

# CLARE COLLEGE LAW JOURNAL

UNIVERSITY OF CAMBRIDGE

VOLUME II: 2025



CLARE COLLEGE LAW JOURNAL  
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## INTRODUCTION

Last year marked the inauguration of Clare College Law Journal (CCLJ). At its inception, the journal was the idea of a Clare law student and recent alumna who worked tirelessly to create a fully-fledged journal with interviews, articles, essays and even a prize sponsored by Matrix Chambers. I am delighted to say that this year's second edition follows in its footsteps to offer a similar range of writings, adapted to the issues facing the world of law in 2025.

A particular highlight from this year is the interview we conducted with Lord Neuberger with a live audience. This was particularly timely since the UK Supreme Court's decision in *Rukhadze v Recovery Partners GP Ltd*<sup>1</sup> had just been released. In its decision, there are several references to Lord Neuberger's comments from previous cases around the nature of a constructive trust over profits made in breach of fiduciary duty, and its relevance to questions of causation and remoteness. We were lucky enough to probe his reactions to how the different judges in *Recovery Partners* construed his earlier statements, eliciting some interesting comments more generally about judges being cited by each other. I hope that readers will enjoy learning about these insights before making their way through a fantastic collection of pieces.

Of all those submissions, it was Wilfred Ong's which impressed the Matrix Panel the most. The panel, chaired by The Honourable Mrs Justice Arbuthnot, felt that Wilfred's article had a really comprehensive approach and was very ambitious in its aims when it came to the creation of a potential endangerment offence in criminal law. Wilfred will be lucky enough to embark on a week's work experience with Matrix Chambers. It was also pleasing to see that a Clare student, Hannah Zia, was recommended for the runner-up prize for her article arguing against the recognition of more than two legal parents. I hope that these articles, among the others, will be read and cited as valuable additions to the legal literature on their respective matters. This year, we also received record number of submissions of first-class Tripos essays. In selecting, we aimed to cover all the compulsory modules, to prioritise those with the highest marks and those written most recently. I hope they will be useful exemplars for students at Cambridge and other universities alike.

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<sup>1</sup> [2025] UKSC 10.

Finally, I would like to thank the CCLJ's fantastic team of editors. Their exacting corrections of grammar, legal principle and readability have greatly contributed to the quality of the articles and interviews in this year's journal. I am excited to see what next year's team will come up with for what I expect to be another brilliant edition to the CCLJ.

Harry Armstrong  
Editor-in-Chief  
Cambridge, June  
2025

Please note that all views expressed within the CCLJ are those of the author of the relevant piece only and are not the views of the Editors personally, the CCLJ team, Clare College, or the University of Cambridge. Furthermore, whilst it has been a priority to ensure the accuracy of the information contained within this journal, the Editors, CCLJ team, and authors of the works published within the CCLJ cannot accept any responsibility for any errors or omissions, or for any consequences resulting from any such errors or omissions.

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# FOREWORD

BY DR DARREN PETERSON\*

It is a great privilege to write the foreword to the second issue of the Clare College Law Journal. The Journal, now an annual publication, is a testament to the diligence and dedication of our students, and the passion with which they approach the law, their education, and the fostering of a legal and academic community within the College. The efforts of those involved in the creation of the Journal over the past two years have been truly impressive. They have conducted insightful interviews with eminent members of the judiciary, the bar, and the legal academy, they have run competitions to encourage and reward students for their legal scholarship, and they have provided an invaluable resource for future generations of students by publishing first-class essays in an open and accessible format. This year, Clare enters its seventh century as a place of research and learning within Cambridge. This anniversary serves as a reminder that seemingly small contributions can leave lasting legacies that endure far beyond the imaginings of those who make them. The students involved in the creation of this Journal should be incredibly proud of their achievements, and it is my sincere hope that their efforts will inspire many generations of Clare law students to come.

Looking at the contents of this issue, the Journal begins with a fitting remembrance of Professor Sir Bob Hepple as we mark ten years since his passing. Professor Hepple, a former Master and Fellow of Clare College, left one of the most significant, inspiring, and enduring legacies of any member of Clare's legal community. As a refugee to the United Kingdom, and strident anti-apartheid campaigner, the Journal's remembrance of Professor Hepple serves as a timely reminder of the extraordinary contribution that can be made by those fleeing political persecution, and of Professor Hepple's commitment to the idea that the law should ensure fairness and justice for all. I hope that Professor Hepple's story, and his contribution to the law, will serve to inspire current and future generations of law students, both within Clare and beyond. The next section continues the Clare Law Journal's tradition of publishing interviews with prominent members of the judiciary and legal academy. This year's interviews, with Lord Neuberger of Abbotsbury, Lord Justice Fraser, and Professor Jonathan Herring, cover an impressive array of topics that will be of interest of law students, including establishing careers within the law, issues of equality, concerns of judicial overreach, considerations of international law, and questions of ethics and medical law. Following this is a series of articles submitted to the journal by law students, which consider a range of contemporary issues within criminal law, family law, constitutional law, corporate governance, and AI.

The standard of these contributions is a testament to the exceptional skill and commitment of Cambridge's law students, and to the passion that they show to understanding, and remedying, contemporary legal issues. Congratulations to all of the students who have had their articles published in the Journal, and a special congratulations to the winner of the Matrix Chambers prize, Wilfred Ong. My congratulations also extend to the students, both past and present, who were involved in the publication of this issue. It is an incredible feat, and one which the College greatly appreciates.

Cambridge, October 2025

\* Turpin-Lipstein Fellow in Law and Director of Studies of Clare College, Clare College, Fellow of the Lauterpacht Centre for International Law and Associate Editor of the British Yearbook of International Law.

## A DECADE ON: REMEMBERING PROFESSOR SIR BOB HEPPLER

August 2025 marked ten years since the passing of Professor Sir Bob Hepple. He was a man who had quite the illustrious career, from his role as Nelson Mandela's legal advisor in his 1962 trial, to being appointed as Queen's Counsel, and becoming a top professor of Labour Law working at several universities around the world. That said, he is held in particular esteem within the Clare College community. From 1964 to 1966, he studied the graduate LLB at Clare in which he was awarded a first-class degree. He then returned between 1968 and 1976 as a Fellow in Law. Finally, he took on the distinct leadership role of Master of Clare from 1993 to 2003. In this second edition of the CCLJ, we look back at his contribution to the world of law and the Cambridge community.

Hepple was a pioneer in conceiving the domain of 'anti-discrimination law'. When he arrived in the UK as a refugee from apartheid South Africa, the level of racial bigotry deeply disturbed him, and he wondered why there was virtually no law on the matter. Despite finding it difficult to get the necessary support from his Cambridge supervisor to conduct a dissertation on (the lack of) anti-discrimination law, he finally convinced Paul O'Higgins (a key Irish Human Rights and Labour Law Professor) to supervise him. This piece was the prelude to the publication of his book *Race, Jobs and the Law in Britain* in 1986. Following his early interest in anti-discrimination law, he developed a course on the subject at University College London in 1982 before becoming a member of the Commission for Racial Equality between 1986 and 1990. At this point, anti-discrimination law was highly piecemeal with the separate Race Relations Acts and Sex Discrimination Acts. Therefore, before the 1997 election, he worked alongside Lord Lester to consider unifying what were around nine different Acts of Parliament on the matter of anti-discrimination – especially in light of their inconsistencies. This, then, constituted the initial base of ideas for the now widely known Equality Act 2010.

Among those who knew him well, he is described as very balanced and level-headed. When speaking about legislation of the Thatcher Government, he both questioned the neoliberal underpinnings but equally acknowledged how, in certain quarters, unions were being seen to abuse their power. In interviews at the Squire Law Library between 2007 and 2008, Hepple himself stated that he liked being described as a 'sensible radical': 'I like to do radical things but I like to do them in a rational way'. This perhaps reflects his work in the domain of anti-discrimination

law. While his work was certainly pioneering at the time, the incremental and considered development of anti-discrimination law was a logical response to the lacuna in the protection against arbitrary discrimination in the workplace.

Looking to the future, Hepple believed that Labour Law would be constructed around the base of equality and human rights, rather than excessive dependence on developments in European Union Law. There is no doubt a move in this direction. Lady Simler in the recent *Mercer* case heavily cites ECHR Article 11 jurisprudence around the right to strike and to form unions. Meanwhile, Underhill LJ in the recent case of *Higgs* attempts to reconcile Article 9(2) (the freedom to manifest one's religion) and the general rule against permitting the justification of direct discrimination in the workplace under the Equality Act 2010. Hepple was therefore perceptive about a potential shift in the source of worker protection. In addition, Hepple suggested that there was a serious risk that the positive duties under the Equality Act 2010 would become marginalised and ineffective, and that this would be an important area for reform. While the Labour government is planning to strengthen positive duties when it comes to sexual and third-party harassment in the workplace, Hepple's criticisms still ring true in respect of the very weak general public sector equality duty which requires public bodies to merely 'have regard' to the importance of equal treatment.

Hepple, then, was an equality law pioneer whose contributions will no doubt outlive his career and lifespan. But he was more than this; he was equally an important member of the Cambridge community. When this journal reached out to Catherine Barnard, Hepple's former colleague at the faculty, she had this to say:

*Bob was the most wonderful man. He was kind, generous and immensely supportive. He was the closest I ever had to a mentor, before it was the done thing, and I always relied on his thoughtful advice. He, together with Paul Davies and Mark Freedland, set the tone for academics in the field. They shared an immense generosity of spirit, tremendous decency and a sense of fun, while giving great encouragement to junior people. I think of him often and I miss him very much. To his, and my, delight he shared a birthday with my son and in the later years we often celebrated it together. The phrase 'Titan in the field' is much used but in Bob's case it was the correct epithet.*

It is hoped that this short piece serves as a useful remind of Hepple's contribution not only to the discipline of labour law, but to university and college life more generally. May his works continue to be read and cited, and his legacy live on.

Harry Armstrong  
Editor-in-Chief  
Cambridge, June 2025

## MATRIX CHAMBERS ACCESS PRIZE

For the second year running, Matrix Chambers has kindly sponsored Clare College Law Journal through the Matrix Chambers Access Prize. This prize rewards the individual from an ‘access’ background who produces the best article, as judged by a panel convened by Matrix Chambers. The prize-winner is then entitled to a week’s work placement with the set.

Last year’s winner, Harry Armstrong (now the Editor-in-Chief of this edition), shadowed Mark Summers KC in an extradition trial in Westminster Magistrates’ Court. For the benefit of future writers, he wrote a piece outlining what his week involved:

*“I undertook a one-week work placement with Mark Summers KC in Westminster Magistrates’ Court. Mr Summers, Matrix’s ‘go-to silk for extradition cases’, represented a high-profile defendant in relation to an extradition request by a foreign judicial authority. Not only was I lucky enough to watch the full hearing, but the barristers took time to discuss the case with me as various procedural hurdles were crossed and as new arguments were introduced. Being able to ask questions gave me an invaluable opportunity to understand how a barrister thinks in practical terms, rather than the purely academic perspective which an undergraduate student like myself would normally adopt. Unlike those sat in the gallery, I was able to listen to the meetings between Mr Summers and the barrister from the CPS as well as to privileged conversations with the defendant. During the week, Rachel Holmes (Chief Executive of Matrix Chambers) gave me a personal tour of Matrix’s headquarters and offered me some valuable advice for any future pupillage applications I might make. Equally, Christine Bacani, a member of the Fees & Finance Team, sat down with me for a coffee chat during which we discussed how Matrix functions, with a particular emphasis on its outreach initiatives. Matrix made a conscious effort to ensure I got the most out of the week, being particularly receptive to my personal interests.”*

This year, Matrix Chambers awarded the prize to Wilfred Ong for his article, *The Way Forward: Recklessness in Attempts and Endangerments*. The judging panel, chaired by Mrs Justice Arbuthnot, felt that Wilfred's article had a really comprehensive approach and was very ambitious in its aims. The CCLJ also extends its congratulations to Hannah Zia as the runner-up. We thank

Matrix for taking the time to judge the articles and offer an invaluable experience to the winner.  
We hope this partnership continues to develop.

**matrix**  
chambers

# INTERVIEWS

# LORD DAVID NEUBERGER OF ABBOTSBURY

Former President of the UK Supreme Court (2012-2017)

Interview conducted by **HARRY ARMSTRONG** on **8 MAY 2025**

Edited by **ALEXA LILLEY** and **HARRY ARMSTRONG**

## A) Background, Career and Projects

- 1) You have a scientific background. Your family has many scientists among them and you yourself studied Chemistry at university. How do you think your scientific background was helpful in your career and how did it give you a different perspective when sitting on the Supreme Court?**

I think that's an interesting question that raises a number of points. First, there is the question of whether, if you're going to become a lawyer, you're better off reading something else. Most judges and senior lawyers have strong views on this matter. Generally, if they read law, they believe that you should read law. If they did not, then they argue that you should not read law. I don't have the right answer. I do feel the loss of not having spent three years immersed in law as an intellectual topic, considering issues in a way that I've never quite had the opportunity to do so. On the other hand, I do think I benefited from a different area of intellectual exercise, which in some ways is more strictly logical. And it can be said to be easier to move from something that's more strictly logical to an area that is less strictly logical. I don't mean to say that the law isn't rational. It is. But you can't fudge things in science in the same way that you might be able to in law. In science, until you get into the vagaries of subatomic theory and the like, it is very much binary. There's a right answer and a wrong answer. You couldn't write a satisfactory essay in science for a university exam saying the quantum theory is wrong, but you can write a good essay in a law exam arguing that the Supreme Court got things wrong. There are other differences between law and science, but I think I found it good for me.

As a school child and university student, I was rather undisciplined in my thinking. And I think science was a particularly good discipline for me, probably up to A Levels in particular, but also at university. The other thing is that it did give me an advantage in some areas of law. It also gave me familiarity with figures, which can be particularly useful in valuation and patent cases. When I became a judge, I had done no patent law at all. But because they were short of patent judges,

they looked around and found someone with a science degree, and that helped me in my career because it gave me an extra string to my bow in terms of areas of expertise.

**2) You have had quite an international career. You have worked in places including the UK, Singapore and Hong Kong. What differences have you observed in the approaches to hearing cases? Do you think the UK has something to learn from those other jurisdictions?**

For a number of reasons, the view generally taken is that, on the whole, the UK has more to teach others than to learn from other jurisdictions. That is partly a hangover of the mentality of the British Empire, and it can partly be said to be justified because we are the origin of the common law. But one always has to remind oneself that we have lots to learn from others.

Sitting as a judge, the thing that has struck me as different between Singapore and Hong Kong, on the one hand, and the UK, on the other, is that barristers stand up to judges much more here than they do in Singapore and Hong Kong. If a judge says to a barrister here, even in the Supreme Court, ‘but surely that argument cannot be right’, the chances are that the barrister will come back and say, ‘actually it is right, and you've got it wrong’. In Singapore and Hong Kong, there is a tendency of greater respect (though some may say less courage) of accepting what the judge says and moving onto the next point. There's also less give and take, and that's almost an extension of the same point. Particularly on appeals, they tend to be very quick. They are not as quick as the United States, where in the Supreme Court, everybody famously only gets twenty minutes. In this country, on appeals in the Supreme Court, cases often last two days, sometimes three or even four. In Singapore and Hong Kong, cases seldom last more than a day, and often last less than half a day.

I am personally a great believer in the value of all argument. While judges shouldn't talk too much, I think it is desirable that they test counsel, indicate what concerns them, and let the case develop. I prefer this to treating oral argument as somewhat formulaic, which is my impression of what happens in the European Court of Justice and to some extent in the Strasbourg court. In the common law tradition, which I value, we do have ‘give and take’ of argument, which I think is good.

**3) What do you think about the benefits and drawbacks of adversarial and inquisitorial systems? What approach do they take in Singapore and Hong Kong?**

In Singapore and Hong Kong, the system is very much based on what happens here. They are adversarial. There's always a big argument about the benefits of one and of the other. Most tend to prefer and support the system that they've grown up with and are used to. It is quite interesting to me, and this comes back to the scientific point that so much of the way cases are conducted has not really been tested. We are very keen in all sorts of areas to emphasise that everything should be evidence-based, but there is little evidence about whether the inquisitorial system is better than the adversarial system. The inquisitorial system tends to involve shorter hearings and tends to involve less oral evidence and is generally a bit cheaper. But the adversarial system is said to have the advantage of going into things in greater depth.

Nobody has actually tried to conduct some tests for which system produces more reliable and better results. We just go on believing that what we've got is right and trying to improve it, but not really knowing how we should be improving it or what's good and what's bad. For instance, there are quite often cases where judges have to reach very difficult conclusions as to whether to take away a child from its parents and give it into care in the local authority. Those cases can sometimes last ten days, with the parents often represented separately and there are masses of expert evidence. In the end, the judge has to form a view. I've often wondered whether they should take thirty such cases and have a parallel hearing, one of which involves a judge simply looking at all the documents for two days and saying what order he or she would make and the other involving a full-blown hearing for ten days and seeing what order the judge makes. They can then compare whether the two orders are the same. If they almost always are the same, one wonders what the value of the hearing would be. However, there is no appetite for such sort of testing.

**4) I can see that you have worked alongside Amal Clooney in writing a textbook on freedom of speech and international law. Is your book centred on European Human Rights Law, customary international law or the rules of other supranational systems? How do you think international law can be used to uphold free speech, both for journalists and for ordinary citizens?**

There are various supranational courts, and we look at their decisions. There's the African Court, the American Court, and the European Court, and they try to introduce an international approach. The trouble with topics like freedom of speech is that, to some extent, different countries have different standards, different traditions, and different cultures. There is a large degree of consensus and consistency among these various courts. But, of course, there are various countries, including China, where different considerations apply, and it's quite difficult to tread a fair and independent balance when one comes to discussing it.

There's not only a geographical argument, but there is also a temporal argument. Four hundred or so years ago, which in the scheme of things is not very long, freedom of speech, like almost every other freedom that is enshrined in human rights conventions, was completely unknown in this country. Things have now changed. It is interesting to me to consider the effect of the Internet and how it enables people to disseminate views that can be quite dangerous and misconceived to billions of people. It does raise some very interesting and challenging points. I don't pretend to have any answers, and many people would say that any attempt to fetter freedom of expression because of these concerns would be a cure which is worse than the disease.

**5) You were a judge on cases such as *Pretty* and *Nicklinson* and spoke about how it is right for Parliament to adopt legislation in response to the politically divisive issue on assisted dying. Now that we are in the midst of those debates in Parliament, I wonder what you think of the criticisms levelled at the Assisted Dying Bill?**

As a general principle, I support assisted dying. Your life is your life, and provided you don't do things that directly damage other people, you should be free to do what you like with your life. It is a bit odd, in a way, that you should be free to kill yourself, but that you shouldn't be able to be helped if you need help to do that. Also, if you have considered cases, as I have done, of people who have got the most unenjoyable lives in terms of pointlessness or pain, it seems positively cruel to deny them the possibility of putting an end to their lives.

I agree with the criticism of the rule that you must be within six months of death. It seems a bit odd. If you've only got six months to live, making you wait those six months is rather less cruel than making you live through twenty years of pain and misery (if that is your prognosis). I think the difficulty comes in relation to people who need help because they are going through a phase

of wanting to commit suicide, but are of unsound mind. The same can be said of people who are pressurised to commit suicide or seek to commit suicide by relations who want to inherit their money and don't want them to spend it on care.

It is easy to exaggerate all this. Any change in the law and any right you give to people has risks. The fact that freedom of expression can be abused and taken advantage of doesn't mean that we should get rid of freedom of expression. So, the fact that there may be abuses from time to time if we allow assisted suicide has to be balanced against the enormous suffering that some people have and who want to die. So, I strongly support the concept of assisted suicide. I think there should be protection, but I think we have to be a little bit careful about overdoing the protection.

So far as judges being involved is concerned, I think there are both practical and principled objections to judges being involved. In individual cases, as a matter of course, the decision whether someone should be permitted to be assisted in committing suicide is initially an executive decision, and judges are not members of the executive. They're members of the judiciary and they shouldn't be involved in the executive decision. More importantly, they're not particularly well placed to decide cases simply which are not being contested and argued about. Judges decide disputed cases. It seems to me that where judges should get involved is where there is a serious dispute about whether somebody should be permitted to be assisted: one relation is saying they shouldn't be and another is saying they should. That is a classic case for judicial involvement and that's a stage when I think judges can and should be involved. But in the normal sort of case, I don't think they should be.

## **B) Equity**

**6) What is your opinion on the use of *FHR*<sup>1</sup> in the recent judgment of *Recovery Partners*<sup>2</sup> by all three judges, bar Lady Rose? Different judges in the latter case used paragraphs from your judgment to explain the nature of the remedy of account of profits in different ways**

It's always quite interesting to see your judgments in previous cases being commented on and applied.

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<sup>1</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

<sup>2</sup> *Rukhadze and others v Recovery Partners GP Ltd and another* [2025] UKSC 10.

The moment you see your judgment referred to, you think, 'oh God, they're going to say I was talking rubbish'. When you look and see they have not said that, you feel relieved. However, sometimes they do say that, but they put it more politely, which often makes you think 'did I really say that?' Then you think either that they may have been right, or sometimes you think I'm not quite sure this is being used in the way I intended.

I think a lot of the problem arises from the fact that, for instance, in the *FHR* case, I do not think it really mattered when the constructive trust arose. Indeed, in the recent case you mentioned, I don't think it mattered. They all agreed with the result and reached the same conclusion. In the great majority of cases, I think, where there is uncertainty in an area of law, you obviously want to go for the solution that tends to produce just results, but it is always difficult to predict what facts will come up and where the point will arise. Subject to this, I think my preferred position is to keep it as simple as possible. I think that is highly desirable. The law is simple, and when listening to advocates, when I was a judge, other judges and I would tend to take the same view. I preferred counsel who simplified points rather than complicate them because I think that is what the law should be doing. Of course, it can immediately be said that there is a danger of oversimplifying, but I think, as a general proposition, I find the Briggs approach attractive (not sure if this is the word he meant) because it is simpler.

In *FHR*, I'm not sure I had this precise point in mind in the sense that I'm not sure how strongly it was argued because it wasn't. The real issue was whether there was a proprietary right at all. The issue when it arose or how it arose wasn't really an issue. Therefore, there is some force in the point that Lord Briggs was placing too much weight on what I said when it had not really been argued.

I am relatively conservative on the issue of the remedial constructive trust because of my concern about a lack of certainty. I think that if you have a remedial constructive trust, you will rapidly come to a situation where the judge will say, 'I do not like what the defendant has done, so I will create a remedial constructive trust which will become a sort of cure for any perceived injustice.' This would leave the law in uncertainty. It is very difficult to find any English case where there was a remedial constructive trust. Although Dyson Heydon, the former Australian High Court judge and a very good equity lawyer, suggests that the original order made by the judge at first instance in *Boardman v Phipps* was a remedial constructive trust solution. However, there is very little to indicate in that judgment that the judge in question actually intended to create such a trust.

**7) How do you respond to concerns, for example, expressed by Lord Burrows, that if we adopt this primary duty theory and courts instead rely on equitable allowances to remedy any supposed injustice, that legal certainty is undermined?**

It is a fair point. In general, I am unkeen on introducing equitable principles into commercial contractual arrangements too readily. On the other hand, equity and the common law have developed together, particularly since the 1870s, with the legislation feeding off each other. To pretend that you can simply look at commercial contracts and commercial arrangements without invoking equity is unrealistic because, if equity did not exist, contract law would have developed in some way to allow for it. The simple position would be to adopt what I call ‘simplicity’. It is my principle of simplicity that you should keep equity out of contract law, or else give it full flow, rather than taking a slightly nuanced approach to equity in the context of contractual relations.

I would not say that simplicity is by any means the only guide. As I have said, you also want to achieve just results. I think more broadly, when it comes to any approach to the law, legal principle or difficult case, you are almost always having to balance the interests of having the law be certain on one hand and producing a fair result on the other hand. That tension is never going to be fully satisfactorily resolved. Like so many tensions, people argue about it as if it’s a matter of principle, but actually, it’s a matter of degree. You’ve got the extreme view that equity should have no part to play whatsoever in commercial law, and you’ve got the other extreme view that it should be given completely free rein. Hardly anyone supports either extreme view. Once you depart from the extreme view, it’s just a question of where you are on the spectrum.

**8) Some of the judges in *Recovery Partners* talked about the purposes of fiduciary duties and the relevant commercial considerations. What do you think the purpose of fiduciary duties are? Do you see them as distinct ‘duties’ or as ‘relationships’ that are imposed by virtue of the positions of the parties?**

Since I’ve retired from being a judge, I’ve done a lot of arbitrations, and quite a few of the arbitrations have been subject to civil law. On the mainland of Europe, in South America, much of Asia, and Africa, they have a theory of good faith which they apply to contracts. To my mind, having done a number of such cases, good faith can have the effect of whatever you want it to have. One of the reasons why English law is popular and common law is popular in commercial contracts, even where

it has nothing to do with the country or common law countries, is because it's much more certain. I think what good faith does is emphasise how important some civil lawyers think it is that the result is a fair and proper one, being moral and correct, irrespective of what the parties have agreed. We've chosen not to incorporate this notion of 'good faith', and having seen it in action now, I think we're quite right to avoid it to the full extent that it is involved in civil law. However, we have introduced equity to give a degree of flexibility to our law and its outcomes. In other words, the rules of contract are quite principled, quite simple and quite clear, but then they are given the flexibility by the addition of equity.

I think again when one looks at equity, there is the tension between whether you are trying to achieve fairness and justice through equity, or whether you are applying clear principles (which help you achieve justice and fairness). If you look at the history of equity, it started off well. In the 16th, 17<sup>th</sup>, and 18th centuries, it was very much what is fair and what is just, but Lord Nottingham and one or two others took it by the scruff of the neck and started to introduce rules. In more recent times, Lord Millett, probably our best equity judge since the war, introduced equity based on certain principles, and one of those principles was the one you have mentioned, which Lord Briggs identified. I think it is a useful test and a useful principle, but I also think simplicity and certainty are important. I think one has to be careful about being too firm on equity. I think that certainly the 'Briggs approach' is a simple and sensible one, but I am afraid that it won't be applicable in bad terms, in naked terms, in unqualified terms, in every case. As for the equitable allowance, I do not see a problem with making adjustments after the event to accord with fairness. I do not find it surprising or concerning that subsequent events may call for an adjustment to be made.

**9) Do you think that equity still has a role to play in our legal system? What do you see as the role of equity in the 21st century?**

I think that our common law system, with all its faults and advantages, has laid down important principles where Parliament has failed to intervene with statute and case law. The rules may be inconsistent at times. The rules might require modernisation. The rules might require restructuring. But, on the whole, what we should do is to take the law as it is in the cases, inconsistent and arbitrary as it sometimes might be, and develop it in a cautious way. This is the least bad option. I don't pretend it's perfect. There are times when you have to change the law from established case law because of modern changes in life, morality, technology and business practices. That's one of the

strengths of the common law: you change it to the needs of the circumstances. Sometimes you come up against a principle that's been established in cases which just seem offensive and wrong.

The law represents life. The idea that you're going to get a series of rules which govern every single case and which you can summarise on two pages is just 'Cloud Cuckoo Land'. I think we have to be careful of looking for some wonderful solution rather than valuing what we've got. It sounds very smug, very complacent, to put it that way, but that's the way our law is developed, and one should be very careful of taking a knife to it or doing anything too revolutionary. It is easy to see the problems with our present system, but it's difficult to perceive the problems that will come to pass if one changes it. I'm all in favour of change and development, but I prefer it to be organic and gradual. That's how equity develops; that's how common law develops. Maybe it's because I've given my professional life to it that I'm biased, but I think it's as good a system as you can get. However, as I suggested at the beginning, I cannot pretend to have carried out a scientific audit which shows that our system is better than anybody else's.

**10) Since *FHR*, we have seen the development that constructive trusts might arise not only in respect of secret commissions and bribes, which might be seen as particularly egregious breaches of a fiduciary duty, but now over any profits. Do you feel that this is an unwarranted overstep of property law in commercial transactions, as trusts can now be asserted in a broader range of circumstances than were perhaps envisaged back when *FHR* was decided?**

I think, arguably, you could say it started with *Keech v Sandford*, but probably the most relevant case was *Boardman v Phipps*. In that case, which was precisely the sort of extension you're talking about, the Law Lords split 3-2 on whether there was an equitable claim. I think that that is a classic area where there's room for two views, as evidenced by the 3-2 split, and the law has to form a view as to whether to take one line or the other. Having taken one line, you are then faced 50 to 60 years later with the question of whether you stick to that line. What the Supreme Court said in the recent case is that you should. They slightly differed as to how you do it and what the analysis is. That's how I think the law should develop. I think that after 60 years, the Supreme Court could have said we think the majority went too far in *Boardman v Phipps*, and we think that the minority was right, or something like that. By the sound of it, reading their judgments, they weren't in that much doubt. In *FHR*, I was self-evidently in doubt because I'd gone the other way in the case in the Court of Appeal.

I didn't find it an easy point, and I still don't. Indeed, the judges in the 19th-century cases were all over the place on the point.

One of the advantages of long judgments that we have now (over the short, crisp judgments of the Victorian times) is that, if you are giving a long judgment, it is because you're going through the cases in a painful way, to make sure that what you're doing is consistent with the previous cases. When you have judges who just summarise their view of the law in a paragraph, it is much easier on the reader, but if the judges haven't looked at the cases, the chances are they may say just the opposite thing later down the line.

Coming back to your point, there is room for different views. The House of Lords went one way, and the Supreme Court, more than half a century later, agreed. Of course, in this country, the other advantage of our system is that if Parliament, the democratically elected legislature which is ultimately the final arbiter of our law, thinks the courts are going wrong, Parliament can legislate. I have to admit that Parliament legislating on the point raised in *Boardman v Phipps* is not terribly likely, but it would be open to them to do so.

# THE RIGHT HONOURABLE LORD JUSTICE FRASER

Judge of the Court of Appeal of England and Wales and Chair of the Law

Commission of England and Wales

Interview conducted by SAKSHI JHA on 26 June 2025

Edited by SAKSHI JHA

## **A) Journey into Professional Practice**

### **1) Going back to the very start, what motivated you to pursue a career in law?**

Going back to the beginning, I had studied maths and physics at school and wanted to do Maths at Cambridge or Oxford. My maths teacher wasn't convinced my maths was strong enough for Cambridge – which outraged me... So, I started looking at other subjects for which I may have been better suited. When I looked into it, I thought law probably suited me better. I was very good at Maths and Physics, but I was also quite interested in subjects like History and English, so it seemed like the ideal subject. So, I applied to Cambridge to do law, but I did actually sit the Cambridge entrance exams in Engineering, and won an Exhibition in Engineering for Law. Which was an unusual combination, even then.

### **2) You undertook your undergraduate studies and your LLM at St John's College. How would you describe your time at university? Can you share some highlights or memorable experiences?**

I was effectively what they now call a 'student athlete'. I played basketball for the university, learned to row there, and did well at that too. I probably spent more time pursuing sporting pursuits than I did in the library. But I concentrated on my academics sufficiently to do reasonably well. I probably spent 50% of my time on academics, 50% on sport, though. I certainly did not go out socially very much.

In terms of memorable experiences, I thought the LLM was brilliant. You could choose four subjects from an enormous range. While I was doing the LLM, there was a visiting professor, John Fleming from Berkeley in the United States, who is well known in the law of tort. As a result, one of the subjects I took was the American law of tort. That, together with my basketball background, as the

majority of the team were American, led to me having as my first legal job a post at White & Case in Los Angeles. While working as a summer associate for two summers, I was left wondering whether to pursue the California Bar or the Bar in London. In the end, I opted for London.

– **‘What do you think was the tipping point that led you to choose London over LA?’**

I’m not really sure. There was a whole range of considerations. One difference between US and UK lawyers was their approach to litigation, and at White & Case, they had a “war room”. I had family in the UK and none in the US. I found there were many interesting differences. I did enjoy living in LA, and I travelled a great deal around the US and came to realise how very different some states and cities are from others. I also probably missed the cyclical seasons — they didn’t have that in Southern California. It never rained — it maybe rained once in 6 months. I decided that I would come back and attend Bar School in London, which had been the original plan.

### **3) Did you have any role models or mentors who influenced your career path?**

In academic terms, not quite, but the nearest I came — and we stayed in touch until he sadly died two years ago — was Dr P.A. Linehan. He was my tutor at Cambridge, a historian, and he was a very wise man, a great guide, and a very useful sounding board. A lot of his tutorial pupils stayed in touch with him, and I would see him in Cambridge every now and then, chat to him on the phone, and so on. Once I became a barrister, my first pupil master was Lord Justice Haddon-Cave. I left those chambers and went elsewhere to do my second six months in more specialised work, but I stayed in touch with him over the years, and he’s the closest I’ve had to a mentor over the years. He went to the High Court Bench; I went to the High Court Bench. He was appointed to the Court of Appeal, I have been appointed to the Court of Appeal, and so on. He’s now doing a public enquiry into alleged extrajudicial killings in Afghanistan by special forces, so I don’t see him very much, but I do stay in touch with him. He really influenced my career path, I would say, by example and helping me realise what was possible.

## **B) Judicial Career**

**4) Your focus as a barrister was in international arbitration, technology, engineering and construction disputes. We see technology-oriented litigation is increasing by the day,**

**and I'm curious if you have any areas or issues you think people should watch for in terms of growing legal relevance or prominence in the technology sector?**

There are some quite difficult and interesting issues which arise in relation to the way technology is currently booming. At the Law Commission, where I am currently the Chair, we are about to publish a paper on the legal issues arising from Artificial Intelligence or AI, pointing out in clear terms some of the difficult legal issues that arise with applying traditional legal concepts to this new field. Later this year, we are also publishing a paper on the difficult issues in private international law which arise from the cross-border nature and non-territoriality of digital transactions. Traditionally, not just in the UK, but across the world, physical location has played a powerful role in determining jurisdiction and judicial sovereignty. Physical territoriality obviously cannot apply in traditional terms to a great deal of digital transactions or assets, and all of those things are really breaking new ground, so these issues are probably those of most relevance in the 21st century.

**5) Your career as a judge has been broad, with you being authorised to sit in the Commercial Court, the Technology and Construction Court, the Administrative Court, as well as other King's Bench Division work (including group litigation and crime). With your experience, how do you see the role of courts evolving, especially in emerging areas of law like technology and commercial disputes, perhaps in terms of balancing tradition with a need for adaptability?**

The role of the court (the function of the civil courts) is unlikely to evolve at all, in the sense that its primary function is to be the resolver of disputes. There must be some option of last resort for private individuals, the state or commercial organisations to have an independent arbiter when they cannot agree, or when other ways of resolving protracted disputes have failed. The criminal cases are there to determine wrongdoing in the criminal law field. So, in a sense those functions are not going to change, but the way in which the courts perform that function is changing very much. It's already changed quite a lot in the last ten to fifteen years, and will continue to change in ways we can't necessarily foresee. I'm always quite interested when I meet younger people to find out what they think the courts are like now, in terms of traditions such as wig-wearing and so on.

The Rolls Building is the specialist business and property law building, and is the largest specialist court that's purpose-built in the world. If you went in there, it wouldn't appear to you like a normal

court building at all. It's certainly nothing like the Royal Courts of Justice where we are as we speak, with the Victorian and Gothic influence. It's very modern, with great Wi-Fi, a large number of court rooms and three super-courts built specifically for major multi-party disputes. The judges who sit there fall into one of three specialist categories: the Commercial Court, the Technology and Construction Court, or the Chancery Division. Apart from the fact that the judges in the Chancery Division wear judicial robes, none of the judges wear wigs (they all wear simple suits) so it's very different to the traditional court. There's also a huge number of screens, and very little paper used, so witnesses are often giving evidence over video links – all things you'd expect in a modern business environment rather than what most people think of as a courtroom. Computerised case systems also mean I could sit at a desk in my private room and access any pleadings, witness statements, or court documents for whichever case I'm assigned – and that applies to the Court of Appeal as well. For the Crown Court, we use a case management system called DCS which again allows me, sitting at that desk, to access any one of the case papers in any Crown Court criminal case I might be considering. So, we already use a lot of technology. While we were catapulted forward somewhat by COVID-19, we already were using technology a fair bit. So, the way we embrace technology has changed over the last ten years.

In terms of tradition, I suppose there are still traditional forms of dress, and in criminal cases, the judge will still wear a bench wig and gown, and barristers will wear their wigs and traditional court dress. There was a push to get rid of that about twenty years ago, and a wide public consultation was undertaken. It was discovered that most of the public wanted to retain these. If you are a victim or witness in a serious crime and you're seeing the person who attacked you tried before a jury, most of the public doesn't want the person doing that to look like a bank manager. This applies to every court. Barristers don't want to be catching the tube home in a carriage and find themselves near the family of the accused, who could recognise them. It gives them a cloak of professional anonymity, so I think that's one part of tradition for the moment we'll most likely retain for the foreseeable future, and for sound reasons. Otherwise, I am sure that the courts will move with the times, if not ahead of them. The modern judiciary has embraced the use of new technology, and I think some people's idea of what a judge is like, which they may have in their mind from old movies or TV programmes, is very different from the reality today.

### **C) The Law Commission**

**6) On 29 June 2023, you were appointed as the new Chair of the Law Commission of England and Wales. What are some of the key priorities for the Law Commission under your leadership?**

The key priority for us is to do very high-quality work, to a reasonable timescale, to help the development of the law as it moves forward in terms of reform, so it keeps abreast of the challenges of modern life. Some areas of the law might be governed by statutes that were written in some cases over a hundred years ago. We have just produced a report on reforming the Wills Act recently, which was pretty Victorian. Given the law helps all members of society lead a fulfilling and beneficial life, it must stay up to date. If you think of the way technology evolves and human relations develop, one hundred years ago, a couple living together and having children would almost definitely be married. There was quite a lot of societal disapproval of people doing that who weren't married, and there was no ability for people to marry someone of the same biological sex. There were no formal same-sex partnerships, and for those in such relationships, they were careful to keep the details away from public view. That has all changed quite rightly and very dramatically over time, and if the law is to remain applicable and relevant to the way people live their lives, the law must change too. So that's one of our key priorities: to maintain our push to recommend reforms to the law where it is outdated and will improve by being reformed.

One of my priorities was to increase and build on our international engagement. One reason is (and this isn't being patronising to the rest of the world) that the law of England and Wales is seen as being a leader in setting an example globally, and as being the gold standard to which a lot of other jurisdictions aspire. That's not to say other jurisdictions don't have law as good as ours, but over hundreds of years, the UK has demonstrated 'thought leadership' that many others have benefited from.

At the Law Commission, we recently produced a report on electronic trade documents, which led to an Act of Parliament called the Electronic Trade Documents Act 2023. Bills of exchange or lading in the 17th to 19th centuries were hugely important documents. If you were exporting coffee and you were the owner of the coffee plantation wishing to sell the coffee, holding the bill of lading for the cargo of coffee gave physical ownership of the goods. That document could then be traded. International trade would involve an owner, a shipper, a seller, a broker, an end buyer, and usually a bank or a number of banks. All of those entities relied on the legal status of that physical document.

Electronically, you cannot have physical possession of a document like that, and this was seen as holding back international trade, as it made it more difficult to freely trade physical goods, as the document of ownership traditionally had to be a physical one. So, we passed the Electronic Trade Documents Act in this country, which allows the same thing to happen even though the document is electronic. This now means electronic trade documents can have the same legal effect as physical ones. That's a way of demonstrating how the law of this jurisdiction can be a world leader in reforming and keeping up to date the law in its relevance. Because of that, I'm very keen that we build and foster strong international relations with other law reform bodies across the world, across a variety of jurisdictions, so that's one thing we've also been doing as much as we can at the Law Commission. Obviously, there are constraints on resources, but through dialogue and relations with other jurisdictions we can only help the cause of law reform across the world.

**7) What are some of the most exciting or innovative reform proposals you've seen come out of the Law Commission during either your tenure, or even in general?**

It is the sixtieth anniversary of the Law Commission this year, so we have been looking back at some of the most important reforms that have come out of our work while celebrating, as well as looking at what we can continue to do. Sixty years obviously covers quite a wide breadth, but some highlights include the Children Act, the Mental Capacity Act, and the Insurance Act. The Sentencing Act was also a huge codifying Act bringing together all the parts of criminal sentencing which were scattered across various statutes, and we're currently doing a significant report on the law governing disabled children's social care. The law of contempt and criminal appeals are also being projects on which we are working on at the moment, and we have about seventeen different projects underway.

So, all of our reform proposals are exciting in the sense that if they become an Act of Parliament, they will improve the law. Some of them affect a wider number of people than others. If you're making a will, for example, and our will reform proposals are passed into law (which we hope they will), that would be really beneficial for some individuals. Traditionally, three ways of changing wills currently exist: by destruction, by making another will, or if you get married. With predatory marriages on the increase, we've recommended that a person's will is not automatically nullified as a result of marriage. An 85-year-old person, for example, who is subject to a predatory marriage may not know that their will, which might contain very careful provisions for their adult children, becomes completely revoked as a result of that ceremony. Moreover, if they die, they would die intestate, and

all the property goes to the person who married them. So, these reforms directly impact people. However, our proposals also affect fairness and justice. These are just examples, rather than the superlatives of what we have achieved, but to give an example of how we have strived to improve the law to benefit society generally.

**8) Do you have any advice for any students?**

Be resilient. It's not always going to be plain sailing; you won't always succeed, but don't be put off. You will often learn of the success of others or imagine that people who have done well have never had any setbacks. You would be wrong; most people will have had failures along the way. If you are interested in it, the legal profession is sufficiently wide that there will be a niche for you which will match your interests, and you have to be prepared to work hard. But it is interesting and rewarding, and you are unlikely to be disappointed by your career.

# PROFESSOR JONATHAN HERRING

Professor of Law at Exeter College, University of Oxford

Interview conducted by **SOFIE DOLAN, LILY SEAR** and **HARRY**

**ARMSTRONG** on **19 MAY 2025**

Edited by **SOFIE DOLAN** and **LILY SEAR**

## A) Background

### 1) **What inspired you to pursue a career in law, and how did you end up exploring so many different areas of law?**

I think it was probably when I was about seven, and I used to watch a show called Crown Court. It was set in a courtroom, and it was like a soap opera. I really got interested in the different stories, and so from that age, I said I wanted to be a lawyer.

Certainly, when I was at school, I wanted to be a solicitor and was very keen to work in criminal law. So, I did my law degree and got a training contract with a firm in London that did criminal law. I remember walking in through the front door feeling *'at last, I've done it! I've got where I've been aiming for for so many years!'* But it wasn't long into practise when I decided it probably wasn't for me. I wrote to my tutor back in Oxford, saying *'can I come back and do a BCL?'* Fortunately, my tutor said, *'oh, sure'*. So, I finished my contract but the day I qualified, I left and came back to do the BCL.

After that, I got a series of little jobs replacing people who were going on sabbaticals and on parental leave and that kind of thing and started to build up an academic career. As to the number of subjects, I guess I started off with criminal law, but so many of the issues around criminal law relate to things more generally, like medical and family law, and I really enjoy the areas where a whole host of different laws interact. For example, domestic abuse – it's not just a criminal law matter and it's not just a family law matter. You'll see a mixture of all sorts of things and to be able to stand back and look at issues from a range of different perspectives is really helpful.

### 2) **What keeps you intellectually curious about the law after so many years?**

I guess I'm really interested in people and relationships. There are things I feel strongly about - injustices that need to be righted and trying to make the world a better place in so many different ways. At one time, it seemed the world was getting in a better and better direction, but increasingly it seems to be going in the opposite direction. I have a sense of unfairness and want to try and make things better.

**3) Are there any areas you're now exploring that you didn't expect to find so fascinating?**

I've ended up writing much more about sexual offences than I ever thought I would. I think certainly when I was young, I saw that, perhaps very naively, as a women's issue and that it wouldn't be right for a man to be writing about sexual offences. Now, I'm very much on the other side of that thinking. This is a man's problem and it's something that men need to be talking about and seeking to address. It's not women whose behaviour needs to change, it's men's. So, I've ended up probably writing and thinking about that much more than I would have expected to.

Secondly, perhaps disability as well. Two of my children have disabilities and that was probably something that before I thought a little bit about but not much. Certainly, that experience has led me to be thinking much more and writing much more recently about disability.

**4) What legal reform would you consider most necessary/pressing in your current work, if you could make one change?**

There are so many things. I feel as soon as I start to think of proposing one, I think of all sorts of others crying out as well. The book I've just been finishing is on the law of rape and it's just in such an awful position at the moment, with so few rapes being prosecuted and those that are prosecuted not leading to a full conviction at trial. I think that in that area, the law has gone badly wrong in focusing very much on the victim and the victim's responsibilities and whether the victim consented, rather than it being about the defendant and the defendant's responsibilities.

That's very much the theme of the book that'll be coming out in a few months, which is called *Shifting the Spotlight*. It's trying to say the problem in rape trials is that it's the victim who ends up being the one effectively on trial, and actually, it should be the defendant and asking him why did you go ahead

and have sex? What good reasons did you have to be absolutely sure there was consent? What steps did you take to ascertain those consent?

One of the aims of this new book is to suggest the other radical proposal that whether the victim consents or not is irrelevant. It simply should not be part of the trial and the offence should be redefined in essence to be a sexual penetration without a reasonable belief in consent. That will close off a lot of those lines of questioning because it becomes irrelevant how the victim responded to the rape afterward. Whether she immediately reported to the police or took some time, and the details of her sexual history, will largely be irrelevant. Anything the defendant didn't know about couldn't possibly be relevant, and that, I think, would be one step towards trying to resolve that problem. There's a lot more that would be needed to properly change the law, but I think that this would be an important step.

So that's what I've been thinking about a lot recently, but of course, I could immediately think of lots of other areas too.

## **B) Medical law**

### **5) The 10<sup>th</sup> Edition of your textbook on medical law and ethics has just been released; what are some of the key changes in the last three years?**

Clearly assisted dying has been very much in the news. I'm perhaps a bit of an outlier in that I wish we were not talking about assisted dying, but the right to protection from suicide. I think that's the issue - we have an epidemic of suicide. We have utterly failed to provide adequate protections and resources into mental health. The issue that a number of people who towards the end of their life wish to die, to prevent a painful death, is very small and I think simply in terms of the statistics and the gravity of the issue, we should be making suicide prevention the key issue. If we put all of the effort, all of the discussion in newspapers and all of the expert reports that we've put into assisted dying into the issue of suicide, I think that that would be a much better use of resources. There are exceptional cases when someone should have access to assisted dying, but I think that's very, very rare. The really important questions about right to die are really actually the right to protection from suicide.

### C) Conversion Practices

- 6) **You've argued that conversion practices should be seen as squarely within the remit of modern criminal law, and that the issue of coercion can arise in the religion context. Do you think that reluctance to legislate against conversion therapy is related to this religious sensitivity, and how can governments and lawmakers reassure religious groups that criminalising conversion practices does not restrict their rights?**

I think the evidence suggests that the majority of conversion practises are connected to religious groups. So, it's not surprising that the focus has mainly been on that area. I think that is perhaps where the concept of coercive control is particularly helpful so that there's a line between someone preaching a religious view, for example, and possibly praying for someone. On the other hand, there's a real difficulty here, and that's understanding the culture of the more conservative religious groups. Of course, there are plenty of very liberal religious communities who are very inclusive, but the issues tend to arise in relation to the more traditional ones, which are often highly hierarchical. Someone who is the pastor or the priest has quite significant control over the members of the congregation. Particularly if it if we take Christianity, for example, where you've got a church that believes in heaven and hell, and that those people who have committed sins, but are not acknowledging that, are going to go to hell. So, if the pastor says being trans or queer is going to send you to hell, that's enormously powerful for a believer. Although the preacher might perceive themselves as simply presenting the gospel, in fact, to those hearing it, because of the theological background, the power that's being exercised is enormously powerful. I think that's one of the particular difficulties here - the kind of religious organisations which are liable to engage in conversion therapy are likely to have those powerful figures. There's a real need to teach those pastors and priests about spiritual abuse, coercive control and to understand more carefully that how those words will come across; they won't come across as simply statements of religious belief, particularly when backed up with the fear of eternal consequences.

- 7) **You've suggested that conversion practices are comparable to other harms in criminal law that cannot be consented to. Do you think that the argument in favour of banning conversion practices is only convincing because of the tangible harm it can cause, or should harm to autonomy and dignity be enough to warrant criminalisation?**

I think it goes to how we understand the nature of harm in the criminal law. I was giving a lecture recently, and I've written an article where I talk about how, what I call the soldier model of harm, used to be used. Harms to the person were harms to people's physical bodies: actual bodily harm, grievous bodily harm and murder. But I think we're beginning to see a recognition that criminal law is taking into account the importance of relationships to people, people's mental health, people's emotional health, perhaps even people's spiritual health. All of those are really important to who we are as people.

In fact, for example, victims of domestic abuse often record that it wasn't the physical attacks that were the worst bit. It was living in constant fear of a constant control over their liberty, which was the worst. So, I think we need to acknowledge that actually emotional and relational harms are very, very serious wrongs, and to try and shift off an image that it's physical abuse which is somehow ranked as automatically the worst. Of course, physical abuse can then often lead to relational and emotional harms as well, but it's indeed those that are often the worst aspect.

When we take this into account, we can start to really see some of the serious wrongs of conversion practises. It's actually challenging the person's self-worth. That's almost one of the worst things you can do to someone - to make them think they're no longer valuable or to think that they're sinful or awful. And so that should certainly fall within the purview of criminal law.

#### **D) Relational Harm**

- 8) The offence of coercive and controlling behaviour has a 'lower' harm threshold than many offences, focussing on 'serious effect'. While I agree that we should think about harm in a more nuanced and open-minded way, is there not just a case for harm playing a central role in offences. While offences might target a harm (whether that be a relational harm or serious, physical harm), specifying it in the offence definition can be unhelpful. Whether or not harm is caused is often based on moral luck, not the defendant's choice. Equally, those who cannot prove that harm was caused are not protected. For instance, there are reports of a case of a victim of coercive or controlling behaviour being told that it is to her credit that the judge could not find that the behaviour had a 'serious effect' on her? Why not just ditch harm as an actus reus element altogether?**

I completely agree, in particular because a key point of coercive control is often gaslighting, where the victim is taught and told by the abuser *'it's your fault. You know I like my tea ready at 6:00, you deliberately didn't have it ready, and you've made me angry. It's your fault that I'm angry because you didn't do what I said or you know I don't like it.'* In the worst cases, the victim then takes that on and they say that it was their fault. That is a particular problem if you've got to show the abuse to have an impact upon them, as they've come to be so brainwashed by the abuser that they end up blaming themselves. Again, a loss of self-worth can be very closely connected. *'I'm lucky that my partner stays with me because I'm so terrible. Nobody else would have me. My partner's jealous only because he loves me so much and he wants to spend all his time with me. It's an expression of his love.'* All of these are tactics that are used by abusers in these cases. So, I think that requirement of needing to have a specified impact upon the victim is really dangerous.

- 9) In your writings on relational harm, you talk about 'watching the livestreaming of the relationship, rather than taking a photograph of the incident'. Clearly, much of our law is centred on the single-incident model of harm. How far are we moving away from that? Even course of conduct crimes seems to require a collection of single incidents, so are almost like a collection of photographs, rather than a livestreaming. How can we define offences to take into account the relational approach?**

I'm not sure the problem is necessarily the legislation, it's actually the litigation and prosecution of it. Let's say the defendant one morning said to his partner *'I like it when you wear your blue shirt'*. Well, if that's all you've got, of course you might say there's nothing wrong with that. Perhaps if anything, that sounds like a compliment. But if every morning he's saying *'I like it when you wear the blue shirt'*, you can start to gradually get that he's trying to control what she's wearing.

*'I'd like to have tea at six'*. Just that one comment means nothing, but if it comes repeated, then you've got a real problem. If you're a prosecutor, you're going to say to the judge, I need to show you on 100 different times he insisted that the tea was ready by 6:00, or he made specific comments about clothing indicating what he didn't like over one hundred times. Only then is the judge likely to get a sense that this is actually a controlling case, rather than just someone commenting on their partner's appearance. And yet that's then going to take forever. If you need to present to the judge the first time he talked about the time for his tea, which was on Tuesday the 16th of March, then the trial's will

take weeks and weeks. It's not surprising that, certainly in family cases in particular, the judges have been saying things like, '*oh, just give me the first the five worst incidents just highlight the worst things.*' However, then we're back to the incident model, and so it's a real problem in practise proving this relationship model, just because of time, especially given that the family calls, for example, are so overburdened.

Some people have sort of despaired, saying coercive control is great in theory and as a sociological model, but it's just impractical in modern busy family courts and criminal courts. But I think there are some signs that that barristers and judges are getting better and better at looking out for bits of evidence that might be very particularly revealing. There was a fascinating case recently called *F v R* where the barrister trawled through hundreds of thousands of ordinary texts, but located one where the woman had asked her partner if she could have permission to go to the toilet. The judge immediately said that that one text just speaks volumes about the nature of this relationship.

I think that required the barrister an eagle eye to look out for what sorts of things might be so simple and symbolic of coercive control for judges to immediately say '*yes, that is exactly what you would be looking for.*' It may be that with extra training, hard work and barristers and judges perhaps having to have specialised domestic abuse courts, that that we might find a way through those practical problems. But there's no denying that it's not an easy theory to operate in a busy courtroom.

## ARTICLES

# *The Way Forward: Recklessness in Attempts and Endangerments*

Wilfred Ong\*

*Abstract: The offence of attempt falls within the broader category of inchoate crimes. But a key question persists: should the mens rea for attempts require intention, or can recklessness suffice? Building on the view that attempts are failed attacks, this essay investigates the critical distinction between attacks and endangerments, arguing that failure to uphold this divide has led to significant issues in the law. Specifically, treating recklessness—typically associated with endangerment—as sufficient mens rea undermines the principle of fair labelling and distorts the ordinary meaning of attempts. Drawing on the perspectives of Duff and Yang, the author advocates for a clearer test to distinguish between these categories—one that focuses not on culpability, but on whether the defendant tried to harm the protected interest or was indifferent to it. Accordingly, only direct intention should suffice as the mens rea for attempts. Instead of subsuming inchoate endangerments under attempts, the time has come for a more principled approach of creating a separate inchoate endangerment offence. Such a reform is central to effective deterrence, as it would better highlight the distinct moral wrong involved in an endangerment as opposed to an attack.*

This work is divided into three parts. First, I will introduce the issue and the law as it stands. Second, I will introduce Duff’s and Yang’s views. I will then resolve their differences to create a unified approach and apply that to the more difficult cases of intended endangerment and oblique intention. Third, I will suggest guidelines for reform and provide justifications for them.

## **I: The Law as it Stands**

The crucial question is what should be the *mens rea* for attempts, particularly for substantive offences which do not require intention. The Criminal Attempts Act 1981 speaks of requiring intention to commit the substantive offence.<sup>1</sup> However, it is not explicit whether the same requirement applies to substantive offences which do not require intention. For instance, the offence of criminal damage requires a mens rea of ‘intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged’.<sup>2</sup> In such cases, should recklessness suffice for attempts?

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<sup>1</sup> Criminal Attempts Act 1981, s 1(1)

<sup>2</sup> Criminal Damage Act 1971, s 1(1)

There is no clear answer in case law. In the context of rape, *Khan*<sup>3</sup> held that it did. As long as there was intention to have intercourse, recklessness as to consent was sufficient *mens rea* for attempted rape. In the context of converting criminal property however, *Pace*<sup>4</sup> held that it did not. Mere recklessness as to whether the property was stolen was not enough. Knowledge or belief as to the circumstance element was required. Thus, a possible interpretation is that whether or not recklessness suffices is based on the severity of the substantive offence.

The Law Commission reports also offer limited guidance. In 1980, the Law Commission recommended that ‘an intent to bring about each of the constituent elements of the offence attempted’<sup>5</sup> was required. This was because it was thought that attempts involved intention to commit the complete offence as opposed to some element(s) of the offence.<sup>6</sup> However, the position was reversed in 1989, and the *Khan* approach was adopted.<sup>7</sup> This was due to concerns that the 1980 report would make the scope of criminal attempts too narrow. The reasoning was that by requiring intent as to every element of the offence, defendants who should be culpable would escape criminal liability altogether.<sup>8</sup> While the policy considerations here are compelling, I think we ought to strive for a more principled approach to this issue.

It seems to me that, in viewing recklessness as being sufficient, the scope of attempts was unsatisfactorily expanded beyond the ordinary meaning of an attempt in order to criminalise culpable unaccomplished acts, such as culpable endangerment. We should not ‘water down’ the meaning of ‘intent’ in the Criminal Attempts Act and should confine the scope of attempts to direct intention.

There is, however, a principled way out of this untidy compromise. By viewing attempts as failed attacks,<sup>9</sup> I argue that the problems of adequate criminalisation and accurate labelling can be solved. First, the law needs to recognise the distinction between attacks and endangerments. Second, reform is needed to recognise an altogether separate inchoate offence of endangerment (alongside the offences of attempt, encouragement and assistance, and conspiracy).

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<sup>3</sup> *Khan* [1990] 1 W.L.R. 813.

<sup>4</sup> *Pace* [2014] EWCA Crim. 186.

<sup>5</sup> Law Com. No. 102, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (1980), at para. 2.14.

<sup>6</sup> *Ibid*, at para. 2.17.

<sup>7</sup> Law Com. No. 177, *A Criminal Code for England and Wales* (1989), at paras. 13.44-45.

<sup>8</sup> Law Com. No. 318, *Conspiracy and Attempts* (2009), at paras. 8.133 & 8.137.

<sup>9</sup> R. A. Duff, *Criminal Attempts* (1996), at chs. 8.5 & 13.3.

## II: Duff's and Yang's Views Unified

### Duff's Views

Duff was one of the pioneers of the distinction between attacks and endangerments. Attacks are the intentional harming of protected interests. For instance, if I shoot you intending to injure you or start a fire intending to damage your property, I attack your physical integrity or your property.<sup>10</sup> Meanwhile, endangerments are the non-intentional harming of protected interests. For instance, if I shoot in your general direction without intending to injure you or start a fire very near to your property without intending to damage your property, I endanger your physical integrity or your property.<sup>11</sup>

Duff also argued that attempts are failed, unconsummated attacks.<sup>12</sup> Therefore, attempts and endangerments can be distinguished because while the former is intrinsically or essentially harmful, the latter is only potentially harmful.<sup>13</sup> Because intent is the paradigm *mens rea* for attacks, it is also by extension the paradigm *mens rea* for attempts. In contrast, the paradigm *mens rea* for culpable endangerments is recklessness.<sup>14</sup>

Interestingly, Duff is of the view that intended endangerments should count as attacks,<sup>15</sup> but cases of oblique intention, where harm is not directly intended but there is foresight that harm will be caused as a side-effect, should count as an extreme type of endangerment.<sup>16</sup> This is apparently because the former manifests hostility, rather than mere indifference.<sup>17</sup> However, it seems to me that the hostility requirement for attacks is problematic, as there is an argument to be made that certain culpable endangerments manifest hostility. For instance, hostility is present if, during a road rage incident, an agent swerves their car toward another vehicle aiming to force that vehicle off the road, but there was no direct intention to cause injury.

It is hard to justify why some difficult cases should count as attacks while others should count as endangerments, when it is difficult to meaningfully distinguish between these cases based on

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<sup>10</sup> R. A. Duff, 'Criminalizing Endangerment' (2005) 65 La L Rev, at 941.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, at 958.

<sup>14</sup> Ibid, at 944.

<sup>15</sup> Ibid, at 950.

<sup>16</sup> Ibid, at 951.

<sup>17</sup> Ibid, at 950.

hostility. I will expand more on this in the later section where I attempt to unify Duff's and Yang's views.

### **Yang's Views**

Yang's work built on the idea of attacks and endangerments as fundamentally distinct wrongs. He offered justification for why viewing recklessness as being insufficient *mens rea* for attempts is consistent with ordinary language by arguing that attempts, as failed attacks, elicit different types of attitudes from those who have been wronged as compared to endangerments.<sup>18</sup> We demand that the agent of an attack should not have *tried* to harm a protected interest. In contrast, we demand that the agent of an endangerment should have taken more care, so as not to risk harm to others.<sup>19</sup> Yang uses the example of responding to an attack versus an endangerment on someone's tree to illustrate his point: a typical response in the former case would be 'Why are you trying to harm my tree?' while in the latter case it would be 'You should be careful! You could have harmed my tree!'.<sup>20</sup>

Yang also argued that the law should follow our ordinary understanding of attempts and endangerments in order to serve its deterrent function. A crucial part of addressing and preventing any type of wrong surely has to do with recognising the wrongful action for what it really is.<sup>21</sup> If we care to differentiate between attacks and endangerments, it is not good enough to subsume an act of endangerment under the law of attempts.<sup>22</sup>

Unlike Duff, Yang took a more hardline stance on whether recklessness sufficed for attempts. He directly challenged the decision in *Khan* and argued for extending the approach in *Pace* to attempts in general.<sup>23</sup> He also viewed both intended endangerments<sup>24</sup> and cases of oblique intention<sup>25</sup> as endangerments, not attacks.

### **Duff and Yang Unified**

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<sup>18</sup> Di Yang, 'Recklessness and Circumstances in Criminal Attempts.' *Criminal Law and Philosophy*, vol. 17, no. 2, 2023, 363.

<sup>19</sup> *Ibid*, at 369-370.

<sup>20</sup> *Ibid*, at 371.

<sup>21</sup> *Ibid*, at 377.

<sup>22</sup> *Ibid*, at 367.

<sup>23</sup> *Ibid*, at 362.

<sup>24</sup> *Ibid*, at 367.

<sup>25</sup> *Ibid*, at 366.

Having introduced Duff's and Yang's views, I will attempt to resolve their differences in favour of Yang's stance. While they agree that attacks and endangerments should be recognised as distinct concepts, they disagree about the classification of some of the more difficult cases, particularly in the case of intended endangerments.

Two fundamental issues need to be addressed to engage with this debate meaningfully: 1) at which point on the recklessness-to-intention scale do we decide if someone is culpable for an attempt, and 2) on what basis should we draw that line.

It has been suggested that we should instead draw the line based on hostility. Indeed, Duff has suggested that hostility is intrinsic to attacks,<sup>26</sup> and therefore attempts. However, while hostility is a useful criterion to distinguish between typical cases of attacks and endangerments, it does not fare so well in the more difficult cases of endangerments which come close to direct intention, such as instances of intended endangerments and oblique intention. This is because, as Duff has recognised, there can be normative disagreements about what constitutes hostility.<sup>27</sup> The argument as to whether difficult cases should be considered as attacks or endangerments can genuinely go both ways, depending on how hostility is construed. This inserts an element of subjectivity into the exercise, which would lead to considerable uncertainty. A test that works well in typical cases but struggles in the more difficult cases is not very useful.

We need a test that brings clarity in difficult cases. I will argue instead that the test should be whether the defendant *tried* to harm the protected interest or was merely indifferent to it. Only direct intention should be sufficient *mens rea* for attempts generally.

Figuring out which point on the recklessness-to-intention scale to draw the line for attempts is difficult if we focus solely on concepts relating to culpability (such as hostility). This is because endangerments are not necessarily less culpable than attacks. The attack-endangerment distinction is important not because it marks differences in the extent of culpability, but because it marks different types of moral wrong.<sup>28</sup>

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<sup>26</sup> Duff (n 10), at 943.

<sup>27</sup> Ibid.

<sup>28</sup> A.P. Simester, "Why Distinguish Intention from Foresight?" in *Harm and Culpability* (A.P. Simester & A.T.H. Smith eds., 1996), at 71.

In my view, those who view the more difficult cases, such as intended endangerments, as attacks, are guilty of using culpability to determine whether the *mens rea* is that of an attack or endangerment. They operate under the mistaken assumption that attacks are necessarily more culpable than endangerments. This view does not always hold, especially in the difficult cases where *mens rea* is close to, but not actually, direct intention. An agent who is extremely reckless as to the life of another may be just as culpable as someone who attacks another. For example, a driver who swerves onto a crowded sidewalk with utter disregard for the safety of pedestrians may bear the same level of culpability as one who does so with the intent to injure someone. We must recognise that an attack is an attack, not because it is particularly culpable, but because it involves direct intention to harm a protected interest.

It seems to me that this misconception has been the source of much of our troubles in the law of attempts. Not wanting agents who endanger culpably to escape sanction, we criminalise at the expense of fair labelling. But I argue that it does not have to be one or the other. Both objectives could be achieved if inchoate endangerments were separately criminalised in the law. The first step in this has to be recognising and upholding the distinction between attacks and endangerments.

Therefore, the demarcation should be based on the different characteristics of each type of wrong. The test for attempts should be whether the defendant *tried* to harm the protected interest or was merely indifferent to it. This approach lends much-needed simplicity and clarity to the exercise. I will now illustrate its application to the difficult cases of intended endangerment and oblique intention below, which are both extreme forms of endangerment.

### **Intended Endangerment**

Intended endangerment refers to a case where an agent might intend not to cause substantive harm, but to create (or to expose another to) a risk of harm.<sup>29</sup> For instance, forcing a victim to play Russian roulette or swinging a golf club towards somebody's precious vase to see how close they can get without hitting it are examples of intended endangerment.<sup>30</sup>

### **Oblique Intention**

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<sup>29</sup> Duff (n 10), at 950.

<sup>30</sup> Ibid.

Oblique intention is where an agent might not intend harm directly but foresees that harm will be caused as a side-effect. A famous example of this is from Glanville Williams: ‘suppose that a villain of the deepest dye blows up an aircraft in flight with a time-bomb, merely for the purpose of collecting on insurance. It is not his aim to cause the people on board to perish, but he knows that success in his scheme will inevitably involve their deaths as a side-effect.’<sup>31</sup>

### **Applying the Unified Approach**

In both these cases of extreme indifference, because we judge the agent’s actions to be at least equivalent to an attack in terms of culpability, the temptation is to label them as attacks. However, as mentioned above, endangerments are not so-called because they are less culpable than attacks, but rather because they are a different kind of wrong. They involve indifference rather than intention. Thus, both intended endangerment and oblique intention should not be subsumed under attempts, but rather should be separately criminalised as endangerments. This does not mean that the agents are let off the hook. The extent of the sanction will be commensurate with their culpability under this separate endangerment offence.

A key aspect that my argument turns on is the existence of a separate inchoate endangerment offence. It is to this aspect that I will turn now.

## **III: The Way Forward**

### **The Need for Reform**

The criminal law punishes certain forms of endangerment, but it has tended to focus mostly on consummated offences where the risk has actualised. For example, an agent might be guilty of wounding and of criminal damage if injury results and property is damaged.<sup>32</sup> However, if the endangerment is unconsummated and the risk has not been actualised, it is not clear whether there is criminal liability. This is because there is no general offence of unconsummated endangerment (unlike unconsummated attacks in the form of attempts liability) in English law.<sup>33</sup> It seems to me that the time has come for the law to fill the gap and recognise an altogether separate inchoate offence of endangerment.

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<sup>31</sup> G. Williams, ‘Oblique Intention’ (1987) 46 *CLJ* 417, at 423

<sup>32</sup> Duff (n 10), at 942.

<sup>33</sup> *Ibid.*

I will offer two guidelines for reform. They are not meant to be comprehensive, but are merely intended to serve as a starting point for legislators who have made the enlightened decision to uphold the attack-endangerment distinction in inchoate offences.

### **Guideline 1: Not A Wholly General Offence**

The Criminal Attempts Act 1981 is of general application as it applies, subject to limited exceptions, to ‘any offence which, if it were completed, would be triable in England and Wales as an indictable offence’.<sup>34</sup> However, unlike attempts (unconsummated attacks), unconsummated endangerments should not be a wholly general offence. This is because in the case of failed attacks, they are generally serious enough to warrant criminal sanction: if a crime exists, it is generally accepted that it is also an offence to attempt to commit that crime.<sup>35</sup> But the same universal condemnation is not true of failed endangerments. They are one step removed from the harm that is intrinsic to a failed attack.<sup>36</sup>

We must ask ourselves, from the perspective of penal desert, whether the kinds of wrong in unconsummated endangerments are always serious enough to warrant the coercive attention of the criminal law, and the numerous costs involved in criminalisation.<sup>37</sup> Because endangerments are not intrinsically culpable, criminalisation will depend on the type of potential harm and the type of *mens rea* involved. Therefore, a wholly general offence of failed endangerment is undesirable. Instead, the offence needs to be subject to certain restrictions which focus on the more serious endangerments. For instance, in his draft Code of Conduct, Robinson proposes an offence of ‘act[ing] in a way that creates a substantial and unjustified risk of causing a result made criminal by this Code’.<sup>38</sup> However, I argue that even so, this restriction can be refined further, as it affords judges too wide a discretion.

### **Guideline 2: Criteria for Criminalising Unconsummated Endangerments**

It is difficult to suggest criteria to specify which endangerments are serious and should therefore be criminalised without resorting to general descriptors such as ‘substantial’ and ‘unjustified’ mentioned above, which are, in my view, too broad to be helpful. There is a certain circularity in the process, the perennial tension inherent when proposing broad legislation of this sort: in searching for a coherent general principle, we cannot help but fall back on vague yardsticks which invoke our moral

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<sup>34</sup> Criminal Attempts Act 1981, s 1(4)

<sup>35</sup> Stephen, *History of the Criminal Law of England* (1883) vol. 2, at 221-3.

<sup>36</sup> Duff (n 10), at 958.

<sup>37</sup> Ibid.

<sup>38</sup> Paul H. Robinson, *Structure and Function in Criminal Law* (1997), at 218.

instincts instead of a formula of sorts. This is problematic since, as we have seen, there can be normative disagreements about these culpability concepts.

However, we can circumvent this problem by taking advantage of the good sense of centuries of legislation and common law. Some complete offences can be committed either as an attack (with intent) or as an endangerment (with recklessness or negligence).<sup>39</sup> For instance, a defendant can be guilty of criminal damage whether the damage to property is caused intentionally or recklessly.<sup>40</sup> Rape is another example where the offence can be committed either through intention or indifference. This is because, whether by Parliament or judges, it was thought that indifference in these contexts was a serious crime because it endangered important protected interests which merit criminalisation even if they were not intended. If it has been decided that a consummated endangerment is worth criminalising, then its unconsummated form is very likely worth criminalising as well. What matters is that an important protected interest is being endangered, and the agent, in not taking more care, is culpable. By using this as a proxy, we can specify which types of protected interests require enhanced protection with greater certainty and clarity. For instance, unconsummated endangerment in the context of property interests and sexual integrity should be criminalised.

Evidently, this is a rough proposition that will need to be stress-tested and refined, but it is, in my view, a promising starting point in light of the alternative criteria suggested.

### **Justifications for Reform**

But why should we insist that endangerments be recognised as such in the law and create an altogether separate offence for it? In the final section, I will provide two justifications.

First, while I have thus far stressed the importance of fair labelling as a key reason why we should not be subsuming endangerments under attempts, I have not yet explained the reason for its importance. We should uphold the attack-endangerment distinction because fair labelling is central to effective deterrence. A crucial part of addressing and preventing any type of wrong surely has to do with recognising the wrongful action for what it really is.<sup>41</sup>

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<sup>39</sup> Duff (n 10), at 949.

<sup>40</sup> A. P. Simester et. al., *Criminal Law: Theory and Doctrine* (7<sup>th</sup> ed. 2019), at 461.

<sup>41</sup> Di Yang (n 18), at 377.

Offence labels matter because they serve a vital communicative function. They tell citizens that a certain kind of action is wrong and should not be done.<sup>42</sup> For example, Yang argues that in the context of sexual integrity, the point of an inchoate endangerment offence such as reckless sexual conduct is not to communicate that it is wrong to act with negligence as to consent in sexual encounters. The complete offence of rape already does that by criminalising non-consensual sex and doing so without a reasonable belief in consent. Rather, the purpose is to highlight the endangerment as a distinct wrong, different in kind from attempted rape.<sup>43</sup> This is because, while most people understand that rape is wrong and roughly why it is wrong, significantly fewer people appreciate the fact that we can cause serious harm to others by not taking sufficient care, or what it means to take sufficient care, especially in the context of sexual encounters.<sup>44</sup> In other words, a separate inchoate endangerment offence contributes to effective deterrence through education. We would be doing more to highlight the wrongfulness of acting with negligence or recklessness by highlighting the indifference that gives rise to such actions.<sup>45</sup> In contrast, to convict an agent who endangers another under attempts liability would distort the wrong committed and mislabel the kind of wrong as an attack.<sup>46</sup>

Second, from the point of view of parliamentary sovereignty and constitutional propriety, it is contrary to the language of the Criminal Attempts Act 1981 for judges to subsume endangerments under attempts. Because the statutory language requires intention to commit the substantive offence,<sup>47</sup> it is wrong in principle to convict endangerments, which involve *mens rea* of recklessness and negligence, under the category of attempts. If Parliament creates a separate offence of inchoate endangerment, it will achieve much-needed clarity in this area of the law by distinguishing between what are really two distinct wrongs. In turn, judges no longer must go against statutory wording to criminalise endangerments.

### **Concluding Remarks**

So far, I have suggested that attacks and endangerments should be distinguished not by culpability concepts, but by whether the defendant *tried* to harm the protected interest or was indifferent to it. Accordingly, only direct intention should suffice as the *mens rea* for attempts. Next, I suggested guidelines to serve as a starting point for the creation of an inchoate endangerment offence. It should

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<sup>42</sup> Ibid, at 376.

<sup>43</sup> Ibid, at 376-7.

<sup>44</sup> Ibid, at 377.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid, at 376.

<sup>47</sup> Criminal Attempts Act 1981, s 1(1).

not be the same kind of wholly general offence as criminal attempts, but should be specified by using completed offences as a proxy. I also provided justifications for such reform in accordance with the objective of effective deterrence and constitutional principle.

Looking ahead, the suggested guideline of using completed offences as a proxy to decide which types of un consummated endangerment should be criminalised needs to be scrutinised and refined. This is because the argument of not subsuming endangerments under attempts rests heavily on the premise that there exists an inchoate endangerment offence which is capable of satisfactory criminalisation of culpable endangerments.

# *Two's The Number? A Case Against the Recognition of Multiple Legal Parents*

Hannah Zia\*

*Abstract: The debate around the recognition of multiple legal parents has become an increasingly contested issue, driven by greater social awareness of diverse family structures, including same-sex parenting, assisted reproduction, and polyamorous relationships. While each family form deserves recognition and respect, expanding legal parenthood beyond two individuals risks undermining legal clarity, misaligning with social realities, and complicating child welfare protections. This paper defends the current two-parent paradigm, making the case against the recognition of multiple legal parents. It then considers that a more effective approach is to strengthen parental responsibility, ensuring that additional caregivers can support children without destabilising the legal framework.*

## **Introduction**

I should state at the outset what this article is not. It is not a promotion of biological determinism to underpin legal parenthood. Nor is it a denial of the legitimacy of alternative families, or the per se promotion of a conservative nuclear ideal. Instead, it supports the existing two-legal-parent framework on legal and policy grounds, emphasising its role in providing clarity, reflecting social reality and safeguarding children's interests. However, for this framework to remain effective, parental responsibility must be reformed to recognise the role of additional caregivers without undermining the clarity of legal parenthood. In this way, legal parenthood and parental responsibility would sit alongside each other in a complementary relationship to ensure clarity and inclusivity.

I begin by challenging biological determinism as a basis for legal parenthood, demonstrating that legal parentage is already shaped by intention as well as biology. I then defend the appropriateness of the two-parent model, considering legal principles and social realities. I engage in a brief examination of other jurisdictions to illustrate how multi-parent recognition has been approached elsewhere, before turning to my central claim: that strengthening parental responsibility, rather than redefining legal parenthood, is the most effective and legally coherent response. Finally, I offer some concluding thoughts.

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**i. Against biological determinism**

To defend the two-parent paradigm, it is necessary to examine its foundations which hinges on the distinction between biological parenthood ‘(parenting by being’) and social or intentional parenthood ‘(parenting by doing’).<sup>1</sup> The law has largely struck an appropriate balance by recognising both biological and intentional parenthood as foundations for legal parenthood.

Under the common law, the birthing mother is the legal mother and if the child was conceived through sexual intercourse, the biological father is the legal parent.<sup>2</sup> However, the Human Fertilisation and Embryology Act 2008 significantly expands legal parenthood by the incorporation of intention-based criteria, ensuring recognition of non-conventional families. Non-biological parents can now attain legal parenthood, including a father who consents to the use of a third-party sperm donor to fertilise his wife’s embryo, or a non-birthing lesbian partner. The two-parent paradigm is no longer strictly attached to biology, and justifiably so.

Andrew Bainham is a well-known opponent of this trajectory.<sup>3</sup> He argues that in the interests of truth, individual autonomy and children’s welfare, the law should take a more cautious approach before “sever(ing) this (biological) relationship between parent and child.”<sup>4</sup> In his view, legal parenthood should prioritise biological connections whenever possible to preserve kinship networks and uphold the principles outlined above. He further argues that parental responsibility can support non-biological involvement in daily caregiving but equating social and biological parents is a mistake.<sup>5</sup>

While Bainham’s critique is compelling, it has two key flaws. Advances in medical science have shown that the traditional model of one biological mother and one biological father is not absolute. Full surrogacy now allows the implantation of the commissioning parents’ sperm and egg into another woman’s womb. In these cases, biology does not provide a clear basis for choosing between the genetic and gestational links in defining motherhood. There is no inherent biological reason to

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<sup>1</sup> Judith Masson, ‘Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families’ in J.R. Spencer and Antje Du Bois-Pedain (eds), *Freedom and Responsibility in Reproductive Choice* (Oxford University Press 2006) ch 8.

<sup>2</sup> *The Amphill Peerage* [1977] AC 547, 577: “[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition.”

<sup>3</sup> Andrew Bainham, ‘Arguments About Parentage’ (2008) 67(2) *Cambridge Law Journal* 322.

<sup>4</sup> Joint Committee on the Human Tissue and Embryos (Draft) Bill 2007, Volume II: Evidence, HL Paper 169-II, HC Paper 630-II, Ev 16, paragraphs 2 and 24.

<sup>5</sup> Bainham (n 2), 351.

prioritise the birthing process over the genetic connection; any such choice is essentially a political decision framed in biological terms. Moreover, developments in mitochondria donation mean it is now possible for a child to have three genetic parents.<sup>6</sup> Finally, given the advancements in transgender medical treatments coupled with the Gender Recognition Act, it is now possible for the same person to be the ‘father’ to one child and ‘mother’ to another.<sup>7</sup> To use biology as a basis for legal parenthood is to misunderstand the increasing complexities of biological links.

Secondly, Bainham’s view does not easily align with our social reality, in which many non-biological parents engage in most, if not all, of the functional day-to-day parenting of the child. This is not to negate the right to know one’s biological origins, but to cast doubt on the assertion that a biological link is self-evidently unique such that it should dictate legal parenthood. While the biological tie can hold personal significance, there is no reason why it should be the sole basis for legal parenthood, especially in situations where the biological parent has little or no involvement in parenting. This is most evident in cases of licensed sperm donation, where the commissioning couple, and not the donor, are to be the legal parents. The liberalisation of the law accepts what Bainham overlooks: the defining importance of intentional or social parentage which is becoming the “primary” and appropriate test.<sup>8</sup> While biology should not define legal parenthood however, this does not imply that parenthood should be extended to more than two individuals. Rather, the two-parent model remains the most effective framework for ensuring clarity, stability, and aligning with social reality.

## ii. **In defence of the two-parent paradigm**

Having cast doubt on the argument that biological connection should form the premise of legal parenthood, I nevertheless argue that legal parenthood is sensibly confined to a maximum of two individuals. The paradigm adequately reflects social reality while remaining inclusive of non-traditional family forms.

The Human Fertilisation and Embryology Act (HFEA) provides a clear example of how the two-parent model has adapted to accommodate non-traditional families. Under the HFEA, second female

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<sup>6</sup> Cambridge University: Assisted Reproduction – Kids Grow Up Just Fine, but It May Be Better to Tell Them Early’ (University of Cambridge, 24 October 2019). Jens Scherpe, “Men giving birth, children with three parents, and other future family law problems.” <https://youtu.be/1ufU3XZOb7o>

<sup>7</sup> S. Gilmore, ‘The Gender Recognition Act 2004’ [2004] *Family Law* 741, 744.

<sup>8</sup> C. Barton and G. Douglas, *Law and Parenthood* (Butterworths 1995).

parents can attain legal parenthood when in a formalised relationship or if certain conditions are met.<sup>9</sup> In these cases, the non-birthing lesbian woman is treated as legally equivalent to a father in a non-formalised relationship, ensuring that same-sex families are fully recognised within the existing framework. Moreover, the Act explicitly excludes sperm donors from legal fatherhood, reinforcing the principle that parental intention, not mere biology, determines legal parenthood.<sup>10</sup>

The two-parent model is not merely an imposed historical or heteronormative construct: it aligns with how many non-traditional families actively choose to structure their parental roles. Case law suggests that many same-sex couples using assisted reproduction deliberately create a two-parent nuclear model, often excluding donors from legal parenthood. In *Re D*, a lesbian couple sought to limit the role of their sperm donor, partly to reinforce their own recognition as a family unit.<sup>11</sup> Similarly, in *MA v RS*, Hedley J acknowledged the danger of giving “insufficient respect to the nuclear family that the lesbian couple has formed” placing “the stability and well-being of that family at risk in order to promote a relationship with a man who was never intended to be a ‘father’.”<sup>12</sup> While some scholars critique the *reproduction* of the nuclear model in same-sex families, this trend suggests that the two-parent paradigm provides a stable and legally coherent framework that many families voluntarily adopt.<sup>13</sup> Rather than being an imposed legal constraint, it appears to be a preferred and functional structure.

Expanding legal parenthood risks undermining the very model that has facilitated the legal and social recognition of same-sex families. As such, while Lucy McCaughan argues that the recognition of multiple legal parents would contribute to the ‘normalisation’ of LGBTQ+, this sentiment must not undermine the autonomy of same-sex couples to organise their families within a chosen dyadic dynamic.<sup>14</sup> Drawing on research surrounding same-sex marriage, it is important not to underestimate the desire of same-sex couples to ‘be normal’ by asserting their equal status within the two-parent paradigm, rather than serving as inadvertent figureheads for a multi-parent movement.<sup>15</sup>

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<sup>9</sup> Human Fertilisation and Embryology Act 2008, ss 42–44.

<sup>10</sup> *Ibid*, s 45(1).

<sup>11</sup> *Re D (Contact and PR: Lesbian Mothers and Known Father) No 2* [2006] EWHC 2 (Fam).

<sup>12</sup> *Re MA and RS (Contact: Parenting Roles)* [2011] EWHC 2455 (Fam), [2012] 1 FLR 1056.

<sup>13</sup> Julie McCandless and Sally Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73(2) *Modern Law Review* 175.

Available at: [https://eprints.lse.ac.uk/29630/1/McCandles\\_Human%20fertilisation\\_2016.pdf](https://eprints.lse.ac.uk/29630/1/McCandles_Human%20fertilisation_2016.pdf).

<sup>14</sup> Lucy McCaughan, ‘Should the Law Allow Children to Have More Than Two Legal Parents?’ (2024) *New Law Journal* <https://www.newlawjournal.co.uk/content/should-the-law-allow-children-to-have-more-than-two-legal-parents>.

<sup>15</sup> C Heaphy, C Smart and A Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (2013). This research amongst younger generations of same-sex couples who had formed civil partnerships suggests most such

The HFEA also confers legal parenthood onto fathers who do not provide the sperm for the child, recognising the importance of intention to heterosexual couples engaging in assisted reproduction. Specifically, if the sperm donor has given the relevant consent he is not to be treated as the legal father.<sup>16</sup> This exclusive stance adequately reflects social reality where, in most cases, it is the commissioning parent who intends to raise the child and not the donor. A multi-parent approach which may grant legal parenthood to donors, most of whom do not intend to be active fathers, would contradict this reality and risk undermining the clarity of the assisted reproduction framework.

Similarly, reforms to the two-parent model would contradict the fundamental premise of surrogacy, which involves birthing a child for the commissioning parents without granting legal parenthood to the surrogate mother, provided she consents. The relatively rare situations of conflict between the surrogate and commissioning parents should not dictate a move away from a bi-parent model. When disagreements arise, the courts have taken an appropriate case-by-case analysis, guided by the welfare principle.<sup>17</sup> Surely, it is better for the courts to make principled decisions on legal parenthood based on the welfare of the child in each case, rather than consider a multi-parent set up in which the surrogate and commissioning parents may be in long-term conflict?

Additionally, in a two-parent system, courts can clearly determine parental responsibilities in cases of separation, relocation, or inheritance. However, if three or more individuals hold equal legal parent status, it may become significantly harder to resolve disputes. As Elizabeth Marquardt notes, multi-parent litigation often involves households with conflicting interests and suggests that children shuttling between multiple households tend to have poorer long-term outcomes.<sup>18</sup> Adherence to the two-parent model maintains clarity, promotes the welfare of the child, and accurately reflects the social reality of the adults involved.

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couples do indeed just want to be normal—or ‘ordinary’—rather than to be at the vanguard of a radical movement experimenting with alternative forms of relationship.

<sup>16</sup> Human Fertilisation and Embryology Act 2008, s 41.

<sup>17</sup> See for example, *Re: H (Minors) (Local Authority: Parental Rights)* (No.3) [1991] Fam 151.

Balcombe LJ stated: "In considering whether to make an order, the court will have to take into account a number of factors of which the following will undoubtedly be material (the list is not intended to be exhaustive): (1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and the child, and (3) the reasons of the father for applying for the order."

<sup>18</sup> Elizabeth Marquardt, ‘When Three Really is a Crowd’ *New York Times* (16 July 2007) <https://www.nytimes.com/2007/07/16/opinion/16marquardt.html>.

Finally, despite growing discourse around multi-parent recognition, there is little empirical data to suggest that current legal frameworks exclude large numbers of functional parents. The most relevant statistics, such as the rise in stepfamilies (781,000 in England and Wales as of 2021), do not indicate whether additional adults seek full legal parenthood or whether parental responsibility frameworks already accommodate their role.<sup>19</sup> Without clearer sociological data, the assumption that multi-parent recognition is necessary remains unsubstantiated. Expanding legal parenthood prematurely risks introducing legal complexities without a clear social mandate. Until clearer sociological evidence emerges, the law should resist the shift to multi-parenthood. This approach upholds a reasoned commitment to the two-parent model avoiding the pitfalls of ‘bogeyman panic’.<sup>20</sup>

### **iii. Other jurisdictions:**

In advancing the case against the recognition of more than two legal parents, I will briefly examine other jurisdictions who have engaged in multi-parent recognition. In California, Family Code Section 7612 allows courts to recognise more than two parents in cases where only recognising two parents is detrimental to the child.<sup>21</sup> Crucially, cases under this statute have been rare and where they do arise, courts consider emotional ties, parental responsibilities, and the child's needs, examining the child's stability in multi-parenting arrangements.<sup>22</sup> As Scherpe has suggested, the qualified wording of this statute means it is likely to arise only in exceptional cases.<sup>23</sup> It is not drafted to confer the normalisation of a multi-parent paradigm, but to deal with exceptional factual scenarios.

Similarly, legal recognition of three parents has taken place in Canada. In 2007, the Ontario Court of Appeal ruled that a child may have three legal parents: his biological mother and father and the biological mother's lesbian partner.<sup>24</sup> All three parents undertook functional roles in the child's life and the court used its equitable jurisdiction to award the lesbian partner legal parenthood. Crucially,

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<sup>19</sup> Office for National Statistics, ‘Children in Families in England and Wales: Census 2021’ (ONS, 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/childreninamiliesinenglandandwales/census2021>.

<sup>20</sup> Brian Bix, ‘The Bogeyman of Three (or More) Parents’ (1 August 2008) Minnesota Legal Studies Research Paper No. 08-22 <https://ssrn.com/abstract=1196562>.

<sup>21</sup> California Family Code s 7612(c).

<sup>22</sup> Palmer Rodak & Associates, ‘Could a Child Have Three Legal Parents in California?’ (25 September 2024) <https://www.oceansidedivorcelawyer.com/articles/2024/september/could-a-child-have-three-legal-parents-in-califo/>.

<sup>23</sup> Jens Scherpe, ‘Men Giving Birth, Children with Three Parents, and Other Future Family Law Problems’ (University of Cambridge, 24 October 2019) <https://youtu.be/1ufU3XZOb7o>.

<sup>24</sup> *A.A. v. B.B.* (2007) 83 O.R. (3d) 561 (CA), leave to appeal to SCC refused [2007] S.C.J. No. 40 (QL).

the Court held that “[i]t is contrary to [the child’s] best interests that he is deprived of the legal recognition of the parentage of one of his mothers.”<sup>25</sup> This decision is particularly notable because all three parents jointly sought recognition of the lesbian mother’s legal parenthood. This ensured legal clarity and stability from the outset, avoiding disputes that could arise in contested multi-parent cases. If multi-parent recognition were expanded, there is no logical reason to assume that three or more legal parents would not engage in the same disputes over custody, child welfare, and decision-making that arise in two-parent families. While administrative complexity alone may not justify rejecting multi-parent recognition, there is no evidence to suggest that expanding legal parenthood would resolve or reduce such disputes - an outcome that should, at least in part, be a goal of reform if we are to prioritise children’s welfare.

These overseas cases demonstrate that multi-parent recognition is possible under limited circumstances, but they do not demonstrate that expanding legal parenthood should become the default approach. Rather than expanding legal parenthood, a more effective and legally coherent step is to reform parental responsibility. This would allow multiple adults to take on meaningful caregiving roles without introducing legal ambiguity or undermining the stability of the two-parent framework. In this way, the law can recognise the practical realities of multiple adults caring for a child without disrupting the clarity and cohesion of the two-parent framework. Importantly, it would also address an implicit consensus which seems to run among proponents of legal expansion: not all parents should have equal rights.

#### **iv. The case for rethinking parental responsibility over legal parentage:**

In her seminal paper, Katherine Bartlett challenged the exclusivity of parenthood and argued for the recognition of multi-parent families under specific conditions: (a) the parents are not married; (b) they initiate the relationship out of the child’s best interests; and (c) they fulfil the functional and psychological roles of parents.<sup>26</sup> Even within Bartlett’s framework, an implicit hierarchy emerges: some caregivers are worthy of ‘full’ legal parenthood, while others, perhaps biological donors of married lesbian couples or surrogate mothers, are not.<sup>27</sup> Notably, Bartlett qualifies the

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<sup>25</sup> Ibid [12].

<sup>26</sup> Katharine T. Bartlett, 'Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed' (1984) 70 Virginia Law Review 879, 945.

<sup>27</sup> Hain Abraham, 'A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents' (2017) 25(4) Am U J Gender Soc Pol’y & L 271, 30.

expansion of legal parenthood only when there has been an interruption in the existing relationship between the child and legal parent. She does not necessarily advocate for the simultaneous recognition of the full range of rights for more than two legal parents.<sup>28</sup>

This internal distinction exposes a broader issue in multi-parent commentary: even its strongest proponents acknowledge that not all parents should have equal rights. Alison Young, for instance, suggests that a core parental unit should exist, supported by additional legally recognised adults, but that a division would exist between primary and secondary carers.<sup>29</sup> Likewise, Melanie B. Jacobs concedes that “all parents are not equally entitled to the full panoply of parental rights,” arguing that legal status should be determined by actual caregiving contributions.<sup>30</sup> If advocates of multi-parent reform acknowledge a hierarchy of parental rights, it follows that expanding parental responsibility, rather than redefining legal parenthood, is the better solution. Parental responsibility already enables multiple adults to play significant roles in a child's life, without granting all the primary rights of parenthood or creating conflicts over decision-making, inheritance, and custody, issues that arise when full legal parenthood is extended beyond two individuals.

v. **Reforming Parental responsibility:**

The confinement of legal parenthood to two individuals makes it essential for parental responsibility to carry substantive duties, particularly in families where other ‘social parents’ play a crucial caregiving role. Strengthening parental responsibility offers a principled alternative to multi-parenthood models by addressing implicit hierarchies among caregivers, while also ensuring that the law reflects modern family realities. However, if this solution is to hold ground, the courts must re-inject substantive duties into the parental responsibility concept.

UK courts have steadily stripped parental responsibility of any substantive meaning evident, for example, in the purely symbolic parental responsibility granted to the sperm donor in *Re D*.<sup>31</sup> In this case, parental responsibility was granted on the agreement that the sperm donor could not visit or

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Notably, Bartlett’s model best fits an intentional, polyamorous parenting structure which is paradoxically a situation largely absent from existing legal discussion on multi-parent reform.

<sup>28</sup> Melanie B. Jacobs, 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (Forthcoming) *Journal of Law & Family Studies* 15, 22.

<sup>29</sup> Alison Young, 'Reconceiving the Family: Challenging the Paradigm of the Exclusive Family' (1998) 6 *American University Journal of Gender, Social Policy & Law* 505, 515-18.

<sup>30</sup> Jacobs (n 28).

<sup>31</sup> *Re D* (n 11)

contact the child's school, or any healthcare professional involved in the child, without the written consent of mothers. This exemplifies a growing trend in which parental responsibility is increasingly granted to men who play no real part in their children's upbringing.<sup>32</sup> If the law of parenthood exists to further welfare of the child, it is not obvious how the empty vindication of the father's status serves this goal. While Black J correctly recognised the biological dimension of parenthood, her reasoning failed to engage with the broader purpose of parental responsibility which is not merely about acknowledging a biological link but ensuring the child benefits from meaningful caregiving relationships.<sup>33</sup>

A recognition of the truer meaning of parental responsibility would be welcome: "They exist for the benefit of the child, and they are justified only in so far as they enable the parent to perform his duties towards the child" (Lord Fraser in *Gillick*).<sup>34</sup> A substantive concept of parental responsibility would allow it and legal parenthood to coexist cohesively, reflecting the contributions of multiple adults involved in the child's upbringing. For instance, while the legal parent holds prima facie rights, an adult with parental responsibility would still be empowered to make unfettered day-to-day decisions for the child, ensuring that differing inputs are recognised and conflicts are avoided. In practice, applying a substantive concept of parental responsibility alongside the dual legal parenthood model could have led to a similar outcome in the Ontario case. The lesbian couple as the primary custodians would retain their central role while the father, who did not live with the child but remained an active contributor, could still provide substantial support. A substantive concept of parental responsibility would enable unmarried but fully committed fathers, who lack automatic parental responsibility without birth registration, to exercise meaningful caregiving roles. Moreover, it would ensure logical clarity by aligning the plain meaning of the statute ('rights, duties, powers, responsibilities and authority') with the genuine involvement of the adult in the child's life.<sup>35</sup>

A return to the court's substantive approach in *Re H* would be a prudent development.<sup>36</sup> By reinforcing meaningful parental responsibility, the law could better accommodate multiple caregiving

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<sup>32</sup> Peter G. Harris and Rob George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' (6 October 2011) 22 *Child and Family Law Quarterly* 151, 171 <https://ssrn.com/abstract=1939802> accessed 23 February 2025.

<sup>33</sup> *Re D* (n 11) [89]. ("Whatever new designs human beings have for the structure of their families, that aspect of nature cannot be overcome").

<sup>34</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1985] 3 All ER 402.

<sup>35</sup> Children Act 1989, s 3(1).

<sup>36</sup> *Re: H (Minors) (Local Authority: Parental Rights) (No. 3)* [1991] Fam 151. The Court of Appeal held that a number of factors should be taken into account when considering whether to grant a parental responsibility order including: the

roles alongside the existing two-parent framework, ensuring that children benefit from stable support networks without destabilising legal parenthood or heightening conflicts. Simultaneously, it offers a more coherent alternative to expanding legal parenthood, preserving the two-parent model while still recognising the diverse contributions to a child's well-being.

vi. **Concluding thoughts:**

Legal parenthood is an invariably political concept, shaped by evolving family structures and competing legal and social priorities. While calls for multi-parent recognition stem from a desire to accommodate diverse family forms, the existing two-parent framework already provides both legal clarity and practical inclusivity. It reflects social reality, offers a stable foundation for child welfare, and is not inherently exclusionary. Rather than expanding legal parenthood, a more effective approach is to strengthen parental responsibility, allowing additional caregivers to take on meaningful roles without destabilising the legal framework. The law can and should accommodate modern family diversity, but this does not require dismantling the two-parent paradigm.

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degree of commitment which the Applicant had shown towards the child; the degree of attachment which existed between them; and the reasons for applying for the order.

# ***A Glass Half Empty: Artificial Intelligence, the Rule of Law, and the UK's Pressurised Public Sector***

Aribah Chaudhry\*

*Abstract: The UK's public sector is facing unprecedented challenges due to prolonged underfunding, increased demand, and deteriorating working conditions. In response, artificial intelligence (AI) is being integrated into public administration in the hopes of enhancing efficiency and alleviating strain. While this uptake in AI has been subject to great moral and ethical debate, this article seeks to weigh in on the debate from a legal perspective. In particular, it aims to critique the use of AI in public administration on the basis that this threatens the rule of law. In what follows, I explain the current use of AI in the public sector (section I). I then submit that the administrative use of AI threatens the rule of law on the basis of i) a lack of transparency (section II), ii) bias in decision making (section III), and iii) a threat to fundamental rights (section IV). Finally, I consider how the law may mitigate this threat, suggesting that while judicial review may be an avenue of protection, greater caution and specialised AI regulation is needed to ultimately protect the rule of law (section V).*

## **I. INTRODUCTION**

The UK's public sector is undoubtedly at its crisis point. After over a decade of underfunding, matched with poor working conditions, and a greater demand for services like the NHS and social welfare, it is no wonder that the UK's public bodies seem less than capable of responding to the needs of its users. Many have sought to revitalise this part of the economy by suggesting reforms to spending and methods of increasing staff satisfaction.<sup>1</sup> Yet, it remains an uphill battle to bring Britain's pressurised public sector back into shape.

It seems that the latest solution is the use of artificial intelligence (AI) in the day-to-day functioning of public authorities. From minor organisational tasks to widespread administrative decision-making, AI is being rapidly integrated into our public sector in an attempt to increase efficiency and reduce

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<sup>1</sup> S Hoddinott, C Rowland and N Davies, *Fixing Public Services: Recommendations* (Institute For Government, 22 July 2024) <<https://www.instituteforgovernment.org.uk/publication/fixing-public-services-labour-government/recommendations>> accessed 7 January 2025.

public strain.<sup>2</sup> Crucial public bodies, such as the Home Office, have been found to use a form of AI known as automated decision making (ADM).<sup>3</sup> ADM systems process large amounts of data to create algorithms that can make administrative decisions without the involvement of a human being. Public bodies also use other forms of AI for everything from daily administrative tasks to surveillance and facial recognition.<sup>4</sup>

Undoubtedly, this technology presents advantages for the efficiency of the UK's public sector. Margetts highlights that AI may be used to create innovative policies, make speedier decisions, or help administrators with core tasks.<sup>5</sup> Meanwhile, the Tony Blair Institute has found that the Department for Work and Pensions, which already uses ADM, could make available 40% of their time by further relying on AI.<sup>6</sup> Indeed, it seems that AI could address the strain on many public bodies, and may improve productivity, by allowing routine decisions to be made more easily.

However, this approach is not without criticism. The widespread use of AI has become subject to a large moral and ethical debate, with the opposition often critiquing its use on the grounds of potential mass unemployment, environmental damage, and the distribution of misinformation.<sup>7</sup> This article seeks to weigh in on the debate from a legal perspective. In particular, I aim to critique the use of AI in public administration on the basis that this practice threatens the rule of law. Having explained the current use of AI in the public sector, I submit that the administrative use of AI threatens the ROL on the basis of i) a lack of transparency surrounding the logical thinking of AI and its prevalence in public administration (section II), ii) bias decision making resulting in an improper exercise of power (section III), and iii) a threat to fundamental rights (section IV). Finally, I consider how the law may mitigate this threat, suggesting that while judicial review may be an avenue of protection, greater caution and specialised AI regulation is needed to ultimately protect the rule of law (section V).

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<sup>2</sup> Public Law Project, *Securing meaningful transparency of public sector use of AI* (October 2024) 4 <<https://publiclawproject.org.uk/content/uploads/2024/10/Securing-meaningful-transparency-of-public-sector-AI.pdf>> accessed 8 January 2025.

<sup>3</sup> Public Law Project, *Tracking Automated Government 'TAG' Register* (9 February 2023) <<https://trackautomatedgovernment.shinyapps.io/register/>> accessed 8 January 2025.

<sup>4</sup> For example, the facial recognition technology used by South Wales Police in *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

<sup>5</sup> H Margetts, 'Rethinking AI for Good Governance' (2022) 151 *Daedalus* 360, 368 <<http://www.jstor.org/stable/10.2307/48662048?refreqid=fastly-default>> accessed 8 January 2025.

<sup>6</sup> A Iosad, O Large and L Britton, *Governing in the Age of AI: Reimagining the UK Department for Work and Pensions* (Tony Blair Institute for Global Change, 9 July 2024) <<https://institute.global/insights/politics-and-governance/reimagining-uk-department-for-work-and-pensions>> accessed 8 January 2025.

<sup>7</sup> For a comprehensive account of these concerns see D Acemoglu, 'Harms of AI', in Justin B Bullock (ed) and others, *The Oxford Handbook of AI Governance* (Oxford Academic 2024).

## II. RISK 1: A LACK OF TRANSPARENCY

Public authorities' use of AI presents a risk to the rule of law because it lacks the transparency required as part and parcel of the duties of administrators.<sup>8</sup> Indeed, Raz highlights that the rule of law requires that legal systems consist of rules which are open, clear and stable.<sup>9</sup> As such, not only should laws themselves be easily accessible, understandable, and relatively unchanging, but the making of such laws ought to be guided by general rules which are too.<sup>10</sup> This was explained by Hayek before him, who stated that the rule of law requires it to be possible to foresee with certainty how an authority will use its powers.<sup>11</sup> Raz highlights that this is particularly important when it comes to 'ephemeral parts of the law'<sup>12</sup> such as administrative decision making. In the case of AI, I submit that this rule-of-law requirement means that authorities ought to disclose how and when AI is used when exercising their discretion. This, however, is not the current case.

Currently, the role of AI within the public sector remains elusive and unclear. Due to a lack of formal reporting requirements, little data has been made available. What data has been found has been the result of deliberate efforts and research.<sup>13</sup> For example, the Public Law Project has issued repeated Freedom of Information Requests in order to create their 'Tracking Automated Government (TAG) Register' - with 83.6% of their data being received this way.<sup>14</sup> Despite this, nearly 70% of the automated tools that they have tracked are still classed as 'low transparency'. This lack of understanding on how AI impacts the public sector makes it difficult to develop appropriate regulations, due to a lack of knowledge on how an authority uses AI when exercising its powers. This undermines the clarity and the openness that the rule of law demands of administrators.

Concerns also arise from the lack of transparency on how AI makes its decisions.<sup>15</sup> Of course, AI gains knowledge through machine learning, with large swathes of data being used to develop

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<sup>8</sup> See, for example, *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 which mandates that public policies ought to be transparent and available to the public.

<sup>9</sup> J Raz, 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012), 213.

<sup>10</sup> *ibid.*

<sup>11</sup> F A Hayek, *The Road to Serfdom* (Routledge & Kegan Paul 1944), 54.

<sup>12</sup> J Raz, 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012), 215.

<sup>13</sup> Public Law Project, *Tracking Automated Government 'TAG' Register* (9 February 2023) <<https://trackautomatedgovernment.shinyapps.io/register/>> accessed 8 January 2025.

<sup>14</sup> *ibid.*

<sup>15</sup> J Burrell, 'How the Machine "Thinks:" Understanding Opacity in Machine Learning Algorithms', (2016) 3(1) *Big Data & Society* 1, 10 <<https://doi.org/10.1177/2053951715622512>> accessed 8 January 2025.

algorithms or build intelligence. But the true intricacies of how an AI processes this information, sifting through data to decide what is relevant to its logic and output, is elusive to even its manufacturers. This is known as the black box problem<sup>16</sup> and presents the most obvious issue when it comes to the right to reasons in administrative law.<sup>17</sup> Though there is no general duty to give reasons, certain factors in the interest of fairness may require that the reasons behind a decision must be provided. For example, where reasons are needed to bring judicial review against a decision-maker.<sup>18</sup> In the case of AI, the opacity of its reasoning process means that no rationale is documented. Any attempts to generate reasoning would seemingly be done in the aftermath, via a prompt, and there is no guarantee that these reasons would reflect its true logic, undermining the clarity required by the rule of law.

Ultimately, the lack of transparency surrounding both the use and reasoning of AI makes it increasingly difficult for individuals to challenge AI-made decisions. Without reasons, an individual may struggle to bring the appropriate ground of judicial review. Indeed, without the knowledge that AI has been used in their decision, an individual may not realise they have a basis for judicial review in the first place. This is particularly so when noting that many AI-generated decisions are biased or violate human rights, as discussed below. The Public Law Project has rightly argued that transparency around the use of AI is paramount to administrative accountability.<sup>19</sup> Indeed, on this basis, it seems that the current lack of transparency also undermines the basic requirement that the rule of law holds administrators accountable, and as equally subject to the law as other individuals.<sup>20</sup>

### III. RISK 2: BIAS IN DECISION MAKING

Administrative AI practices may risk undermining the rule of law particularly where AI is used to generate decisions. This is on the basis that many AI-generated decisions are highly susceptible to be biased in their output. In administrative law, public bodies are subject to the rule that the exercise of

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<sup>16</sup> B Mittelstadt *The Impact of Artificial Intelligence on the Doctor-Patient Relationship* (Council of Europe 2022), 16 <<https://rm.coe.int/inf-2022-5-report-impact-of-ai-on-doctor-patient-relations-e/1680a68859>> accessed 8 January 2025.

<sup>17</sup> *R v Secretary of State for the Home Department, ex parte Doody* [1993] UKHL 8, [1994] 1 AC 531 (Lord Mustill)

<sup>18</sup> *ibid.*

<sup>19</sup> Public Law Project, *Securing meaningful transparency of public sector use of AI* (October 2024) 11 <<https://publiclawproject.org.uk/content/uploads/2024/10/Securing-meaningful-transparency-of-public-sector-AI.pdf>> accessed 8 January 2025.

<sup>20</sup> This best expressed by the maxim 'government by law and not by men', highlighted in J Raz, 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012), 212.

their powers must be free from bias.<sup>21</sup> This principle reflects a key requirement of the rule of law. Raz explains this on the basis of natural justice, stating that the rule of law mandates aspects such as open and fair hearings, and an absence of bias, to ensure the correct application of the law.<sup>22</sup> Alongside this, Bingham rightly argues that the rule of law exists to govern the exercise of power, and so, requires that public officers must exercise the powers conferred on them fairly and in good faith.<sup>23</sup> On this basis, making decisions via AI (such as ADM) could breach this principle due to the immeasurable bias that may occur.

The potential bias that arises from the use of AI has been well documented.<sup>24</sup> Indeed, it was recognised by Lord Sales, who stated in an address to the Supreme Court,<sup>25</sup> that automation can lead to systemic bias. This bias manifests itself due to the way AI is trained and processes information. Since AI systems garner their knowledge from the data that is selected solely by the administrator, they are subject to ‘training bias.’<sup>26</sup> This is particularly detrimental where the data used is unbalanced or reflects unconscious bias or unfair practices - as is often the case.<sup>27</sup> This is exemplified particularly in cases of prisons and policing, with Chohlas-Wood highlighting that data from the US criminal justice system is extremely susceptible to biased outputs that negatively impact ethnic minorities. This is due to the fact that ethnic minorities are more likely to be prosecuted for certain crimes, despite committing those crimes at rates roughly equal to white Americans.<sup>28</sup>

This risk of bias has been reflected domestically in *R (Bridges) v South Wales Police* [2020]<sup>29</sup> where South Wales Police were found to have violated their public-sector equality duty<sup>30</sup> by using AI facial recognition technology. The Court of Appeal found their technology risked being less accurate in respect of ethnic minorities and women. It also acknowledged the scientific evidence of bias in facial

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<sup>21</sup> *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357.

<sup>22</sup> J Raz, 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012), 217.

<sup>23</sup> T Bingham, *The Rule of Law* (Penguin Books 2011), 60.

<sup>24</sup> For a detailed account on how this bias occurs, please see S Silva and M Kenney, 'Algorithms, Platforms, and Ethnic Bias', (2019) 62 *Communications of the ACM* 37 [193].

<sup>25</sup> P Sales, 'Judicial Review Methodology in the Automated State' (*The Supreme Court of the United Kingdom*, September 2024) 17 <[https://supremecourt.uk/uploads/speech\\_lord\\_sales\\_2409\\_157955367d.pdf](https://supremecourt.uk/uploads/speech_lord_sales_2409_157955367d.pdf)> accessed 15 January 2025.

<sup>26</sup> *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

<sup>27</sup> A Chohlas-Wood, *Understanding Risk Assessment Instruments in Criminal Justice* (Brookings Institute, 19 June 2020) <<https://www.brookings.edu/research/understanding-risk-assessment-instruments-in-criminal-justice/>>. accessed 8 January 2025.

<sup>28</sup> *ibid.*

<sup>29</sup> *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

<sup>30</sup> Equality Act 2010, s 149.

recognition software and regarded this as ‘a serious issue of public concern’.<sup>31</sup> Indeed, this potential for bias in AI has also been recognised by the European Union, whose recent AI Act seeks to restrict certain forms of AI that may lead to racial and gender-based biases.<sup>32 33</sup> The absence of any such ban or limitation in the UK means that individuals are undoubtedly susceptible to biased decision making in a way which subverts the very fairness that the rule of law seeks to uphold.

#### IV. RISK 3: FUNDAMENTAL RIGHTS ISSUES

Finally, the use of AI in public administration presents a risk to fundamental rights; which recent scholarship has rightly argued that the rule of law requires a state to uphold.<sup>34</sup> This is on the basis that law ought to reflect universal principles of justice, meaning a state which oppresses or harms its people (thus limiting their autonomy) cannot be regarded as adhering to the content of the rule of law, even if this harm is a result of proper legal procedures.<sup>35</sup> Bingham highlights that the link between fundamental rights and the rule of law has been often acknowledged in human rights instruments, which often use the rule of law as their basis.<sup>36</sup> Indeed, this is seen throughout the jurisprudence of the European Court of Human Rights which asserts that the rule of law is inherent in all the Articles of the ECHR.<sup>37</sup> Given that the Convention has been ratified by the UK,<sup>38</sup> it is right to conclude that the protection of fundamental rights is mandated by the UK’s rule of law.

While it may seem difficult to conclude which rights are fundamental, Bingham convincingly argues that those contained within the ECHR, are indeed fundamental to the UK’s ROL.<sup>39</sup> Focussing on what is most relevant to the scope of this article, this includes Article 8: the right to respect for private and family life.<sup>40</sup> Article 8 requires that a state must not intrude upon areas of an individual's private

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<sup>31</sup> *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058 [172].

<sup>32</sup> European Commission, *Artificial Intelligence – Questions and Answers* (1 August 2024)

<[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1683](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1683)> accessed 10 January 2025.

<sup>33</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L 1689/1, arts 10, 14, 15.

<sup>34</sup> For a prominent account of this argument, see T R S Allan, ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44 *The Cambridge Law Journal* 111, 111-112.

<sup>35</sup> T Bingham, *The Rule of Law* (Penguin Books 2011), 67.

<sup>36</sup> *ibid*, 66.

<sup>37</sup> *Lekić v Slovenia* (App no 36480/07) (2018) [94]; *Iatridis v Greece* [GC] (App no 31107/96) (2000) [58]; *Former King of Greece and Others v Greece* [GC] (App no 25701/94) (2000) [79]; *Broniowski v Poland* [GC] (App no 31443/96) (2004) [147].

<sup>38</sup> See The Human Rights Act 1998, c. 42

<sup>39</sup> T Bingham, *The Rule of Law* (Penguin Books 2011), 68.

<sup>40</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 8.

and personal life, beyond what is necessary in a democratic society.<sup>41</sup> This involves obligations upon the state to impose appropriate safeguards when handling the personal data of individuals<sup>42</sup> and the need for these safeguards is greater where data undergoes automatic processing.<sup>43</sup> Therein lies the tension between AI and this fundamental right.

Primarily, the risk to the right to privacy results from the vast amount of personal data being retained by AI in order to build algorithms. The UK Government itself has acknowledged this fact, and has admitted that the current frameworks in place do not sufficiently address this threat.<sup>44</sup> This is reflected in *R (Bridges) v South Wales Police* where the Court of Appeal acknowledged that the Data Protection Act 2018 alone was insufficient in protecting Article 8 on the basis that the technology in this case was novel and automated.<sup>45</sup> Following this, the court found that South Wales Police had failed to properly consider the impact of their facial recognition technology and, had they properly done so, they ought to have found that their technology was unjustified and disproportionate under Article 8(2).<sup>46</sup>

Though the technology used in this case was for facial recognition, it is easy to imagine that the retention of large swathes of sensitive data to build algorithms, without sufficient regulatory frameworks, could also undermine the fundamental right to privacy. This has been acknowledged within the EU's AI Act, which seeks to require that certain AI developers make an impact assessment of their AI models.<sup>47</sup> This assessment must outline the potential implications for fundamental rights' that may arise from the use of their AI technology. Ultimately, the widely accepted risk to privacy that AI presents, coupled with the insufficient safeguarding in the UK, jeopardises the fundamental rights of individuals. This straightforwardly violates the protection of fundamental rights as required by the rule of law.

## V. THE WAY FORWARD

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<sup>41</sup> ECHR, art 8(2).

<sup>42</sup> *Z v Finland* (App no 22009/93) (1997) [95].

<sup>43</sup> *S and Marper v United Kingdom* [GC] (2008) App nos 30562/04 and 30566/04, ECHR 2008-V [103].

<sup>44</sup> Department for Science, Innovation and Technology, *A Pro-Innovation Approach to AI Regulation* (GOV.UK, 3 August 2023), 1.2 <<https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper#part-1-introduction>> accessed 8 January 2025.

<sup>45</sup> *R (on the application of Edward Bridges) v the Chief Constable of South Wales Police* [2020] EWCA Civ 1058 [85] - [91], [104].

<sup>46</sup> *ibid* [152] - [153].

<sup>47</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L 1689/1, Annex VIII, s C(4) - (5).

To mitigate the risks of undermining the rule of law, I submit that tailor-made legislation is an overdue necessity. Currently, there is little bespoke regulation to address the risks I have highlighted. Indeed, while the UK is a party to the Framework Convention on Artificial Intelligence<sup>48</sup> which may reduce the extent of these threats, the ratification of this convention into domestic law is yet to be proposed. Similarly, while Private Members' Bills in the House of Lords have sought to regulate AI, the success of these bills remains to be seen.<sup>49</sup>

Of course, judicial review has an important role to play in AI regulation. As highlighted throughout, challenges of bias and fettering, exercising the right to reasons, or bringing rights-based claims are tools to limiting the threat that AI presents. However, it seems a reliance on judicial review may not be enough. Lord Sales notes that this reliance presents significant challenges. For example, there is a difficulty in building an evidential case against AI as the aforementioned lack of transparency means that the evidence required for a successful challenge is often inaccessible.<sup>50</sup> This, combined with the stringent time-frame of bringing a claim of judicial review, may make successful challenges difficult, if not impossible.<sup>51</sup> Similarly, Lord Sales highlights that the mechanism of judicial review is based upon individual justice, with no process for a group examination of applications. This means individual challenges are unsuccessful in addressing the systemic bias arising from algorithmic decision making.<sup>52</sup>

In light of this, the most straightforward solution would undoubtedly be to prevent the use of AI in the public sector. However, it is accepted that this may not be practicable. If automation is the direction in which our society must go, then at least some fitting regulation is in order. Primarily, as recommended by the Public Law Project,<sup>53</sup> the Government must focus on ensuring transparency and reporting of the use of AI. This would enable administrative accountability by opening up the ability

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<sup>48</sup> For details on this convention, please see Council of Europe, *The Framework Convention on Artificial Intelligence - Artificial Intelligence* (8 November 2024) <<https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence>> accessed 18 January 2025.

<sup>49</sup> e.g. the Artificial Intelligence (Regulation) Bill 2023 (HL Bill 112) and the Public Authority Algorithmic and Automated Decision-Making Systems Bill [HL] 2024 (HL Bill 75). The former Bill was dropped at the dissolution of parliament, while the latter is on its third reading in the House of Lords (as of 28 January 2025).

<sup>50</sup> P Sales, 'Judicial Review Methodology in the Automated State' (*The Supreme Court of the United Kingdom*, September 2024) 14 <[https://supremecourt.uk/uploads/speech\\_lord\\_sales\\_2409\\_157955367d.pdf](https://supremecourt.uk/uploads/speech_lord_sales_2409_157955367d.pdf)> accessed 15 January 2025.

<sup>51</sup> *ibid*, 16 - 19.

<sup>52</sup> *ibid*, 17.

<sup>53</sup> Public Law Project, *Securing meaningful transparency of public sector use of AI* (October 2024) 59 - 62 <<https://publiclawproject.org.uk/content/uploads/2024/10/Securing-meaningful-transparency-of-public-sector-AI.pdf>> accessed 8 January 2025.

to bring challenges and evidence claims, alongside creating the clarity of discretion that is vital for the rule of law. Similarly, knowledge of administrative AI use will allow for more precise regulatory frameworks, ensuring that administrative discretion remains properly constrained and that the correct safeguards for fundamental rights are in place. Ultimately, transparency in the use of AI in the public sector is the key that opens up the door to upholding the rule of law.

## VI. CONCLUSION

As AI grows in popularity, it is clear that the public sector's reliance on AI threatens the rule of law by introducing risks. First, the hidden use of AI by administrators breaches the rule of law's requirement of clarity. This makes administrative accountability all the more difficult. Second, administrative discretion must be properly exercised, namely through the prevention of bias and by respecting restraints on discretion. AI algorithms undermine this by creating biased decisions and undercutting the principle that discretion must be not too much and not too little.<sup>54</sup> Similarly, the rule of law is again violated by the threats of AI to the fundamental rights of privacy. Namely, this right is risked by the sheer volume of data uploaded to AI models with no consent or rules on retention. With the administration's growing reliance on AI, it is all the more crucial to acknowledge that, perhaps, AI presents far more issues than efficiencies. The government must respond to this threat, primarily, by developing requirements on reporting and transparency in the public sector. Of course, regulating the risk is but one option. Judicial review tacitly remains another. Perhaps the key is for decision makers to carefully consider their use of AI on the grounds of what they ought to do, instead of what they can do. After all, those who exercise state functions remain subject to the rule of law, like anyone. This is the fundamental principle, and automated efficiency ought never be worth more than the state's ultimate duty to uphold it.

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<sup>54</sup> J Raz, 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 March 2012), 222.

# ***Patient Autonomy and Medical Refusal: Evaluating the Rights of Competent Patients to Refuse Treatment Across Age and Clinical Needs***

Vicki Wong\*

*Abstract: The right of competent patients to refuse medical treatment is a fundamental principle in medical law, grounded in the respect for bodily autonomy. This essay explores the ethical and legal justifications for this right, analysing the principles of autonomy, beneficence, and non-maleficence. It then examines how competence is determined for both adults and minors, with respect to the Mental Capacity Act 2005 and the Gillick competence test. While adult patients generally have their refusals respected, the law is less clear for minors, whose refusals can be easily overridden by the courts in cases of severe harm or risk of death. This paper highlights that the current law does not uphold the right to refuse treatment equally for adults and minors, creating uncertainty and inconsistency. It argues that greater legal certainty is needed to recognise and protect patient autonomy, regardless of the patient's age and medical needs.*

## **Introduction**

A patient's ability to refuse and consent to medical intervention is widely considered a fundamental right,<sup>1</sup> with the right to consent being arguably more essential as a positive right to access medical treatment. These rights are grounded in the well-established principle of respect for bodily autonomy, which enables patients to choose what treatments are carried out on their bodies. However, it may be argued that even with adequate competence, patients should not always have the right to refuse treatment — for instance, in life-or-death situations or where there are urgent medical needs, or when a child has limited decision-making despite being assessed as competent. The ultimate question then arises: should a competent patient be permitted to refuse any medical intervention, irrespective of the patient's medical need or age?

In response, this essay will examine both the ethical justifications and legal framework underpinning the right to refuse treatment. It will first explore the ethical rationale for protecting refusal as an expression of autonomy, then explain how competence is determined differently depending on the patient's characteristics. It will finally evaluate whether the current law governing adult and child patients sufficiently upholds bodily autonomy. Under this discussion, it will be concluded that whilst

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<sup>1</sup> Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6<sup>th</sup> edn, Manchester University Press 2016) 123.

competent patients do have a legal right to refuse treatment, this right is not always absolute, and the law remains uneven in its protection of autonomy — particularly in the case of children.

### **Are there ethical justifications for competent patients' right to refuse?**

Generally, allowing patients to refuse treatment upholds the principle of autonomy. The seminal work of Beauchamp and Childress helped establish the respect for bodily autonomy as arguably the most imperative ethical consideration in modern medical law.<sup>2</sup> This is because it is grounded in the idea that individuals should have control over what is done to their own bodies. Informed decision-making is a key aspect of autonomy, as it ensures that patients understand the nature and consequences of proposed treatments, allowing them to make choices that align with their unique values and beliefs that could substantially affect their physical and mental well-being. Moreover, autonomy is complemented by the principle of non-maleficence: to 'not harm' patients. For instance, forcing medical interventions against patients' wishes may cause severe mental anguish, adding an unnecessary burden on individuals who may already be suffering immense stress from receiving treatment. This right to refuse treatment is enshrined within Article 8 of the European Convention on Human Rights, highlighting the importance of respecting private life and patients' ability to protect their bodily autonomy.<sup>3</sup> This was demonstrated in *Pretty v UK*, where the ECtHR affirmed that Article 8 encompasses an individual's ability to make decisions about their body, even in matters of life and death.<sup>4</sup> Therefore, it is argued that the law should honour patients' dignity and interests by permitting patients to make their own decisions, presenting a patient-centric approach to healthcare.

Nonetheless, a patient's right to refuse may conflict with other ethical considerations. For example, it may contradict the principle of beneficence, which requires medical professionals to give patients the best treatment.<sup>5</sup> Certainly, is it reasonable for layman patients to reject doctors' professional opinions, especially in circumstances where expert judgements would significantly increase the chances of recovery? It seems potentially imprudent for patients, who are generally clinically inexperienced, to make such decisions. However, despite training guidelines and second opinions, beneficent decision-making processes could be subjective depending on the unique beliefs of each practitioner, which could unintentionally contribute to traditional paternalistic practices and sustain

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<sup>2</sup> Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (8<sup>th</sup> edn, OUP 2019) 13.

<sup>3</sup> Daniele Ruggiu, 'Implementing a responsible, research and innovation framework for human enhancement according to human rights: the right to bodily integrity and the rise of 'enhanced societies'' (2018) 10(1) *Law, Innovation and Technology* 82, 98.

<sup>4</sup> [2002] ECHR 427.

<sup>5</sup> Jonathan Herring, *Medical Law* (7<sup>th</sup> edn, Pearson 2021) 8.

a toxic ‘doctors know best’ ideology when deciding what medical interventions to provide.<sup>6</sup> This is concerning because doctors, though intending to benefit patients, may then neglect patients’ informed and autonomous views to realise their own beliefs. Accordingly, it is submitted that prioritising beneficence over bodily autonomy is extremely unfair to patients, considering that their bodies will ultimately bear the consequences of medical interventions.

However, beneficence and autonomy are not necessarily in conflict. Respecting patients’ preferences and autonomy, particularly when it reflects deeply held beliefs or avoids mental anguish, can in many cases align with what is clinically beneficial. For instance, preserving dignity and control through autonomous choice may reduce stress and enhance overall well-being, thus serving patients’ best interests. Convincingly, Pellegrino and Thomasma argue that the operation of beneficence is ‘intimately linked with [patients’] preferences’ given the duty of loyalty that doctors owe to their patients,<sup>7</sup> thus propounding that patient autonomy is ultimately the pivotal consideration in decision-making.

Therefore, the principle of bodily autonomy appears to trump other ethical considerations when making healthcare decisions. This hence justifies allowing competent patients to refuse treatment. I will now consider how the law currently determines *who* and *to what extent* patients can invoke and exercise this right.

### **How is a patient’s competence determined in current medical law?**

The first step in any situation concerning the refusal of care is to ascertain competence, otherwise known as capacity within medical law. Notably, it is determined differently based on the age of the patient in question. For adults, capacity is established by satisfying a two-stage test under the Mental Capacity Act 2005 (MCA),<sup>8</sup> starting with a rebuttable presumption that the patient has capacity (s 1(2) MCA). This assessment questions whether an individual is capable of understanding, retaining, and communicating information (s 3 MCA). There should also be a noticeable absence of any disturbance to the mind or brain which might hamper the adult patient’s competence in making reasoned decisions (s 2 MCA). Furthermore, *Chatterton v Gerson* stresses that adult patients must have a sufficient understanding of the nature of medical procedures to effectively consent to or refuse

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<sup>6</sup> Basil Varkey, ‘Principles of Clinical Ethics and Their Application to Practice’ (2021) 30(1) *Medical Principles and Practice* 17.

<sup>7</sup> Edmund D Pellegrino and David C Thomasma, *For the Patient’s Good: The Restoration of Beneficence in Healthcare* (OUP 1988) 29.

<sup>8</sup> Shaun D Pattinson, *Medical Law and Ethics* (6<sup>th</sup> edn, Sweet and Maxwell 2020) 177.

treatment.<sup>9</sup> It is especially important that patients are able to infer the consequences of their decision-making and convincingly defend their reasons for refusal.<sup>10</sup> S 8(1) of the Family Law Reform Act 1969 stipulates that this test also applies to minors aged 16 and 17. For children under 16, however, satisfactory competence depends on their intelligence and ability to fully comprehend medical advice — the benchmark outlined in *Gillick v West Norfolk and Wisbech AHA [1986]*.<sup>11</sup>

Accordingly, this essay submits that if these respective tests are satisfied, the patient should be legally and ethically permitted to accept or refuse treatment, in line with the principle of autonomy. After all, once an individual is deemed competent, they are considered capable of making informed and reasoned decisions about their own medical care. This raises the question of whether the law in practice consistently respects this reasoning, especially when decisions involve high-stakes consequences or involve minors. The following sections will critically analyse how medical law reflects and occasionally limits this stance.

### **Treatment of adult patients**

To a large extent, the common law respects adult patients' right to bodily autonomy. Following the landmark case of *Montgomery v Lanarkshire Health Board*, patients are now 'regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession'.<sup>12</sup> Similarly, earlier precedents emphasised the need to protect a patient's right to choose. For instance, in *Chester v Afshar*, the House of Lords held that a surgeon's failure to disclose a small but serious risk of surgery breached the patient's autonomy and right to make an informed decision.<sup>13</sup> Linking to the aforementioned argument challenging the prioritisation of beneficence, s 1(4) of the MCA established that a patient should not be considered incapable merely because they make an unwise decision. This argument is best exemplified through cases on end-of-life decisions. For instance, an informed patient could contemporaneously refuse treatment even if it causes death, as held by the Court of Appeal in *St George's NHS Trust v S* that a competent adult's refusal of treatment must be respected even if it risks serious harm to herself or her unborn child, reaffirming the legal priority of bodily autonomy over medical opinion or public interest considerations.<sup>14</sup> This stance has been repeatedly affirmed by

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<sup>9</sup> [1981] 1 All ER 257.

<sup>10</sup> Daniel C McFarland and others, 'Decisional Capacity Determination in Patients with Cancer' (2020) 34(6) *Oncology* 203.

<sup>11</sup> [1986] AC 122.

<sup>12</sup> [2016] UKSC 11 [75].

<sup>13</sup> [2004] UKHL 4.

<sup>14</sup> [1998] 3 All ER 673.

the courts,<sup>15</sup> thus giving utmost respect to competent patients' free and informed refusal. If a doctor operates on a person despite their express refusal, criminal and tortious liability may arise — it is irrelevant that the doctor provided life-sustaining treatment in considering an objective medical need.<sup>16</sup> Therefore, the current legal approach indicates how highly regarded the decisions of competent adult patients are.

However, autonomy is limited regarding basic care, such as the maintenance of basic hygiene and pain relief. Competent patients are generally not permitted to refuse interventions providing for these, even if this contradicts their wishes.<sup>17</sup> This may be attributed to the need for safeguarding a person's dignity and welfare, as well as the public policy of creating more pleasant working conditions for caregivers. Nonetheless, Grubb noted that the limited autonomy regarding basic care only operates in 'exceptional circumstances', such that the decisions of competent patients are otherwise mostly respected.<sup>18</sup>

Moreover, it appears the right to refuse treatment is not stringently enshrined in statute but rather established through an amalgamation of case law. While the MCA 2005 affirms that individuals with capacity may make their own decisions, including refusing treatment, it does not explicitly codify a standalone right to refuse medical intervention in all situations. Instead, this right has developed incrementally through judicial decisions, with courts shaping its scope on a case-by-case basis. Although critical analysis of these cases suggests that judges have been largely consistent in their approach towards respecting the choices of adult patients, this essay submits that further codifying this fundamental right would provide greater legal certainty to competent patients in knowing that their autonomy is of paramount importance in medical decision-making.

### **Treatment of child patients**

In stark contrast, the current law governing child patients presents a lower adherence to the fundamental right of refusing treatment. This is because, in *Plymouth NHS Trust v B*, the court stressed its inherent jurisdiction to override any refusals of children, even if they satisfied their respective tests for competence.<sup>19</sup> In this case, it was found that a child's refusal to treatment could

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<sup>15</sup> See *Re T (Adult: Refusal of Treatment)* [1992] Fam 95, and *Airedale NHS Trust v Bland* [1993] AC 789.

<sup>16</sup> *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 429.

<sup>17</sup> Pattinson (n 8) 446.

<sup>18</sup> Andrew Grubb, 'Consent to Treatment: the competent patient' in Andrew Grubb (ed) *Principles of Medical Law* (2<sup>nd</sup> edn, OUP 2004) 141.

<sup>19</sup> [2019] EWHC 1670 [30].

be quashed if it would cause an imminent risk of death or severe harm. Similarly, *Re X (A Child) (No 2)* is a prime example which illustrates how judges may overrule a Gillick competent child's refusal of life-saving blood products.<sup>20</sup> Here, the court considered a 15-year-old Jehovah's Witness who refused a blood transfusion on religious grounds. Despite acknowledging that she appeared mature and well-informed, the court authorised the transfusion, emphasising that her life could not be sacrificed on account of her religious beliefs, given her young age and the seriousness of the medical risk. Moreover, there is potential for parents to consent on behalf of their competent child even if they have expressly refused treatment, demonstrated in *Re R (Wardship: Medical Treatment)*.<sup>21</sup> In this case, the court indicated that even if a child had been deemed *Gillick* competent, either parental consent or the court's inherent jurisdiction could override their refusal. This once again severely narrows the autonomy granted to children with mental capacity. Accordingly, these cases indicate that children's refusal can be easily outweighed by other authorities, in spite of their proven competence, highlighting the limited legal weight granted to a child's right to validly refuse medical intervention.<sup>22</sup>

However, it is recognised that the differences between children and adults may justify some degree of differential treatment in medical law. Judicial caution may be grounded in a legitimate concern for safeguarding young people from decisions with irreversible or fatal consequences, especially where emotional immaturity or external pressure, for example, from family or religion, might distort judgment. Moreover, children, particularly younger ones, are still undergoing cognitive and moral development, which may affect their ability to consistently understand and evaluate complex medical information or long-term consequences, even if their cognitive capacity formally meets the legal *Gillick* test. This developmental trajectory, combined with concerns about minors' general vulnerability, may justify the courts' protective stance. Furthermore, it is arguable that not all children should be treated the same: whilst a 10-year-old and a 17-year-old may both be minors, their decision-making capacities and maturity from life experience are not equivalent.

Nonetheless, this approach to minors is problematic and perplexing. After all, what is the purpose of establishing whether children are competent if their refusals can be easily overridden anyway? This is especially true for minors aged 16 to 17. Since their capacity is tested in the same way as adults under the MCA, it is implied that older children have comparable levels of understanding and

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<sup>20</sup> [2021] EWHC 65.

<sup>21</sup> [1992] 1 FLR 190.

<sup>22</sup> Herring (n 5) 44.

maturity to that of adults, hinting at their proficient decision-making ability despite having the legal status of a child. Although *Re W (A Minor)* acknowledged that a competent child's refusal is a 'very important consideration', especially those of older minors, the court noted in obiter that it ultimately retains the power to prevent severe harm or death.<sup>23</sup> If refusal rights are routinely displaced in high-stakes cases, the legal recognition of children's autonomy becomes symbolic rather than substantive. Therefore, an examination of case precedents seemingly suggests that children's decision-making freedom is easily threatened by their age. As such, this essay contends that if competent adults can refuse even life-saving treatments, the law should equally respect the decisions of competent children, rather than perpetuate the erroneous double standard that is currently featured.

## **Conclusion**

In conclusion, the fundamental right to refuse treatment must be protected in medical law, giving the utmost importance to autonomy. This is adequately reflected in the law's treatment of competent adults, allowing individuals to make informed choices about their medical care, even in life-threatening situations. Prioritising patient choice ensures that medical treatment aligns with personal beliefs, dignity, and well-being.

In stark contrast, the legal framework for minors presents inconsistencies. Even when children demonstrate competence, children's rights to autonomous decision-making are extensively violated. Case law has demonstrated how their refusal may be easily overridden by courts or parents, particularly in life-or-death circumstances. This creates a contradiction — if minors can legally consent to treatment, it is logical to demand that they also have the right to refuse it. Therefore, lawmakers should consider codifying the right to refusal within the legislation as a formal guarantee for autonomy. Regarding competent minors, judges should more readily recognise children's abilities to make informed decisions despite their young age, thus giving the utmost respect to a patient's right to refuse treatment irrespective of need or age. Consequently, this may ensure further legal certainty and fairness, ensuring that medical law fully respects bodily autonomy.

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<sup>23</sup> [1992] 2 FCR 785.

# ***Navigating Corporate Governance in the Digital Age: Legal Challenges and the Effectiveness of the European Union's General Data Protection Regulation (GDPR)***

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*Abstract: The digital revolution has transformed the landscape of corporate governance, presenting unprecedented challenges in safeguarding individuals' privacy rights and data security. Against this backdrop, the European Union (E.U.) introduced the General Data Protection Regulation (GDPR) in 2018, aiming to harmonise data protection laws across member states and enhance individuals' control over their personal data. This essay critically evaluates the effectiveness of the GDPR in addressing the legal challenges posed by the digital age within the realm of businesses and data controllers in their compliance with transparency and legitimacy. This essay distinguishes the GDPR from previous data protection directives as a more cohesive, international, and harsh legislative piece outlining how, where and when data processing can be lawfully carried out. Through a detailed overview of regulation principles, exploring its revolutionary impact as sustaining a global regulatory model, and its possible limitations of the law, an analysis of the effectiveness of the GDPR is subsequently explored.*

## **Introduction**

The progressing innovations and developments in the field of information technology- as part of the so-called 'Digital Age,' have led to the emergence of new markets which operate primarily on the 'collection, analysis, processing, and monetization of personal data.'<sup>1</sup> This naturally creates information asymmetries, as argued by Waerdt,<sup>2</sup> defined primarily by data-driven companies' gathering far more data than consumers can reasonably oversee. A data-driven company (DDC) is one which delivers services, technology and digital products fundamentally rooted in data- such as data analytics, artificial intelligence, broadband networks and cloud computing.<sup>3</sup> The obscurity of

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<sup>1</sup> Peter J van de Waerdt, 'Information Asymmetries: Recognising the Limits of the GDPR on the Data-Driven Market' (2020) 38 Computer Law & Security Review 105436.

<sup>2</sup> *ibid.*

<sup>3</sup> UK Government, The UK Data-Driven Market (GOV.UK, 2021) <https://www.gov.uk/government/publications/the-uk-data-driven-market/the-uk-data-driven-market> accessed 12 July 2025.

how consumer data is processed raises security and privacy concerns regarding how businesses and organisations can comply with data processing lawfully.

The European Union's (EU's) General Data Protection Regulation, enforced by the Information Commissioner's Office, came into effect in the United Kingdom on 25th May 2018. This Regulation of the European Parliament and the Council of the EU aimed to replace the previous Data Protection Directive 95/46/EC with extensive punitive measures. In essence, provisions were established for the 'protection of natural persons with regard to the processing of personal data and on the free movement of such data.'<sup>4</sup> The legal incentives of this regulation were to enhance global business' compliance with data transparency by giving 'data subjects'<sup>5</sup> much more autonomy over how corporations process their data. For the following reasons, the GDPR's departure from previous EU mandates on data use and collection was transformative in both strengthening corporate accountability, and generating unintended consequences. Firstly, the legislation enables broader data exploitation through ambiguous terminology, which may allow DDC's the privilege of leveraging 'grey areas' of the law against the spirit of the GDPR. Second, the penalties are extremely high for even minuscule violations of the law. Finally, data collectors are held responsible for mishandled data processing by third-party users.<sup>6</sup>

The speculation concerning previous data-protection laws derives from the failure of global corporations to integrate responsible data collection practices and security measures within their operations to protect personal data.<sup>7</sup> This concern spiralled via unprecedented cybersecurity incidents within businesses themselves, facilitating a 'fast-spreading epidemic of data misuse incidents.'<sup>8</sup> Through an exploration and legal analysis of the GDPR, this essay aims to navigate the legal challenges faced by corporate governance in the digital age. It will examine the overall effectiveness of the GDPR, nearly eight years later, in appropriately processing data and protecting the rights of natural persons.<sup>9</sup> Whilst recognising ongoing challenges to the legislation, this essay contends that

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<sup>4</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2016] OJ L119/1.

<sup>5</sup> GDPR, Ch 3.

<sup>6</sup> Larry Downes, 'GDPR and the End of the Internet's Grand Bargain' (Harvard Business Review, 25 April 2018) <https://hbr.org/2018/04/gdpr-and-the-end-of-the-internets-grand-bargain> accessed 23 January 2024.

<sup>7</sup> *ibid* (n 5).

<sup>8</sup> *ibid* (n 5).

<sup>9</sup> GDPR, Art 4.

the GDPR has been largely successful in establishing a more robust framework for data protection across the EU.

## **Regulation Overview**

Chapter 1, Article 4 of the GDPR sets out the central terms of the legislation. A vital definition for companies to consider resides in what constitutes ‘personal data.’ The law explicitly defines ‘personal data’ as ‘any information relating to an identified or identifiable natural person including names, identification numbers, location data, online identifiers etc.’<sup>10</sup> The law states the need for companies to process data a) lawfully, fairly and in a transparent manner. Furthermore, companies should only process what is objectively deemed b) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed<sup>11</sup>. This is related to the term ‘data minimisation’ as outlined in Chapter 2, Article 5. The last point to consider is the law’s assertion that it is up to corporations and businesses to process the information of data subjects in a way that ensures appropriate security of personal data. This obligation extends beyond mere collection and storage; it includes actively preventing unauthorised or unlawful processing, as well as guarding against accidental loss, destruction, or damage. To meet this standard, the regulation mandates the implementation of appropriate technical and organisational measures - such as encryption, access controls, or staff training protocols - that are proportionate to the level of risk involved. This principle, often referred to as the obligation of ‘integrity and confidentiality’, reflects the GDPR’s emphasis on proactive accountability: organisations must not only respond to breaches but demonstrate that they have embedded privacy and security into their data processing practices from the outset.<sup>12</sup>

In this section, I present the lawful basis for processing data. Under the law, companies must establish at least one of the following lawful bases to legitimately process the personal data of ‘data subjects’. First, the data subject must have provided consent, though the feasibility of the withdrawal of consent must be considered. Furthermore, processing is legally permitted when it is necessary for the performance of a contract involving the data subject; or fulfilling a legal obligation to which the organisation is subject. For instance, an e-commerce website must collect a customer’s address and payment details to deliver a purchased product- a necessary fulfillment of contract. In more urgent cases, data may be processed to protect vital interests, such as matters of life and death (e.g., sharing

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<sup>10</sup> *ibid.*

<sup>11</sup> GDPR, Art 4.

<sup>12</sup> *ibid.*

health data during an emergency), or is necessary for tasks in the public interest like public health research.<sup>13</sup> Perhaps the most flexible ground is when processing is necessary for a company's legitimate interests- as long as those interests don't override a data subject's fundamental rights. For example, data analytic firms may argue that tracking user engagement helps improve services. However, this flexibility is controversial because of its potential for overuse. In the UK, the GDPR is supplemented by the Data Protection Act 2018,<sup>14</sup> which implements and clarifies specific provisions that the GDPR allows member states to interpret differently. This enables the UK to tailor certain data protection rules to better suit national priorities and contexts.

### **The GDPR versus Data Protection Directive 95/46/EC**

Both the Directive and the GDPR aimed to strengthen the legal framework governing data processing by clearly defining legitimate grounds and permissible purposes, while also setting boundaries to limit the scope of such activities. However, the consequences of breaching these laws diverge as the GDPR escalates such policies through the introduction of a maximum administrative fine.<sup>15</sup> This is handed to corporations who are unable to meet the regulations, and such punishments result in maximum fines of up to 20 million euros or 4% of their annual global turnover. This signals a marked shift from the Directive's relatively modest enforcement measures of unspecified maximum penalties,<sup>16</sup> reflecting the EU's commitment to deterrence and compliance. Moreover, the GDPR expands the regulatory landscape by enabling collective redress mechanisms, thereby empowering data subjects beyond individual complaints. Enhanced obligations on data processors and standardised breach notification requirements further embed a culture of transparency and responsibility. The recognition and enforcement of new data subject rights, such as the right to erasure ('right to be forgotten') and data portability, underscore the GDPR's ambition to return control over personal data to individuals in an increasingly digital age.<sup>17</sup>

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<sup>13</sup> GDPR, Art 12.

<sup>14</sup> Data Protection Act 2018, C 12 <https://www.legislation.gov.uk/ukpga/2018/12/contents> accessed 12 July 2025.

<sup>15</sup> Shannon Togawa Mercer, 'The Limitations of European Data Protection as a Model for Global Privacy Regulation' (2020) 114 AJIL Unbound 20.

<sup>16</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 24 <https://eur-lex.europa.eu/eli/dir/1995/46/oj/eng> accessed 12 July 2025.

<sup>17</sup> Shannon Togawa Mercer, 'The Limitations of European Data Protection As A Model for Global Privacy Regulation' (2020) 114 AJIL Unbound 20.

These innovations collectively position the GDPR as the world's most advanced data protection law, a view supported by experts like Shannon Togawa Mercer. The GDPR has not only heightened legal accountability, but has also catalysed a shift in corporate governance, compelling companies to integrate data protection as a strategic priority rather than a mere compliance obligation. The question remains whether this regulatory rigour has translated into sustained behavioural change within data-driven enterprises- which this essay will continue to explore.

## **The GDPR as a Global Regulatory Model**

This section will examine the GDPR as a Global Regulatory Model, highlighting key enforcement actions that demonstrate its effectiveness in holding corporations accountable. In January 2019, the French Data Protection Authority imposed a €50 million fine on Google for violations regarding an absence of transparency, spreading inadequate information and the lack of viable consent concerning the nature of advert personalisation.<sup>18</sup> The complaints were filed in May 2018 by the associations None Of Your Business (“NOYB”) and La Quadrature du Net (“LQDN”). They raised shared concerns about Google's questionable legal basis for processing personal data and expropriating behavioural data to create personalised advertisements. The investigation, coordinated by the Commission Nationale de 'Informatique et des Libertés (CNIL), erupted swiftly and online inspections were coordinated in September 2018- aiming to ensure Google's data processing practices complied with the French Data Protection Act.

Article 23 of the GDPR permits individual EU member states to introduce specific derogations or exceptions to certain provisions of the Regulation. This flexibility is a notable strength of the GDPR, as it acknowledges the diverse social and political contexts across member states, allowing for tailored regulations that better reflect variations in data subject behaviours and local legal traditions. In the case of the French investigation, the CNIL found that user consent for ad personalisation was neither sufficiently “specific” nor “unambiguous”.<sup>19</sup> Google's practice of placing the option to modify ad settings under a “More options” button- hidden above the “Create Account” prompt- effectively obscured this choice from users. Although Google technically offered the ability to

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<sup>18</sup> European Data Protection Board, ‘The CNIL's Restricted Committee Imposes a Financial Penalty of 50 Million Euros against GOOGLE LLC’ (2019) [https://www.edpb.europa.eu/news/national-news/2019/cnils-restricted-committee-imposes-financial-penalty-50-million-euros\\_en#:~:text=On%2021%20January%202019%2C%20the,consent%20regarding%20the%20ads%20personalizatio](https://www.edpb.europa.eu/news/national-news/2019/cnils-restricted-committee-imposes-financial-penalty-50-million-euros_en#:~:text=On%2021%20January%202019%2C%20the,consent%20regarding%20the%20ads%20personalizatio) accessed 20 February 2024.

<sup>19</sup> *ibid.*

manage personalised ads, the GDPR's core principles of transparency and accessibility were undermined. Users were required to navigate multiple steps to disable a pre-selected ad personalisation option, a design choice that effectively assumed consent and has been criticised as a deliberate strategy to maximise data collection. Consequently, such consent was deemed ambiguous and invalid under GDPR standards.

The GDPR has effectively curtailed companies' attempts to meet compliance only at a minimal, superficial level. This is due to the GDPR's consolidation of key terms regarding consent being 'specific,' 'unambiguous' and 'accessible',<sup>20</sup> as well as harsher financial penalties. The concerns raised in the Google case exemplify the risks these definitions aim to mitigate- users were denied essential safeguards around how their data is processed, which is particularly alarming given the vast scope of personal information Google collects, the diversity of its services, and the virtually unlimited ways such data can be combined and exploited. Crucially, the violation was not a one-off incident but a persistent, ongoing practice embedded within Google's user interface, enabling continuous large-scale data collection. Furthermore, the case highlights the heightened responsibility Google bears in France due to Android's dominant market share, as emphasised by the European Data Protection Board. Thousands of French users routinely create Google accounts via their smartphones, making compliance not just a legal formality but a critical corporate obligation. Given that Google's revenue model heavily relies on advertising profits derived from behavioural data, its adherence to GDPR provisions is imperative. The significant fine imposed by the CNIL thus serves as a potent deterrent, especially in an era where economic globalisation and digital business models increasingly commodify personal data- phenomena often referred to as 'Surveillance Capitalism.'<sup>21</sup> This underscores the GDPR's role not only as a regulatory framework but as a necessary counterbalance to evolving commercial data exploitation.

Another set of significant enforcement actions under the GDPR includes the UK Information Commissioner's Office (ICO) imposing a fine of nearly £200 million on British Airways in July 2019, following a breach that compromised the personal data of approximately 500,000 customers. Similarly, Marriott International was fined just under £100 million for exposing the personal data of nearly 340 million individuals.<sup>22</sup> These cases underscore the GDPR's commitment to accountability

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<sup>20</sup> *ibid.*

<sup>21</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

<sup>22</sup> Shannon Togawa Mercer, 'The Limitations of European Data Protection As A Model for Global Privacy Regulation' (2020) 114 *AJIL Unbound* 20 <https://doi.org/10.1017/aju.2019.83> accessed 23 January 2024.

and consistency in its application of sanctions. The predictable and structured nature of these penalties enhances the law’s credibility, reinforcing its status as ‘the most developed data protection law in the world.’<sup>23</sup>

Beyond enforcement, the GDPR has cultivated substantial market power and global normative influence. Its comprehensive framework has positioned the EU as the de facto global privacy regulator. By the end of 2018, 75 non-EU countries had adopted data protection laws inspired by the GDPR, with over ten-including Brazil, Thailand, and India- directly modelling their regulatory regimes on its provisions.<sup>24</sup> Even the United States, typically resistant to EU-style data regulation, responded with the introduction of the California Consumer Privacy Act (CCPA), often described as a “GDPR-lite,” which came into effect in June 2018.<sup>25</sup> Finally, A GDPR “adequacy decision” allows data to flow freely from the EU to non-EU countries that meet its high privacy standards, without extra safeguards. This reinforces the GDPR’s global dominance by making it the benchmark others must meet to access EU markets.<sup>26</sup> This diffusion of GDPR-inspired legislation highlights the regulation’s expansive soft power and its success in reshaping the global privacy landscape.

## **Limitations of the GDPR**

This section evaluates whether the GDPR’s fundamental principles have been effectively upheld within corporate governance, focusing especially on the limitations of data controllers’ information obligations.

Article 11 of the GDPR invokes a form of ‘processing which does not require identification.’<sup>27</sup> This provision permits data controllers to forgo certain transparency obligations when personal data is processed in an anonymised or pseudonymised form. For example, a company might mask user identities by replacing names with codes, meaning it no longer needs to provide detailed information about how that data is used. This places the burden on individuals to prove that the data concerns them in order to exercise their rights- a burden that complicates individual access and control. This

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<sup>23</sup> Mercer, ‘The Limitations of European Data Protection’, 22.

<sup>24</sup> Malwarebytes Labs, GDPR: An Impact Around the World (Malwarebytes Labs, 2020) <https://www.malwarebytes.com/blog/news/2020/04/gdpr-an-impact-around-the-world> accessed 12 July 2025.

<sup>25</sup> Mercer, ‘The Limitations of European Data Protection’, 22.

<sup>26</sup> CookieYes, GDPR Countries: What are the GDPR Adequacy Decisions? (CookieYes, 10 May 2024) <https://www.cookieyes.com/blog/gdpr-countries/> accessed 12 July 2025.

<sup>27</sup> GDPR, Art 11.

creates slight contradictions in the effectiveness of the law as businesses can utilise robust pseudonymisation to intentionally avoid providing all the necessary information as outlined in Chapter III, Section 2 of the GDPR.

Despite GDPR's aim to enhance transparency, many data subjects remain uncertain about how their online activities- such as clicks and searches- are practically transformed into targeted advertisements. Article. 13(2)f and 14(2)f<sup>28</sup> require companies to provide "meaningful information about the logic involved" in data processing, but they do not specify the level of detail required. As Kamarinou and others question: 'Does the term 'logic' refer to the data set used to train the algorithm' or does it concern the 'algorithm itself' such as the mathematical theories on which the 'design of the algorithm is based?''<sup>29</sup> This ambiguity creates a significant gap: individuals often lack real understanding of the complex processes collecting and using their data daily. Even when reports are provided, the technical nature of algorithmic operations means transparency is limited in practice, falling short of GDPR's goal to make data processing fully accessible and intelligible to ordinary users.

The dialectic of the GDPR derives from seeking to settle a balance between transparency and detail<sup>30</sup>. Whilst businesses, corporations and any kind of data controller are obliged to provide data subjects with accessible information regarding the handling of their personal data, they also ought to provide this information in an understandable manner. However, increase in detail coincides with an increasing level of difficulty in the explanation provided. Consequently, many consumers remain unclear about why data such as their Google search history, YouTube activity, or location from Google Maps is collected. This gap undermines the GDPR's transparency principle, as data subjects are frequently unable to identify which specific actions or data points result in their categorisation for targeted advertising.<sup>31</sup>

This final analysis highlights a core limitation of the GDPR concerning cross-border data transfers, where geographic location is used as a proxy for privacy protection. While Articles 44-49 assert that data transferred outside the EU must remain subject to GDPR standards, this principle clashes with the realities of data processing in jurisdictions outside of the EU, like the U.S. This inconsistency was

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<sup>28</sup> Waerdts (n 1).

<sup>29</sup> Waerdts (n 1).

<sup>30</sup> Waerdts (n 1).

<sup>31</sup> Waerdts (n 1).

amplified in July 2022, when the European Court of Justice (CJEU), in its Schrems II ruling, invalidated the EU-US Privacy Shield adequacy standard and ‘questioned the suitability of the EU standard contractual clauses.’<sup>32</sup> The controversies surrounding this case shed light on the complexities of transatlantic data transfers, fuelling misconceptions that data localisation serves as a suitable proxy for data protection. This case further illustrates a fundamental challenge for the GDPR: relying on territorial boundaries to guarantee privacy overlooks deeper structural differences in legal frameworks, revealing flaws when regulating global data flows.

## Conclusion

This essay has situated the GDPR’s distinguished position as a significant data protection law in the Digital Age. Whilst the legislative requirements of transparency can be challenged in practice, we cannot fail to acknowledge that all aspects of purpose limitations, accountability and comprehension of data processing are included cohesively throughout regulation articles.

Furthermore, the evolution of the GDPR to combat the inconsistencies in overseas data transfers is apparent in 2024. In July 2023, the European Commission proposed a new law with primary incentives to facilitate and streamline cooperation between national Data Protection Authorities when enforcing the GDPR in cross-border cases. The added regulation would set up ‘concrete procedural rules for the authorities when applying the GDPR’.<sup>33</sup> One notable obligation mandates that the lead Data Protection Authority submit a summary of key issues to its national counterparts involved in the data transfer. This reform seeks to streamline input and foster consensus among authorities from the outset. For corporations, the new regulations further strengthen due process rights during DPA investigations into potential GDPR breaches, enhancing legal certainty and expediting dispute resolution. Crucially, these procedural enhancements not only bolster the collective capacity of DPAs to enforce the GDPR consistently, but also safeguard the due process rights of corporations under investigation, thereby increasing legal certainty.

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<sup>32</sup> Emily Hancock, 2024.

<sup>33</sup> European Commission, ‘Data protection: Commission adopts new rules to ensure stronger enforcement of the GDPR in cross-border cases’ (Press Release, July 2023).

Thus, the GDPR has overall been an effective and reliable tool in combating the data insecurities that arise within the Digital Age. It has adequately updated previous directives on data protection laws by amplifying businesses' incentives to comply through harsh penalties and increased opportunities for data subjects to access their information. It has had a positive global impact in acting as an ideal regulatory model, has increased accountability from data controllers and most importantly facilitates enhanced data protection.

# *Abolishing the Prerogative of Mercy: Constitutional Safeguard or Unnecessary and Undemocratic*

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*Abstract: In response to growing public discontent around the political use of the presidential pardon in the United States, this essay argues that Britain's own prerogative powers should be subject to more intense scrutiny. It tracks the development of judicial review of the royal prerogative of mercy (RPM) and addresses the question of whether reform is needed. Whilst most criticism of the RPM comes from a separation-of-powers argument largely proposed by those in favour of a legalistic constitution, this essay criticises the prerogative from a democratic angle. Operating on the premise that the existence of each non-democratic power needs to be justified, this essay questions the extent to which mercy has to be granted via a prerogative power and explores the benefits of the existing parallel statutory pardon scheme. This essay concludes that the RPM is no longer a necessary use of executive power and should be replaced by the existing statutory pardon schemes and a statutory power to pardon conferred on the Justice Secretary, subject to increased parliamentary and judicial oversight. The normative justification for these proposals is the need for transparency and public confidence in the democratic nature of the constitution.*

In the light of President Biden granting his son Hunter an unconditional pardon and President Trump doing the same for roughly 1,500 people involved in the attack on the Capitol (January 6 2021), there has been much controversy over the purview of this executive power in the United States. I suggest it is therefore a worthwhile exercise to consider the executive's power to grant mercy in the United Kingdom. The royal prerogative of mercy (RPM) finds its roots in the principles of medieval kingship. Today, it is exercised by the monarch on the advice of the Secretary of State for Justice. The traditional position of the courts was that the exercise of this prerogative was not justiciable whatsoever, a problematic approach to what many describe as the executive asserting quasi-judicial powers.<sup>1</sup> The landmark decision of *Bentley* demonstrated a shift from this position—exercise of the prerogative of mercy is now reviewable under the head of procedural fairness or natural justice principles.<sup>2</sup>

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<sup>1</sup> David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) University of New South Wales Law Journal 37(1) 312.

<sup>2</sup> *R v Home Secretary ex parte Bentley* [1994] QB 349. For an example of procedural fairness as a head of judicial review, see *R (Osborn) v Parole Board* [2013] UKSC 61.

However, issues remain. The Ministry of Justice claims it only grants pardons in the case of an unlawful conviction and, in any case, only when someone with a vested interest makes a request.<sup>3</sup> Neither of those conditions were satisfied in its most recent exercise of the prerogative to pardon Alan Turing for his conviction in 1952 of ‘gross indecency’ due to his homosexual relations. The uncertainty that comes with such unlimited discretion is problematic, even if uncontroversial in the case of Turing. Conventional criticisms of the prerogative of mercy typically come in the form of a separation-of-powers argument, claiming the prerogative of mercy is the executive acting unduly in a judicial fashion. This argument has its merits, but defenders of the RPM point out that the relevant injustice is not always a strictly legal one, but a political one which judges cannot have discretion over. The criticism that I propose has largely been neglected—the democratic argument. In a democratic state, the existence of broadly non-democratic powers such as prerogatives must be justified to maintain public confidence in the constitution’s democratic credentials. Whilst many prerogative powers serve vital purposes, whether there is a need for a royal prerogative of mercy is less clear. This essay will propose an abolition of the prerogative of mercy. Instead, it should be replaced by statutory pardons and a statutory power to pardon, subject to significant parliamentary oversight and substantive review in the courts.

### **(I) The Courts’ Traditional Position**

The courts traditionally held the position that the exercise of the RPM was not subject to judicial review. This was powerfully stated in the Privy Council’s judgment in *De Freitas v Benny*<sup>4</sup>—a Trinidadian case concerned with an appeal against the imposition of the death penalty. Holding that ‘a convicted person has no legal right even to have his case considered...in connection with the exercise of the prerogative of mercy’,<sup>5</sup> Lord Diplock justified the RPM’s immunity from judicial review through the now infamous statement that ‘mercy is not the subject of legal rights. It begins where legal rights end’.<sup>6</sup> Lord Roskill in the *Council of Civil Service Unions*<sup>7</sup> case provides further justification, claiming that the RPM’s ‘nature and subject matter are such as not to be amenable to the judicial process’.<sup>8</sup>

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<sup>3</sup> David Torrance, ‘*The royal prerogative and ministerial advice*’ (2024), House of Commons Library, 64.

<sup>4</sup> [1976] AC 239.

<sup>5</sup> *ibid* 247.

<sup>6</sup> *ibid*.

<sup>7</sup> *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] AC 374.

<sup>8</sup> *ibid* 418.

This position was a problematic one. It relies purely on the good faith of politicians, as demonstrated in Lord Denning’s comments in *Hanratty v Lord Butler*<sup>9</sup>:

The Justice Secretary “advises [the Queen] with the greatest conscience and good care. He takes full responsibility for the manner of [the RPM’s] exercise. That being so, the law will not enquire into the manner in which the prerogative is exercised”.

This statement represents excessive faith in the political process—it justifies the rationale that the RPM is never reviewable based on an unevidenced presumption that all future Justice Secretaries will be as prudent and responsible as those who came before them. There is no good reason provided as to why the courts cannot act ‘at the margins’ to protect against lapses of judgment and errors of law.<sup>10</sup> The courts also failed to consider that the exercise of the prerogative had to be limited due to rule-of-law concerns; if not, legal rules would fail to provide any reliable understanding of legal consequences. Whilst mercy as an abstract concept may act beyond the scope of legal rights, in practice the exercise or non-exercise of the RPM acts specifically to restore or remove legal rights. Regardless of policy considerations, exercise of the RPM always concerns legal rights to some degree since it requires someone to have lost rights through a conviction. Furthermore, the broader ‘excluded categories’<sup>11</sup> approach adopted allowed for gross injustice and bias in the exercise of certain prerogatives to go unchecked by the courts simply because of the nature of the prerogative.

## (II) Departure from the Traditional Position and a New Approach to Justiciability

As with many developments in judicial interpretation in the UK, it was in the Commonwealth where courts were first willing to review the exercise of the RPM. In the case of *Burt v Governor-General*,<sup>12</sup> the New Zealand Court of Appeal held that exercise of the RPM was generally reviewable, and instead justiciability was to be determined on the specific exercise and facts of the case. It stated that ‘the prerogative of mercy can no longer be regarded as no more than an arbitrary monarchical right of grace and favour’.<sup>13</sup> The UK High Court in *Bentley*<sup>14</sup>, citing *Burt*, held that exercise of the RPM

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<sup>9</sup> [1971] 115 SJ 386.

<sup>10</sup> Thomas Poole, ‘Judicial Review at the Margins: Law, Power, and Prerogative’ (2010), LSE Legal Studies, Working Paper No.5.

<sup>11</sup> *Council of Civil Service Unions & Others v Minister for the Civil Service*, [1985] AC 374, 418 (Lord Roskill).

<sup>12</sup> [1992] 3 NZLR 672.

<sup>13</sup> *ibid* 681.

<sup>14</sup> *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349.

was in fact reviewable for errors of law.<sup>15</sup> The new approach was justified, as in *Burt*, as a means of reinterpreting the RPM as ‘a constitutional safeguard against mistakes’.<sup>16</sup> The High Court recognised the RPM’s importance but also the need for it to be subject to some degree of judicial review in order for it to adapt to the modern constitution. In *Bentley*, it was rightly pointed out that excluding the RPM from review even in the case of the grave errors would be regrettable, particularly since ‘many types of decisions made by the Home Secretary do involve an element of policy (e.g. parole) but are subject to review’.<sup>17</sup> However, it remained unclear if any substantive review of the RPM was possible—the courts’ general reluctance to review RPM on the ground of irrationality would indicate that it would be extremely unlikely.<sup>18</sup>

The categories-based approach to justiciability was effectively made redundant in *Miller II*<sup>19</sup> as the Supreme Court held that no prerogative was excluded from review, only by considering the specific exercise of the prerogative at hand and the facts of each case could a judgment of non-justiciability be found.<sup>20</sup> This is undoubtedly a welcome step as it ensures that legal accountability is at least available in the cases of the most severe executive mistakes.

Having regard for the RPM specifically, Adam Perry strongly defends the *status quo*.<sup>21</sup> He recognises the necessity for judicial review to act at the margins, in line with principles of natural justice. However, he staunchly defends the nature of the prerogative. He provides a strong rebuttal to what I have referred to as the ‘conventional’ criticism of the RPM’s exercise. He responds specifically to Joshua Rozenberg’s arguments that the courts are best placed to pardon and that ‘ministers must not usurp the role of judges’,<sup>22</sup> citing the separation of powers. Perry points out that injustices are often not strictly legal and that judges only have the constitutional power, under the separation of powers, to reverse legal injustices. There are merits to Perry’s arguments—courts lack the institutional capacity to completely take over the executive’s role in granting mercy. They are not best placed to consider such issues of public interest and policy, especially given their unelected status.

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<sup>15</sup> ‘The Home Secretary failed to recognise the fact that the prerogative of mercy is capable of being exercised in many different circumstances and over a wide range’, *ibid*, 363 (Watkins LJ).

<sup>16</sup> *ibid* 365.

<sup>17</sup> *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 362 (Watkins LJ).

<sup>18</sup> See Lord Diplock in *CCSU* case.

<sup>19</sup> *R (On the application of Miller) v The Prime Minister* [2019] UKSC 41.

<sup>20</sup> *ibid* [37].

<sup>21</sup> Adam Perry, ‘Who’s Afraid of Mercy?’ (Judicial Power Project: Posts, 5 February 2016) <<https://judicialpowerproject.org.uk/whos-afraid-of-mercy/>>.

<sup>22</sup> Joshua Rozenberg, ‘Should Hollande Be Able to Pardon a Woman who Killed her Abusive Husband?’, *The Guardian* (London, 2 February 2016) <https://www.theguardian.com/commentisfree/2016/feb/02/hollande-jaqueline-sauvage-pardon-abusive-husband> (Accessed 26 December 2024).

Additionally, the courts are broadly unrepresentative of the population at large and it would not be wise to hand them what is broadly a political power. However, it is not clear why the RPM cannot be subject to stronger political and legal accountability, nor why Parliament cannot replace the executive's role in exercising this power.

### **(III) Necessity and Purpose of the Prerogative: A Case for Abolition**

I suggest it is essential for each prerogative power to be democratically justified in the United Kingdom. The exercise of prerogative powers, as a remnant of absolute monarchical power, are subject to limited legal accountability and virtually no political accountability or oversight besides potential ramifications at a general election. Most prerogatives are limited by convention (such as declarations of war and the granting of royal assent), but in the case of the RPM, it is clear that the government's self-imposed conditions are often ignored. The vast majority of prerogative powers are necessary and vital for the functioning of an effective government. Prerogatives serve the purpose of avoiding the tedious process of parliamentary approval, and the importance of the prerogatives to make treaties, declare war, and recognise states can be justified in this way. The RPM once served the purpose of resolving urgent issues when the death penalty was still in place but, with capital punishment's abolition in the UK, it is unclear what emergency situations the RPM deals with. Unjust sentencing must be dealt with, but it is clearly no longer necessary for solely the executive to wield the power of granting mercy. The RPM does not solve for any efficiency issues that justify the non-democratic means by which it is exercised. Where a historical law or even the outcome of some exceptional case is unjust, there is no argument that proves the executive specifically ought to have the power to pardon that individual or class of individuals, without any *ultra vires* limits.

In defending the *status quo* from Rozenberg's concerns about a monarchical power, Perry points out that the RPM is exercised very infrequently. Whilst this point may demonstrate that there is no need for judges to replace the executive, it actually supports the view that this power need not be exercised as a prerogative. It is vital to note that statutory pardons exist alongside the RPM. Robert Hazell points out that, in recent years, statutory pardons have largely been enacted in remorse for the state of the law in previous times.<sup>23</sup> Some of the most famous examples of statutory pardons include Turing's Law<sup>24</sup> and the Disregards and Pardons Scheme which pardoned those historically convicted of same-sex offences. It then seems unnecessary for Turing to be pardoned by the RPM when a

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<sup>23</sup> Robert Hazell and Timothy Foot, 'The Prerogative of Mercy' in 'Executive Power: The Prerogative, Past, Present and Future' (2022), Hart Publishing, Oxford, 154-170.

<sup>24</sup> Policing and Crime Act 2017, s 164.

statutory pardon was an available option. Statutory pardons offer vastly superior democratic legitimacy (since they are passed through Parliament) and can be far more readily enforced by the courts in the case of misapplication of the statute. Whilst statutory pardons cannot deal with individual cases in the same way, a statutory power to pardon would provide the exact same benefits of the RPM with the accountability benefits of statutory pardons. Few proponents of the RPM have readily addressed this point. Some, like Julian Murphy, claim that the RPM is necessary as an external route to deal with injustices (in a non-legal sense) caused by harsh mandatory sentencing schemes in Australia.<sup>25</sup> Such an exercise of this power would bear several rule-of-law concerns. Firstly, an overuse of the prerogative leads to uncertainty about the legal consequences of legal rules. Secondly, it would likely be a weak and ineffective way of dealing with what Murphy claims in his article is a systemic issue. Such systemic problems are matters for the legislature to resolve to achieve a uniform application of the law.

Ultimately, the only purpose of an RPM distinct from some form of statutory pardon seems to be public relations, whereby celebrated individuals can receive a ‘special’ pardon. This appears to be the only way to reconcile Turing’s pardoning through the RPM rather than through statute. The benefit of such a system is heavily outweighed by the corresponding public relations issue of the exercise of an inherently undemocratic power, as well as the potential ramifications of improper exercise by the executive, with limited legal accountability and scarcely any parliamentary oversight. There is no justification nor distinct purpose for the RPM.

#### **(IV) Striking a Balance: The Need for Substantive Review and Political Accountability**

I propose that the legislature should pass a statute repealing the RPM. In its place, statutory pardons could help fill the gaps. It can be appreciated [??] that pardons will often not be so wide-ranging and may be specific to individuals facing non-legal injustice, so a statutory power to pardon should be enacted and conferred to the Justice Secretary. Parliament has attempted to implement more parliamentary oversight but due to the nature of the prerogative, the oversight is entirely optional and advisory.

An example of this can be seen in Section 16 of the Criminal Appeals Act 1995:

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<sup>25</sup> Julian Murphy and others, ‘*An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing*’ (2021) *Monash University Law Review* 46(3) 252.

*(1) Where the Secretary of State refers to the Commission any matter which arises in the consideration of whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction and on which he desires their assistance, the Commission shall—*  
*(a) consider the matter referred, and*  
*(b) give to the Secretary of State a statement of their conclusions on it;*  
*and the Secretary of State shall, in considering whether so to recommend, treat the Commission's statement as conclusive of the matter referred.*

The issue with this present system is that it entirely relies on the Secretary's willingness to refer a matter to the Commission. In the proposed statutory power to pardon, there would be a degree of enforced parliamentary oversight either through a Select Committee or through voting, shifting the balance of power away from an executive monopoly. The statutory power to pardon would set out some criteria according to which mercy may be granted to prevent excessively broad discretion, a matter of policy and public interest for the legislature and executive to consider. A statutory power would promote transparency in decision-making which is not only beneficial for those affected by the decision but for public confidence in the exercise of executive discretion more broadly. Another benefit of the statutory power to pardon is that the courts would be less reluctant to consider more substantive forms of review, such as the ground of irrationality. They are less confident to do in the case of prerogative powers due to the still controversial constitutional justification for the review of non-statutory powers. A statutory power to pardon would provide greater legal accountability and political accountability to the power to grant mercy, without unduly limiting executive discretion in considering public interest and policy.

## **(V) Conclusion**

The RPM played an essential role when the death penalty still existed. It allowed the government to effectively and efficiently pardon those facing imminent threat to life. However, today it is growingly unclear what the necessity of a prerogative power to mercy is, and what purpose it serves—an essential question in a democratic constitution. The RPM is subject to limited judicial review that protects against the most obvious errors of law. However, especially in the light of how similar powers have been manipulated to political ends in other democratic countries, there is a need for greater legal and political accountability in the exercise of granting mercy. The statutory pardon can be used to solve for broad legal injustices that existed historically, and a statutory power to pardon can be used in those individual exceptional cases which require the exercise of discretion. The courts

could better scrutinise such decisions regarding errors of fact or irrationality, and parliament would have a greater role in ensuring the proper procedures are followed. Ardent political constitutionalists who defend the RPM may claim the proposed reform constitutes undue interference with executive discretion. However, if ministers indeed act ‘with the greatest conscience and good care’,<sup>26</sup> what is there to fear?

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<sup>26</sup> *Hanratty v Lord Butler* [1971] 115 SJ 386 (Lord Diplock).

# *Stretching the Four Corners: A Comprehensive Interpretation of Smart Contracts*

Timothy Chow and Lauren Xiong\*

*Abstract: A smart contract is a type of self-executing agreement formed by codes which can be directly performed by computers. Despite the fact that smart contracts have not yet been widely adopted, they might have a revolutionary impact on the commercial industry in the future. Thus, an ideal approach to interpreting smart contracts has to be explored. This article specifically discusses the differences between the interpretation of a traditional contract and a smart contract. To solve the issues therein, it is proposed that a new hybrid test based on the modification of the traditional contractual interpretation and the ‘reasonable coder’ test suggested by the Law Commission should be adopted.*

## **Introduction**

Since the Law Commission proposed the ‘reasonable coder’ test to interpret smart contracts – a self-executing agreement formed by codes and without the need for third-party involvement,<sup>1</sup> in its article ‘*Smart Legal Contracts, Advice to Government (No 401, 2021)*’,<sup>2</sup> this proposal has triggered a wide academic debate as to which type of interpretive approach is suitable for smart contracts.<sup>3</sup>

As Nick Szabo, the designer of the smart contract, proposes, a smart contract is ‘a computer transaction protocol that executes the terms of a contract’.<sup>4</sup> Since a smart contract directly puts parties’ agreements into computer codes, it is different from a traditional contract. However, in accordance with the UK Jurisdiction Task Force’s article, as long as the requirements of traditional contract law are met, smart contracts can be legally binding.<sup>5</sup> Going forward, Sarah Green submits

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<sup>1</sup> Sarah Green, ‘Smart contracts, interpretation and rectification’ (2018) 2 *Lloyd’s Maritime and Commercial Law Quarterly* 234, 234.

<sup>2</sup> Law Commission, *Smart Legal Contracts, Advice to Government* (Law Commission No 401, 2021).

<sup>3</sup> See, for example, Ikenna Henry, ‘The Compatibility Gap between Smart Contract and the English Contract Law of Interpretation’ (2021) 46 *Exeter Law Review* 16. The author argues that the contract law must retract from the strict objective test and switch to a more subjective test. Also, see Nick Hsu & Jagjit Sahota, ‘Interpreting Smart Contracts: The Reasonable Coder and the need for a Stronger Contextual Approach’ [2024] *OUULJ* 146, in which the authors propose a back shift to contextual interpretation is needed.

<sup>4</sup> Don Tapscott and Alex Tapscott, *Blockchain Revolution* (1<sup>st</sup> ed, Penguin, 2016), 101.

<sup>5</sup> UK Jurisdiction Taskforce, ‘Legal Statement on cryptoassets and smart contracts’ (2019) *The LawTech Delivery Panel*, 135. Specifically, to form a legally binding contract in English law, it needs five elements, which are offer,

that there are, in general, two types of legally binding smart contracts.<sup>6</sup> The first type is a smart contract created by two coders directly using machine code, i.e. a ‘dry’ language (“**the First Type**”). Contrarily, the second type of smart contract, despite being coded as well, is based on respective parties’ discussions in natural (human) languages, i.e. ‘wet’ language (“**the Second Type**”).<sup>7</sup>

A smart contract needs to be interpreted.<sup>8</sup> Specifically, the lexicon that codes adopt is significantly different from the wet language humans use for communication. This is because human understandings are based on both textual and contextual meanings. However, the smart contract is formed by codes, and codes are sometimes combined in specific ways to follow certain instructions that only coders can understand. For example, consider the following phrase ‘Go to the shop and buy a newspaper. If there are any eggs, get a dozen’.<sup>9</sup> Natural human contextual understanding of this phrase is to go to the shop and buy a newspaper, if there are any eggs, get a dozen eggs (“**Interpretation 1**”). Contrarily, the ‘dry’ language would understand it as to go to the shop and buy a newspaper, and if you also see any eggs in the shop, then get a dozen of the newspaper (“**Interpretation 2**”). In this sense, two situations might arise. First, the parties’ subjective intention is different from the objective meaning expressed by the codes in the smart contract. Especially when considering Interpretation 2, if the parties’ subjective intention is different from the contextual meaning of the code, then how the smart contract is interpreted will be an issue, as there might be two or more understandings being generated. Second, there will be another situation where the interpretation of the “dry language”, usually the wrongly arranged code, has benefited one party but has also acted to another party’s detriment.

This article will first elucidate to what extent the interpretation of a smart contract is different from interpreting a traditional contract, and the associated issues of applying the current interpretation approach to a smart contract. The second section will critically examine the ‘reasonable coder’ test, proposed by the Law Commission. Specifically, this section aims to explain that, despite the authoritativeness of the ‘reasonable coder’ test, it is, in fact, flawed. Concluding by shedding light on the importance of retaining the power to adjudicate among judges, it is proposed that a new, hybrid test should be adopted to strike a balance best.

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acceptance, consideration, certainty, and the intention to create legal relations.

<sup>6</sup> See Green (n 1).

<sup>7</sup> *ibid.*

<sup>8</sup> Law Commission (n 2), paras 4.10 and 4.11.

<sup>9</sup> See Green (n 1).

## Part I: Differences in interpreting a smart contract between a traditional contract

Certain reports suggest that, as there are great similarities in interpreting a smart contract and a traditional contract, the conventional interpretation should be adopted. For example, Herbert Smith Freehills Kramer proposes that, akin to the interpretation of a traditional contract, the current test could also be applied in interpreting the smart contract, which is ‘being what a reasonable person would have understood the (coded) term to mean.’<sup>10</sup> To interpret a traditional contract in English law, as set out by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich*,<sup>11</sup> the aim of interpretation is the ‘ascertainment of the meaning which the document would convey to a reasonable person who has all the background knowledge that would reasonably have been available to the parties in the situation where they were at the time of the contract.’<sup>12</sup> This objective test of ascertaining what a reasonable person would understand the contract tries to convey the parties’ intention is widely adopted in subsequent cases.<sup>13</sup> Since the smart contract is composed of clear and unambiguous codes, in order to interpret the smart contract, the court can still adopt the more objective approach by translating the codes into natural human languages, and then just follow the traditional interpretation approach. Furthermore, even if the court finds it hard to deduce the parties’ respective intentions from the smart contract alone, the court could adopt a similar approach in interpreting traditional contracts by looking at the ‘background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.’<sup>14</sup>

However, the first problem with this argument is, as Ikenna Henry suggests, ‘without knowing the context of initial design objectives of the smart contract, the intention of parties remains ambiguous.’<sup>15</sup> When it comes to interpreting traditional contracts, Lord Wilberforce emphasises that earlier authorities ‘contain little to encourage and much to discourage, evidence of negotiation or of the parties’ subjective intentions’.<sup>16</sup> This is reaffirmed by Lord Hoffmann in *Chartbrook v Persimmon*

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<sup>10</sup> Law Commission (n 2) para 4.34, in which Herbert Smith Freehills Kramer suggests that the traditional ‘reasonable person’ test should also be applied in interpreting the smart contract.

<sup>11</sup> *Investors Compensation Scheme v West Bromwich Building Society and Others (No. 1)* [2001] UKSC 36 [17].

<sup>12</sup> *ibid per* Lord Hoffmann.

<sup>13</sup> For example, in *Arnold v Britton* [2015] UKSC 36 *per* Neuberger LJ at [16] – [20], ‘commercial common sense and surrounding circumstances should not be used to undervalue the language of the contract ... the commercial common sense if not to be invoked retrospectively, and is relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made’.

<sup>14</sup> *Arnold v Britton* [2015] UKSC 36 *per* Lord Hoffmann.

<sup>15</sup> Ikenna Henry, ‘The Compatibility Gap between Smart Contract and the English Contract Law of Interpretation’ (2021) 46 *Exeter Law Review* 16, 16.

<sup>16</sup> *Prenn v Simmonds* [1971] 1 WLR 1381, 1384.

*Homes*:<sup>17</sup> ‘pre-contractual negotiations are inadmissible.’<sup>18</sup> This means that simply focusing on the objective context of the smart contract, as proposed by the Law Commission, is likely to lead to a situation where the intentions of respective parties are obeyed or ignored.

The second issue relating to interpreting a smart contract is that, if the court still adopts the traditional parol evidence rule in interpreting a smart contract, there will be huge discrepancies between the meaning of the code and the parties’ respective intentions.<sup>19</sup> Under the parol evidence rule, it is assumed that the intention is conveyed by solely the contractual text. The text itself is usually reliable and certain because, during the stage when a contract is drafted, lawyers will be involved in the negotiation phase in ascertaining the parties’ respective intentions. Then, based on what the parties have agreed, the contract will be formed. However, there is no role for lawyers in drafting a smart contract. Instead, after the parties have finished the negotiation and reached a consensus, the smart contract will directly and autonomously self-execute the agreement after the coder enters the code. In this sense, this smart contract will be translated by a third-party coder who ‘will most likely not have any substantive interest or view on the substance of the agreement.’<sup>20</sup> As there might be inconsistencies between human communications and the meaning conveyed by the code, this is more likely to cause an error in contextual translation.<sup>21</sup> In conclusion, then, translating oral agreements directly into smart contract code is inherently risky. Unlike drafting a traditional legal contract, which uses natural human language, coding requires creative interpretation. The developer's choices when converting spoken terms into executable logic can unintentionally misrepresent the parties' original agreement.

## **Part II: A Hybrid Subjective-Objective Approach**

The interpretation of the smart contract under English law relies hitherto on the “reasonable coder test”<sup>22</sup> requiring judges to ascertain what a reasonable programmer would understand the code to mean. It is submitted that this test poses several problems. First, it contradicts the established principle that the task of judges is to ‘ascertain the objective meaning of the language which the parties have

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<sup>17</sup> *Chartbrook v Persimmon Homes Ltd* [2009] 1 AC 1101.

<sup>18</sup> *ibid* [28].

<sup>19</sup> Law Commission (n 2), para 151.

<sup>20</sup> *Green* (n 1) 247.

<sup>21</sup> *ibid*.

<sup>22</sup> Law Commission (n 2), para 4.32.

used to express their agreement’.<sup>23</sup> More fundamentally, the test focuses interpretation on the technical meaning of code rather than the intentions of the contracting parties. What is required instead is a ‘Hybrid Subjective-Objective Approach’ to better interpret smart contracts.

This proposed model will incorporate two key shifts. First, it requires the court to consider relevant subjective evidence of the parties’ intentions, including pre-contractual communications and negotiations. This aligns interpretation with the ultimate aim of identifying what the parties really intended. Second, the interpretation of coded terms would become a collaborative exercise between judges and coding experts. Experts would translate and explain the code’s technical meaning. However, final interpretative conclusions would remain with the judges. This avoids over-reliance on coders’ views about intended meaning. The subjective evidence and expert explanations would complement each other to inform the court’s objective assessment of the parties’ intentions.

Adopting this hybrid model would represent an evolution of orthodox English contract interpretation doctrine to suit the complexities of smart contracts. It would retain the benefits of objective interpretation - promoting certainty and limiting costly factual disputes over subjective intent. While more subjective evidence would be admissible, judges must assess it to reach a final interpretation aligned with the parties’ likely intentions. Allowing in subjective material does not mean automatically deferring to it if an objective analysis suggests otherwise. As such, key discipline and constraints associated with objectivity are retained rather than wholly discarded under the hybrid approach.

Critics have surmised that this hybrid approach could undermine certainty or lead to endless factual disputes over negotiating history.<sup>24</sup> However, it is contended that the benefit of better fulfilling parties’ reasonable expectations outweighs any marginal increase in fact-finding disputes. Other critics may suggest that relying more on expert coders better reflects the technical nature of code. Yet prioritising technicians’ views over judges risks improperly outsourcing interpretation of legal agreements. The main reason boils down to that – while skilled in writing code to execute transactions, coders often lack specialized insight into translating technical functions into legal contractual intent. The coder focuses on technical efficacy of code – in lieu of the intended legal arrangements between parties.

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<sup>23</sup>*Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [13].

<sup>24</sup> Nick Hsu & Jagjit Sahota, ‘Interpreting Smart Contracts: The Reasonable Coder and the need for a Stronger Contextual Approach’ [2024] 12 OUULJ 146.

### Part III: Beyond the Four Corners

In *Chartbrook*, nonetheless, Lord Hoffman holds that ‘it would not be inconsistent with the English Objective theory of contractual interpretation to admit evidence of pre-contractual negotiations...’ and that the exclusionary rule ‘may well mean... that the parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended’.<sup>25</sup> This illustrates the principle of stretching the four corners which sets the stage for why this departure might be justified – especially in the context of smart contracts. That is to say – no conceptual limits exist as to the definition of background – thus rendering a departure from the rule possible and justified given that there are pragmatic grounds. It is contended that the interpretation of smart contracts may break new ground. Of course, the main drawback remains that once the floodgate to evidence is opened, pre-contractual statements may be ‘drenched in subjectivity’ and in dispute.<sup>26</sup> Also, an additional problem is that admitting pre-contractual evidence is vital, if not essential for smart contracts, for the parties’ final stance when agreeing to the fully coded contract is reflected in their actions during the negotiation process. This greatly echoes Lord Hoffman’s view that the guiding principle of the contract is to ‘enforce promises with a high degree of predictability’.<sup>27</sup>

There are also concerns as to the risk that a third party will find that the contract does not mean what they initially thought.<sup>28</sup> This concern, seemingly true at first glance, is flawed in reality. This is because it is unlikely that many individuals will be able to read and comprehend smart contracts. Most individuals lack the necessary coding knowledge or legal-technical understanding to read and comprehend the underlying logic of these contracts. As a result, only those with specialised training – such as blockchain developers or legal experts – are likely to fully understand what the smart contract entails.

### Conclusion

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<sup>25</sup> *Prenn* [33], [41].

<sup>26</sup> *ibid* [35], [38].

<sup>27</sup> *ibid* [37].

<sup>28</sup> *ibid* [40].

Smart contracts will soon become more significant as technology advances and artificial intelligence comes into play. This article has sought to elucidate that the Hybrid Subjective-Objective Approach should be adopted to interpret smart contracts. This model properly balances the benefits of objective interpretation with the need to ascertain the parties' true intentions. It would allow courts to consider relevant subjective evidence (including pre-contractual communications and negotiations) to better understand the context and intended meaning of coded terms. Meanwhile, expert coders would assist the court by providing expert evidence, explaining the technical meaning of code, which judges can use to inform their interpretative analysis. However, the court would retain ultimate control over drawing final conclusions on the parties' intended meaning of disputed and ambiguous terms.

CAMBRIDGE LAW TRIPOS  
FIRST-CLASS ESSAY

Sofie Dolan

**“Whenever it is acknowledged by the Court of Appeal that an error of procedure has been made at trial, or that a piece of evidence was improperly admitted or excluded, the conviction should be quashed.”**

**2024 Triplos**

## **INTRODUCTION**

In this essay, I will firstly explain the current law of appeals concerning procedural errors and improper evidence in practice. After this, I will analyse the underpinnings of this system, in terms of practicality and moral conviction, arguing that one should lean towards exclusion when impropriety is involved. However, a blanket scheme of quashing convictions that are subject to any errors or irregularity is out of touch, both with the government’s current mental state and the consequences that could ensue from it.

## **PARA 1 – CURRENT LAW ON APPEALS**

In order to appeal a conviction, it must be shown that the conviction is unsafe (s2(1)(a) CAA 1968). There is no definition of ‘safety’ in legislation, however Sakande and Padfield argue that there are two elements that emerge from case law, and this is supported by *Pendleton*. The first is that the Court of Appeal is persuaded that the trial judge made some error or permitted some irregularity, and secondly that the court of appeal also decides that the error renders the conviction unsafe, meaning that there is a real possibility that the jury might not have convicted.

Examples of where this may be the case include errors in summing up and admitting evidence which should have been excluded, however *Cooper* tells us that it could be a cumulation of multiple factors. It is not enough that there is a ‘substantial judicial hunch’ about the conviction’s safety, and thus the test is fairly strict. There may be an irregularity, but it may not be significant enough to have an impact on the safety of the conviction.

It may be useful to use an example. If we have an individual convicted of murder, and there is substantial DNA evidence and also identification evidence, it is unlikely that an error in summing up is bound to make this conviction unsafe.

## **PARA 2 – UNDERPINNINGS OF THE LAW OF APPEALS**

First, I will examine the theoretical underpinnings of the law of appeal. *Spencer* convincingly argues that a criminal conviction is only deemed acceptable if it carries moral authority. To commit a crime is a moral wrong, and a deprivation of liberty via imprisonment is only acceptable if it is morally authoritative, as this is so invasive into one's autonomy and dignity. This argument suggests a higher success rate of appeal.

Next, there are practical underpinnings of the law of appeal. *Spencer* argues that if we uphold convictions where authorities have discarded and almost ridiculed the foundations of justice, then this undermines the restraint that the public attribute to the police. If there are no consequences to this wrongdoing, then this signifies that breaking the rules of justice is acceptable, proving detrimental to the public.

Both of these arguments suggest a favour towards successful appeals. However, what has not been acknowledged is the public interest in conviction, specifically regarding safety. For example, if we use the murderer example from earlier, the statement posed to me would lead to a quashing of conviction without any balancing act. It would disregard the fact that despite this irregularity, the defendant would almost certainly have been convicted. The consequences of this statement are both confusing and worrying.

It seems illogical that someone who would have been convicted, regardless of the error, can be automatically freed despite their moral wrongdoing. Whilst I understand the moral and practical underpinnings of this argument, as discussed previously, it potentially would allow those who have essentially committed their crime to walk free, undermining public safety and confidence in the criminal justice system. With the lack of funding that the criminal justice system is currently experiencing, errors are inevitable, yet to quash every conviction due to this seems unrealistic and unconvincing.

## **POSSIBILITY OF RE TRIALS**

The argument posed may be more convincing if it was viewed as a suggestion for increased retrials. In this case, the conviction would be quashed and if the interests of justice require it, a retrial will be ordered (s7(1) CAA 1968). Thus, if we view this to be in favour of retrials, the problems encountered of illogical thinking and public safety have been cured. As the errors would not operate in this retrial, one can see how the conviction would have finalised despite the error.

However, this may not be a simple ‘fix’. I have already mentioned the grave funding crisis affecting the criminal justice system, and thus ordering increased retrials by broadening the interests of justice test, allowing a wider understanding, will only worsen this. There is a possibility that by the time of retrial, a convict may have already finished their sentence. It seems unrealistic to further burden the system. Ultimately, this seems to be a challenge between moral justifications and practicality.

## **2006 PROPOSALS**

The proposal stated may be unrealistic as the government has shown a desire to permit less quashing, rather than more. In 2006, the government announced an intention to change the law so that quashing on ‘purely procedural grounds’ was not allowed if guilt was sure. Thus, whilst this plan ultimately did not proceed, one could argue that an idea directly contrary to the government’s headspace is completely unrealistic, and instead the current law finds a balance that is more palatable between academics and the government.

However, it must be stated that these proposals received immense backlash. Academics strongly objected, stating that it failed to recognise that the appeal process must uphold the rule of law, which may mean few who are seemingly ‘guilty’ must have their convictions quashed. Furthermore, it perpetuated the false narrative that those who are ‘clearly guilty’ can escape punishment through appeal (*Spencer*). An example of this is *Mullen*, where British authorities persuaded the Zimbabwe authorities to act unlawfully, and thus constituted the gravest misconduct (*Spencer*).

## **CONCLUSION**

In conclusion, I disagree with the statement posed, and instead find the current law on appeal to be generally satisfactory. Whilst understanding the underpinnings behind the quashing of convictions, I am not convinced that this outweighs the public interest and logical nature of a balancing exercise, looking at the error and the impact that it may have had. I would personally argue for an increase in the use of retrials, finding a common ground between the two arguments, however one must be aware of the practical difficulties that this provides. Lastly, it seems idealistic to suggest the statement posed when it appears that the government possesses an opposing ideology.

Paddy Hickey

**“In my judgment, the interests of creditors can only supplant the interests of shareholders altogether when the company becomes irreversibly insolvent, making insolvent liquidation or an administration unavoidable. I agree with Lord Reed that the test of a real and not remote risk of insolvency and the test of likelihood of becoming insolvent should be rejected.” (LADY ARDEN) Discuss.**

2022 Tripes

### **Introduction**

Lady Arden and the Supreme Court in *Sequana* failed to deal with many key issues. Her rejection of the test of likelihood of insolvency is welcome, but her failure to deal with the ‘knowledge’ requirement of directors, and her treating creditors homogenously, means that Parliament must step in.

### **‘Irreversibly insolvent’ and ‘insolvent liquidation...unavoidable’ as the trigger**

This extract of Lady Arden’s judgment in *Sequana* was helpful in some respects in relation to triggering the duty to consider the interests of creditors under s172(3). It was, however, deeply unhelpful in other respects.

First, she was correct to concur with Lord Reed in their rejection of a test of the likelihood of becoming insolvent. Indeed, the majority held the threshold to be knowledge of insolvency, bordering on insolvency, or that an ‘insolvent liquidation or administration is probable’. It is this last element that Lady Arden and Lord Reed were correct to reject. Certainly, such an inclusion would be to set the threshold too low and threaten the corporate rescue culture that should be incentivised. A 51% likelihood of insolvency is ‘probable’ and, under this approach, would trigger the duty, but it should not, especially since voluntary creditors can be protected by contract (e.g. financial covenants) and often bargain for rights in rem. Sealy and Cheffins outline how setting the threshold too low also undermines the core functions of directors of making business judgments, taking risks, and rescuing a firm from financial difficulty. The threshold should be correspondingly high to protect against such risks, and Lady Arden and Lord Reed’s judgments should be welcomed to this end.

Nevertheless, the fact that the justices failed to determine the question of ‘knowledge’ on the part of directors is deeply unhelpful. Lord Reed sounded caution because ‘knowledge’ was not suggested in *West Mercia*, whereas Lords Hodge and Briggs asserted that subjective knowledge is required, in line with wrongful trading. Lady Arden declined to resolve the issue because it was not required on the facts. This is unfortunate, but it speaks to the fact that if the Supreme Court cannot ensure appropriate clarity and guidance in this area, Parliament ought to step in and legislate to clarify where and when the trigger for the duty to act in the ‘interests of creditors’ applies. Lords Hodge and Briggs’ suggestion fails to recognise this duty as distinct from wrongful trading, and insistence upon their having the same mental element is unfounded and unnecessary. Instead, the majority’s approach of an objective level of knowledge (that the directors ‘know or ought to know’) should be welcomed, as it has been in Ireland (s224A, Irish Act 2014). This was also suggested by the High Court in *Hunt v Singh* following *Sequana*. Indeed, this would make it easier for liquidators to claim as there is no need to establish the directors’ subjective knowledge of insolvency, thereby strengthening creditor protection. Furthermore, adopting unreasonable beliefs should not be a basis for directors escaping their responsibilities.

It is unfortunate that Lady Arden failed to help rectify this issue in *Sequana*, but she and Lord Reed were correct to reject the test of ‘likelihood of becoming insolvent’.

### **‘Creditors’ interests ‘supplanting’ those of ‘shareholders’**

While Lady Arden addressed the extreme circumstance of when ‘creditors’ interests ‘supplant’ those of shareholders, she failed to distinguish between different types of creditors, or how to balance interests before they ‘supplant[ed]’ those of shareholders.

Beginning with the latter, Lord Reed suggested that a ‘balancing exercise’ occurs before creditor interests become paramount. In line with *West Mercia*, the weight given to creditors’ interests increases as the financial situation worsens. This is a case of context, and the Court encouragingly adopts flexibility. However, Keay has correctly criticised the ambiguity of the judgment on the basis that directors need to be guided by consistent and clear principles and should be able to tell with some degree of accuracy when the duty will arise. Indeed, guidance should be provided by Parliament through statute by codifying different potential situations and how creditors’ interests should be balanced, not least because the Supreme Court failed to do so in *Sequana*. A similar approach to that

of Ireland should be adopted, where guidance is provided by directors having regard to ‘the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business’, and to act in ‘good faith’ for the overarching viability of the company (Irish Act 2014). Deliberate or gross negligence is a high threshold ensuring the corporate rescue culture is preserved but bright-line guidance reduces uncertainty in this balancing exercise.

In relation to the former issue of ‘creditors’ being treated homogeneously; Lady Arden’s judgment is unhelpful. By referring to ‘creditors as a whole’ she failed to appreciate the distinctions that exist between creditors, such as secured, unsecured, and involuntary creditors, and consequently failed to provide guidance on how to approach conflicts that might arise between them. This is particularly problematic for directors nominated by PE funds. The law should prevent nominee directors from acting in the interests of their principal rather than in good faith for the company, something they might be inclined to do when bordering on insolvency. For example, the board – due to nominee directors – might prioritise unitranche debtors over first-lien debtors. Lady Arden’s insistence upon having regard for ‘creditors as a whole’ is therefore deeply unhelpful. Instead, Parliament should issue guidance on how nominee directors ought to conduct themselves to regulate internal creditor conflicts during financial difficulty for a company, although weight should be provided for what protection the lender successfully contracted for.

Furthermore, Lady Arden’s broad-based approach fails to address the issue of dual holders (acting as both creditors and shareholders). With creditors often receiving more through higher interest rates in today’s economic climate, they might – with their votes attached to equity – vote against themselves as shareholders and in favour of themselves as creditors, often at the expense of pure shareholders. This is not necessarily a new concept (e.g. *Salomon v Salomon*), but it has become more pressing. The issue is inherently connected with the s172 duty to act in the best interests of the company. The enlightened shareholder approach, rather than shareholder primacy (*Re Smith* cf. *HLC Environmental*) is difficult to achieve in that if the director has multiple principals, and they have conflicting interests, it is difficult to establish how directors ought to navigate this path, especially before creditor interests have ‘supplant[ed]’ those of shareholders. The subjective ‘good faith’ element (cf. s171(b)) would likely do much of the lifting.

Finally, on the other side of the equation for balancing, shareholders are not homogenous (e.g. preference vs ordinary shares). Lady Arden again fails to appreciate this, further exacerbating how the balancing exercise operates in practice when creditor interests are not yet paramount.

### **Rectifying Uncertainty**

Lady Arden and the rest of the Supreme Court in *Sequana* have demonstrated that much uncertainty remains in this area of law. If the courts cannot establish coherence, it is for the legislature to step in. As noted, the knowledge element of directors should be objective. Lady Arden's rejection of the test of likelihood of becoming insolvent was appropriate, as the threshold would otherwise be too low. Guidance should be provided in the form of prohibiting certain actions to aid directors' understanding of their duties. The same should be available to nominee directors who have multiple principals.

Furthermore, the court failed to define 'insolvency' for the purpose of triggering the duty. Quinn and Gavin highlight the benefits of the Irish Act adopting a balance sheet insolvency definition (s509(3)(b)). A concern over this definition is that balance sheet accounts fluctuate regularly, and many companies frequently fall into insolvency according to their balance sheet. Nevertheless, this would merely trigger a duty to 'have regard to' creditor interests, thereby mitigating the harmful effects of adopting a balance sheet insolvency definition in the strict sense. Furthermore, it is a higher threshold than cash-flow insolvency (which many start-ups fall victim to), it takes a long-term view, and it is more serious. It also solves Sealy's argument that codification would cause directors to become risk-averse, encouraging passive asset-preservation and discouraging reasonable attempts at corporate rescue. A balance-sheet insolvency definition should therefore be adopted.

### **Conclusion**

Lady Arden and the rest of the Supreme Court in *Sequana* failed to clear up most of the uncertainty in this area of law. She was correct to reject the likelihood of insolvency test, but her failure to deal with the 'knowledge' requirement, and to distinguish between different groups of creditors was disappointing. This considerable uncertainty should be rectified by the legislature.

**‘A principal function of contract law is to provide a framework of rules which apply to contractual relationships unless the parties expressly opt out of them.’ (LORD LEGGATT in Barton v. Morris) (2023). Discuss.**

**2023 Triplos**

It is doubtful whether a principal function of ‘contract law’ as a whole is the provision of a framework of rules, though this intention underpins many contractual doctrines (eg. implication and damages). This is because in some areas the courts have failed to apply or formulate these doctrines with sufficient clarity so as to give them the clear and prospective qualities associated with a ‘framework of rules’. Moreover, in other areas, the extent to which the parties are able to ‘opt out’ of these rules is diminished both due to the doctrines themselves, and the clarity with which they can predict their application. Consequently, only a limited number of doctrines are concerned with the provision of such ‘rules’ – therefore they lack the collective coherence to be properly described as an optional ‘framework’.

The intention of various doctrines to provide default ‘rules’

Broadly speaking, it is desirable for contract law to function in the manner of a ‘framework of rules’. This is because it provides ‘efficiency’: preventing the parties having to expend time and resources negotiating rules to cover every possible contingency (Lord Leggatt). Moreover, it enables for an ‘injection of values’ (Lord Sales) into contracts: ensuring fairness prevails where the parties have made no express provision for the relevant circumstances. Consequently, various doctrines clearly aim to achieve this.

The main doctrines aiming to achieve this outcome are damages (Lord Sales) and implication (Lord Leggatt). Damages clearly embody default rules aiming explain the remedial position upon one party’s breach of contract and can clearly be contracted out of via liquidated damages clauses, provided these do not amount to penalty clauses (*Cavendish*). Implication by law and statute also clearly aims to provide such rules – implying terms into a statute of a particular type to provide rules for eventualities common in those kinds of contract. For instance, the Sale of Goods Act (SGA)

implies a term that goods sold by sample correspond to their sample (s15(2) SGA) into all commercial contracts for the sale of goods.

Are they sufficiently clear and prospective so as to constitute ‘rules’

Terms implied in fact are plainly not sufficiently prospective and clear so as to constitute ‘rules. As pointed out by Lord Neuberger – these are implied ‘ad hoc’ into contracts, intended to reflect the intentions of the relevant parties (being implied where ‘obvious’ – *Marks & Spencer*). These should therefore be excluded from the scope of Lord Leggatt’s statement, as their application – being tailored to each contract – lacks the requisite predictability, and certainly does not able them to be considered a ‘framework’.

Terms implied by statute, however, are fairly clear and precisely formulated, e.g. a term that goods sold by sample correspond to their sample (s15(2) SGA) is unambiguous. At first glance, terms implied by law (i.e., terms implied by the courts into a certain kind of contract, such as that an estate agent will receive reasonable remuneration for introducing a buyer to a seller (*Devani*)) appear to be extremely clear, prospective, and predictable – having the quality of a ‘precedent’ (Lord Leggatt). However, the disagreement between the majority and minority in *Barton* suggests that the implication of terms in law is not as precedent-based as hoped. Lord Leggatt would have extended the aforementioned estate agent caselaw a case in which there was no estate agent. Lord Burrows would have implied a term in law based on a vague notion of ‘necessity’ (on the basis of *Irwin and Scally*). Both judges would only have done this because they were precluded from implying a term in fact (as this did not accord with the parties’ intentions) but wanted to achieve a fair outcome (whereby the claimant was remunerated). This undermines any notion of predictable incrementalism which gives extensions of precedent the character of a ‘rule’. This conclusion accords with Peden’s analysis (judicially confirmed in *Crossley*) that terms implied by law are driven by ‘policy’. If this policy is not sufficiently predictable – here reduced to a desire to do justice – terms implied in law cease having the quality of a ‘rule’. Admittedly this was not the majority’s approach: but it does demonstrate a judicial predisposition to make terms implied in law just as ‘ad hoc’ as those implied in fact.

The rules on damages are at first glance, sufficiently clear and prospective so as to constitute rules. Where the standard ‘diminution in value’ measure is awarded (e.g. *Classic Maritime*) – the quantum of damages to be given is reasonably clear and prospective: the difference between the market value

of the product and what was actually provided. Similarly, the ‘cost of cure’ measure (e.g. *Radford*) can also straightforwardly be ascertained – it is the cost of performing the services. However, the award of damages for distress (*Watts*) or subjective value (the consumer surplus - *Ruxley*) are far less predictable and intangible. Moreover, the extent to which such damages may be discounted due to the other party’s failure to mitigate their loss – i.e., ‘act reasonably’ – is equally difficult to ascertain. Thus, the rule – if it does exist – is therefore more aptly described as one which states that damages *will* be awarded, rather than one which allows parties to always precisely ascertain the *quantum* of such damages. Consequently, when parties include liquidated damages clauses specifying precise sums, they are not replacing one rule with another – as plausibly implied by the statement – but elevating the contract’s remedial position to the status of a ‘rule’.

### Can the parties really opt out

Regarding damages there is overtly a constraint on the parties’ ability to ‘opt out’ of the relevant implied terms. Any liquidated damages clauses must not count as ‘penalty’ clauses; they must be proportionate to the party’s ‘legitimate interest’ in performance. While this is a far higher bar than previous caselaw (e.g., *Dunlop*), it still constitutes a constraint – leading one to question whether the parties really can ‘opt out’ of damages rules at will.

Regarding implication, the parties can often not contract out of statutory implied terms, as such exclusions of liability are precluded. E.g., s6(1) UCTA precludes exclusions of liability for s15(2) SGA. Indeed, generally speaking the CRA and UCTA constrain the parties’ ability to exclude their liability so broadly that many other default rules are likely engaged. Although admittedly terms implied in law and fact can be excluded by party intention (confirmed in *Barton*).

However, the broad (factual matrix-based) approach to interpretation following *ICS* means that the parties may often have difficulty contracting out of one of the aforementioned default rules. Particularly if the courts take a more interventionist approach (as Sumption suggest they do) to defending the ‘injection of values’ (see Lord Sales above) which these rules constitute.

### Conclusion

Consequently, in many cases the ‘default rules’ the relevant doctrines aim to impose will fairly plausibly have the quality of a rule. However, there are significant and notable exceptions to this. Consequently, it is doubtful that they have the consistency and collective coherence to constitute a ‘framework’, even if they constitute ‘rules’ in most cases. Moreover, the ability of the parties to opt out of these rules is also constrained – undermining the statement further.

Robyn McCollam

**“Explain the significance of dolus in the Roman law of delicts.”**

**2024 Tripos**

Delict, one of the two pillars of obligations alongside contract, was centered around the idea of one causing another to suffer a wrong and, in many cases, this required ‘dolus’, the notion of deliberate wrongdoing. However, while dolus certainly was significant in many respects, so was the notion of ‘culpa’. Thus, its significance must be carefully evaluated.

Firstly, dolus was regarded as meaning deliberate wrongdoing, being viewed as more criminal than culpa, which merely required fault and something being contrary to the law. Dolus certainly was very significant when one looks at iniuria and theft, or furtum, as it was then regarded. According to Gaius, “theft cannot be committed without wrongful intent”, or dolus malus and thus, ‘dolus’ was pivotal when one sought to bring the actio furti. Alongside the requirement of contrectatio, or dealing with a thing, the fact that the action of the defendant was ‘fraudulent’, according to Paul in book 39 On The Edict, was necessary to bring an action. Even if one had indeed dealt with the property of another in a manner which was contrary to natural law, according to Justinian, the action could not be brought unless the dealing had indeed been ‘dolus malus’. In respect of iniuria, being grounded in contumelia, it required intention and one could not commit a negligent iniuria. Iniuria allowed victims to bring actions against those who had deliberately affronted them or insulted them, causing them to suffer emotional loss. While ‘dolus’ was not explicitly mentioned, dolus being widely regarded as deliberate wrongdoing, it is clear that what was required to bring the actio iniuriarum was deliberate wrongdoing on the part of the wrongdoer. So, while it was not explicitly mentioned as criteria, it is clear that the ideas behind dolus were indeed at play in the delict of iniuria.

Dolus is also significant when one looks to the Praetorian edict of ‘dolus’, where one could bring the actio doli. Ulpian laid out the requirements for this, claiming that “where something is alleged to have been done with a malicious or fraudulent intent [dolo malo facta] and there is no other relevant action and there seems to be a reasonable ground, I will grant an action”. This shows that dolus was so significant in the Roman law of delicts that even if one’s wrongful action did not fit into one of the established delicts, it was still possible for an edict to be brought, so long as dolus was present. This suggests that the presence of dolus itself, and a culpable intention was more deserving of punishment

than the result of the attempted delict, the loss of something in one's possession for example. Ulpian outlined that one would be guilty of *dolus* where one claims he is wealthy or example, intends to put the money he receives into trade, or will make a speedy repayment of the money, becoming liable for fraud. Thus, *dolus* in the sense of being akin to its own delict was very significant in the Roman law of contract and allowed a number of citizens who had suffered loss at the hands of another's wrongful intent, to bring an action and recover.

Also, *dolus* was significant in that it was able to move a wrongful action from the scope of one delict into another. For example, Paul spoke of the boundary between *servi corruptio* and *iniuria*, claiming that for an *actio iniuriarum* to arise, the wrongdoer must deliberately intend for the master of a slave to suffer emotional damage, should he insult the slave, and the wrongdoer must intend to commit *iniuria*. However, this notion of deliberate wrongdoing proves its significance as if one who does "give evil counsel", according to Paul, does so with no thought to the master and does not commit deliberate wrongdoing, merely the *actio servi corruptio* will lie. Again, this was seen with the boundary between *servi corruptio* and *damnum iniuria*. Ulpian claimed that where one has persuaded a slave to go onto a roof or go down a well, "if he persuaded him without fraudulent intent [*dolo malo*], he is not liable; if with fraudulent intent, he is". Thus, the intention of the wrongdoer and whether they deliberately do something, in line with the idea of *dolus*, will turn one wrongful action from one delict to another and this, it is highly significant.

On the other hand, '*dolus*' is often superseded by '*culpa*', which plays a much more significant role in the Roman law of delicts and often left *dolus* redundant. This can clearly be seen in the delict of *damnum iniuria datum*. *Damnum iniuria datum* arose when death or damage had been wrongfully caused for which compensation could be claimed and it was monitored by the *Lex Aquilia* of the first half of the third century BC. Both chapter 1 and chapter 3 of the *lex Aquilia*, which dealt with the killing of slaves or four-footed beasts of the class of cattle in the former, and injuries less than killing in the latter, explicitly stated that it arises where one was "wrongfully" committed the action, with *iniuria* being the standard of wrongfulness. *Iniuria* likely meant the absence of lawful excuse, as confirmed by Justinian when he stated that it means, "something done contrary to law". However, for the classical jurists, it merely embraced both *dolus* and *culpa*. Gaius states for example, "he is deemed to kill wrongfully [*iniuria*], by whose wrongful intentions [*dolus*], or fault [*culpa*], death has ensued". This means that it was irrelevant whether the defendant intended to cause the property damage and all that mattered was that it was wrongful, removing the requirement of the act being

deliberate, which differentiated between *dolus* and *culpa*. This meant that anything which was caught by *dolus* could also come under the scope of *culpa*, removing any significant role that *dolus* played in the law of delicts. In turn, this meant that negligence sufficed to fulfil the requirement of the act being wrongful. This was confirmed by Paul when he stated that “there is fault when what could have been foreseen by a diligent man was not foreseen” and again by Ulpian, who claimed, “under the *lex Aquilia* even the slightest degree of fault counts”. Thus, *dolus* was not significant at all in regard to *damnum iniuria datum*, and ‘*culpa*’ and ‘*iniuria*’ played much greater roles in establishing liability for delicts.

In addition, a number of delicts required no intention whatsoever, the mere fact that one had suffered harm was sufficient, once again proving the largely insignificant role played by *dolus*. This was especially so in regard to the praetorian delicts. The Edict of the Aediles was a clear example of this, which held one liable where a dangerous animal was bound or chained where there is frequent traffic and it injured someone or caused damage. Liability here was imposed regardless of any fault on the part of the wrongdoer, he did not need to have any wrongful intention, as embodied by *dolus* and it didn’t even matter that he was completely unaware of the danger. Therefore, in a number of delicts, this being one of them, it did not matter that one had acted wrongfully, or intended to do so. Thus, the scope of *dolus* was limited and it only had an effect in some of the delicts, limiting its significance to a very large extent.

To conclude, *dolus* was of great significance in the Roman law of delict and had it not been used, this would have left a huge gap in the law of delict and made it very difficult to determine when one was deserving of punishment, and which punishment they were deserving of.

**Kamala is the sole trustee of the Widget Family Trust, which was created by Johnny Widget (as settlor) in 2018. As trustee of this Trust, she holds a very substantial portfolio of investments, worth about £14 million. The Trust's named beneficiaries are Johnny; his wife Linda; and their children, Marie and Ne-Yo. Their third child, Oscar, is not a beneficiary; this is because there has been acrimony between Oscar and Johnny, dating back many years. The trust has a presumptive duration of 21 years, and provides for the equal division of the capital at that time among the beneficiaries. However, the terms of the trust give Kamala a great deal of discretion. She has the power to terminate the trust at any time; on termination, she has the power to distribute the trust property as she sees fit among the beneficiaries. Before that time, she has powers to add and delete beneficiaries. She also has the power to make payments of income, capital or both, 'to or for the benefit of' any beneficiary in her absolute discretion. There is a clause that provides that 'No trustee shall be liable for any loss or damage which may happen to the trust fund'.**

**During the life of the Trust, Kamala has made fairly regular payments to Marie and Ne-Yo, when they requested assistance with the costs of education and large purchases. In each case, Kamala asked them to explain their needs, considered the request, and recorded her decision in a memorandum, keeping all these documents in her records. One Friday, 7 February 2020, Linda called Kamala and asked Kamala to advance £15,000 to Oscar, because he needed it to buy a used car. Linda said that Oscar needed to get the money that day, or he might lose the car. Kamala satisfied herself that Oscar did need a car, and that the amount of money was appropriate for the car in question. She also spoke to Johnny, who said that he now regretted excluding Oscar as a beneficiary. Kamala formed the view that Oscar should be added as a beneficiary. She called Pauline, a lawyer who helped her with the trust. Pauline said, 'if you want, you can go ahead and make the advance. Come in on Monday, and we will complete the documentation to add Oscar as a beneficiary'. Kamala advanced £15,000 to Oscar. Oscar bought the car that day, using the advanced funds. On Monday 10 February 2020, Kamala executed a deed adding Oscar as a beneficiary. Oscar later transferred ownership of the car to his friend Régine, as a gift. The car is now worth £12,000.**

**Some weeks later, Johnny spoke to Kamala and told her that he disagreed with Ne- Yo's decision to start a Master's degree in film studies. He said, 'I don't want Ne-Yo to get anything more from the trust, at least for the time being'. Kamala went to see Pauline again, and Kamala executed a document by which Ne-Yo was removed as a beneficiary. Kamala wrote a note for the file that said, '20 March 2020. Removed Ne-Yo as beneficiary. Settlor's request'. Since that time, Ne-Yo has received nothing from the trust despite his requests. Ne-Yo discussed this with Marie. Marie made a decision to renounce worldly wealth. She said to Ne-Yo, 'I hereby give you all my rights under the Widget Family Trust'.**

**Ne-Yo seeks your advice. He wishes to know what are the consequences of these events, including all possible arguments for liability of any party. Advise him.**

**2023 Triplos**

#### Kamala's Advance to Oscar

We will first consider whether Kamala (K)'s advance of £15,000 to Oscar (O), in order that he buy a car, can be challenged. At the time of the transfer of the asset (Friday 7<sup>th</sup>), O is not a beneficiary under the trust, as he does not gain such status until Monday 10<sup>th</sup>. Therefore, this action might be considered an unauthorised exercise of trustee power, given that K has transferred trust property to a non-object of the trust. It is noted that K has the power to introduce new beneficiaries, and the power to make payments of income, capital or both, 'to or for the benefit of' any beneficiary in her absolute discretion, however, there is no power in the trust document to advance sums to those outside the trust beneficiaries.

Although the exercise of the power to convey £15,000 to O may have been defective, K, as a legal person, can still convey assets. Per Lord Millett in Foskett v Mckeown, it is possible for the beneficiaries to assert their rights against the third-party recipient of the unauthorised disposition, unless that third party is a bona fide purchaser for value of the legal estate without notice. Alternatively, Lord Millett holds in Tang Ying Loi v Tag Yin Ip that a beneficiary may elect to treat the proceeds of an unauthorised disposition as part of the trust fund. On these facts, then, the beneficiaries might treat the car purchased by O as part of the trust fund, given that Régine (R) is given the car as a gift, and therefore cannot benefit from the BFP defence. The beneficiary's right in the £15,000 is not overreached. However, given that the car has depreciated in value, the beneficiaries

might instead elect to bring a personal claim against K as trustee. The mechanism for reconstituting the trust fund after a misapplication of trust property is through falsification (AIB v Redler).

However, given the modern approach to causation in cases of trustee breach advanced in Target Holdings and confirmed in AIB, K might argue that her breach of trustee duty is not a 'but for' cause of the loss sustained to the trust fund through the unauthorised disposition. This is because O's status as a non-beneficiary was changed from Monday 10<sup>th</sup>, rendering the disposition authorised. The recent case of Main v Giambrone, distinguishes between active and passive duties. Applying this to our facts, it must be determined whether K is under a passive duty not to send trust assets to non-beneficiaries, or an active duty to execute deeds to add beneficiaries to the trust before sending trust assets. Here, it is arguably that K is under the passive duty to hold money and not release it unless to a beneficiary; therefore, had K not authorised the transfer to O, the fund would still have £15,000. Even given the shift towards equitable compensation for trustee breach, on these facts, K cannot try and rely upon a break in the causation chain.

It might also be noted that on this unusual fact pattern, because O (as of Monday 10<sup>th</sup>) is now a beneficiary, O could bring the action against K for the breach. However, there is an exemption clause in the trust deed which purports to exclude liability. The rule in Armitage v Nurse holds that liability for gross negligence may validly be excluded as not trespassing on the irreducible core of the trust, however, liability for fraud may not be excluded. Here, the exclusion clause is likely enforceable, as Arden LJ in Citibank v MBIA contends that if the trustee still acts in good faith, the trust document may exclude liability. Lord Templeman (Hayin v Citibank) defends this position on the grounds of utmost protection of settlor's intention. Therefore, K's liability here may be excluded.

#### Is Pauline a dishonest assister?

As K cannot be held liable, due to the valid exemption clause, could the beneficiaries bring a claim against Pauline (P) as a dishonest assistant? This may be preferable as the law is not settled on whether the exemption clause would extend to cover P, and, arguably, the protection afforded by the clause is personal to K. However, this claim is unlikely to be successful, given the requirement of 'dishonesty' expounded by Lord Hoffmann in Barlow Clowes, interpreting Twinsectra, requires that the person's conduct be dishonest by standards of reasonable and honest people. P does not seem to

be here in her actions attempting to procure a breach of trust through unauthorised disposition of the trust asset.

### Ne-Yo's removal as a beneficiary

Here, we might consider whether K's removal of Ne-Yo (NY)'s as a trust beneficiary can be challenged due to inadequate deliberation. This concerns the circumstances where K is acting within the scope of her power (as noted, she has broad powers to delete beneficiaries), but has taken into account considerations they should not have (rule in Hastings Bass). Here, the issue is whether K is in breach for following the instruction of the settlor. Generally, in English law, the settlor's wishes, for example, where contained in 'letters of wishes' are unenforceable once the trust is constituted. Furthermore, trustees are under a statutory duty (s5 Trustees Act 2000) of even-handedness between different classes of beneficiaries, therefore given both J and NY are equal beneficiaries of the trust, K might have breached this even-handedness in accepting J's opinions as to power of appointment (in this case deletion of a beneficiary) as justified in following by 'settlor's request', evidenced in the written note. The Supreme Court in Pitt v Holt; Futter v Futter held that for the doctrine of inadequate deliberation to apply, the failure of consideration or false considerations must be sufficiently serious to ground a breach of trust and that this must be a breach of 'fiduciary duty'. The most comparable fiduciary duty here would be the no-conflict principle, where K has breached their duty of no conflict between different principals: J and NY. However, the language of 'fiduciary breach' has been criticised by Virgo for its obscuring language.

### Potential for illusory trust?

A passing comment might be made of the potential that J (as settlor) has retained such extensive control over the trust asset that he has failed to divest himself of the beneficial interest. In Webb v Webb, the settlor's extensive power to advise the trustees was considered part of the finding of an illusory trust. On our facts, J's influence over K seems pretty pervasive. However, we do not have enough information to conclude that J has retained beneficial ownership.

### Marie's purported rights transfer

Marie (M) purports to orally transfer to NY 'all her rights' under the trust. Dispositions of equitable interests generally require the formality of writing, as required by the LPA 1925 s53(1)(c). Where the beneficiary assigns her equitable interest to another, this is considered a disposition (Re Danish Bacon). Though M uses the phrase 'all her rights', here she can only be referring to her equitable interest, as she cannot pass NY full legal and beneficial ownership of her share of the trust fund without the consent of the other beneficiaries. Furthermore, the use of the language 'under the trust' implies the continued existence of the trust, therefore, it must be assumed M is attempting to direct her equitable interest to NY, which is a disposition (Grey v IRC), requiring writing. The purported disposition is invalid.

**Should any constitutional conventions be enforced by the courts? Would such enforcement convert them from conventions into law?**

**2024 Tripos**

Introduction

A convention is a precedent that generally acts as a political constraint but is not legally enforceable by courts. The orthodox view is that conventions are restricted to the political realm and can only be 'recognised' by courts as evidence of e.g. public interest (*Jonathan Cape* [1976]). The question of whether conventions should be enforced by courts requires a discussion of how this would benefit the constitution as well as how this may undermine constitutional principles like parliamentary sovereignty and the separation of powers. This essay will argue that, in some cases, it would be beneficial to enforce political conventions, particularly the Sewel convention and ministerial responsibility. In relation to the second part of the question, it will be argued that this would not necessarily turn such conventions into law because the distinction between law and convention is not clearly demarcated to begin with. As Allan argues, both seem to be founded on the same principles.

Should any constitutional conventions be enforced by the courts?

This essay does not argue that there should be a general rule that all conventions are legally enforceable. This would be a destructive breach of the separation of powers where the law would be infused with legal uncertainty regarding which practices constitute conventions. However, it will be suggested that, in specific cases, enforcing constitutions could be highly beneficial for (i) recognising the special constitutional status of the devolved legislature and (ii) strengthening parliamentary scrutiny of the executive.

**i) The Sewel Convention**

The Sewel Convention is codified in both the Scotland Act 1998 and the Government of Wales Act 2006 as the practice that 'the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. In *Miller I* [2017], it was argued on behalf of the devolved legislatures that Parliament would have to seek consent in order to

enact legislation which would trigger Article 50 of the EU Withdrawal Act since it had implicated devolved areas. The Supreme Court took a robust approach and quickly dismissed this argument with Lord Neuberger stating that ‘it is well established that the courts of law cannot enforce a political convention’. The court went on to state that they could not ‘give rulings on the operation or scope’ of the convention which arguably stands at odds with the Upper Tribunal’s judgement in *Evans* [2012]. The tribunal explicitly discussed the nature and scope of the education convention in weighing up whether the publication of certain correspondences would be in the public interest. Their approach was arguably correct and, although they did not ‘enforce’ the convention as such, it proved beneficial in coming to a well-reasoned judgement on the implications of publication.

This essay argues that, in the context of the Sewel convention, the courts should go further than both *Miller I* and *Evans* [2012] and actually enforce the doctrine. McHarg makes a valid point when he states that the court in *Miller I* too ‘casually dismissed’ the proposition that the convention could be legally enforced and thus confirmed ‘a key anxiety in the UK’s minority nations about their lack of constitutional security’. Although it could be countered that the codification of the Sewel convention in the devolution statutes of Scotland and Wales served only as a symbol of political commitment, McHarg says that this ‘closed off the debate about the need for devolved consent rather than leaving it open for political resolution’ which may suggest a separation of powers concern.

Ultimately, it seems odd not to legally enforce the doctrine when it applies only to devolved matters considering that the devolved legislatures have been conferred the power to amend and repeal acts within their competency. Further, from a political perspective, a more robust judicial attitude towards compliance with the convention may ease some of the tensions that are currently a result of the judiciary’s narrow interpretation of the devolution statutes in recent cases (*UNCRC* [2023]). Elliott rightly argues that the Sewel convention recognises the constitutional value of respect to the autonomy of devolved legislatures and the court’s current approach displays an ‘unwarranted’ conservatism.

## **ii) Individual ministerial responsibility**

Arguably individual ministerial responsibility *was* legally enforced in *Miller II* as the courts recognised that, in practice, parliamentary sovereignty necessitated the opportunity to scrutinise the executive. It will be argued that this was a commendable approach to the convention that should

continue to be employed by the courts. The executive occupies a uniquely powerful position as the ‘dominant institution to which the other two institutions react’ (Griffiths). With the growing ‘administrative state’, effective parliamentary scrutiny of the executive is essential in preserving both parliamentary sovereignty and the separation of powers. The Ministerial Code states that ‘ministers have a duty to account, and be held to account, for the policies, decisions and actions of their departments and agencies’. The convention requires that every minister is responsible for their official conduct as part of the executive, with ministers leading specific departments expected to take ultimate responsibility for the actions of that department.

The convention has been described by Drewry as a ‘largely mythical aspiration’ as it has a tendency to be undermined. This is partly due to the convention’s malleability – uncertainty about the scope of requirements of the convention makes it easier for the executive to evade accountability. This can be exemplified by Boris Johnson’s determination that Home Secretary Priti Patel had not breached the Ministerial Code in 2020, contrary to Sir Alex Allan’s report on Minister’s Interests. This denial of responsibility by both a Prime Minister and a senior Minister vindicates the claim that the convention is ultimately unenforceable and ineffective in promoting accountability as it stands. If the convention were, however, legally enforceable the nature and scope could be developed through judicial interpretation and ministers would be forced to comply with its requirements. Although there is a broad argument that the recognition of legal conventions that have political roots constitutes an intervention by the judiciary into political matters beyond its institutional competence, enforcing this convention would arguably have the opposite effect. By ensuring that the executive is held accountable, parliamentary sovereignty would be elevated in practice and destructive breaches of the separation of powers would be prevented, as was alluded to in *Miller II*.

### Would enforcement convert conventions into law?

Dicey draws a sharp distinction between convention and law and states that a rule which is recognised and enforced by courts is a law. By this logic, enforcing conventions would constitute a convention transitioning from a political precedent to a law. However, it will be argued that Dicey’s view is outdated and does not recognise the reality of the modern UK constitution. Dicey subscribed to a clear distinction between legal and political constitutionalism which simply does not exist in practice. The UK does not adhere to such rigid categorizations and the better view is that of Allan who rightfully recognises that both law and convention are founded on the same constitutional values.

Thus, there is no ‘clear conceptual divide between law and convention’ as Jaconelli suggests. Allan says that when a convention can be legally sanctioned “all depends on the circumstances and the legal context in which they arise”, a notion which has been demonstrated by this essay.

### Conclusion

To conclude, there are certain constitutional conventions that should be legally enforced by courts, namely the Sewel convention and individual ministerial responsibility. This has been adduced by evaluating the constitutional benefits of legal sanctions, in comparison to the drawbacks. It can also be concluded that, since arguably law and convention are rooted in the same fundamental values, they cannot be clearly demarcated. Lacking a clear definitional boundary, the assertion that legal enforcement turns convention into law must be rejected.

Ayush Sangavi

**‘Throughout the history of the EU, there have been tensions in the relationship between the Union and the Member States and between the essential characteristics of EU law and the preservation of national identity. These tensions led to the United Kingdom leaving the EU.’**

2024 Tripos

### Introduction

The tensions between the EU institutions and the EU’s Member States, inseparable from the tensions between the essential characteristics of national law and the preservation of national identity, go to the heart of the EU’s legal order. It is argued in this essay that such tensions certainly played a part in the Brexit decision – though the blame for these tensions must be shared between the Member States (including the UK) and the institutions of the EU.

### The CJEU’s conflict with the BVerfG

The tensions between the EU legal order and the Member States can be well illustrated by the ‘standoff’ of sorts between the CJEU and the German Federal Constitutional Court (BVerfG) relating to the concept of the primacy of EU law (the idea that EU law cannot be overridden by domestic legal provisions, *Costa v ENEL*). Indeed, in seeking to preserve their national identity in the *Lisbon Treaty Ratification* case, the BVerfG originated the idea of ‘constitutional identity’ protection, with the argument that the German Parliament only had the authority to permit future Treaty changes (which would come with new legal obligations on the German state) provided Germany’s ‘constitutional identity’ was not undermined. Tensions intensified during the *PSPP* case, in which the BVerfG argued that the CJEU was acting ultra vires with respect to their proportionality assessment of action taken by the ECB, leading to an unprecedented press release by the CJEU which, as rightly argued by **Dani and Mendes**, was ‘misguided’ and arguably only worsens tensions. However, it is submitted here that to the extent that such tensions influenced the decision of the United Kingdom to withdraw from the EU (Brexit), the UK fell foul to the assumption that all such tensions – or conflicts – between national courts and the EU legal order are ‘destructive’ (**Bobić**). Indeed, **Bobić** reconceptualises the tension between the BVerfG and the CJEU as ‘constructive’ in that it can be seen to ‘open up space for debate’. Though we should be wary of ‘destructive’ conflict which ‘questions the system’s entire

existence’, not all tension between the EU and its MS is destructive, and it is submitted that the UK failed to realise this in the lead up to Brexit.

### The first *Tobacco Advertising* case

Moreover, tensions between the institutions of the EU and its MS were also seen in the CJEU’s decision in – and the aftermath of – the first *Tobacco Advertising* case. However, this proposition can perhaps be tempered by the counterargument that the actions of the Court in this case were merely a reflection of the unique ‘essential characteristics’ of the EU – though this does not mean that such tensions did not contribute to Brexit. The first *Tobacco Advertising* case saw the Court exert its influence on the EU rulemaking process in two ways: firstly, it was the first time that the Court annulled a legislative act (hereafter “the Directive”); secondly – and arguably more importantly, the Court showed its influence through its response to Germany’s subsequent failed challenge to a revised version of the Directive. **Weatherill** has argued that since a revised version of the Directive was adopted, the Court’s decisions on the matter of the limits of EU competence have become ‘no more than a "drafting guide."' It is argued that it is such ‘lenient judicial control’, as put by **Weatherill**, lay bare a far more ominous influence of the ECJ on EU rulemaking: that of so-called ‘competence creep’. The legal basis provided for the revised (and adopted) Directive was Article 114 TFEU, which relates to harmonisation of the internal market; however, the Directive in substance seemed to concern public health, an area within the shared competence of the EU as per Article 168 TFEU, and therefore requiring ratification by the Member States. Indeed, the preamble to the Directive (2003/33/EC) contained statements claiming that the harmonisation at hand was ‘intended to protect public health by regulating the promotion of tobacco’. However, perhaps the argument can be made that integrationist outcomes such as this one are difficult to achieve in what **Bobić** describes as the ‘strange and rare creature’ of the EU, and that unorthodox means such as that by the Court with regards to Directive 2003/33/EC are therefore justified by the ends. Indeed, though concerns with regards to the validity of Member State consent can be levied, we must remember that given the unique nature of the EU, we may need to ‘abandon some pre-conceived assumptions concerning constitutionalism’, as argued by **Bobić**. Be that as it may, it is clear that such examples of ‘competence creep’ by the Court have had a large impact not only on the rulemaking process of the EU, but also on the attitudes of Member States to the legitimacy of the Union’s rulemaking process – indeed, they arguably played a significant part in the United Kingdom’s decision to initiate Brexit.

## EU citizenship

The straw of tension which arguably broke the (British) camel's back, however, was arguably the expansionist interpretation of EU citizenship by the CJEU. The narrow-minded optimism regarding EU citizenship which was common during the period (spanning at least the first 11 or so years of the 21<sup>st</sup> century) which **Barnard** has described as the 'golden age' of EU citizenship saw the Court argue that EU citizenship was 'destined to be the fundamental status of nationals of the Member States' (*Grzelczyk*). As argued by **Barnard and Leinarte**, the debate surrounding the introduction of EU citizenship in the 1970s focussed predominantly on whether citizenship would 'help answer 'the European identity' question', meaning that key practical considerations of great important to Member States, such as how to manage immigration flow, were largely ignored. When crises (including a great deal of tension with Member States) caused by these oversights then emerged, the Court became 'less ambitious in its decisions concerning EU citizens', as perhaps seen most notably in the decisions in *Dano* and *Alimanovic*. However, as put by **Barnard**, it was "too little too late" – the disenfranchisement much of the UK population had with the migration resultant from EU citizenship, for example, was already well-ingrained. This is true even if such disenfranchisement was somewhat unfounded, with an LSE study finding that EU migrants contribute more to the nation's GDP and are a smaller burden on the welfare system than the average Briton. In this sense, Court of Justice seemed to take too lax a view towards tension with Member States and Court bite off more than it could chew, thereby impinging too far on the sovereignty of MS regarding the acquisition of (EU) citizenship and causing dire consequences. Though hindsight is, as the saying goes, a wonderful thing, the best solution for states leaving (or wishing to leave) the EU may be, as proposed by **Barnard and Fraser Butlin**, a concept of migration 'based on the notion of *fair movement* or *managed migration*, which combines the benefits of existing EU free movement rules with the possibility of greater control for the host State.' By finding a middle-ground, disintegration to the EU such as Brexit could perhaps have been avoided – and future disenfranchisement could arguably also be evaded.

## Conclusion

The tensions between the EU institutions and the Member States have no doubt left a permanent mark on the history of the Union – though tension between essential characteristics of EU law and the preservation of national identity can be constructive and certain Member State concessions are

required for a supranational organisation such as the EU to effectively operate, the CJEU – and Commission – certainly went ‘too far’ at times. Ultimately, this led to much of the British population seeking to ‘Take back control’ and thus leaving the Union.

**"Vicarious liability rests on the theory that it is fair to hold a defendant liable for the acts of the tortfeasor on the ground that the tortfeasor is engaged in the defendant's enterprise. Vicarious liability cannot be extended to tortious acts committed by an independent contractor, who, by definition, is engaged in his own enterprise. It is not fair to impose vicarious liability on a defendant in those circumstances.' Examine critically the law of vicarious liability in the light of this statement."**

**2024 Tripos**

This essay will argue that vicarious liability (VL) rests on the theory of enterprise liability and that this theory can properly accommodate VL for independent contractors (IC). It will begin by discussing various justifications that have been advanced for VL and concluding that enterprise liability seems most convincing. Finally, it will argue that the enterprise liability justification does militate towards VL for ICs in certain situations.

### **Vicarious Liability**

I start by discussing the underlying assumption that VL rests on the theory that VL is morally justified since T is engaged in D's enterprise. Various other justifications have been advanced over the years. Lord Phillips in *Christian Brothers* pointed out that an employer is likely to be in a position to pay. But normatively, the mere fact that D is able to pay for a tort is hardly a sufficient basis for holding him responsible for the actions of another. Moreover, this argument collapses into state liability since the government is best able to compensate, which is not the system we currently have. The 'ability to pay' rationale therefore cannot explain VL.

Phillip Morgan has argued that VL is founded on control and attribution. He conceives of VL as attributing an employee's tortious actions to an employer. But he fails to explain why it is right for this exercise of attribution to be carried out. Moreover, his argument would be too extensive as it points towards holding parents responsible for the torts of their children, or teachers responsible for the torts of their students, which of course does not align with the current law on VL.

Instead, I argue that enterprise liability as explained by Keating is the most convincing explanation for VL. He states that VL is justified since “the employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer’s reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss”.

I submit that this rationale is not only normatively sound but also reflects the current position on VL quite well, which will be explained below.

The conception of an ‘enterprise’ justification outlined in the essay title is too wide to properly reflect the current law on VL. It is accurate in the sense that it explains liability for those ‘akin to employment’ (since they are engaged in D’s enterprise). It also does explain cases like *Mohamud*, in which D seemed to be held liable by virtue of the fact that tortfeasor (T) was engaged in D’s enterprise in the sense of being an employee.

But I think *Mohamud* is at odds with more modern developments and should be considered anomalous. *Pace* Lord Toulson, the explanation of the court in that case that T was furthering his employer’s business is unrealistic. A man carrying out a racist attack has no interest in benefitting his employer. Moreover, the rationale mentioned in the essay title would militate in favour of liability in cases like *WM Morrison* [2020] or *BXB* [2023] since T’s in that case were in fact engaged in D’s enterprise: T in the former was an employee of D and T in the latter was a senior member of D’s organisation. Yet liability was not found.

The conception I have outlined above can better explain these cases. In *Mohamud* and *WM Morrison*, D did not create any risk of T’s committing the tort that they did: D did no more than provide the opportunity for this to occur. I think such a rationalisation is reflected quite well by the ‘close connection test’ as outlined in *WM Morrison*. If a tort is so closely connected to acts that T is authorised to do such that it can be regarded as being committed in the course of employment, I think that it is quite natural to describe D as having created a risk of that tort occurring.

The conception I have advanced is not without criticism. Some have argued that if this was the true basis for VL, the law would look different than it currently does. Horsey and Rackley question why D is liable only for torts committed by employees and not all accidents arising in the course of D’s

enterprise. I would respond by saying that it is unfair to impose liability in situations where D has only provided the opportunity for the tort to occur rather than genuinely increasing the risk of its occurrence in pursuit of a gain. In situations where D does materially increase the risk of an accident, strict liability will indeed be imposed in some scenarios, such as those covered by *Rylands v Fletcher*, demonstrating the prevalence of my conception of enterprise liability throughout the law as a whole. Stevens argues that enterprise risk cannot explain cases like *Cox*, in which D did not exist to make profit. But as Brodie points out, this assumes that the “benefit” that D gains must be a pecuniary one when there is no reason for it to be restricted in this way. If a hospital or a church furthers its goals by running certain risks it should be liable should those risks eventuate.

### **Independent Contractors**

I think the essay title is contradictory in its assertion of enterprise risk while simultaneously arguing for no liability with respect to ICs. On the justification advanced in the essay title, I think it is quite accurate to speak of independent contractor’s being engaged in D’s enterprise. It is true that such a contractor is also acting in their own interests and furthering their own enterprise but I question the binary distinction that ICs either only act for themselves or only act in the interests of others. I think both can be true at once. An IC engaged in his own enterprise, if performing work that is integral to D, can also be engaged in D’s enterprise by furthering D’s goals. Therefore, on the rationale given in the essay question, I think that VL can rightly be extended to tortious acts committed by an IC insofar as that IC can properly be described as engaged in D’s enterprise as well as his own. This formulation of the principle would not affect the decision in *Barclays Bank* itself, for example, since the doctor in that case is, I submit, not properly described as engaging in D’s enterprise. He was doing no more than treating patients who had been referred to him.

Finally, my explanation of enterprise liability also points towards liability for ICs. The rationale I have advanced can easily accommodate liability in such a situation where the contractor’s activities can be fairly said to be part of D’s business and where D has created the risk of T contractor’s tort. Therefore, I submit the position from *Barclays* that there can never be VL for an IC is anomalous and at odds with the most convincing and accurate singular rationale that we have for VL.

### **Conclusions**

In this essay I have argued that VL is not justified on the rationale described in the essay title, but instead a more refined version which I have outlined above. In line with both of these justifications however, I have sought to show that VL should be imposed on ICs in certain contractors and that the current position post-*Barclays* is unsatisfactory in this regard.

Camryn Taliku

**Conrad enters a supermarket shortly before Christmas, hoping to be able still to buy a turkey. There are no turkeys left on the shelf, but he sees that an elderly shopper, Edith, has one in her shopping basket. While she is not looking, he takes it. When he arrives at the checkout counter, he pays for the turkey with a debit card that belongs to one of his flatmates, Alan. He does not have Alan's permission to do this, but he hopes that Alan will not object and he intends to pay him back shortly after Christmas, either in cash or by making a deposit for the same amount of money to Alan's bank account. Outside the supermarket, he sees Edith in great distress, and she explains she has somehow lost her turkey, that it had been the last one on the shelf, and that she will not be able to cook the usual Christmas lunch for her family. Conrad recognises her and offers to sell to her the turkey (which he has just bought) for twice the amount that he had paid for it, and she gladly pays him in cash. Before Conrad has an opportunity to hand over the turkey, Edith's husband, Harold, approaches. Harold had also been in the supermarket though he had not seen Conrad take the turkey from Edith's basket. He nonetheless remembers that Conrad had been nearby and is suspicious of him. Harold asks Conrad whether he had taken the turkey from Edith's basket and Conrad denies this. Harold says that he does not believe him, and he seizes from Conrad's hands the cash which Edith had given him. As Harold walks away, Conrad follows him, insisting that Harold has misunderstood. Anticipating that Conrad might soon turn violent, Harold punches Conrad on the chin and knocks him to the floor. Consider the criminal liability, if any, of Conrad and Harold.**

**2023 Tripos**

### **Theft of the turkey**

Under s4(1) Theft Act 1968, the turkey suffices as property since it satisfies the 'all other property' requirement given that it is capable of being owned. The property belongs (s5) because it is sufficient that someone else has possession or control, or a proprietary right or interest in the thing (s5(1)). E has possession and control of the thing since it is in her trolley and a proprietary interest in it as she has interest in buying it. She may also have a proprietary right by being the first person to take it off the shelf with the intent of buying it. C has an intention to permanently deprive E of it because he is hoping to buy it to take home and presumably eat, which amounts to an intent to treat the thing as his own and dispose of it regardless of E's rights (s6(1)) by taking it out of her possession and control.

He is dishonest, notwithstanding his willingness to pay the supermarket for it (s2(2), since he knows he doesn't have E's consent (s2(1) to take it as he deliberately waits until she's not looking. Section 3(1), concerning appropriation requires any attempt to assume the rights of the owner. This may be satisfied because by taking it from another's basket, he is controlling who is able to buy the turkey, assuming the rights of the shop owner who are the only people who have control over transactions with customers. It does not matter that E does not own the turkey at this point, it is enough that it does not belong to C. Therefore, he commits theft of the turkey.

### **Paying for the turkey – theft and fraud**

By using his flatmate's card, commits fraud by false representation under s2 Fraud Act 2006 which requires dishonestly making a false representation and intending by it to make a gain for oneself or another, cause loss, or expose another to the risk of loss (s2(1). A false representation is one which is untrue or misleading, and C knows that it is or might be untrue or misleading (s2(2); this is satisfied because by using the card he makes a representation that he is A or has A's permission to do so; he knows this is not the case it says he has no permission; his hope in consent and intent to pay him back is immaterial. Therefore, he is dishonest. He also intends to make a gain by using it, which is the turkey as by pretending to be A / have his permission to use the card he gains access to property – the money on the card. He also causes loss to A, despite intending to pay him back, as his money is spent. A false representation can be made once submitted into any system or device (s2(5) so inserting the card into the card reader suffices for making the representation because it comes with the representation that he is legally using it.

The money on the account is a thing in action so capable of being stolen (Kohn). However, a theft conviction cannot be found as he lacks an intention to permanently deprive since he intends to pay the money back. Dishonest borrowing is not theft (Neal v Gribble) so if he pays back by deposit into his account, he does not commit theft as he has no intent to indefinitely exclude V's right to the money. However, if he pays him back in cash taking the debit money will amount to theft because he has an intent to permanently deprive of the thing in action, as he will replace it with tangible money rather than restoring the actual debit money he took. The elements of theft are satisfied because he is dishonest, since he acts without permission, he appropriates the property because by spending it he assumes the rights of the owner. The property suffices for the purposes of s4 (Kohn) and belongs to another since it is in A's name, as evidence of a proprietary right.

He must have an intent to return the card itself, or he commits theft of the card also, under the same principles as the theft of the thing in action, though the card is tangible property.

### **Selling the turkey**

C, although having an intent to gain money by selling it for twice its price, makes no false representation as he does not provide any misleading information, since he doesn't suggest that the price he is asking for the turkey is what he paid for it.

C commits theft of the cash because her lack of consent does not preclude a finding of appropriation (*Hinks*) because she has been deceived as to the circumstances of the sale, given his previous theft. The property suffices under s4(1), as discussed above and belongs to another since it was in her possession and control (s5(1)). C is dishonest under an application of *Hinks* where dishonesty was found based on exploitation of Hinks' lack of knowledge of the circumstances of the transaction. Under *Ivey*, he is also dishonest because he knows the turkey was stolen from her he is exploiting his theft to make a gain, and this would be dishonest to ordinary decent people, since making a gain from one's dishonest actions is dishonest. He has an intent to permanently deprive because by taking the cash he has an intent to treat it as his own by spending it. Therefore, he commits theft of the cash. It could be argued that he only commits theft of the amount above what she would have paid, since she would have paid this amount anyway, but he satisfies all the elements of the offence towards the whole amount, so theft lies in respect of the whole amount.

Once E pays for the turkey, he may undertake a duty to safeguard her financial interests by handing over the thing, however, his failure to hand over the thing is not done intentionally, since H prevents this, so he does not dishonestly abuse this position for fraud by abuse of position under s4 Fraud Act.

### **H steals the cash?**

H does not steal the cash because he is not dishonest since he believes, owing to his suspicion of C, that he has a right to deprive C of the property on behalf E. However, he must do so with the intent of doing it on E's behalf, or he will be guilty of theft: the cash is money under s4(1) Theft Act for the purposes of 'property', he has an intent to permanently deprive by walking off with the cash and thus disregarding the C's rights with an intent to treat it as his own (s6(1)) and appropriates it by taking it

from him as this amounts to assuming the rights of the owner by taking to deal with it as he pleases and the property belongs to another since it is in C's possession and control (s5(1)).

### **Battery**

H commits a battery against C when he punches him since this amounts to an unlawful application of force (Ireland) with intent to do so (Santana-Bermudez), since intent can be inferred from the deliberate act.

### **Self-defence?**

H may raise self-defence since pre-emptive force is allowed where the danger may be imminent or occur at some point in the future (Cousins). A punch so severe so as to knock someone to the ground was neither necessary nor proportionate since no indication of potential violence had occurred, so therefore was not reasonable despite H's beliefs (s76(4) CJIA).



CLARE COLLEGE  
LAW JOURNAL

Volume II: 2025

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