CIL ('inherent right'). However, collective self-defence is parasitic on individual self-defence and since the existence of the latter is controversial, so is the former's.

CIL?

Overall, it is extremely difficult to gather convincing evidence that sufficient state practice and opinio juris exist for individual defence against terrorist attacks to be enshrined in CIL. This is because, amongst other reasons, states are often not aware of the use of force of other states in this respect and the way silence can be interpreted is controversial.

It is highly unlikely however, as Gray argues, that the US (and by analogy the UK's) counter-terrorism self-defence doctrine represents CIL - the necessary widespread and uniform support necessary to limit the prohibition on the use of force is not present. The Non-Aligned Movement (120 States) has since 9/11 consistently reaffirmed its view that Art.51 is restrictive and should not be rewritten or reinterpreted. Cassese also claims that what may at the time have appeared to indicate widespread acceptance of a broader right of self-defence was motivated by emotional reaction to 9/11 and may not amount to the consistent practice and opinio juris required for customary change.

State practice tends to indicate that some responsibility on the part of the host state is still asserted (Moir). Therefore, the UK Attorney-General is not correct in endorsing the UK's right to use self-defence against the terrorist attacks committed by FOWL.

LABOUR | 78%

Matthew Leitch

'The concept of "worker" should replace that of the "employee" as the gateway to labour law rights.' Discuss.

2023 Tripos, Question 6

The thesis statement is incorrect. First, the rights enjoyed by employees should not extend automatically to workers. The operation of these rights may be extremely difficult to apply to workers, noting the different "gateways" provided by different "worker" statuses, as seen in NUPFC. Secondly, it is important that "worker" should not replace "employee" to respect the choices of those that genuinely wish not to have their relationship classified as such, particularly noting the tax implications of this. Thirdly, "worker" is too conceptually uncertain to operate as an effective "gateway" to all labour law rights.

Applicability of Employee Rights to Workers

First, "worker" status may mean different things between statutes, and even within them. As such, which "gateway" labour law rights are flowing through may differ depending on the purposes for which one is a worker. Thus, it would be problematic to simply remove employee status and replace "worker" as a unified gateway through which all labour law rights flow through. For example, in NUPFC, the Court of Appeal determined that foster carers were workers for the purposes of ss.2-4 TULRCA. This meant that they were "workers" for the purposes of trade union law (ss.1,5 TULRCA). However, the mechanism by which the court arrived at this conclusion was via the A11 ECHR case law relating to "employment relationship," particularly from The Good Shepherd, despite there not being a contract between the foster carers and the local authority. As Bogg and Ford acknowledge, as a consequence of the s.3 HRA obligations, worker status differs across statutes. Worker is the "gateway" to different rights – it cannot be said to be a universal definition. But as Underhill LJ lucidly pointed out – this discordance is necessary.

Applying some of the "gateway" rights that s.230(3)(b) ERA workers have to foster carers would be problematic. As the Narey Report highlighted, the right to time off makes no sense where there is a quasi-parental role. Noting these differing worker status "gateways", replacing the "employee" with a universal "worker" status is thus problematic. The transposition of particular rights received by employees, such as statutory sick pay, or the right to request flexible working, to workers, is not simple. For example, how would statutory sick pay operate in the context of foster carers? Similarly, the right to request flexible working is not easily transposed onto gig economy workers. Therefore, noting the different ways in which "worker" status is used as a "gateway" through which labour law rights flow, it would be extremely difficult to transpose all of the rights that employees have to these different categories of workers through a unified "worker" concept as the gateway to labour law rights.

Freedom of Choice

Secondly, worker status should not "replace" employee status because, whilst one perspective is that labour law rights flow from these statuses, another, crucial, perspective is the other consequences of one's status. If "worker" replaced "employee," this could lead to people electing not to be a worker because they wish for tax purposes to be a true independent contractor – and then receive no labour law rights. This binary would be problematic. As Freedland recognises, the intermediary status is desirable, noting the wider consequences of status. Whilst Adams posits that it would be desirable to extend labour law rights to a wide range of persons, enabling them statutory rights only accessible by employees, such as unfair dismissal protections (s.94(1) ERA), it can be rebutted that the intermediate status is important. If there were merely "worker" and "self-employed" statuses, it may be difficult for people to structure their tax liabilities around this. For example, some people may not wish to have the new "worker" status (de facto employee) and its labour law rights because they would prefer to be a certain tax status, despite being entirely unlike an "employee," but closer to a current "worker". Currently, divergent tax statuses emerge from the tripartite categorisation, with the possibility that people can have different tax statuses and

employment statuses. Adams-Prassl highlights this diversity of statuses post-Uber, with cases such as Atholl House illustrating that one can be self-employed for tax purposes whilst a worker for labour law purposes. This intermediatory status is desirable, and it is important to recognise that labour law protections to recognise the tax consequences of that status. In contrast – if there was a return to the binary – with workers encompassing de facto employees – many may fall outside of protective legislation entirely, rather than being granted the "intermediate" (Davidov) status, whilst retaining tax benefits. Therefore, "employee" should not be replaced by "worker," because of the consequences for other statuses, such as tax law.

Worker Status: Too Uncertain

Thirdly, the concept of "worker" should not replace that of "employee" because it is conceptually too uncertain. "Worker" cannot replace employee status before the status itself is coherent, consistent, and simple to apply. The paradigmatic S.230(3)(b) worker status provides a "gateway" through which workers can access the minimum wage (s.54(3) NMWA) and rights under the Working Time Regulations. However, the test for worker is difficult to apply. The courts consistently emphasise that the words of the statute should be used to determine whether status is satisfied, most pertinently and in the Supreme Court by Lady Hale in Bates, and recently emphasised in Sommerville in the Court of Appeal and Sejpal in the Employment Appeal Tribunal. Yet, the vacuous wording of the statute is uncertain. Adams acknowledges this, highlighting that the court still resorts to common law tests to establish who is a worker, with uncertainty. Countouris similarly recognises the application of common law tests, such as dominant purpose (James) or integration (Hospital Medical Group), are internally uncertain and their application by the courts is imprecise.

Moreover, further uncertainty has been added by Uber. There, Lord Leggatt resorted to purposive interpretation to grant Uber drivers worker status. Bogg and Ford describe this as "statutory Autoclenz," where the court look beyond the contract and consider the purpose of the ERA, as protecting those that are vulnerable and precarious (Burtchell, Honey, and Deakin) when determining the reality of the relationship to determine status. Yet, the purposive approach post-Uber and how

it is to be applied is highly uncertain. Whilst Bogg celebrated Uber as sounding the "death knell" for contract in determining worker status, this is not the reality that has played out in the courts. Brodie was rightly "far from convinced" about the reality of starting from the statute, and cases such as Simply Smile and Sejpal have illustrated the uncertainty about what Uber stands for. In Simply Smile, the EAT held that the ET did not fall into error by starting from the contractual position to determine worker status. Thus, whether there is "contractual" or "statutory" Autoclenz remains to be determined. With such an uncertain test for worker, it would be undesirable for this to be the "gateway" through which all employment rights flow. In contrast, the test for employee is more certain, with the tests used to determine s.230(1) clearer. Cases on the common law tests for employee – control, integration, economic reality, and mutuality of obligation are easier to apply – and should remain for those that are genuine employees. Therefore, whilst "worker" status is very uncertain, and employee status easier to determine, it should not replace worker as the gateway to labour law right.

In conclusion "worker" status should not replace "employee" as the gateway to labour law rights. I have highlighted the different "worker" statuses and the different "gateways" they provide to labour law rights in the NUPFC case, and the problems of transposing rights currently received by s.230(1) employees (and even s.230(3)(b) workers) to all workers as the gateway to labour law rights. I have also argued that it is crucial to recognise the tax consequences of this proposal, and the rights of people to choose their status, particularly following Uber. Finally, I suggested that "worker" is currently too conceptually uncertain to replace "employee" status.

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