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CONTENTS

Editor's Foreword 7

A discussion of The [Independent Review of Administrative Law] Panel's analysis of the courts' growing tendency in Judicial Review cases to edge away from a strictly supervisory jurisdiction
Michael Feeney (Winner of the Michael Beloff Essay Prize) 9

Are longer sentences for youths convicted of murder, as proposed in the 'The Police, Crime, Sentencing and Courts Bill' justified?
Mark O'Connor (Winner of the Lee Essay Prize) 20

Understanding legitimate expectations: Why it is time to revisit Reynold's Trust Theory
Kieron Spoors 31

Compassion by compulsion: the case for strengthening corporate responsibility for modern slavery
Ben Cartwright 41

Advocacy tactics: approaching strategic litigation in the European Court of Human Rights
Zoe Chan 52

Quantifying legitimate interest - a formal derivation of the Makdessi Test
Karim Pal 61

Justice shortchanged? Redrawing the ethical boundaries of lifted judgments post *Crinion v IG Markets* [2013] EWCA Civ 587
Shen-Way Chong 70

Anorexia Nervosa in the Court of Protection: Discovering the Damaging Legacy of Incapacity and (In)Escapable Catch-22
Jordan Briggs 85

Balancing protection of reputation with freedom of expression: does the Defamation Act 2013 Reverse the 'chilling effect' previous defamation law had on freedom of expression?
Emma Darlow Stearn 100

Mission Aborted or Mission Creep? Implications of judicial review reforms in the Judicial Review and Courts Act 2022
Miranda Sadler 122

EDITOR'S FOREWORD

Welcome to the fourteenth volume of the Gray's Inn Student Law Journal. The Journal provides a unique opportunity for Gray's Inn students to showcase their talents and commitment to the Bar, alongside the chance to engage academically in any legal topic of their choosing. I have been impressed by the number of insightful submissions received this year, which are a true testament to the intelligence and aptitude of the Inn's student members. It's been a pleasure to read all of the submissions I received and I hope that readers of the journal will find the articles published herein as interesting as I have.

This year we have continued with the practice of assembling a panel of peer reviewers to help ensure the quality of contributions, and give students the opportunity to reflect and further improve upon their submissions if they so wished. I am supremely grateful to them for volunteering their time to assist me. This year's journal showcases a diverse range of interests and specialisms and includes essays from the Lee and Beloff Essay prize winners. Michael Feeney addresses the government's response to the Independent Review of Administrative Law's Report on judicial review reform, and the topic of judicial review more broadly. Mark O'Connor explores the issue of longer sentences for youths convicted of murder, questioning whether longer sentences are justified as proposed in the 'Police, Crime, Sentencing and Courts Bill'.

Other topics include the doctrine of legitimate expectations as Kieron Spoors examines Reynold's trust theory. Ben Cartwright exposes the weaknesses in the Modern Slavery Act and argues for greater corporate responsibility. Zoe Chan looks at how strategic litigation has been utilised in the European Court of Human Rights, and Shen Way Chong examines the ethical boundaries of lifted judgments. These are but a few of the range of subjects thoughtfully and robustly examined by this year's contributors.

My gratitude extends to the student members of Gray's Inn who elected me for this role, which I have enjoyed immensely, and to all of the students who submitted entries for this year's journal.

HELEN GREGORY

NOTE

The journal style for citation of legal authorities is OSCOLA, fourth edition. Legal abbreviations may be found in the Cardiff Index to Legal Abbreviations at http://www.legalabbrevs.cardiff.ac.uk

A DISCUSSION OF THE [INDEPENDENT REVIEW OF ADMINISTRATIVE LAW] PANEL'S ANALYSIS OF THE COURTS' GROWING TENDENCY IN JUDICIAL REVIEW CASES TO EDGE AWAY FROM A STRICTLY SUPERVISORY JURISDICTION

Michael Feeney

Winner of the Michael Beloff Essay Prize

'The [Independent Review of Administrative Law] Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision-makers has been replaced, in essence, with that of the court. We should strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament.'[1]

A BARRISTER (PSEUDONYM)

Introduction

The quotation above is taken from the government's response to the Independent Review of Administrative Law's (IRAL) Report on judicial review reform, and it concisely summarises the government's fears that the courts in judicial review cases are becoming increasingly interventionist and usurping the role of Parliament and the executive. A detailed look at the IRAL Report and at judicial review more broadly demonstrates, however, that these fears are largely unfounded. There is widespread agreement amongst legal commentators and practitioners that the role of the judiciary is to play a supervisory role without making judgments based on the merit of decisions themselves, and the courts' respect for the expertise and democratic mandate of Parliament and the executive should not be overshadowed by a small selection of extremely unusual high-profile cases. It is inevitable that some judicial review cases will involve politically controversial issues, but when deciding these cases the courts have a duty to ensure the legality of government action even when this is bound to have political consequences. To the extent that the courts are so metimes forced to undertake

substantive review, this is largely due to the Human Rights Act 1998 (HRA), which Parliament has the power to repeal whenever it wishes to do so.

The first part of this essay begins by looking at the IRAL Report in detail, demonstrating that the government's characterisation of the IRAL Report is mistaken. The second part of this essay looks at judicial review more broadly, showing that the courts are well aware of their constitutional role and are careful not to usurp the role of Parliament or the executive even when deciding cases that have political consequences. The third part of this essay argues that by undertaking substantive review under the HRA the courts are not trespassing on the territory of Parliament or the executive, especially since Parliament has the option to repeal the HRA whenever it wishes to do so. The fourth part of this essay concludes by arguing that the government's unfounded fears of interventionist courts potentially pose a real threat to the UK constitution, as the government might resort to ouster clauses which would place the judiciary in the impossible position of having to choose between parliamentary supremacy and the rule of law.

2. The IRAL Report

In the first sentence of the quotation above, the Rt Hon Robert Buckland QC MP writes that, 'The [Independent Review of Administrative Law] Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.'[2] This characterisation of the IRAL Report is inaccurate, as the Report actually shows that the courts are well aware of their supervisory role and that there is no need for large-scale reform to curb the excesses of interventionist courts. In the chapter on justiciability, for example, the Report concludes by stating, 'The first response would be - as a general rule - to allow the courts to take the lead in this area of law, and trust in the courts to properly observe the boundary between what sorts

[1] Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, Judicial Review Reform: The Government Response to the Independent Review of Administrative Law (CP 408, March 2021) [2].

[2] Ibid [2].

of exercises of public power (and issues in relation to the exercise of that power) should be regarded as justiciable and what sorts should be regarded as non-justiciable. We have a number of reasons for favouring this response.'[3] This quotation is representative of the Report as a whole, which concludes that, in general, the principles of judicial review are understood and followed by the courts. Apart from recommending legislation to reverse the decision in *R (Cart) v The Upper Tribunal*[4] and allowing courts to suspend a quashing order, the Report states that the government should refrain from undertaking any further far-reaching reforms.[5]

This is not to suggest that the current system of judicial review is perfect, and after a more detailed and thorough review, procedural reforms could usefully be undertaken to improve efficiency and prevent unmeritorious cases from taking up the time of the courts and the executive.[6] It is important to emphasise, however, that any problem with judicial review does not lie with courts deciding cases based on merit. This is because, as the IRAL Report puts it, 'the great majority of cases involve the straightforward application of well-established judicial review principles.'[7] This analysis is supported by Appendix D of the Report, which shows that the vast majority of judicial review cases are settled or decided in favour of the Defendant and that the success rate has remained relatively stable over the last twenty years.[8] While this might give the government a genuine grievance in the sense that unmeritorious cases might be taking up too much time and too many resources, it does not provide a

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[3] Lord Edward Faulks QC, Carol Harlow QC, Vikram Sachdeva QC, Alan Page, Celina Colquhon, Nicholas J McBride, *The Independent Review of Administrative Law* (CP 407, March 2021) [2.68-2.69].

[4] [2011] UKSC 28.

[5] *The Independent Review of Administrative Law* [Conclusions 8].

[6] On this point see Rt Hon Baroness Hale of Richmond, *Independent Review of Administrative Law: Response to a Call for Evidence* (EIN 106, October 2020) [4].

[7] *The Independent Review of Administrative Law* [Conclusions 6].

[8] Ibid [D36-D37].

basis for stating that the courts are increasingly quashing government decisions based on the merits of the decisions themselves. In fact, in the government's response to the IRAL Report, the only concrete example Robert Buckland QC MP can provide of courts usurping the role of Parliament or the executive is the concept of 'fiduciary duty', which has long ceased to be part of the law.[9] This example hardly gives credence to the idea that there is a current constitutional crisis caused by the judiciary ignoring its supervisory role. In actual fact, the IRAL Report portrays a judicial system in which the courts understand their supervisory role, as is made clear by the Report's overall conclusion that 'the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action.'[10] Unfortunately, the government has not accepted this clear conclusion, and their characterisation of the IRAL Report is inaccurate.

3. A Broader Look at Judicial Review

Why then is the government so afraid of interventionist courts when the IRAL Report does very little to support such fears? The answer is the government's defeat in the two recent high-profile cases of *R (Miller) v Secretary of State for Exiting the European Union*[11] and *R (Miller) v The Prime Minister* (hereafter referred to as *Miller 1* and *Miller 2* respectively).[12] The government's preoccupation with *Miller 2* in particular explains why the government's response to the IRAL Report focused so much on the concept of 'nullity' (which was deployed in *Miller 2*).[13] The fact is, however, that in both of these landmark cases the Supreme Court made a legal decision about the legality of government action without considering the political merits of Brexit. In *Miller 1* the majority held that an Act of Parliament was necessary to withdraw from the EU, and in *Miller 2* the Supreme Court unanimously

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9 *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* [29].

10 *The Independent Review of Administrative Law* [Conclusions 15].

11 [2017] UKSC 5.

12 [2019] UKSC 41.

13 *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* [71-81].

held that the government's prorogation of Parliament was null and void because it had offended the principle of parliamentary supremacy. In both *Miller 1* and *Miller 2* the Supreme Court did not overstep the mark by ensuring that, even within a politically sensitive context, the legality of the government's actions was properly assessed. Neither of the judgments was concerned with the merits of Brexit, and in coming to its legal decision in both cases the Supreme Court rightly disregarded the inevitable political consequences that would follow from any judgment either way. Although academic and legal debate over whether *Miller 1* and *Miller 2* were rightly decided is perfectly legitimate and welcome, neither *Miller 1* nor *Miller 2* furnish an example of the Supreme Court 'becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.' Both cases were focused squarely on *how* the government wished to accomplish its agenda, not on the merits of the agenda itself.

Despite the undoubted significance of *Miller 1* and *Miller 2* in constitutional terms, these two cases should not be allowed to dominate every discussion of judicial review because both cases were incredibly unusual. As the IRAL Report says, 'While both Brexit cases- *Miller 1* and *Miller 2*- represented substantial setbacks for the government and were of considerable constitutional importance, we are not convinced that the decisions (novel though they were) in those cases are likely to have wider ramifications given the unique political circumstances which provided the backdrop for those cases being brought.'[14] These two cases understandably attracted a huge amount of interest and attention given what was at stake in each, but what makes them so interesting is also what makes them unrepresentative of judicial review as a whole. For every controversial case in which the government is held to have acted illegally there are many more routine cases in which the government is held to have acted legally.[15] An examination of judicial review beyond *Miller 1* and *Miller 2* reveals that in general the courts are careful not to trespass on the territory of Parliament or the executive.

For example, in his response to a call for evidence from the IRAL, Lord Reed notes that the

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14 *The Independent Review of Administrative Law* [2.37].

15 Ibid [2.74].

Conservative manifesto statement 'judicial review is not, and should not be regarded as, politics by another means' is a direct quote from two judicial review cases in which the challenges raised were dismissed because they were considered political rather than judicial.[16] Two more recent cases also demonstrate that the courts are well aware of the limits on their supervisory role in judicial review.

First, the recent Court of Appeal judgment in *Bell v Tavistock and Portman NHS Foundation Trust* concerning the capacity of children to consent to treatment for gender dysphoria begins by stating clearly that, 'The treatment of gender dysphoria is controversial. Medical opinion is far from unanimous about the wisdom of embarking on treatment before adulthood. The question raises not only clinical medical issues but also moral and ethical issues, all of which are the subject of intense professional and public debate. Such debate, when it spills into legal proceedings, is apt to obscure the role of the courts in deciding discrete legal issues. The present proceedings do not require the courts to determine whether the treatment for gender dysphoria is a wise or unwise course or whether it should be available through medical facilities in England and Wales. Such policy decisions are for the National Health Service, the medical profession and its regulators and government and Parliament.'[17]

This clear statement of the judiciary's limitations demonstrates the Court of Appeal's obvious desire not to issue (or even be seen to issue) a judgment based on medical or moral considerations. The court's ultimate conclusion that it is a matter of clinical judgment in each individual case as to whether a child can give informed consent or not shows the court's understanding and acceptance of its own lack of expertise compared to the knowledge of medical professionals. *Bell* is typical of the way in which, for the vast majority of cases, the courts accept their supervisory role and acknowledge the superior knowledge and expertise of other bodies in non-legal areas.

To give one final example, in 2020 the Supreme Court refused permission for an appeal from the

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16 Rt Hon Lord Reed, *Response to a Call for Evidence* (EIN 135, October 2020) [12]. The two cases cited by Lord Reed are *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326] and *R (Wilson) v The Prime Minister* [2019] EWCA Civ 304 at [56].

17 [2021] EWCA Civ 1363 [3].

Court of Appeal on the legality of the Coronavirus Regulations, stating that no arguable point of law was raised on the appeal.[18] Unsurprisingly, this decision attracted far less attention than *Miller 1* and *Miller 2*, but this refusal of permission is actually more illustrative of judicial review as a whole because it shows the way in which the government's assessments are normally respected. Once an unhelpful obsession with *Miller 1* and *Miller 2* is overcome, it becomes clear that the courts, in the vast majority of cases, respect the expertise and democratic mandate of Parliament and the government by refraining from making their own decisions based on the merits of the cases themselves.

4. The Human Rights Act and Proportionality

Cases that engage the HRA provide an exception where the courts do sometimes engage in weighing up the merits of a decision when assessing whether an infringement of an individual's human rights was proportional or not. For example, in *A and others v Secretary of State for the Home Department* the House of Lords held that section 23 of the Anti-Terrorism, Crime and Security Act 2001 breached Article 14 of the European Convention on Human Rights (ECHR) because only non-British nationals were subject to indefinite detention without trial and there was no justification for such discrimination.[19] In cases such as these the merits of an Act of Parliament or secondary legislation are considered, although the ultimate sanction under section 4 of the HRA is a declaration of incompatibility which, in theory, Parliament is under no compulsion to act upon.

Under the HRA there is therefore substantive review of the kind complained of in the government's response to the IRAL Report. In undertaking such substantive review, however, the courts are following their duty under the HRA and the cause is not the courts' approach to judicial review but the HRA itself. Under section 6 of the HRA it is unlawful for a public authority to act in a way that is incompatible with any of the rights incorporated into the HRA by section 1. Section 6 therefore forces the courts to assess whether a public authority has disproportionately infringed an individual's

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18 *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605.

19 [2004] UKHL 56 at [68] and [73].

human rights, and in conducting the proportionality test when an individual's human rights are engaged the courts are following the express will of Parliament as set out in the HRA. If the government does not approve of such substantive review then the obvious remedy is to repeal the HRA rather than blaming the courts' approach to judicial review.

There is, however, some concern that the proportionality test might survive even a repeal of the HRA, and these fears are not entirely unfounded. The landmark case of *R(Daly) v Secretary of State for the Home Department* was the first time that the proportionality test in a human rights case had been adopted by the House of Lords, but the basis of the judgment was not the HRA or the ECHR (although both of these were mentioned) but the common law right to legal professional privilege.[20] There is therefore some reason to believe that even without the HRA the courts might take it upon themselves to protect what are seen as fundamental common law rights by adopting a sort of proportionality test. In addition, Professor Jason Varuhas has argued that the courts have become increasingly willing to rely on the 'principle of legality', which requires any infringement of common law rights to be stated expressly.[21] The problem with this development in particular is that, unlike the ECHR, there is no clear list of what common law rights exist or are capable of engaging the principle of legality.[22] If the HRA were repealed, there is therefore evidence that the courts might still be prepared to protect what are seen as fundamental rights.

Despite this, it is misplaced to say that interventionist courts usurping the role of Parliament and the executive is an acute problem at the moment. The concept of 'deference' means that in an area where courts lack expertise such as foreign policy or national security the courts will be slow to intervene.

A proportionality review may still be undertaken when there are issues of foreign policy or national security at stake, but the government's assessment in any such case will be given great weight and it

20 [2001] UKHL 26 at [23].

21 Jason N.E. Varuhas, 'The Principle of Legality' [2020] CLJ 578, 578.

22 Ibid, 582.

will only be in rare cases that the government's reasoning will be rejected.[23] Arguably there was not much deference shown in *Miller 2*, but this was because the government failed to provide any reasoning or justification for the prorogation, instead relying solely on the argument that prorogation was non-justiciable.[24] In the extremely unlikely scenario that the prorogation of Parliament was subject to judicial review in the future, great weight would be given to any justification provided by the government. The cases in which an individual's fundamental rights are vindicated are much more prominent and well-known than the more routine cases in which deference and respect for the government's expertise and democratic mandate are the deciding factors, but this prominence should not act as a distraction from what is happening in general for the vast majority of cases.

Proportionality is a fundamental protection for fundamental rights, but in practice its main benefit is usually to force the government to provide adequate justification and explanation when making decisions affecting fundamental rights. This requirement helps further good administration without normally providing a ground on which government decisions are quashed. As the experience of the recent pandemic has shown, even when infringements on individual rights are extreme the courts are ready and willing to accept the government's diagnosis of their necessity given the government's superior expertise. The existence within judicial review of proportionality is an important safeguard of last resort, but it does not in general pose an existential threat to the separation of powers that is respected by the judiciary.

5. Conclusion and Implications

It is not just semantic or academic to dispute the government's characterisation of judicial review in their response to the IRAL Report. The government's unfounded belief that the courts are increasingly trespassing on the government's territory poses a real threat to the UK constitution and the rule of law. In its efforts to address a mischief that does not exist in reality, the government might be tempted to resort to ouster clauses preventing certain public bodies or certain types of decisions

23 See for example A and others v Secretary of State for the Home Department, discussed above, for a rare example of this happening.

24 [2019] UKSC 41 [58]-[62].

from being subject to judicial review. Any such reforms are only under consideration at the moment, but the government's response to the IRAL Report states that this an option that the government would like to explore further.[25] Ouster clauses present the courts with an insoluble problem, as they essentially force the courts to choose between parliamentary supremacy and the rule of law. This tension in the past has led the courts to stretch statutory language to breaking point in order to effectively ignore ouster clauses.[26] If the government persists in its mistaken belief that the courts are intent on frustrating the government's agenda, the use of ouster clauses in the future could destroy the balance of the UK constitution in which the courts refrain from making political decisions based on merit and in which public bodies submit to judicial scrutiny of the legality of their actions. The willingness of public bodies to be subject to scrutiny is absolutely vital for effective, lawful administration, and a false perception that the judiciary is the enemy of the executive is in danger of preventing this.

To give just one example, in August 2020 a Home Office advertisement referred to 'activist lawyers' who were allegedly attempting to 'delay' and 'disrupt' the deportation of illegal immigrants.[27] This advertisement is unfortunately representative of a government which blames lawyers for doing their jobs by applying the law and holding public bodies to account. This attitude is far more threatening to the rule of law than the spectre of interventionist courts which exist more in imagination than in reality. As the IRAL Report puts it, 'the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.'[28] It is worrying that the substance of the

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25 *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* [11].

26 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

27 For the BBC News story covering the Home Office's withdrawal of the advertisement see 'Home Office scraps "activist migrant lawyers clip"' <https://www.bbc.co.uk/news/uk-politics-53937593> accessed 29 September 2021.

28 *The Independent Review of Administrative Law* [Conclusions 15].

government's response to the IRAL Report shows no sign of heeding this call for mutual respect, despite paying lip-service to it at the end.[29] The judiciary have a duty to continue to respect the limitations on their supervisory role, but it is vital that legal commentators and practitioners do not passively accept the narrative that the courts are becoming more interventionist in judicial review cases. There is far more agreement on how judicial review should work in practice than the government's worries would lead one to believe.

This agreement needs to be highlighted and emphasised before the government mistakenly takes drastic action that is not needed and that would place an incredible strain on the UK constitution.

[29] See *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* at [119-120] for the concluding passage where the government refers to the IRAL Report's conclusion.

ARE LONGER SENTENCES FOR YOUTHS CONVICTED OF MURDER, AS PROPOSED IN THE 'POLICE, CRIME, SENTENCING AND COURTS BILL' JUSTIFIED?

Mark O'Connor

Written and awarded in October 2021

Congruent with an adult convicted of murder, the sentence applicable to a youth so convicted, Detention at Her Majesty's Pleasure (DHMP), carries a mandatory life sentence under Section 90 of the Powers of Criminal Courts (Sentencing) Act 2000. The minimum period of that life sentence to be served in custody must be set by the court. The Proposals at Clause 103 of the Police, Crime, Sentencing and Courts Bill, (hereafter, the "Bill"), function to substitute Para. 6 of Schedule 21 of the Sentencing Act 2020, for Para. 5A under the Bill.[1] Para. 6 provides that "if the offender was aged under 18 when the offence was committed, the appropriate starting point, in determining the minimum term, is 12 years".[2] The Bill substitutes that provision for a new framework which reflects the age of the offender and the seriousness of the offence.[3] Under the proposals, the starting point is higher where the offence falls within the categories applicable to adult offenders under paras. 3 through 5 of Schedule 21, and where the offender is closer to adulthood.[4]

Due to the Bill's length, and particular provisions having attracted public controversy, the clause itself has received relatively scant attention on its course through the parliamentary process. During the Bill's second reading in the House of Commons, Mr. James Gray MP spoke passionately on the murder of his constituent Ellie Gould and what he considered the disproportionately low sentence her 17-year-old killer received.[5] His support received the implicit endorsement of Dr. Kieran Mullan MP

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1 When the Bill was proposed in the House of Commons, the clause in question was Clause 103. However, when proposed in the House of Lords, an inserted clause has resulted in the relevant clause being Clause 104.

2 Sentencing Act 2020, Schedule 21, Para 6.

3 Police, Crime, Sentencing and Courts Bill 2021, Clause 103.

4 Sentencing Act 2020, Schedule 21, Paras 3-5.

5 HC Deb 15 March 2021, vol 691, cols 85-6.

who condemned as "intellectual snobbery" the equation of harsher sentencing with unsophisticated baser instincts and a misunderstanding of the interlink between rehabilitation and recidivism.[6]

The House of Commons Committee reviewed the clause in its twelfth sitting.[7] Former Parliamentary under Secretary of State at the Home Office and Ministry of Justice Chris Phlip MP, outlined the logic of the clause's new framework. Taking as a basis the Sentencing Council's guideline for young offenders, that framework, he advocated, represents an approximation of the equivalent minimum term for an adult.[8] The Sentencing Council propose that for a youth offender aged 15-17, the minimum term should fall broadly within half to two-thirds of the adult sentence, and for those under 15, further reductions should be applied.[9] However, the tapering within the new framework creates an exponential curve which deviates from the Sentencing Council's guidelines: For children aged 10-14, the starting point resides at half the adult equivalent, aged 15-16 at two-thirds, and aged 17, 90%.[10] These reductions would be applied with reference to the particular seriousness of the offence and the equivalent adult starting points. The resultant sliding scale reflects a nexus between chronological age and the seriousness of the offence which purports to recognise the various stages of a child's development, and the manifest difference between a child of 17 and a child of 10. Likewise, it reduces the gap in starting points between a 17-year-old and an 18-year-old who has recently come of age.

While the Sentencing Council do reference a system of appropriate reductions in relation to the sentencing of youths, it is also made clear that such a guide should not be applied mechanistically.[11]

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6 *HC Deb 16 March 2021, vol 691, col 243.*

7 Public Bill Committee, *Police, Crime, Sentencing and Courts Bill* (HC 2021-22 PBC (Bill 5)).

8 Ibid.

9 Sentencing Council, *Guideline for Sentencing Children and Young People*, 2017, Para 4.10.

10 Public Bill Committee, *Police, Crime, Sentencing and Courts Bill* (HC 2021-22 PBC (Bill 5)), col 485.

11 Sentencing Council, *Guideline for Sentencing Children and Young People*, 2017, Para 6.46.

As the guidelines make clear, the emotional and developmental age of a child is of at least equal importance as their chronological age.[12] While, perhaps intuitively, the Bill's proposals for a gradated framework could be seen as a statutory basis which better corresponds to a young offender's culpability, it remains a framework which will require the input of judicial discretion. Analysing Para. 6 of Schedule 21, the Court of Appeal in *R v H* concluded that no mathematical table can accurately reflect the experience of a young offender, or the extent to which that offender may or may not have learned from or been damaged by the experiences to which they were exposed.[13] The expectation that a child or young person will be dealt with less severely by the court than an adult derives from a young person's lack of experience, manifesting in a reduced empathetical understanding of the consequences of their actions. This imbues the assessment of culpability with an additional complexity, compounded further by a young person's subjective vulnerability in view of their upbringing and experiences. Therefore, it is always more prudent that the sentencer should be able to make a balanced and unencumbered judgement in this respect.

Notwithstanding, the starting points prescribed by the Bill were purposely intended to be subject to judicial discretion. Since conception, the Government's proposals have rejected the imposition of mandatory minimum custodial terms, despite the White Paper seeming to justify incorporation of the new framework on the basis that the court, under the current Schedule 21, is restricted in its ability to give a sentence which properly reflects the age of the offender.[14] As Sir Igor Judge emphasised in his then capacity as President of the Queen's Bench Division, it is worth the sentencer reminding themselves that irrespective of the starting point, the end result may be a minimum sentence of any length.[15] By contrast with the provisions applicable to adult offenders, the ubiquitous 12-year starting point for under-18s is entirely open-ended. It makes clear that the appropriate resulting sentence

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12 Ibid.

13 Reference by HM Attorney General No. 126 of 2006 (R v H) [2007] 1 All ER 1254, [2007] EWCA Crim 53, Para 34.

14 Ministry of Justice, 'A Smarter Approach to Sentencing' (September 2020) <https://www.gov.uk/government/publications/a- smarter-approach-to-sentencing> Page 94, Accessed 30 September 2021.

15 (R v H) [2007] 1 All ER 1254, [2007] EWCA Crim 53, Para 33.

should be fact specific, the court taking into account each and every aggravating and mitigating feature of the offence. The starting point serves to inform the beginning of the process which results in the sentence.

The elements of this process were expounded in *R v H* on AG-Reference 126 from 2006.[16] The offender, under the age of 15, pleaded guilty to the murder of an 11-year-old boy with whom he had purposively ingratiated himself through the mentoring service at the boys' school.[17] The aggravating features of the murder were immediately apparent. The victim was physically vulnerable, having suffered with cystic fibrosis, and was targeted at least in part due to that vulnerability. While the killing was not premeditated, the offender had spent some weeks manufacturing a scheme to ensure the victim's presence at his house in order that he might make untoward sexual advances. The victim's refusal triggered a chain reaction culminating in the lethal attack, which was sustained and perpetrated with an horrific level of violence. Finally, while attempts to conceal the victim's body were callow and not likely to aid any way in self- preservation, they encapsulated the offender's lack of compassion and remorse in the period after the killing.[18]

The elements of mitigation were also self-evident. In addition to being under 15 years of age and having no history of violence, the offender's upbringing and childhood were characterised by the court as "desperately sad and disturbing".[19] According to detailed psychiatric reports heard by the court, his particular emotional deprivation and denigration had resulted in a state of subjective stress and emotional disturbance indicative of an adjustment disorder.[20] Compounded by a low average intelligence, the offender was emotionally immature and vulnerable. The trial judge, McCombe J, had considered that the elements of mitigation offset the aggravating factors of the offence so that the

16 Ibid.

17 Ibid. Para 8.

18 Ibid. Para 37.

19 Ibid., Para 29.

20 Ibid.

sentencing process arrived back at the starting point of 12 years, having also included a full allowance for the guilty plea entered.[21] The Court of Appeal considered this to be unduly lenient. In making that assessment, Sir Igor Judge emphasised that while the elements of mitigation identified by the trial judge were relevant, the fact that the offender was under 18 had already been reflected in the starting point.[22] The court identified elements of the offence which could not be treated as wholly consistent with the offender's extreme youth. In particular, the elements of planning, the sustained violence and the calm efforts toward concealment. Despite the offender's age and particular disadvantages, taken together, these represented a "formidable level of culpability and seriousness".[23] The minimum custodial term of the offender's sentence was increased to 18 years, reduced to 15 with the appropriate allowance for his guilty plea.

The court's reasoning clearly elucidates that no arithmetical process can effectively determine an offender's culpability. However, it also demonstrates that while the level of responsibility and culpability of a young offender is likely to be lower than an adult, the manner in which an offender's age interacts with the other elements of the offence is dynamic. H's chronological age was relevant to the court in relation to the particular weight to be attached to his disturbed upbringing. However, when analysing his particular emotional vulnerability, chronological age was clearly secondary to his emotional and psychological development. In assessing his degree of culpability and, therein, the appropriate minimum tariff, age represented a multifaceted and idiosyncratic component of the offender's ultimate level of criminality. A young offender's emotional and developmental ages are not discrete numerical values, but a nexus through which the facets of an offence should be viewed. The nuance involved in making a balanced judgement of these matters is dependent upon the open-endedness of the statutory starting point. The same exercise when conducted under the Bill's new proposals is manifestly more complicated, without any corresponding benefit in the correctness or fairness of the resulting sentence. Any statutory interruption in the sentencing process must be

21 Ibid. Para 3.

22 ibid. Para 32.

23 Ibid. Para 43.

precise in what it is accounting for else it will distort the discretionary exercise.

This observation remains true where an offender's level of maturity exceeds what is expected of a young person of that age. In *R v Leon Clifford & Others* [2021], Brandon Liversidge was convicted of murder alongside four co-defendants, all over the age of twenty-one.[24] For Liversidge, aged 16 at the time of the offence, the starting point of 12 years was markedly different from the thirty-year starting point of those sentenced alongside him. Commencing sentencing, the judge made clear that the offender's age had already been taken into account through the lower statutory starting point. Proceeding, he found that, alongside the aggravating elements of the offence, Liversidge's "self-evident maturity and ... intelligence" justified raising the minimum term quite considerably, setting it at 20 years.[25] For a sixteen- year-old, committing murder for gain, the new framework prescribes an identical starting point of 20 years. There is no doubt that if the judge was sentencing under those new provisions, much of what he considered were the aggravating factors necessitating an increase in the minimum term would be deemed accounted for. However, the judge evaluated Liversidge's maturity and intelligence as increasing his culpability "even making allowance for the immaturity which [he] inevitably had as a sixteen-year-old".[26] He considered Liversidge to be an individual who was "devious and quite able to look after himself", an "intelligent person - more intelligent than the other defendants who gave evidence".[27] His comments revealed an offender he considered to be more culpable than a typical sixteen-year-old, whose sentencing under the new provisions would have commenced at the minimum term Liversidge received. The extent to which this greater culpability would then inform the sentencing exercise beyond what is already prescribed by the higher statutory starting point is unclear. Certainly, a deviation of eight years from that starting point, placing Liversidge at 28 years, would be inappropriate, being considerably longer than any of his

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24 R v Leon Clifford & Others [2021], Sentencing Remarks of Picken J <https://www.judiciary.uk/wp- content/uploads/ 2021/03/barrydocks.sentencing> Accessed 30 September 2021.

25 Ibid. Para 60.

26 Ibid.

27 Ibid.

adult co-defendants. Indeed, increasing the minimum term by any degree moves the sentence beyond what the judge considered Liversidge's ultimate criminality. In removing from consideration elements which would normally guide a sentence from its starting point to its conclusion, the new framework undermines the balanced consideration and judgement of the sentencer.

Nevertheless, the new framework is premised on a policy decision to increase minimum custodial terms for the most violent crimes. This was apparent in the Government's proposals for the Bill and from the character of the debate as the Bill progressed through the House of Commons.[28] Indeed, the Bill as a whole was acknowledged by Lord Dholakia during the second reading of the House of Lords as containing "a raft of provisions designed to further increase the harshness of sentencing".[29] There is no inherent illegitimacy in advocating for such a policy position and putting forward a bill to achieve such. However, even at the expense of unfettered judicial discretion, for the most serious crimes, usually those which linger in the public eye, an adherence to the equivalent adult categories of severity does not necessarily achieve the harsher sentences envisaged. For example, in *R v Markham and Edwards* (2017), Haddon-Cave J identified numerous aggravating factors, most prominent being the double murder.[30] Amongst the judge's deliberations were included: the "remarkable premeditation"; the unnatural betrayal of the relationship inherent in matricide and sororicide; the vulnerability of the victims, who were attacked in their beds; the brutal killings "in the form of executions"; the use of a knife, which was brought to the scene; the grotesque conduct following the killings; and the offender's "expressed happiness" at what they had done.[31] At the time of the offence, Lucas Markham and Kim Edwards were both under the age of 15 and were sentenced to a minimum term of 21 years before credit for guilty plea. The Court of Appeal approved the

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28 Ministry of Justice, 'A Smarter Approach to Sentencing' (September 2020) <https://www.gov.uk/government/publications/a- smarter-approach-to-sentencing> Page 94, Accessed 30 September 2021.

29 HL Deb 14 September 2021, vol 814, col 1341.

30 R v Markham & Edwards [2017] EWCA Crim 739.

31 Ibid. Para 39.

minimum term, considering 21 years to be neither wrong in principle, nor manifestly excessive.[32] Under the new framework, the starting point for the minimum term would have been 15 years, Markham being 14 and Edwards, 13, with the offence falling under Para. 3(1) on account of the double murder. This starting point is significantly below the minimum term arrived at by both courts.[33] The double killing was only one of many aggravating features of the crimes. However, the Court of Appeal considered, much which served to aggravate the crimes could be said to coalesce into "one articulation of adolescent willingness to behave without thought of consequence".[34] The extent to which the 15-year starting point would cover the cumulative aggravating effect of that one articulation is unclear, and would no doubt be so for the sentencer.

In *R v Aziz* [2019], the sentencing judge concluded that the aggravating factors of the offence justified a minimum term of 24 years, reduced to 19 in view of the mitigating factors.[35] Under the new framework, the starting point would have been 17 years, Ayman Aziz being 16 years old, and the offence falling under Para. 4(1) of Schedule 21 owing to the offender's sexual motivations for the crime. As in *R v Markham and Edwards*, this starting point is lower than the minimum term Ayman Aziz received, and the same distortion to the sentencing process occurs. However, here a further point is relevant. In addition to the sexual motivation, the killing was aggravated by numerous other factors: A weapon was brought to the scene for the purpose of committing the murder, there was an additional offence of rape, and the victim was subjected to a prolonged period of suffering owing to the particular sadistic element of the offending.[36]

The aggravating factors so greatly compound the gravity of the offence, that each ought to be weighed during the sentencing exercise. That exercise requires the setting of a minimum term which

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32 Ibid. Para 59.

33 ibid.

34 Ibid. Para 55.

35 R v Aziz [2019] EWCA Crim 1568, Para 17.

36 Ibid. Para 26.

reflects the overall seriousness of the offences. On appeal, the first ground was the willingness of the sentencing judge to "float free" from the statutory starting point of 12 years.[37] Defence counsel argued that for the starting point to have purposive effect, it must exert a "substantial drag" on aggravating features.[38] In rejecting that submission, the Court of Appeal held that aggravating and mitigating factors should not lead to a "rigid arithmetical increase or decrease in minimum term", but required a "subtle evaluation" by the sentencing judge.[39] With one element elevated to define the statutory starting point, the heinous brutality which the judge considered justified an increase to 24 years before mitigation, loses its weight in the assessment of overall criminality.

At the Committee stage in the House of Commons, the new framework was characterised as "predictable and transparent, so that everyone can see how the system works". Public confidence in the criminal justice system and a sense of justice served for the families of victims is important. However, it is not in question that the courts routinely issue minimum sentences above the starting point. The Government impact assessments in relation to the relevant provisions of the Bill found that DHMP tariffs between 2011 and 2019 ranged between 5 and 27 years, and that approximately 5% were for 23 years or more.[40] There are low numbers of murders committed by persons under 18.

Between 2015 and 2019, while fluctuating, there has been an average of 27 DHMP sentences per year.[41] The majority of these offences are committed by those aged between 15 and 17, for whom the new proposals will result in higher starting points in all but one circumstance. Moreover, as the Government's impact statements acknowledge, there is no evidence the provisions will have an

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37 Ibid.

38 Ibid. Para 19.

39 Ibid. Para 25.

40 Ministry of Justice, 'Sentencing, Release, Probation and Youth Justice Measures' March 2021, <https://publications.parliament.uk/pa/bills/cbill/58-01/0268/MOJ_Sentencing_IA_FINAL_2021>, Page 11, Accessed 30 September 2021.

41 Ibid.

impact on public safety through either incapacitation, deterrence of rehabilitation.[42]

On course through the House of Commons, the new framework has been supported with reference to the murder of Ellie Gould.[43] That argument, derived from the campaigning surrounding Ellie's tragic and untimely death, equates the value and worth of a victim with the sentence of their killer.[44] Those campaigns have quite rightly reverenced the victim of the crime. However, when that killer is a child, the sentencing process must be exempt from the pressures of the press and media. The focus must remain on the particular culpability of the offender. The sentence received is not intended, nor could it conceivably, measure, quantify or recompense the inevitable grief of a victim's family members. While there is an inherent logic to tapering minimum sentence starting points the closer to adulthood an offender comes, the proposals fail to recognise the nature and length of time over which a young person develops and matures. The new framework presumes that a 17-year-old is on the cusp of full emotional development as an adult. However, that presumption disregards a great deal of evidence regarding the maturation of young people beyond the age of 18.[45] It also assumes that the rights and vulnerabilities of children and the corresponding obligations of the state gradually diminish as they approach that age. Contrary to the presumptions of the new framework, studies into the development of adolescents have found that, to account for the delayed timing of role transitions, adolescence is better understood as extending to the age of 24.[46] In other areas of public policy, the Government's recent changes have suggested recognition of the fact that a young person's vulnerability continues

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42 Ibid. Para 77.

43 HC Deb 15 March 2021, vol 691, cols 85-6; Public Bill Committee, *Police, Crime, Sentencing and Courts Bill* (HC 2021-22 PBC (Bill 5)).

44 Public Bill Committee, *Police, Crime, Sentencing and Courts Bill* (HC 2021-22 PBC (Bill 5)); <https://www.itv.com/news/westcountry/2021-03-10/huge-sense-of-relief-parents-of-murdered-school-girl-ellie-gould-win- sentencing-fight> Accessed September 2021

45 Susan Sawyer, et al. 'The age of adolescence.' *The Lancet Child & Adolescent Health* 2.3 (2018): 223-228, page 224.

46 Susan Sawyer, et al. 'The age of adolescence.'

beyond the age of 18, such as the extension to the entitlements of care leavers until the age of 25.[47]

In setting the starting point of 12 years, Schedule 21 creates a presumption that a young person is less culpable for their actions. That presumption reflects the rights and particular vulnerabilities of a young person, while always remaining subject to judicial discretion. Removing the free-standing approach under Para. 6 of Schedule 21 deprives young people convicted of murder of a significant safeguard. In V v United Kingdom [2000], the European Court of Human Rights considered the compliance of DHMP sentences with Article 3, which prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence.[48] It found that the punitive element inherent in the minimum term approach did not give rise to a breach of Article 3.[49] Moreover, in relation to mandatory life sentences, neither S. 142(1) of the CJA 2003 which sets out the general purposes of sentencing, nor the principle aim of the youth justice system that aims to protect the welfare of the offender, apply.[50] In place of these protections is the current statutory regime, which recognises that the sentencing of children and young people comes from a different place than the sentencing of an adult. The new framework attempts to establish consistency with the sentencing of adults by upwardly adjusting sentences for young people. Article 37 of the UN Convention [on the Rights of the Child] provides that the detention of a child should only be for the shortest appropriate period of time. Assessing that necessary period should remain within the purview of the sentencer.

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47 Written Evidence Submitted by the Youth Justice Board, 11 June 2021

48 V v The United Kingdom, Application no. 24888/94 [1999] ECHR 171, Para 92.

49 Ibid. Para 95.

50 Sentencing Council Guidelines in Overarching Principles, Para 1.2.

UNDERSTANDING LEGITIMATE EXPECTATIONS: WHY IT IS TIME TO REVISIT REYNOLD'S TRUST THEORY

*Kieron Spoors**

Introduction

The doctrine of legitimate expectations is well established in UK administrative law. In principle, it protects the claimant's expectation that a public authority will act according to its representations. Yet, in the decades since the Court first recognised it in *Schmidt v Secretary of State for Home Affairs*,[1] there has been no clear understanding of why these expectations should be protected. Academics and judges have offered several justifications, which, rather than helping to understand the doctrine, highlight the uncertainties about its normative foundations.

This article argues that it is time to revisit the trust theory developed by Paul Reynolds.[2] The trust theory explains why legitimate expectations should be protected in ways that existing principles have failed to do. The purpose of this article is twofold. First, it is an opportunity to re-evaluate the normative principles that are argued to underpin the doctrine of legitimate expectations. Second, it will shed much-needed light on the utility of the trust theory, which courts and academics have rarely considered.

In Part 2, this article will explain Reynolds' trust theory. Part 3 will then evaluate this theory. First, it will look at what support can be found in the case law. Second, it will analyse trust as a normative principle, noting two justifications for legitimate expectations that courts often cite: fairness and good administration. Third, it will address the criticisms of the trust theory put forward more recently by Joe Tomlinson. This article will conclude with a call for greater recognition of the trust theory.

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1 [1969] 2 Ch 149, 170 (Lord Denning MR).

2 Paul Reynolds, 'Legitimate expectations and the protection of trust in public officials' [2011] PL 330 ('Reynolds').

Explaining Reynolds' trust theory

First, it is necessary to explain the trust theory that, according to Professors Wade and Forsyth, "captures precisely why legitimate expectations should be protected."[3] For Reynolds, this theory concerns an individual's trust in a public authority's representations.[4] The public authority makes a promise, and the individual trusts the public authority to be faithful to that promise. Reynolds argues that what underpins the existence of this trust and the need to protect legitimate expectations is the need for promises to be kept.[5] The breaking of promises undermines trust; without trust, there is no promise and no legitimate expectation.[6]

While Reynolds suggests that the protection of legitimate expectations can promote "general" trust in government, he puts forward the notion of "specific trust," in which the relevant trust is the trust in the decision-maker to do what they have indicated they will do.[7] Thus, the doctrine's application is limited to cases where trust can provide "genuine guidance."[8] The trust theory primarily addresses the existence of an actual expectation.[9] Reynolds notes that it is for the courts to consider any overriding interests and the remedy to be granted,[10] though he suggests that the relevance of trust will assist in deciding the intensity of review and applying that to the case.[11]

In essence, Reynolds' trust theory proposes a better understanding of the doctrine's objectives. It does this by taking legitimate expectations back to its roots: the notion that when a public authority

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3 HWR Wade and Christopher Forsyth, Administrative Law (Oxford: Oxford University Press, 11th edn., 2009), 447.

4 Reynolds (n 2), 341.

5 *Ibid*., 343.

6 *Ibid*., 342-3.

7 *Ibid*., 343.

8 *Ibid*., 346.

9 *Ibid*., 343.

10 *Ibid*., 343-4.

11 *Ibid*., 348.

promises something, the individual expects its fulfilment, thereby placing trust in the public authority. If that trust is broken, the decision to renege on the promise can be challenged.

Evaluating Reynolds' trust theory

1.1 Support in the case law

While the courts are ordinarily not concerned with the theoretical when applying the doctrine to cases, we can find some support for the trust theory. In EU law, Advocate General Trabucchi in *Deuka Deutsche Kraftfutter GmbH BJ Stolp v Einfuhrund Vorratsstelle fur Getreide und Futtermittel* described trust, as protected by legitimate expectations, as "one of the superior rules of the Community legal order for the protection of individuals."[12] In Polish law, Anna Vigna and Dariusz Kijowski observed that it has been customary to regard the protection of legitimate expectations corresponding to "the principle of citizen's trust in the state and its laws."[13] Further afield, in the Hong Kong case *Ng Siu Tung v Director of Immigration*, dissenting Judge Bokhary PJ opined that the doctrine "facilitates the task of governance," which allows people to have faith in what their government says and does.[14] These examples show that the doctrine is not just about an individual's trust in the decision-maker. It goes to that individual's trust in the state.

While it is true that these examples are from other jurisdictions, there is evidence of the trust theory finding its way into UK jurisprudence, notably in immigration and asylum cases. In *Mehmood (Legitimate Expectation)*, McCloskey J cited Wade and Forsyth, who remarked that good governance "depends upon trust between the governed and the governor."[15] He continued, stating that the ingredients for recognising a substantive legitimate expectation include "an unambiguous promise or

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12 (C5/75) [1975] ECR 759, 777.

13 Anna Vigna & Dariusz Kijowski, 'The Principle of Legitimate Expectations and the Protection of Trust in Polish Administrative Law' (2018) 23 Białostockie Studia Prawnicze 39, 45.

14 [2002] 1 HKLRD 561 [349].

15 [2014] UKUT 00469 [15], citing HWR Wade & Christopher Forsyth, 'Administrative Law' (10th edn., OUP Oxford 2009), 447.

assurance by a public official in which the affected citizen reposes trust."[16] This view was confirmed by the Upper Tribunal in *Iqbal (Para 322 Immigration Rules)*.[17] Therefore, the trust theory isn't entirely alien to UK public law jurisprudence.

1.2 Trust theory as a justification for protecting legitimate expectations

For the trust theory to have credibility, it must be capable of justifying legitimate expectations in ways existing justifications have failed. As was outlined in the introduction, there are two principles that courts often cite. The first of these principles is fairness. In *R (BAPIO Action Ltd) v Secretary of State for the Home Department*, Lord Scott considered fairness as "imperative underlying a judicial review challenge," reasoning that a decision-maker should not be allowed to frustrate an expectation that has been given and relied upon by another.[18] Lord Dyson in *Paponette v Attorney General of Trinidad and Tobago* noted the "balance of fairness" courts must strike between the claimant's interest and any overriding interest.[19]

The other principle, which Lord Kerr in *Re Finucane's Application for Judicial Review* regarded as a "recurring theme" of the judgments,[20] is good administration which seems to concern public authorities sticking to their word. Lord Fraser in *Attorney General of Hong Kong v Ng Yuen Shiu* suggested that good administration requires them to act fairly and implement their promise.[21]

While they have the appeal of simplicity, there are two significant issues with relying on these principles to justify protecting legitimate expectations. First, the courts have struggled to define these

16 *Ibid*. [15]. Though he refers to substantive expectations, we could apply it to procedural ones.

17 [2015] UKUT 00434 (IAC) [11] (McCloskey J).

18 [2008] UKHL 27, [2008] 1 AC 1003 [29].

19 [2010] UKPC 32, [2012] 1 AC 1 [42].

20 [2019] UKSC 7, [2019] 3 All ER 191 [72] ('*Finucane*').

21 [1983] 2 AC 629 (PC) 638.

principles, if they even define them at all. Fairness suffers the most from this. It is far too broad for the courts to define and apply easily. In *R v Inland Revenue Commissioners, Ex p. MFK Underwriting Agents Ltd,* Bingham LJ suggested that fairness imports the "notion of equitableness, of fair and open dealing."[22] However, it is not helpful to adopt a somewhat circular definition whereby fairness is defined by what is fair and equitable. Good administration is no better. Reynolds argued that the notion of good administration "sits on the same plane of abstraction"[23] as fairness and abuse of power. Lord Kerr in *Finucane* observed that it could not conduce to good administration to allow a public authority to resile from an undertaking.[24] However, he fails to elucidate what good administration means and its relevance to legitimate expectations.

The second major issue relates to the first. The existing normative principles are so broad that they can apply to other grounds of judicial review. Farrah Ahmed and Adam Perry captured this point well when examining fairness. They argued that the "promiscuity" of fairness, by which they mean its applicability to other areas besides legitimate expectations, renders it unable to explain why legitimate expectations arise in some cases but not in others.[25] Laws LJ went further in *R v Secretary of State for Education and Employment, Ex p. Begbie* when he observed that there would be no public law without fairness.[26] Although good administration can explain legitimate expectations,[27] it too can explain other grounds for judicial review. It is in the interests of good administration that a public authority considers relevant considerations and discounts irrelevant ones.[28] This general application of fairness and good administration is unhelpful for understanding legitimate expectations as a distinct doctrine.

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22 [1990] 1 WLR 1545 (CA) 1569-70.

23 Reynolds (n 2), 337.

24 *Finucane* (n 20) [72].

25 Farrah Ahmed and Adam Perry, 'The coherence of the doctrine of legitimate expectations' (2014) 73 CLJ 61, 69.

26 [2000] 1 WLR 1115, 1130.

27 *R (on the application of Bibi) v Newham LBC (No.1)* [2001] EWCA Civ 607, [2002] 1 WLR 237 [24] (Schiemann LJ).

28 See *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999, 1020 (Megaw J).

The trust theory resolves these normative difficulties. It provides a more precise explanation for legitimate expectations based on these existing principles.

Normative clarity

Reynolds' trust theory provides clear and detailed guidance on when it applies. Reynolds defines trust as the "trust of the governed in the public authority's representation," a breach of which would undermine the claimant's trust in the public authority.[29] This theory, however, does not stop with a definition. Reynolds explains that for the trust theory to apply, the claimant must have received a representation, generating a "rebuttable presumption" that the claimant trusted the public authority to deliver that representation.[30]

The trust theory identifies a coherent foundation underpinning the doctrine of legitimate expectations. It is more than a hollow label that courts can cite where convenient. There is a framework through which courts can determine the existence of an actual expectation. It does this according to the court's task as outlined by Lord Woolf MR in *R v North and East Devon HA, Ex p. Coughlan*, namely not to "impede executive activity" but to reconcile the need to "initiate or respond to change" with the legitimate interests of individuals.[31] The trust theory offers the individual a level of protection via the trust presumption, but it is not overly rigid. That public officials can rebut the presumption is a recognition of the need for those officials to make decisions.

Furthermore, the trust theory can be viewed as a microcosm for the relationship between individual and state. Reynolds observes that trust in public officials is essential to a properly functioning political system. He adds that the only way public trust in political actors can be secured is by the "institutionalisation of trust" through public authorities accepting the responsibility of protecting that trust.[32] The trust theory encapsulates the essence of legitimate expectations, namely the relationship

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29 Reynolds (n 2), 341.

30 *Ibid*., 346-7.

31 [2000] 2 WLR 622 (CA) [65].

32 Reynolds (n 2), 347.

between the individual and public authority generated by a promise. Yet, it also engages with the fundamentals of the constitution that grounds of judicial review, like legitimate expectations, seek to protect.

Normative specificity

Unlike good administration and fairness, the trust theory cannot easily apply to other judicial review grounds. One could suggest, for example, that an individual will trust that a public authority will not make an unreasonable decision that no reasonable authority would make.[33] The problem is the attempt to dismantle the trust theory by forcing it to apply to other grounds. It fails to recognise the specific relevance of trust to legitimate expectations. As Reynolds explains, the possible existence of trust and the protection afforded by legitimate expectations demand the same thing: promises are kept.[34] Laws LJ remarked in *R (on the application of Nadarajah) v Secretary of State for the Home Department* that it would undermine the notion that authorities would keep their promises if the law did not insist on the refusal being justified as a "proportionate measure in the circumstances."[35]

Moreover, Reynolds makes a critical distinction between trust in the general sense, meaning the trust in government for its effective functioning, and the specific instance of trust where the individual trusts what the public authority has indicated it will do.[36] For Reynolds, to suggest that the relevant trust is that the public authority acts fairly and does not abuse its power would mean that recognition of the trust would add nothing.[37] In other words, a generalised trust theory lacking a clear normative framework would be to put forward a principle as opaque and unhelpful as good administration and fairness. Trust theory avoids this by its limited application to specific trusts that precisely captures why the courts should protect legitimate expectations.

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33 See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

34 Reynolds (n 2), 343.

35 [2005] EWCA Civ 1363 [68].

36 Reynolds (n 2), 343.

37 *Ibid*., 343.

Substantiating existing principles

It could be argued that it is unnecessary to ditch existing principles and replace them with an entirely new label. Understanding legitimate expectations can be better achieved by developing a more precise definition of fairness or good administration that explains when a legitimate expectation should be protected. This view could be taken further by questioning whether we need any theory.[38]

The answer must be that we need the trust theory as an analytical device to understand legitimate expectations better. Reynolds does not suggest that the courts do away with good administration and fairness. On the contrary, the trust theory substantiates those existing normative principles. Reynolds argues that the trust theory "gives content to the principles of fairness, abuse of power and good administration."[39] This is because the breach of a legitimate expectation that infringes on the claimant's trust would be an abuse of power and contrary to good administration.[40] The trust theory is the primary normative justification for legitimate expectations. It is the driving force at stage one (i.e. establishing the expectation). It remains an influential consideration at stage two (i.e. the frustration of the expectation), where good administration and fairness continue to play an important role. Those existing principles are not rendered otiose.

This is especially the case for good administration. The trust theory recognises a relationship between trust, good administration, and legitimate expectations since it is through an individual's trust in the public authority that good administration is feasible.[41] Reynolds argues that when trust is promoted, this creates a "co-operative working relationship" in which people are inclined to support the public authority's work through "participation, co-operation and compliance."[42] Good

38 See Joe Tomlinson, 'Do we Need a Theory of Legitimate Expectations?' [2020] 40 LS 286 for a detailed analysis of this question.

39 *Ibid*., 352.

40 *Ibid*., 341.

41 *Ibid*., 349.

42 *Ibid*., 351.

administration can be supported by trust through protecting legitimate expectations.[43] Thus, the trust theory aligns with the core principles of good administration, including that public authorities "deal straightforwardly and consistently with the public."[44] It emboldens existing principles and brings them under one roof, providing legal certainty when previously, the courts may not have relied on the same justification.

Responding to criticisms of Reynolds' trust theory

No theory is without its flaws and critics. This is true for the trust theory with the criticisms put forward by Tomlinson.[45] For Tomlinson, the problem revolves around a distinction between expecting, which he defines as regarding "something as likely," and trusting, which is a "firm general belief that something is reliable, true, or able."[46] His view is that the trust account ignores that a person can expect something without trusting that it will happen.[47] He concludes that the "clear gap" between trust and expectation makes the trust account an "artificial" theory that does not sufficiently connect with how the doctrine applies in reality.[48]

There are three rebuttals to be made to Tomlinson's arguments. First, his distinction between expecting and trusting is a distinction without a difference. As Reynolds argues, when a public official makes a representation that something will happen, it would be "unusual if [the claimant] did

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43 *Ibid.*, 351.

44 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453 [182] (Lord Mance).

45 Joe Tomlinson, 'The Problem with the Trust Conception of the Doctrine of Legitimate Expectations in Administrative Law' (*UK Constitutional Law Association*, 22 July 2016 <https://ukconstitutionallaw.org/2016/07/22/joe-tomlinson-the-problem-with-the-trust-conception-of-the-doctrine-of-legitimate-expectations-in-administrative-law/> accessed 27 December 2021.

46 *Ibid*.

47 *Ibid*.

48 *Ibid*.

not place trust in that representation and expect it to be fulfilled."[49] If the claimant expects the authority will keep its promise, there must be trust in its delivery. Otherwise, there would be no basis to claim a legitimate expectation.

Second, there may well be cases where an individual expects something without fully trusting it or has no trust at all. Reynolds' trust theory accounts for that when he suggests that the presumption of trust is rebuttable.[50] If trust is absent, it shouldn't be a problem for the public authority to show there wasn't a legitimate expectation.

Finally, Tomlinson argues that the trust account is artificial because of a gap between the concepts of trust and expectation.[51] However, he fails to suggest an alternative guide, notwithstanding the point made in the first rebuttal. Legitimate expectations ought to be underpinned by a normative principle in the form of the trust theory. It is not a "misguided endeavour" – as Tomlinson argues it is[52] – to seek a better understanding of the doctrine.

Conclusion

This article has sought to distil the principle that best explains the doctrine of legitimate expectations. It advocates the trust theory espoused by Reynolds. The trust theory is a coherent and detailed account of legitimate expectations that has been lacking. That is not to suggest that we should do away with principles such as fairness and good administration. The trust theory builds on existing principles to capture the fundamental reason the courts protect a claimant's legitimate expectation: the claimant trusts the public authority to deliver on its representation. It is time for academics and courts to take Reynolds' trust theory seriously and recognise that trust is the driving force underpinning the doctrine of legitimate expectations.

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49 Reynolds (n 2), 347.

50 *Ibid*., 347.

51 Tomlinson (n 45).

52 *Ibid*.

COMPASSION BY COMPULSION: THE CASE FOR STRENGTHENING CORPORATE RESPONSIBILITY FOR MODERN SLAVERY

*Ben Cartwright**

Modern slavery is one of the most persistent and deep-rooted human rights abuses of the twenty-first century: studies have estimated that there are more than 40 million slaves worldwide.[1] Although often well-hidden, it is found in the goods we buy, the services we use, and the food we eat; without the acquiescence of national and multi-national enterprises (MNEs) towards modern slavery practices, the problem would not be so severe. After all, '[b]usiness cannot divorce itself from its economic and social context, taking the privileged protection of corporate laws, yet not expecting to meet social expectations.'[2]

In 2015, the UK Parliament passed the Modern Slavery Act (MSA). Included in this is section 54, which obliges companies with an annual turnover of at least £36 million to prepare a slavery and human trafficking statement, outlining the steps that the company has taken to ensure that slavery is not taking place in its supply chains or any part of its business.[3] The aim of section 54 is ultimately to promote transparency in supply chains. With this transparency, an avenue for corporate accountability is opened. If slavery is identified as taking place within a corporate network, companies could take action by, for instance, cancelling contracts and re-evaluating corporate relationships; if action is not taken, sanctions could follow. Ultimately, financial incentives remain the most important influence of corporate behaviour; only the threat of sanction will ensure compliance with any reporting measure.

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* LLB, BCL.

1 ILO and Walk Free, 'Methodology of the global estimates of modern slavery: Forced labour and forced marriage' (2017) <https://www.ilo.org/global/topics/forced-labour/publications/WCMS_586127/lang--en/index.htm> accessed 7 October 2021.

2 Robert Davies, 'The Business Community: Social Responsibility and Corporate Values' in John Dunning (ed), *Making Globalization Good* (OUP 2003) 301.

3 Modern Slavery Act 2015 (UK), section 54(4).

Section 54 will only be effective on its own terms if it contributes to the reduction of modern slavery in business networks and their supply chains. To do this, it must promote substantive compliance with its reporting requirements. However, section 54, and with it, the entire UK modern slavery disclosure regime, is largely defective and needs urgent reform.

Assessing section 54 MSA

Under section 54 MSA, every UK-domiciled business with a total annual turnover of at least £36 million will be required to produce a slavery and human trafficking statement each financial year. Such a statement is defined as either 'a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—(i)in any of its supply chains, and (ii)in any part of its own business, or... *a statement that the organisation has taken no such steps*.'[4] Subsection (5) sets out the suggested detail of such a statement. However, none of this detail is mandatory. Slavery statements must be approved by a director, if the organisation is a company, and a partner, if it is a partnership.[5] The statement must then be published 'in a prominent place on that website's homepage.'[6]

Under subsection (11), a failure to comply with the reporting requirements, or a failure to act upon any identified involvement in modern slavery, can result in civil proceedings being brought against the company; this may lead to a contempt of court order or an unlimited fine. Section 54 is therefore a *civil* provision in an Act that otherwise specifies criminal offences; section 54 is therefore somewhat anomalous.

Ultimately, it is submitted that section 54 is both defective in its own terms, and in the terms it sets out to achieve. The Modern Slavery Policy and Evidence Centre have proposed a 'spectrum of

4 Modern Slavery Act 2015 (UK), section 54(4), my emphasis.

5 Modern Slavery Act 2015 (UK), section 54(6).

6 Modern Slavery Act 2015 (UK), section 54(7).

effectiveness' for section 54, setting out three aims of the provision.[7] First, section 54 seeks to ensure compliance with the remainder of the MSA. Second, it seeks to positively change corporate behaviour. Third, it seeks to prevent continued modern slavery in business supply chains. Section 54 largely prioritises compliance with the law for its own sake rather than properly influencing corporate behaviour. This is for three reasons, explored below. First, the scope of section 54 is too narrow to bring effective change to the private sector. Second, the transparency obligations are so weak that they are practically redundant. Third, accountability under section 54 is effectively non- existent: with neither carrot nor stick to encourage corporate reporting, incentives to comply with the Act are essentially non-existent. Unless a more prescriptive approach is taken, MNEs will never take sufficient action to combat modern slavery in their commercial networks or supply chains.

(a) Scope

For any corporate reporting measure to be effective, the measure's ambit must be sufficiently broad to promote changes in corporate behaviour and improve the conditions of workers. Without this breadth, any progress will necessarily be limited to companies that pursue due diligence voluntarily; this would reduce mandatory corporate reporting to something akin to a code of conduct, which 'generally impose *lower* standards and are more *selective* in their choice of human and labour rights than the public regulatory frameworks'.[8] Indeed, it is clear from the prevalence of modern slavery and human trafficking in the modern world that an entirely voluntary approach is insufficient.

There are four aspects which hamper the scope of section 54. First, the £36m threshold is somewhat arbitrary, and excludes the vast majority of UK-based companies and TNCs. It therefore completely side-lines many service sectors, including domestic work, the agricultural industry, and smaller hospitality venues, where modern slavery is much more likely to take place.[9]

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7 L Hsin, SJ New, I Pietropaoli and L Smit, 'Accountability, Monitoring and the Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis' (Modern Slavery Policy and Evidence Centre 2021) 9.

8 Bob Hepple, *Labour Laws and Global Trade* (Hart 2005) 76. Emphasis in original.

9 This is particularly bad in smaller hotels: there are an estimated 100,000 victims of human trafficking working in the European hotels sector. While section 54 covers reporting requirements for larger hotel chains, independent businesses and smaller chains fall under the radar. See eg 'More must be done to combat human trafficking in hotels' (René Cassin, 14 August 2017) <https://www.renecassin.org/more-must-be-done-to-combat-human-trafficking-in-hotels/> accessed 7 October 2021.

Second, the section 54 reporting requirement is limited to UK-domiciled companies; this is narrower than similar legislation in other jurisdictions. For instance, the Australian Modern Slavery Act 2018 relates to companies operating in Australia *regardless of their domicile*, provided they have a turnover of AUD100m.[10] This prevents overseas companies from escaping scrutiny.

Third, section 54 limits its effect to companies with a particular *income* rather than a particular *employee* count; given the human-centric nature of modern slavery, this seems to be an oversight. An alternative approach can draw from the French approach, which imposes diligence obligations on companies with more than 5,000 French employees, or 10,000 employees overseas.[11]

Fourth, the initiative to report is incumbent on companies: there is no central list of which businesses section 54 applies to.[12] The Home Office has written to 17,000 UK businesses, informing them they are likely to fall under the scope. However, Government has emphasised that 'only individual commercial organisations will have the full data required to definitively determine whether or not they are caught by the legislation.'[13] The state has therefore abdicated responsibility for human rights due diligence.This is unsatisfactory: since Government is unsure where to cast its net, the prospects of a wide enough scope of section 54 to operate successfully in practice are slim. Although the Home Office has suggested smaller companies can act voluntarily by publishing modern slavery statements,[14] this does not solve or assist the scope of the reporting *obligation*.

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10 Modern Slavery Act 2018 (Australia).

11 Loi n° 2017-399 of 27 March 2017 (France).

12 Emphasised in Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 MLR 1017.

13 HM Government, 'UK Government Response to Independent Review of the Modern Slavery Act 2015' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815410/Government_Response_to_Independent_Review_of_MS_Act.pdf> accessed 7 October 2021 [22].

14 Home Office, 'Transparency in Supply Chains etc. A practical guide' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf> accessed 7 October 2021 [3.14].

(b) Transparency

Central to any corporate reporting system is transparency: with greater disclosure, companies will be encouraged to diligently inspect their operations and supply chains. Ideally, this would result in improved standards and a lower incidence of modern slavery and human trafficking.

Certainly, this is a necessary objective. However, the transparency requirements under section 54, let alone the resulting practices, are startlingly barren. As mentioned above, a qualifying statement under the Act can be 'a statement that the organisation has taken *no... steps*' to ensure that slavery and human trafficking are not taking place.[15] Hence, even where a company publishes a statement, it can meet the requirements by declaring that it has done nothing. This certainly is transparent, but transparency for its own sake is no true objective. The objective must be transparency *with the aim of improving standards*. Without this latter element, companies responsible for modern slavery may well escape liability because of mere publication: the California case *Barber v Nestle* is a useful example.[16] There, the defendant's mere publication of a modern slavery statement afforded it a defence to a claim that it violated consumer protection statutes by failing to disclose forced labour in products' supply chains. Corporates are supposed to be *ashamed* when admitting to bad practices; this shame should lead them to take steps in mitigation. All too often, this seems not to be the case.

As in California, where mere publication seems sufficient, so it is in the UK. Subsection (5) gives details about what an organisation's slavery statement 'may' include - none of these are mandatory. Hence, the opportunity for critical reflection on the back of a modern slavery statement is severely limited. Although in recent years the publication of extensive modern slavery statements by companies like Nestle[17] is encouraging, such publication is the exception: the Independent Review into the MSA found that 40% of relevant companies do not publish a statement at all.[18]

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15 Modern Slavery Act 2015 (UK), section 54(4)(b), my emphasis.

16 *Barber v Nestle USA, Inc* (2015) 154 F Supp 3d 954 (CD Cal).

17 Nestle, '2019 Modern Slavery and Human Trafficking Report' <https://www.nestle.co.uk/sites/g/files/pydnoa461/files/ 2020-09/Nestle_Modern-Slavery-Report-2019.pdf> accessed 7 October 2021.

18 Independent Review of the Modern Slavery Act 2015: Final Report (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 7 October 2021 [15].

Ultimately, the voluntary nature of the MSA seems to reflect a wider trend in international regulation, to shift human rights enforcement onto private bodies, who self-regulate in a light-touch manner.[19] Hepple argues that non-binding codes of conduct involve 'a different kind of "race to the bottom", not a genuine "race to the top".'[20] Unless all companies have an obligation or incentive to make full publication *of particular matters*, and to act upon them, progress will be stymied.

(c) Accountability

The 'stick' of any effective reporting mechanism is the threat of sanction: if companies do not comply, or if their reporting is inadequate, effective remedial action should be available. It may be assumed that transparency alone will drive businesses to respond to supply-chain risks, even if only driven by customer concerns.[21] However, studies suggest that voluntary mechanisms will only function effectively where they are accompanied by a credible enforcement regime.[22]

It is also notable that remedy constitutes one of three pillars of the UN Guiding Principles on Business and Human Rights, a core document on the relationship between MNEs and their human rights obligations.[23] Foundational Principle 25 sets out that '[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure... that when such abuses occur within their territory... those affected have access to [an] effective remedy.' Two of the effectiveness criteria for such redress mechanisms are accessibility and predictability.[24] Assessing section 54 against these benchmarks, it is clear that it does not provide for sufficient enforcement and remedy.

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19 See discussion of this trend in Hepple, above, n 8.

20 Ibid 86.

21 Martha Nichols, 'Third-World Families at Work: Child Labor or Child Care?' (1993) 1 Harvard Business Review 22.

22 Lance Compa and Tashia Hinchliffe-Darricarrere, 'Enforcing International Labor Rights through Corporate Codes of Conduct' (1995) 33 Columbia Journal of Transnational Law 663, 688.

23 OHCHR, Guiding Principles on Business and Human Rights (HR/PUB/11/04, 2011).

24 Ibid, Operational Principle 31.

Section 54(11) states that '[t]he duties imposed on commercial organisations by this section are enforceable by the Secretary of State bringing *civil proceedings* in the High Court for an injunction'.[25] There are two things to note here: the enforcement is civil, rather than criminal, and the liability is of the company rather than its directors, who sign the statements. Further, any 'wrong' that is committed is not the slavery itself; it is the failure merely to produce a statement. As Mantouvalou explains, '[t]he MSA did not attempt to pierce the corporate veil with hard legal rules and sanctions for non-compliant businesses.'[26] It is unclear that the criteria of Foundational Principle 25 are being met here. The Independent Review into the MSA has argued for a stronger regime, with reporting failures, and failures to act on identified instances of slavery, constituting an offence under the Company Directors Disqualification Act 1986.[27] Government has rejected such calls.[28]

Also notable is the absence of extraterritorial jurisdiction of the section 54 enforcement mechanism; this is distinct from (for instance) the criminal sanctions in the Bribery Act 2010, which apply extraterritorially. Instead, where UK companies suspect modern slavery occurring in their supply chains overseas, the Home Office encourages them to 'reconsider their commercial relationship' with suppliers.[29] This is hardly the language of duty, nor is it conducive to an effective enforcement regime.

The weakness of the MSA regime has been evident since its introduction: the Act has failed to increase prosecutions for modern slavery,[30] and, as of 2019, the injunction power in section 54(11) has never been used.[31] This is perplexing considering the absence of compliance by around 40% of relevant companies. It is clear therefore that redress mechanisms are neither reliable nor effective.

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25 My emphasis

26 Mantouvalou, above, n 12, 1038.

27 Independent Review, above, n 18 [18].

28 HM Government, above, n 13 [34].

29 HM Government, above, n13 [34]

30 Mantouvalou, above, n 12, 1018.

31 Independent Review, above, n 18 [2.5.2].

Proposed reforms

Given the severity of modern slavery, and the comparative inaction of UK-domiciled businesses in dealing with the problem within their supply chains, section 54 increasingly seems ineffectual. This does not bode well for corporate accountability for human rights generally: considering the lacklustre consideration towards modern slavery, a crime so offensive to human dignity, we can only wonder what accountability results from violations of other, less prominent but equally demanding rights, committed by MNEs.

Considering the existing problems with section 54, and the urgent imperative to strengthen corporate accountability for modern slavery, five specific reforms of the section are recommended.

(a) Broadening scope

First, and most significantly, the scope of section 54 must be widened, to encompass *global* rather than national turnover requirements, as in the Australian MSA, and to encompass national *employee* counts, as in the French law. A draft UN instrument regulating MNEs' activities concerning human rights has declared that the scope of legal liability '[applies] to all business enterprises, including but not limited to [MNEs]', although differential treatment may be warranted depending on the size and sector of businesses.[32] Modern slavery is a stain on the global economy; businesses participating in the economy must take action, irrespective of their annual UK turnover. We should treat modern slavery in the same way health and safety standards: something that every business must address if they want to retain their social licence to operate.

Although comprehensive reporting requirements cannot be imposed on all companies, a minimum standard of due diligence must be expected by all companies regarding their supply chains. Legal liability could then arise either when the business has knowledge of, or facilitates, modern slavery in their supply chains.

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32 Open-ended intergovernmental working group (OEIGWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised draft, 6 August 2020), Article 3

(b) Reporting standards

Second, a minimum standard of reporting should be imposed; as the Independent Review of the MSA argued, 'companies should not be able to state they have taken no steps to address modern slavery in their supply chains..., and the six areas of reporting currently recommended in guidance should be made mandatory.'[33] Existing obligations are paper-thin, and only promote passivity. Instead, compelling disclosure will necessitate compliance, and allow greater opportunity for sanction. Legal enforcement of the reporting requirements would 'transform the legal position from one reflecting a somewhat trite exercise in incentivising disclosure and enhanced transparency to one that possesses real teeth'.[34]

Of course, we ought not to be too prescriptive when mandating reporting requirements: each company's involvement with modern slavery, where it exists, will vary significantly. Unduly burdensome requirements may be counterproductive and lead to defensive reporting. Since modern slavery operates in the shadow of society, the scale of the problem - and the variation across sectors - is impossible to comprehensively map. Therefore, it is unclear whether a wholly command-based legal solution will in fact assist. Instead, a 'reflexive' regulatory approach may be better.[35] This way, until we know exactly what areas on which to compel reporting, only limited legal steps will be taken.

(c) Extraterritoriality and network liability

Third, it is argued that the MSA should draw from the Bribery Act 2010 and provide for the extraterritorial application of section 54.[36] This would mean that companies would be responsible for acting upon modern slavery violations which occur in their supply chains globally, not just in the

33 Independent Review, above, n 18 [17].

34 David Cabrelli, 'Liability for the Violation of Human Rights and Labour Standards in Global Supply Chains: A Common Law Perspective' (2019) 10 Journal of European Tort Law 108, 127.

35 See generally, Neil Gunningham, 'Beyond Command and Control' in Eric Brousseau, Tom Dedeurwaerdere, and Bernd Siebenhüner (eds) *Reflexive Governance for Global Public Goods* (MIT 2012).

36 See Bribery Act 2010 (UK), ss 7 and 12.

UK. A failure to do so may then result in claims in UK courts.

Relatedly, the MSA could adopt a principle of 'network liability',[37] which would impose liability on one company, as part of a network of autonomous companies bound by a common enterprise. This would prevent companies using their distinct corporate structures, when they share a parent company, from escaping accountability for any complicity with modern slavery. By providing for extraterritorial and network liability, in addition to liability derivative from UK-based activities, TNCs will have a much stronger incentive to adequately take action against any modern slavery that may persist under their corporate umbrella.

(d) Director disqualification

Fourth, and associated with proposal (c), we can draw from the Independent Review of the MSA, which recommended that a failure to comply with the reporting requirements, or a failure to act if modern slavery is identified, should be an offence under the Company Directors Disqualification Act 1986.[38] Under section 54(6) MSA, company directors must sign their slavery statements. However, there is no sanction available if the statement is overly vague or vacuous. The prospect of disqualification would usefully focus board-level attention on the efforts made to eliminate modern slavery in supply chains.

(e) Sanction

Finally, the sanctions available under section 54, namely injunctions and fines, should be deployed far more regularly. This may happen even without reforming the statute: the problem is that notwithstanding the lacklustre and non-existent reporting by thousands of companies, the remedial powers have simply never been deployed. Having such powers available, without the prospect of them being used, seriously hampers section 54 from achieving its potential.

The Independent Review of the MSA concluded that Government should adopt a gradual approach to non-compliance, involving 'initial warnings, fines..., court summons and directors' disqualification.

37 See generally, Guenther Teubner, *Networks as Connected Contracts* (Hart 2011).

38 Independent Review, above, n 18 [18].

Sanctions should be introduced gradually over the next few years... to give companies time to adapt to changes in the legislative requirements.'[39] This is an achievable and realistic modification of section 54, and would ensure greater effectiveness of the provision.

Conclusion

Combatting modern slavery through mandatory reporting and disclosure should encourage a 'race to the top', with a general improvement in corporate human rights standards.[40] Like any new legislative framework designed to re-orient business practice and behaviour, the first steps under the section 54 reporting regime are inevitably going to be small. The problem with section 54 MSA is that, in legislation and in practice, its potential has never come close to being realised. If modern slavery in corporate structures is to be taken seriously, genuine efforts must be made to make the whole of the MSA function effectively. The fivefold reform package proposed in this essay will allow for more effective corporate accountability. With these reforms, the MSA will become more effective in its own terms: it will better influence corporate behaviour, and it will reduce the incidence of modern slavery in global supply chains.

39 Ibid [2.5.2].

40 Draft Modern Slavery Act 2015 (Transparency in supply chains) Regulations 2015, HC Deb 19 October 2015, col 1 <https://hansard.parliament. uk/Commons/2015-10-19/debates/7f70eb14-c64f-48b1-b6e5-64312b1c7813/DraftModernSlaveryAct2015(TransparencyInSupplyChains) Regulations2015> accessed 7 October 2021.

ADVOCACY TACTICS - APPROACHING STRATEGIC LITIGATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Zoe Chan

The following is an extract from the author's LLM dissertation

Defining and Reaching Success in Strategic Litigation

From the ground-breaking *Brown v Board of Education of Topeka*[1] to the recent *Lee v Ashers Baking Company Ltd and other*s (the gay cake case),[2] the social justice world is increasingly attracted by the results litigation can potentially achieve, in an arena where justice often takes a lifetime. More funding institutions, upon which non-governmental organisations (hereafter NGOs) and their lawyers depend on financially, are recognising the potential impact of strategic litigation.[3]

One issue preventing the spread of strategic litigation is the difficulty in defining success. Whilst there are some debates around the specificities of what should be included as part of the results from litigation, the consensus is that, in general, one must not simply equate success in court as success in the whole campaign.[4] This is too vague, and unhelpful to those planning to embark on strategic litigation – if we are not only trying to win in court, what are we striving for, anyway?

This piece aims to, through review of the analysis from Barber and Donald & Mottershaw, present a few possible results from strategic human rights litigation, with the hope of illustrating what success *could* look like. It further highlights some ways of achieving these successes, through interventions, in particular.

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1 [1954] 347 US 483 (Supreme Court of the United States of America)

2 [2018] UKSC 49

3 See, for example, an article from the Chair of the Baring Foundation (independent grant-giving foundation): Janet Morrison, 'Janet Morrison: Strategic Litigation Can Be a Useful Tool' (ThirdSector, 2 May 2019) <https://www.thirdsector.co.uk/janet-morrison-strategic-litigation-useful-tool/communications/article/1583511> accessed 16 August 2020.

4 See, for example: Helen Duffy, Strategic Human Rights Litigation: Understanding and Maximising Impact (Bloomsbury Publishing 2018), Chapter 3.

What is success? A retrospective analysis on outcome and impact

Barber's article[5] made a valiant attempt in defining success in litigation by utilising tools usually reserved for organisational effectiveness. Through reviewing three strategic cases, including their direct outcomes and wider impact, Barber suggests through retrospective analysis, the external results that could be identified from the cases; and recommends that these possibilities be considered when defining tangible, achievable goals internally.

Wiwa v Shell[6] was a tort case that settled out of court; the *German-Argentinian cases*[7] utilised Germany's jurisdiction involving German citizens or victims of German descent;[8] and *the Rumsfeld cases*[9] concerned criminal complaints filed (though promptly dismissed) in Germany and France against the former US secretary defence Donald Rumsfeld. None of the three cases studied achieved a judgment finding a violation of human rights. Regardless, as Barber analysed, each of them 'succeeded' in different ways.[10]

The two main results can be deduced from this study:

1) Direct Outcomes. These include redress for the victims of the case (monetary, ceasing of harmful operation in said area etc.), fact finding (including public investigation), allowing victims' stories to be recorded in the legal system, and more.

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5 Catherine Corey Barber, 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations' (2012) 16 The International Journal of Human Rights 411.

6 Wiwa et al v Royal Dutch Petroleum et al (United States District Court, 2009)

7 European Center for Constitutional and Human Rights, 'Argentina' <https://www.ecchr.eu/en/topic/argentina/> accessed 19 September 2020.

8 Wolfgang Kaleck and others, 'German International Criminal Law in Practice: From Leipzig to Karlsruhe', International Prosecution of Human Rights Crimes (Springer Science & Business Media 2006), pg 100.

9 European Center for Constitutional and Human Rights, 'The Rumsfeld Torture Cases' <https://www.ecchr.eu/en/case/rumsfeld-torture-cases/> accessed 19 September 2020.

10 Catherine Corey Barber, 'Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations' (2012) 16 The International Journal of Human Rights, 430.

2) Wider Impacts. These include contributing pressure to corporate social responsibility, attracting public opinion and media attention, illustrating the utility of universal jurisdiction, strengthening transnational human rights networks, and more.

Direct outcomes are how lawyers traditionally define success. For example, the Bar Standards Board's Handbook[11] asserts that "proper administration of justice, access to justice and the best interests of clients are served"[12] should be one of the outcomes of an advocate behaving ethically; that "Clients' best interests are protected and promoted by those acting for them."[13]

Wider impact, however, is much more difficult to define. Barber stressed the difficulty of predicting what wider impact could be achieved – for example, the Rumsfeld cases, although unsuccessful in forcing the prosecution of US officials complicit in torture, was successful in starting a wider movement and changed opinions on the seeming impunity of high officials in powerful states. Indeed, the cases are only part of a wider effort calling for accountability to the atrocities committed under the "war on terror". As Duffy[14] pointed out, these social changes are impactful and significant, but gradual.

Litigation may contribute to "historical clarification of facts"[15], or even prevent similar violations in

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11 BSB, 'The BSB Handbook' <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 19 September 2020.

12 BSB, 'The BSB Handbook' <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 19 September 2020, oC7.

13 BSB, 'The BSB Handbook' <https://www.barstandardsboard.org.uk/the-bsb-handbook.html> accessed 19 September 2020, oC11.

14 Helen Duffy, 'The Role of the Courts: Human Rights Litigation in the "War on Terror"*' (The 'War on Terror' and the Framework of International Law, April 2015) </core/books/war-on-terror-and-the-framework-of-international-law/role-of-the-courts-human-rights-litigation-in-the-war-on-terror/3C8FAAF733DD0F0D54051AEE4AE0976B> accessed 19 September 2020.

15 Helen Duffy, 'The Role of the Courts: Human Rights Litigation in the "War on Terror"*' (The 'War on Terror' and the Framework of International Law, April 2015) </core/books/war-on-terror-and-the-framework-of-international-law/role-of-the-courts-human-rights-litigation-in-the-war-on-terror/3C8FAAF733DD0F0D54051AEE4AE0976B> accessed 19 September 2020.

the future; but as the Barber piece highlighted, this result would be impossible to predict. There is scope for even more creative use of court proceedings. For example, as highlighted by Vanhala and Kinghan in their literature review[16] of MaCann's book[17] on pay equity reform in America, activists creatively interpreted ambiguous or even hostile decisions to serve their goals, including: "using the judgment to raise public consciousness; stimulating political activity by revealing the vulnerability of structural arrangements that once seemed impervious to change; enhancing the threat of imposing litigation costs if decision makers fail to find political solutions." These are further example of the variety of outcomes that are, arguably, not even dependent on success in court; it is *innovatively persuading* by relying on the significance of a legal judgment that furthers the cause.

Although it is impossible to set a clear goal for wider impacts of a case, the advocate can, through understanding of similar cases and their impact, design a strategy or narrative that could push for similar desired effects. As pointed out by O'Brien: "litigation may only be a step along the way and there may be considerable work which remains to be done, leveraging the outcome of the litigation to achieve the ultimate goal".[18]

Widening impact through pushing "levers of change"

Donald and Mottershaw[19] argued that, in any context where the rule of law pertains, an understanding of *what* effects change is a prerequisite not just for the promotion of social change after legal judgments, but also for evaluating what impact was created by the litigation alone. Their research, through case studies and interviews, concluded that social change from litigation can come from top down (for example, the national level instruction to asylum support case workers in

16 Lisa Vanhala and Jacqui Kinghan, 'Literature Review on the Use and Impact of Litigation' (The Public Law Project 2018) Literature Review <https://publiclawproject.org.uk/wp-content/uploads/2018/04/Literature-Review.pdf>.

17 Rights at Work <https://press.uchicago.edu/ucp/books/book/chicago/R/bo3630053.html> accessed 20 September 2020.

18 Paula O'Brien, 'Changing Public Interest Law - Overcoming the Law's Barriers to Social Change Lawyering' (2011) 36 Alternative Law Journal 82, at 85.

19 Alice Donald and Elizabeth Mottershaw, 'Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK' (2009) 1 Journal of Human Rights Practice 339.

Limbuela)[20] or from bottom up, where the judgment validated the efforts of pre-existing progress in the disability sector.

It is submitted that – to push their argument further back in the process - the advocate's understanding of what "levers of change" there are (for instance, what social movement there is behind the issue being litigated on) is key to ensuring the movement lives beyond the litigation itself, achieving a variety of wider impacts.

For example, researchers found that the case *R v East Sussex County Council Ex parte A, B, X and Y*[21] validated the efforts of front-line workers that were already challenging the restrictive policies. Since the judgment, the case was referenced by guidance and policies as an authority. This is a good example of how an advocate could achieve 'success' by furthering the cause on the ground by incorporating the narrative already used by campaigners and practitioners.

By utilising traditional NGOs' legal and policy knowledge, the advocate can not only reduce the time in researching; they can also: i) line up the narrative with what is already being advocated for on other planes, and; ii) ensure that no matter the judgment, the case itself could serve as a boost to the already moving trend. This is not to diminish the advocate's existing legal knowledge. Rather, it is an encouragement to marry the expertise on social change of the frontline campaigners with the advocate's knowledge of the law. O'Brien encourages those involved in public interest lawyering to consider a "social change approach",[22] shifting some attention to the causes of social problems instead of focusing on just fixing the human rights issue it created.

Conversely, as much as we want to think the court is impartial and only follows the law, the very

20 R (Limbuela and Others) vs. Secretary of State for the Home Department [2005] UKHL 66

21 [2003] EWHC 167

22 Paula O'Brien, 'Changing Public Interest Law - Overcoming the Law's Barriers to Social Change Lawyering' (2011) 36 Alternative Law Journal 82, at 85.

creation of "human rights" is political,[23] and we as lawyers must not treat this origin, and indeed innate quality of human rights itself, as dishonourable.[24]

A further example, from the author's former workplace, is a strategic litigation case for recognition of same-sex relationships in Serbia.[25] Whilst it is well understood that the issue of same-sex marriage does not enjoy consensus in the Council of Europe states,[26] there exists some jurisprudence recognising that same sex couples living in *de facto* partnership falls under article 8 (right to respect for private and family life).[27] The Serbian case builds on the existing jurisprudence, and argues that article 8 should be considered in conjunction with article 14 (prohibition of discrimination); and as such the couples in question should have rights equal to heterosexual couples, in that their relationships are formally recognised. The choice to push for recognition of the couple's "partnership", rather than a right to marriage, was deliberate: the domestic NGO supporting this case[28] reported that the Serbian public may be less reluctant to the idea if the more religious concept of "marriage" is divorced from the issue.

23 Walter Kälin and Jörg Künzli, 'Origin and Univsality', The Law of International Human Rights Protection (Oxford University Press 2009). Also see: Aryeh Neier, 'International Human Rights Law: AS OF OCTOBER 3, 2011', The International Human Rights Movement (Princeton University Press 2012) <https://www.jstor.org/stable/j.ctt7sr3h.7> accessed 19 September 2020.

24 Conor Gearty (ed), 'The Crisis of Legalism', Can Human Rights Survive? (Cambridge University Press 2006) <https:// www.cambridge.org/core/books/can-human-rights-survive/crisis-of-legalism/4556AA1F84BBBDB1E9C31B0ACCE31ACA> accessed 20 September 2020.

25 The case is, as of the time of writing, still in the national courts. For more information, see: 'Let Love Be Law - Ljubav Mora Biti Zakon!' (CrowdJustice) <https://www.crowdjustice.com/case/jelena-and-suncica/> accessed 19 September 2020.

26 As of the time of writing, 27 out of 47 of the member states of the Council of Europe provide some form of legal arrangement recognising same-sex partnerships.

27 For example, Schalk and Kopf v. Austria (Application no. 30141/04) 24 June 2010; Vallianatos and Others v. Greece (Applications nos. 29381/09 and 32684/09) Grand Chamber 7 November 2013. A further interesting point of Schalk is a third-party intervention from the United Kingdom government arguing for same-sex relationships to fall within the notion of "family life", at 81.

28 'Labris - Lesbian Human Rights Organization' (Labris) <http://labris.org.rs/sr> accessed 20 September 2020.

This case, developed in conjunction with an international human rights organisation whilst still in the domestic phase, already considered the potential of heading to the ECtHR, and thus have adopted the language of the Convention rights early on.[29] This example not only illustrates the importance of strategic planning in collaboration with local NGOs – as early as possible – but indeed, highlights the importance of formulating the issue whilst bearing the inevitable political divide in mind.

In short, "wider impacts" may look different to every area of focus; one would need a broad understanding of the social-political landscape of that particular issue to pinpoint what 'success' looks like. Symbiotic collaboration between lawyers and NGOs is ripe for facilitating knowledge exchange of this kind.

Alternatively, achieving 'success' through third-party interventions

Bearing in mind this widened view of success defined above, it is submitted that it may be possible to achieve this without directly litigating. Some court systems, such as the European Court of Human Rights, allow for parties not part of the complaint to participate through third party interventions.[30] Although interventions may not be as seemingly powerful as direct engagement with the court as party to a complaint, its impact should not be overlooked – arguably the different results, illustrated above, could be achieved through interventions. Indeed, various international human rights organisations consistently submit to the court through the mechanism.[31]

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29 See further, Ashurt LLP and the Equal Rights Trust, Navigating Human Rights Complaints Mechanisms – Rules Tools and Resources (2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/navigating-human-rights-complaints-mechanisms-rules-tools-and-resources/#:~:text=of%20Human%20Rights.-,%22Navigating%20Human%20Rights%20Complaints%20Mechanisms%20%E2%80%93%20Rules%2C%20Tools%20and%20Resources,or%20assist%20with%2C%20individual%20cases.>, pg. 34.

30 Art 36 ECHR, Rule 44 Rules of Court

31 For example, JUSTICE intervened in Teixeira de Castro v Portugal (Appl No 25829/94), Judgment (Chamber) , 9 June 1998; Othman (Abu Qatada) v. the United Kingdom (Application no. 8139/09), 17 January 2012; Nada v. Switzerland (Application no. 10593/08), 12 September 2012 and more.
See further examples: 'Third Party Interventions' (JUSTICE) <https://justice.org.uk/our-work/third-party-interventions/> accessed 18 September 2020.

Interventions have many advantages to traditional litigation in advocacy. First and foremost, they are not bound by the constraints of applications to the court, where the method and format are prescribed and must be followed.[32] Third party interventions are also not subject to the same stringent admissibility requirements. This presents an alternative solution to the difficult issue of "case selection"; instead of waiting for a case that "checks all boxes" to exhaust domestic remedies, interested parties could simply subscribe to the relevant criteria of cases on HUDOC[33] and request for leave to intervene on any cases that they believe would benefit from them assisting the court.

An extra benefit of third party interventions is its low cost – compared to a case exhausting domestic remedies, often taking years in itself, then going through the arduous process of application, submitting a third party intervention is a two-step process of 1) requesting permission[34] and 2) submitting the intervention. Helen Mountfield QC refers to it as a "powerful and cost-effective way of creating helpful case law from the European Court of Human Rights."[35]

The ECtHR has a few ways of engaging with the interventions. Bürli[36] categorises them into three groups: summary in judgments, reference in reasoning, and reference in separate opinions. Whilst the

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32 See in general: Registry of the Court, 'Rules of Court - 1 January 2020' <https://www.echr.coe.int/documents/rules_court_eng.pdf>. The requirements and restrictions on applicants are significantly longer than that of third-party intervention.

33 European Court of Human Rights, 'HUDOC - European Court of Human Rights' <https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}> accessed 20 September 2020.

34 For more information on requesting leave, see: JUSTICE, 'To Assist the Court: Third Party Intervention in the Public Interest' <https://justice.org.uk/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf>.

35 Ashurt LLP and the Equal Rights Trust, Navigating Human Rights Complaints Mechanisms – Rules Tools and Resources (2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/navigating-human-rights-complaints-mechanisms-rules-tools-and-resources/#:~:text=of%20Human%20Rights.-,%22Navigating%20Human%20Rights%20Complaints%20Mechanisms%20%E2%80%93%20Rules%2C%20Tools%20and%20Resources,or%20assist%20with%2C%20individual%20cases.>, pg. 34.

36 Nicole Bürli (ed), 'Amicus Curiae Intervention', Third-Party Interventions before the European Court of Human Rights: Amicus Curiae, Member-State and Third-Party Interventions (Intersentia 2017) <https://www.cambridge.org/core/books/thirdparty-interventions-before-the-european-court-of-human-rights/amicus-curiae-intervention/C5418A8B4A7DC58C3BF4B622FC226F74> accessed 18 September 2020.

extent of influence in each case is difficult to quantify, her research found a generally rosy picture: in ideological submissions,[37] 74 percent of the cases examined with activist *amicus curiae* interventions, the Court decided in favour of the side supported by the intervention. Indeed, her research highlights the particularly encouraging example of *Bayatyan v Armenia*,[38] where the international human rights law materials supplied by the joint intervention was almost identical to the law referred to by the Court's Judgment.[39]

Third party interventions in the ECtHR present an opportunity to influence the Court, and by extension, the binding judgments; thereby achieving *some* success as defined above. It is submitted that, demonstrated by the example of intervention in the ECtHR, the widened definition for success in strategic litigation meant that it could potentially be reached without direct litigation, saving time and costs in the process. One is encouraged to look beyond shackles of traditional litigation – in each individual case, there may be potential for more cost-effective and creative ways to engage with the jurisprudence.

Conclusion

For those pursuing strategic litigation, it is important to understand that success is diverse; besides the traditional outcome of defending your clients' best interests, with the correct approaches, cases can make a bigger impact in society. To this end, collaboration with NGOs before and during litigation is beneficial to knowledge exchange and maximising impact.

37 Ranging from LGBTQ rights to religious freedom arguments.

38 Bayatyan v Armenia [2011] Grand Chamber Application no. 23459/03.

39 Nicole Bürli (ed), 'Amicus Curiae Intervention', Third-Party Interventions before the European Court of Human Rights: Amicus Curiae, Member-State and Third-Party Interventions (Intersentia 2017) <https://www.cambridge.org/core/books/thirdparty-interventions-before-the-european-court-of-human-rights/amicus-curiae-intervention/C5418A8B4A7DC58C3BF4B622FC226F74> accessed 18 September 2020, 49-50.

QUANTIFYING A LEGITIMATE INTEREST - A FORMAL DERIVATION OF THE MAKDESSI TEST

Karim Pal

Introduction

The Makdessi test, derived by the Supreme Court in Cavendish v Makdessi, has aimed to provide courts with clarity and structure when determining whether a liquidated damages clause in a contract constitutes a penalty clause that should be struck down[1]. It has proved somewhat popular and has been adopted in other common law jurisdictions since[2]. This essay will first outline the background of penalty clauses and the Makdessi test. It will then attempt to provide further structure to that test, providing clear parameters on which judges may focus their decision making. Particularly, it will argue that courts should focus on the benefit derived by the contract-breaker in breaking the contract, and consider whether the liquidated damages clause is disproportionate given this benefit. This will be done through a formalised model which describes why individuals may adhere to, or break, a contract, developed from the work of Gary Becker on the economics of crime committal[3]. It will then consider the implication of the relaxation of the assumptions on which the basic model relies, maintaining that the model nonetheless remains of use.

The Law of Contract

The starting point of contract law is that individuals are free to make their own decisions. A modern market economy necessitates that individuals are able to engage in enforceable agreements between one another. By engaging in such agreements, individuals are able to exchange goods and services; it is upon this trade that the economy is built. Contract law sets the rules for such exchange, and

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1 Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis [2015] UKSC 67

2 For example, see Law Ting Pong Secondary School v Chen Wai Wah [2021] CA 873

3 Becker G, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy,* 1968, Vol. 76 No.2, pp 169 – 217

ensures the enforceability of agreements, so determining the extent to which society can benefit from the gains from trade[4]. These gains are described by the Coase Theorem. That is, assuming parties act rationally, that they will enter into an agreement if it makes them better off. Such private agreements, therefore, will increase societal welfare[5]. As such, it is advantageous from an economic point of view to ensure individuals are able to enter into private agreements if they so wish – that there is a freedom of contract. The freedom of contract is not an unrestricted doctrine. For example, I could not (legally) contract with an assassin to undertake the murder of another. However, in the absence of justification to the contrary, the presumption is that a commercial agreement is able to form a binding contract.

There must, therefore, be valid reasoning for the court to intervene in such a private agreement. Liquidated damages clauses are contractual clauses which stipulate a sum to be paid by a party if the contract is breached. The origins of the court's restriction of penalty clauses lie in equity and public policy[6]. The modern interpretation is now based on the distinction between, on the one hand, the court's refusal to determine the relative fairness of contractual obligations and the court's acceptance of jurisdiction to regulate the remedy for a breach of contract[7].

The Makdessi test

In 2016, the Makdessi test replaced the previous test on penalties outlined in Dunlop Pneumatic Tyre Co v New Garage and Motor Co[8]. There is now a two-stage process for determining whether a liquidated damages clause is a penalty or not:

1. Is the clause a primary or secondary obligation.

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4 Hermalin B et al, 'The Law of Economics and Contracts', *Columbia Law School Faculty Publications*, 2006, p.1.

5 Coase R, 'The Problem of Social Cost', *The Journal of Law & Economics*, 1960, Vol. 3, pp. 1 – 44

6 Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis [2015] UKSC 67 §4

7 Ibid §13

8 Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1914] UKHL 1

A primary obligation is one which goes to further the fundamental objectives of the contract, such as the consideration promised for a specific performance[9]. On the other hand, a secondary obligation is one which is only triggered by a breach of contract. The distinction made here goes to whether the court has jurisdiction to intervene in the agreement between parties. If the clause is a primary obligation then the court will not intervene. Any intervention on such clauses risks offending the rule that consideration need not be adequate.

2. Does the secondary clause impose a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation?

The Supreme Court gave a two-step approach which should be taken in application of this limb of the test:

i. What legitimate interest is served and protected by the clause;

ii. Is the detriment imposed to protect the interest extravagant, exorbitant or unconscionable?

It is this second stage which this essay is interested. However, first to understand the test it is helpful to see it in action, for which the case of ParkingEye v Beavis, heard alongside Makdessi, will be used.

ParkingEye v Beavis

In this case Mr Beavis had parked his car in a carpark managed by the company ParkingEye. ParkingEye displayed a number of signs at the entrance and throughout the carpark stating that a failure to comply with the two hour parking limit would result in a parking charge of £85. Mr Beavis parked in the carpark and exceeded the two-hour limit, for which ParkingEye subsequently demanded an £85 charge. Mr Beavis refused to pay on the basis that the fine constituted an enforceable penalty clause.

9 Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis [2015] UKSC 67 §73

The Supreme Court determined that fine was a secondary clause. On the second limb, though, it was decided that the £85 was not a penalty. Although the amount of the charge exceeded any likely loss which a motorist might need to pay for to park for more than two hours, ParkingEye needed to manage the carpark effectively by ensuring motorists adhered to the rules, the legitimate interest. It was proportional to use the charges as a means of influencing the behaviour of motorists in order so they did not overstay. In this context the £85 charge was not extravagant, exorbitant or unconscionable.

Modelling legitimate interests

It is argued that the core, legitimate interest, which a liquidated damages clause must protect is the contract itself, that is to say, it must deter a breach of contract. In taking this approach, attention is drawn to the wording of the Makdessi judgment, in which Lords Neuberger and Sumption stated: "His interest is in performance or in some appropriate alternative to performance[10]." Lord Dunedin, in his judgment in Dunlop Tyres, stated that the primary aim is to compensate the innocent party for their loss. This was erroneous, treating the symptom of the loss rather than curing its cause itself. It was rightly changed by the Supreme Court in Makdessi by moving the focus to preventing breach in the first place. If no breach takes place, there will be no losses. This is in keeping with the justification for courts striking out penalty clauses: it is not for parties themselves to determine what compensatory damages may or may not be reasonable on occurrence of a breach.

In order to understand how a liquidated damage clause might protect against a breach, it must first be understood why people break contracts in the first place. The model used is adapted from that of by Gary Becker used to describe why people commit crimes[11]. In short, assuming that all legal persons act rationally in their own best interests, people break contracts if their expected utility (benefit) of breaking the contracts exceeds the expected utility from adhering to it. This assumption of rationality is both strict and somewhat unrealistic, but nonetheless is the basis for all economic models. A rational agent will make a cold, calculated decision based on perfect knowledge, taking the course of

10 Ibid §32

11 Becker G, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy,* 1968, Vol. 76 No.2, pp 169 – 217

action that will give them the highest expected benefit. These agents are also assumed to be risk neutral. As stated, the focus which courts and commentary have subsequently placed on the benefits, both tangible and intangible, which an innocent party may obtain from contract performance is erroneous. Instead, the focus should be on the party in alleged breach, and why the contract was breached.

The expected utility which may be derived from adhering to a contract can be described as:

$$E[U_a] = B - C$$

Where $E[U_a]$ is the expected utility from adhering to a contract, B is the benefit of the contract to that person and C is the cost of the contract to them. Simply, the equation states that the expected utility is the benefit of the contract minus its cost.

The expected utility from breaking a contract is:

$$E[U_b] = p(B - D) + (1 - p)B$$

$E[U_b]$ is the expected utility from breaking a contract. Again, for simplicity, it is assumed that just one type of breach can occur. Introducing different kinds of breach, such as those which are repudiatory and those which are not, is a possible further extension of the model. p is the probability of the breach of contract being caught. It is assumed there is a binary set of outcomes here, so 1-p is the probability of not being caught. D is the value of the liquidated damages clause in the contract. Essentially, there are two states of the world that may occur if you break a contract, which each have certain probabilities. The expected utility of taking that action is dependent on the benefit gained from each state and the probability that each will occur. The equation can be simplified as:

$$E[U_b] = B - pD$$

Therefore, a rational person, who possesses perfect knowledge and is a selfish agent, will renege if:

$$E[U_b] > E[U_a]$$

They will always renege if this is true. This equation can be expressed as:

$$B - pD > B - C$$

Through some simple rearrangement we arrive at the final equation of:

$$C > Dp$$

That is to say, if the cost of adhering to the contract (i.e. providing the consideration) is greater than the liquidated damages multiplied by the probability of being caught, then individuals have an incentive to breach the contract. The assumption that the party receives the benefit of the contract in either state allows for what the benefit is to be excluded from the consideration of what that benefit is. Attempting to formulate some quantification of contractual benefit has vexed parties and courts for some time, with intangible benefits proving difficult to value fairly and accurately.

Another key component to this model is that if a person breaches a contract there is a probability associated with being caught or not. A nuance to this is that the probability is not that actual probability of being caught, but the party in breach's expectation of the probability of being caught, which may be different to the actual probability of being caught. In some cases one may be certain that one would be caught, for example if a tenant refused rent. There, any liquidated damages clause greater than the value of rent withheld would discourage a breach, although any liquidated damages substantially more than this may be deemed excessive in protecting the contract.

Application of the model

To understand how the model might be used in a situation where $p<1$, a factual scenario similar to that in ParkingEye will be used. In the example we will assume that the benefit is a parking space. The cost of the parking space is £8.50 for two hours. The liquidated damages clause is an £85 fine.

It is highly likely a judge would determine the clause to be a secondary obligation, similarly to ParkingEye. Then, turning to the second limb it would need to be decided whether the fine is proportional. Inputting the numbers provided to the equation, for the clause to generally work as a deterred against a rational person then:

$$8.5 < 85p$$

Or

$$0.1 < p$$

For the £85 fine to protect effectively against breaches of contract, there must be a greater than 10% chance of being caught. In turn, to not be disproportionate, the probability of being caught should not be substantially more than 10%, so for example it should not be that 50% of those who do not pay for parking are caught, or at least that those parking their cars believe there is a 50% chance of being caught. What would be a reasonable amount in this instance is not a question this essay seeks to answer.

Whether that is an accurate estimate of p or not is a decision for the court, which may, of course, be influenced by evidence brought by parties. This simplifies the decision which the court must make in this example from a rough estimation of the benefits and costs on parties to a single point of decision making. The court is still required to assess evidence and make a decision based on facts, but those decisions will be focussed on things that are actually relevant in maintaining adherence with the contract. This also allows parties to focus the evidence which they bring. A person in breach of the parking terms who may previously have brought evidence relating to the importance of their custom to nearby businesses, or the parking company bringing its own on alleged reputational damage it has suffered can be ignored as irrelevant. Instead the claimant company might bring statistics on the number of fines handed out compared to estimated numbers of non-paying parkers. On the other hand, the defendant parker might adduce evidence on their own estimation of the probability of being caught at the time of parking. The model does not oust the need for judicial judgment in determining cases, estimating p may be a difficult task, but it may at least truncate the issues on which the court need be concerned.

Limitations of the model

Clearly, there are a number of limitations to the proposed model, however with careful consideration these can either be overcome, or provide directions to other areas on which evidence may be required.

One such situation is where the cost of adhering to the contract, the consideration offered, is not a tangible sum. In Makdessi, the consideration was a restrictive covenant to not solicit clients from Cavendish. In such situations the cost may be viewed as the benefit of breaching the contract foregone. This unavoidably does lead to the needing of estimations of benefits to be made, although the benefit of breaking the contract, rather than the benefit of the contract itself. This would require evidence for a judge to consider, however the model does again allow for evidence to be provided on the correct issues – on the benefit of the breach of contract to the breacher, rather than on the benefit of the contract to the innocent party. So, in that case, the court should consider the benefit to Mr Makdessi of breaching the restrictive covenant, which may be evidenced by the value of the contracts he struck with clients in breach of covenant.

Another problematic situation arises if the liquidated damages clause contains non-monetary damages. In such a situation a similar approach as to the above may need to be taken, with evidence submitted on the monetary value of those damages.

Further difficulties arise when we stop considering agents as rational, generally accepted as an unrealistic one. Introducing irrational agents, or a scenario where there are multiple different parties who may breach the contract all with different belief in the value of p are further developments which could be made to the model, building on this basic, assumption-heavy foundation.

Conclusion

The aim of this essay has been to introduce a model which formalises the Makdessi test liquidated damages clauses, rather than to replace the test itself. The model itself distils the variables which a

court may need to consider when applying the test. In simple cases, a court may only need to hear evidence on the likelihood of a breach of contract being caught. In more complex ones, in which assumptions of the model are relaxed, some further evidence may be needed on the costs of acquiescing to contractual obligations. The essay also aims to recalibrate the focus of the tests, away from the benefits derived by the claimant from the contract, to the costs and benefits of the defendant adhering to it. Further research on this matter might explore further relaxation of the model's restrictions, a consideration of what may occur if different parties contracting with a claimant have different estimates of p, and what may happen if the requirement of rationality is relaxed.

JUSTICE SHORTCHANGED? REDRAWING THE ETHICAL BOUNDARIES OF LIFTED JUDGMENTS POST *CRINION v IG MARKETS LTD* [2013] EWCA CIV 587

*Shen-Way Chong**

We skim off the cream of other men's wits, Pick
the choice of flowers of their tilted gardens To
set out our own sterile pots.

- Robert Burton[1]

Introduction

From the annals of the seventeenth century, adjudication by impartial and independent judges has been recognised as one of the cornerstones of civil society.[2] Unlike the medieval epoch where the monarch could summon a judge to compel him to account for his actions,[3] judges of the present demonstrate their independent thought process through their judgments. A judgment goes beyond the performance of a bureaucratic function – the supply of judicial reasoning is essential to "the establishment of fixed intelligible rules and for the development of law as a science".[4]

When a huge portion of partisan submission is 'lifted' to form the crux of a judge's reasons, allegations of bias and partiality will inexorably surface. A lifted judgment is broadly understood as the incorporation of the submissions of one party in whole or in part as the judge's own reasoning, without addressing the central arguments raised by the other party or explaining why those

* I am grateful for the helpful comments from Lady Justice Geraldine Andrews DBE and an anonymous referee on a draft of this article. All shortcomings remain mine.

1 Robert Burton, *The Anatomy of Melancholy* (Floyd Dell and Paul Jordan-Smith eds, Tudor 1948) 18.

2 John Locke, *Two Treatises of Government*, Book II (Black Swan, 1690) at para 4. On the discussion of Locke's theory, see Peter H. Russell, *The Third Branch of Government* (McGraw-Hill Ryerson, 1987) 20 & 21.

3 *O'Reilly v Mackman* [1983] 2 AC 237, 252.

4 Herbert Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd edn, Maxwell 1885) 147 & 148.

arguments were rejected.[5] The audience that a judgment serves needs to understand how the judge analysed the factual circumstances of the case and applied the law accordingly. A lifted judgment either defeats or diminishes these expectations.

Part I of this Article discusses the purpose of judgment writing and the judicial duty to provide reasons. This segment goes further to explore how the courts have dealt with judgments that divulge little to no judicial reasoning, otherwise known as non-speaking judgments.[6] Part II of this Article attempts to illustrate the paradox between lifted judgments and the ethics espoused in the Guide to Judicial Conduct[7] with extensive reference to the leading Court of Appeal decision in *Crinion v IG Markets*.[8] This segment points out the flaws in *Crinion* and argues that it is irreconcilable with the key principles enumerated in the Guide. It concludes with the assertion that a lifted judgment is unethical and poses serious detriment to public confidence in the judiciary. Part III of this Article calls for a 'functional approach' to be preferred over the minimalist prose endorsed in *Crinion* when dealing with instances of extensive judicial copying and proposes an addition to the Guide to clarify the permissible boundaries of judicial copying.

1. Why write judgments

To a great extent, the common law has evolved out of swashbuckling advocacy and at the expense of litigants, rankling courtroom dramas.[9] As the stage is set for a contest of averments, the advocates representing their respective clients inject every available strand of learning, suave persuasion and sometimes emotion in their painstaking attempts to weave an ironclad case. All of these unfold before the bench – justices who are bestowed with the mandate to resolve the dispute by seeking for

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5 See generally, *Williams v Solicitors Regulation Authority* [2017] EWHC 2005; *Crinion v IG Markets Ltd* [2013] EWCA Civ 587; [2013] C. P. Rep. 41; *English v Royal Mail Group Ltd* (2008), UKEAT/0027/08.

6 *Joinery Plus Ltd (in administration) v Laing Ltd* (2003) 87 Con LR 87; *Soleimany v Soleimany* [1999] QB 785.

7 Courts and Tribunals Judiciary, 'Guide to Judicial Conduct' (March 2020) <https://www.judiciary.uk/wp-content/uploads/2020/03/Guide-to-Judicial-Conduct-Guide-Fourth-Amendment-2020-v3-1.pdf> accessed 20 June 2021.

8 [2013] EWCA Civ 587; [2013] C. P. Rep. 41.

9 John D. Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 LQR 205, 213.

answers necessary to justify and achieve a fair outcome. Upon hearing arguments from both sides and admitting all relevant evidence, a decision is eventually rendered in the form of a written judgment that encapsulates much of the legal discourse and signifies the culmination of judicial deliberation.[10]

An authoritative judgment can only be rendered if its author is mindful of the purposes of writing.[11] The judgment that entails after a usually protracted dispute is etched into the institutional memory of the court and becomes the law. At the heart of the English legal system is the adversarial nature of proceedings that has existed since time immemorial, and judgments are written to apprise the litigants "who has won and why".[12] In addition to being a healthy discipline for those who exercise powers that are capable of causing vast harm to others,[13] a written judgment is a vehicle by which the judiciary elucidates, expounds upon and creates rights for the common folk.[14]

Many arguments can be advanced in support of judgment writing, the most obvious reason being the practice of law is traditionally grounded in literary works. "Most law professors, judges and practicing lawyers devote considerable effort to researching the law and composing a variety of legal writings, including law journal articles, client memoranda, appellate briefs and legal opinions".[15] The legal significance of judgment writing lies in the composition of a variety of legal writings, including law journal articles, client memoranda, appellate briefs and legal opinions".[15] The legal significance of judgment writing lies in the composition of a variety of sources ranging from

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10 *Re B (A Minor)* [1990] 1 FLR 344, 347.

11 James Wilson and Alexander Horne, 'Judgment Matters' (2010) 160(7446) NLJ <https://www.newlawjournal. co.uk/ content/judgment-matters> accessed 11 June 2021.

12 ibid. Also see *Meek v City of Birmingham District Council* [1987] IRLR 250; *R v Knightsbridge Crown Court Ex p. International Sporting Club (London) Ltd* [1982] QB 304; *R v Harrow Crown Court Ex p. Dave* [1994] 1 WLR 98.

13 ibid 9, at 211.

14 Gerald Lebovits, Alifya V. Curtin and Lisa Solomon, 'Ethical Judicial Opinion Writing' (2008) 21 Geo. J. Legal Ethics 237, 244.

15 Carol M. Bast and Linda B. Samuels, 'Plagiarism and Legal scholarship in the Age of Information Sharing: The Need for Intellectual Honesty' (2008) 57 Cath. U. L. Rev. 777, 793.

knowledge of various factual and legal issues to the proper application of primary and secondary legislation, precedents, evidential matters and other pertinent sources of authority.[16] One only has to take a cursory glance at the contents of a judgment to realise that these are indispensable literatures in the academy of legal writing.

Written judgments have been described as necessary to "constrain judges and promote accountability in the resolution of real world disputes".[17] Writing a judgment impels the judge to exert intellectual discipline on themselves, which in turn reinforces judicial deliberation to the effect that the ultimate decision is derived from reasoned judgment and thoughtful analysis over an arbitrary exercise of judicial authority.[18] For those aggrieved by the trial court's decision and seek to contest those findings before an appellate court, a meaningful appellate review can only be established if the first instance judgment discloses salient grounds of appeal, to enable the higher courts to clarify certain issues of law which may yet remain unclear.[19] Although no one savours the prospect of being shown to have erred,[20] the "disinterested application of known law"[21] necessitates the removal of injustice alleged by the contender.[22]

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16 Naida Haxton, 'Editing Judgments: Lessons Learned in Law Reporting' (2007) 57 Clarity <https://minio2.123dok.com/dt02original/123dok_es/original/2019/01_24/vrqr1m1579237240.pdf?X-Amz-Content-Sha256=UNSIGNED-PAYLOAD&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=LB63ZNJ2Q66548 XDC8M5%2F20210611%2F%2Fs3%2Faws4_request&X-Amz-Date=20210611T065325Z&X-Amz-SignedHeaders =host&X-Amz-Expires=600&X-Amz-Signature=672739dcdc0c6b0fca314d3cb6be21c8755a728e8f7eedc4762cb cd90bb635c6> accessed 11 June 2011.

17 Jeffrey L. Dunoff and Mark A. Pollack, 'Experimenting with International Law' (2017) 28(4) EJIL 1317, 1338. Similarly, see Roman N. Komar, *Reasons for Judgment* (Butterworths 1980) 9. Cf Alfred Denning, *Freedom Under the Law* (Stevens & Sons 1949) 91 – 92.

18 See generally Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960) 13, 26 & 56.

19 Andrew Bainham, 'Judgment: Whose Responsibility is it?' (2019) Fam Law 849, 851 (note).

20 ibid. Also see *Re L-B (Reversal of Judgment)* [2013] UKSC 8, [2013] 2 FLR 859 at [46] where Baroness Hale commented on the situation where a judge recognises that an error has been made: "it takes courage and intellectual honesty to admit one's mistakes".

21 A phrase coined by Louis L. Jaffe, *English and American Judges as Lawmakers* (OUP 1969) 13 when describing the function of a judge.

22 Lord Devlin, 'Judges and Lawmakers' (1976) 39 MLR 1, 3.

Interwoven with the crafting of judgments is the judicial duty to give reasons, for such duty forms the "building blocks of the reasoned judicial process".[23] As the apothegm goes, a judge should not speak but his judgment should.[24] While a judgment is primarily written for the litigants, it does not follow that the litigants are the sole consumers of the judgment. Judges also write for the public and for professionals including other judges, lawyers, academic scholars and law students.[25] At the broadest level of public accountability, a requirement that judges give reasons for their decisions – grounds that can be debated, attacked and defended – is fundamental to the legitimacy of the judicial institution in the eyes of the public.[26] As Lord Denning explained:

> "in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons."[27]

Recent authorities from the Court of Appeal have equated a non-speaking judgment as an error of law that warrants appellate intervention.[28] Illustrating the sanctity of the judicial duty to provide reasons, Neill LJ in *Re L (Minors)* went as far as holding that a non-speaking judgment was "defective" and ordered a retrial of the matter before another judge,[29] as did Males LJ in *Simetra*

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23 *Glicksman v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097, (2001) 63 BMLR 109 at [11]. It is only a general rule that reasons need to be given. For exceptions to the general rule, see, for example, *Capital and Suburban Properties Ltd v Swycher* (1976) Ch. 319; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 and *R v Harrow Crown Court Ex p. Dave* [1994] 1 WLR 98.

24 Judges Matter, 'Judges Speak Through Their Judgments' (23 September 2019) <https://www.judgesmatter.co. za/opinions/judges-speak-through-their-judgments/> accessed 13 August 2021. In a 2012 lecture, Lord Neuberger stated that: "Without judgement there would be no justice." See Lord Neuberger, No Judgment – No Justice (First annual BAILII Lecture, 20 November 2012) <https://www.bailii.org/bailii/lecture/01.pdf> accessed 13 August 2021.

25 Mary Kate Kearney, 'The Proprietary of Poetry in Judicial Opinions' (2003) 12 Widener J. Pub. L. 597, 601.

26 David L. Shapiro, 'In Defense of Judicial Candor' (1987) 100(4) Harv. L. Rev. 731, 737.

27 Alfred Denning, *The Road to Justice* (Stevens & Sons 1955) 29.

28 *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 at [39]; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [19]; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381-382.

29 (CA, 30 January 1991).

Global Assets v Ikon Finance.[30] The exigency that the modern courts have placed on the expression of intellectual substrate and the disdain for reticence mark a tectonic shift from the stance of their predecessors, especially if one recalls that Lord Mansfield, at one time was audacious enough to advise: "[N]ever give your reasons; – for your judgment will probably be right, but your reasons will certainly be wrong."[31]

2. Lifted judgments - a stain on judicial ethics

Most judges strive to be fair and appear to be fair so that the litigants walk away satisfied that they were fully heard, their positions were fully considered, and the pertinent rules were applied properly throughout the proceedings.[32] These considerations run like a golden thread throughout the legal system and are especially discernible in the first instance courts where interaction between judges and litigants occur more readily. [33] It is easy to overlook them when a judge becomes unduly immersed in the proceedings before them or have made up their mind prior to full argument from counsel,[34] for why else would an author deem judicial neutrality as a myth?[35] The scale of such anxiety, though unlikely to be widespread, wields considerable persuasion, especially when a judgment is 'lifted' verbatim from a partisan submission while neglecting the core arguments of the

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30 ibid 28 at [8]. It must however be stated that a retrial is an expensive step in the judicial process and is rarely granted, see *Lai Wee Lian v Singapore Bus Ltd* [1984] 1 AC 729 at 741: "Thus, if the only conclusion open on the evidence available at trial was the conclusion reached by the trial judge, then, notwithstanding an inadequate statement of reasons, the matter need not go to a new trial."

31 John Campbell, *The Lives of the Chief Justices*, vol 3 (James Cockcroft & Co 1873) 481.

32 This point was more eloquently stated by Sir Robert Megarry: "One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process. See Robert Megarry, 'Temptations of the Bench' (1998) 16 Alta. L. Rev. 406, 410.

33 Simon Stern, 'Copyright Originality and Judicial Originality' (2013) 63 UTLJ 385, 386.

34 Lord Diplock, for example, was characterised as someone who prepared for oral hearings very thoroughly to the extent that it was not unusual for him to have made up his mind before a hearing. See Alan Paterson 'Does Advocacy Matter in the Lords?' in James Lee (ed), *From House of Lords to Supreme Court Judges, Jurists and the Process of Judging* (Hart Publishing 2011) 257. At p.258, Lord Hope, recalling his days as a barrister appearing before Lord Diplock, said: "He didn't allow arguments to develop that he thought had nothing in them ... and really cut you short."

35 Kathleen E. Mahoney, 'The Myth of Judicial Neutrality' (1996) 32 Willamette L. Rev. 785, 788.

other. Understandably, such instance would engender apprehensions that the judge was an unreliable agent of justice who could not be trusted to carry out their constitutional obligation *erga omnes*.

A lifted judgment can be aptly described as judicial plagiarism.[36] Bereft of the judge's independent analysis and contribution, a judgment may appear to be skewed in favour of the party whose submissions were adopted or may at the very least suggest that the judge's mind was shut to the arguments of the losing party.[37] Even if the lifted judgment represents the judge's true thinking, it reflects poorly on the administration of justice.[38] The Guide to Judicial Conduct underscores three distilled principles from the Bangalore Principles of Judicial Conduct[39] that form the essence of judicial ethics – judicial independence, impartiality and integrity.[40] In particular, a judge is expected to display "intellectual honesty"[41] and to "avoid situations which might reasonably reduce respect for judicial office or might cast doubt upon their judicial impartiality".[42] It is difficult to see how a judge who plagiarises the winning submission without any independent thought can be said to have upheld their "Hippocratic" oath of ethics. To argue otherwise would be tantamount to blowing hot and cold.

However, the Court of Appeal in *Crinion v IG Markets Ltd* was reluctant to accept that plagiarism and judicial ethics are mutually exclusive.[43] The gist of the dispute is one of enforceability of debt, yet it is unlikely to be overly significant from a commercial vantage. In a nutshell, *Crinion* is one of the few ironies in English common law that starts off being about one thing only to end up being about quite another – the fashion in which the trial judge opted to draft his reasons. While much

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36 *Williams* (n 5); *Re S* [2015] EWCA Civ 1015; [2016] 2 FLR 965; *Crinion* (n 5); *English* (n 5).

37 ibid 33, at 393.

38 Per Sir Stephen Sedley in *Crinion* (n 5) at [39].

39 United Nations, 'The Bangalore Principles of Judicial Conduct' (2002) <https://www.unodc.org/pdf/ crime/corruption/ judicial_group/Bangalore_principles.pdf> accessed 20 June 2021.

40 ibid 7.

41 ibid.

42 ibid.

43 *Crinion* (n 5).

displeasure was expressed against the etiquette of "cut-and-paste",[44] the court ultimately affirmed that a minimalist judgment was neither defective nor capable of giving rise to injustice that justifies appellate intervention.[45] The test formulated by Underhill LJ was "whether the judge properly addressed" the contentions of the losing side,[46] without further explanation or illustration on judicial propriety. The judgment rendered by His Lordship, read in its entirety, suggests that so long as the judge provides a brief analysis to show that the conclusions derived were not the product of a purely mechanical act, the judge would have discharged his or her judicial duty to provide reasons, notwithstanding that the said judgment was premised unilaterally on one side.

It is certainly regrettable and unfortunate that the court in *Crinion* did not attempt to make any reference whatsoever to the Guide to Judicial Conduct in its decision. The Guide is the closest paraphernalia that judges have to a code of conduct without it actually being one.[47] It is not every day that an opportunity presents itself to the court which begets adjudication on judicial ethics. When the court does get such opportunity, one can almost expect the main non-jurisprudential source on the topic of judicial ethics in the United Kingdom would be cited. Hence, the omission in *Crinion* is patently disappointing because reference to the Guide would have prompted the court to further explicate the ethical principles at play, and perhaps even encourage future courts to steer clear of certain prose and terminology.[48]

By contrast, Pauffley J of the Family Court in *Re L (A Child)* drew explicit attention to two out of the three principles ventilated in the Guide – independence and impartiality.[49] "It is difficult to view the

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44 ibid, per Underhill LJ at [16] and Sir Stephen Sedley at [40].

45 ibid, at [17].

46 ibid, at [36].

47 ibid 7, at 4. The opening remarks sets out the purpose of the Guide, that is "to offer assistance to judges, coroners and magistrates about their conduct. It is based on the principle that responsibility for deciding whether or not a particular activity or course of conduct is appropriate rests with each individual judge." The remarks further stipulate that the Guide is "not a code, nor does it contain rules other than where stated. Instead, it contains a set of core principles which will help judges reach their own decisions."

48 Nothing more than a general remark was made by Sir Stephen Sedley, who stated at para 46: "I hope that a judgment like the one now before us will not be encountered again."

49 [2014] 1 WLR 2795.

justices as having been independent and impartial if, as happened here, [the court] simply adopted the local authority's analysis of what their findings and reasons might comprise."[50]

Although Her Lordship made no mention of the Guide *per se*, the relevant passages are nevertheless *in pari materia* with those principles enumerated in the non-jurisprudential text. Furthermore, Her Lordship thought that "it is fundamental that nothing is sent to the judge by one party unless it is copied simultaneously to every other party" in order to secure fairness to the parties.[51] A quick glimpse at the Guide reveals that exercising equality and fairness of treatment are part of the ethical principle of integrity.[52]

Turning back to *Crinion*, the message that the Court of Appeal is sending to judges is something along the lines of: "lifted judgments will be tolerated so long as you have properly addressed the case, the issues and the evidence bearing on the losing party.[53] Avoid extensive plagiarism though, as recriminations of bias and misconduct may arise more readily." Ultimately, the line that demarcates acceptable copying from inexcusable copying is extremely opaque.[54] There seems to be a tacit acceptance that judges may copy when counsel's submissions are of such quality that rewriting the reasoning and conclusions in the judge's own words would be such a waste of time.[55]

In deciding as it did, the court in *Crinion* essentially preferred a lackadaisical approach to intellectual honesty – that judges, when delivering their judgments, are permitted to "fill up the empty vessel"

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50 ibid, at [68].

51 ibid, at [67].

52 ibid 8, at 7.

53 *Crinion* (n 5).

54 See *English v Royal Mail Group Ltd* (2008), UKEAT/0027/08 where a verbatim reproduction of the respondents' submissions that completely ignored the appellant's submissions rendered the judgment of the Employment Tribunal fatal.

55 *Crinion* (n 5). For example, in para 5, Underhill LJ described the submissions of the counsel for the winning party as "thorough and carefully structured" and commended those submissions as "an excellent piece of work".

first before deciding whether to engage in an elaborated disquisition of empirical analysis.[56]

Intellectual honesty, along with coherence and critical rigour, is a normative heritage of judicial ethics and discipline.[57] It is on this point that the court in *Crinion* left much to be desired. While lifted judgments may convey the extent of confidence that a judge holds in counsel's submissions,[58] this argument is fundamentally flawed and untenable because its inquiry is too limited. Suppose a judge is neither partial towards the winner or biased against the losing party, but instead lacked the requisite sophistication or conscientiousness to fully comprehend a particularly complex and protracted dispute. The matters arising from the dispute have never been adjudicated before and there are no established precedents. After hearing submissions from both sides, the judge delivers a judgment that reproduces a significant portion of counsel's submissions, making only inconsequential changes that afford little to no insight into the judge's own reasoning process. Surely, the lack of competence that the judge had ostensibly demonstrated cannot be said to be an exemplar of intellectual honesty. The courts frequently peddle the notion that justice must not only be done but must be seen to be done,[59] yet it is difficult to see how justice can be seen to be done in the scenario envisioned in light of the minimalist approach laid down in *Crinion*.[60]

Lurking beneath the rationale for minimalism is perhaps the apprehension of imposing more burden on judges who have very little control over their workload and that limited judicial resources would

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56 ibid. At para 16, Underhill LJ admitted that: "a judge will often derive great assistance from counsel's written submissions, and there is nothing inherently wrong in making extensive use of them, with proper acknowledgement, whether in setting out the facts or in analysing issues or the applicable legal principles or indeed in the actual dispositive reasoning."

57 ibid 25. In his article, Shapiro argues that all cooperative undertakings would be difficult or impossible in the absence of truthfulness.

58 ibid 55.

59 *R v Sussex Justices Ex p. McCarthy* [1924] 1 KB 256, 259. See also, *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629; *Bank Mellat v HM Treasury* [2014] AC 700; *R v Abdroikov* [2007] 1 WLR 2679; *Porter v Magill* [2002] 2 AC 357; *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2000] 1 AC 119.

60 Like Megarry once said: "To be condemned without being understood is as bad as being condemned unheard." See Robert Megarry, *Lawyer and Litigant in England* (Stevens & Sons 1962) 135.

be further strained by meritless appeals based on make-weight allegations.[61] However, this burden must not be overstated for judicial accountability and the ethics of judgment writing seek "basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it."[62] The pressure upon modern judges at both first instance and on appeal cannot be said to be greater than that of their forebears, even more so if one considers that judges of today are all accorded with the latest research apparatuses. An ethical judgment – one that encompasses independence, impartiality and integrity – need not be a lengthy judgment.[63] In fact, brevity is key to an authoritative and trenchant legal reasoning,[64] and at the same time allows judges to dispose their cases promptly.

In the end, practical realities support the conclusion that judicial plagiarism and ethical judgment writing simply cannot coexist. Whether the courts attract public support or criticism hinges on the quality of their reasons. The judicial duty to provide reasons can only be said to have been genuinely discharged if the reasons given truly reflect the views of the judge. Where the duty is largely circumvented as was the case in *Crinion*, the inequity that entails will prove difficult to be righted. In consonance with the right to fair trial[65] where decisions in litigated cases are neither submitted to nor blessed at the ballot box,[66] a plagiarised judgment bears the hallmark of a poisoned judgment, and a judge that projects such obvious moral turpitude inevitably drags the reputation of the bench into declension.

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61 ibid 33, at 390.

62 *R v Sheppard* [2002] 1 SCR 869, at [60].

63 Ward LJ was instructive on this point in *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499 and opined: "Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments."

64 ibid 8, at 215.

65 *English v Emery* (n 28) at [19]; *Anya v University of Oxford & another* [2001] IRLR 377 at [12]. For a broader overview of the jurisprudence of Article 6 of the European Convention of Human Rights, see *Garcia Ruiz v Spain* (2001) 31 EHRR 589; *Helle v Finland* (1997) 26 EHRR 159.

66 *Sheppard* (n 62), at [5].

3. An alternative to minimalist prose

Judgment writing is said to be "public writing of the highest order".[67] The question that must be asked is what do we expect of a judge? An appropriate response would be that ethical judgment writing intertwines style and substance,[68] and it is impossible to prescribe a formula of rigid methodology for crafting the perfect judgment.[69] While our expectations on the depth and precision of the judge's independent analysis must be guided by pragmatism over quixotism, it would not be unreasonable to demand that the judge's own imprimatur on the law,[70] at the most rudimentary level, must have explored both sides to a dispute and be capable of explaining to its audience where justice lies.[71]

For clarity, this paper neither attempts to endorse nor extol the idea of judicial originality. The underlying principle of *stare decisis* makes it impractical and undesirable to impose an originality requirement on the enterprise of judgment writing.[72] As one author puts it – "it is only the arrogant fool or the truly gifted who will depart entirely from the established template and reformulate an existing idea in the belief that in doing so they will improve it."[73] Drawing on Canadian jurisprudence, what is required instead is a 'functional mechanism' that can determine whether the alleged deficiencies in reasons that a judgment contains effectively deprive a party of meaningful appellate review.[74] If the conclusion is in the affirmative, it follows that an error of law has been committed which warrants appellate intervention, and *vice versa*.[75]

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67 ibid 14, at 237.
68 ibid, at 238.
69 ibid.
70 ibid, at 249.
71 ibid, at 309.
72 Co Litt 97b.
73 Duncan Webb, 'Plagiarism: A Threat to Lawyers' Integrity?' (*International Bar Association*, 2009) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc2ef7cd-3207-43d6-9e87-16c3bc2be595> accessed 26 June 2021.
74 *Sheppard* (n 62), at [25]
75 ibid.

The starting point for consideration would take into account a list of comprehensive factors including (1) the complexity of the dispute; (2) did the judge fully understand the intricacies of the dispute; (3) did the judge derive any assistance in drafting his or her findings;[76] (4) the extent of the judge's copying and what was copied;[77] (5) any significant inconsistencies or conflicts in evidence which are not addressed in the judgment;[78] (6) did the judge devote sufficient attention to the arguments of the complainant;[79] (7) whether the judge failed to take into account any material consideration or gave consideration to any immaterial circumstance;[80] (8) whether the judge clearly explained his preference for one case over the other;[81] (9) whether the copied text is supported by appropriate citations or up-to-date legal authority;[82] (10) did the judge deliberate or distinguish competing cases cited;[83] (11) any informal arrangement that might exist between the court and a litigant;[84] (12) any other intrinsic or extrinsic factors relevant to the determination of the exercise of independent analysis by the judge.

The multifactorial approach suggested above gives judges some leeway in preparing their judgments in that it is not a fine-tooth comb that sets an extremely lofty threshold of writing that reads as a work of art in itself. At the same time, the clemency granted to judges is not too lenient that it enables them

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76 *Virdi v Law Society (Solicitors Disciplinary Tribunal intervening)* [2010] 3 All ER 653. The Court of Appeal found that assistance rendered by the clerk to the tribunal in drafting their written findings was not *ultra vires* as the tribunal had no power to reconsider their decision.

77 *Re S* (n 36). 20% of the material in the judgment of first instance court which was taken verbatim or near verbatim from the skeleton arguments and written materials submitted by the parties was not serious enough to be appealed.

78 *Sheppard* (n 62) at [28].

79 *English* (n 5). A verbatim reproduction of the respondents' submissions that completely ignored the appellant's submissions rendered the judgment of the Employment Tribunal fatal.

80 *Re B* (n 10) at 347.

81 *Flannery* (n 28) at 382.

82 *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357 at [36]. The Canadian Supreme Court agreed with the view that a failure to attribute outside sources should be discouraged.

83 *Crinion* (n 5) at [17].

84 *Re L* (n 49). Pauffley J observed that in order to secure fairness to the parties and the perception that justice will be done, it is fundamental that nothing is sent to the judge by one party unless it is also circulated to the other party.

to abdicate their core responsibility with impunity, and to delegate the burden and cost of judgment writing to the parties. Where plagiarism is alleged, be it an unattributed inclusion of one paragraph or ten paragraphs dissipated sporadically throughout a 50-page long judgment, or at a rate slightly below the 94% similarity level condemned in *Crinion*,[85] not all factors will be material and the weight assigned to the relevant factors may vary according to the facts of the dispute.

Returning to *Crinion*, the prospect of the impugned judgment being set aside is highly plausible had it been appraised against the list of factors detailed above. Of the 14 issues disputed, the trial judge did either one of these – made zero reference to the arguments ventilated by the defendant's counsel,[86] gave no reason as to why those arguments were rejected,[87] or substantially lifted passages from the claimant's submissions with extreme paucity of his own reasoning.[88] More egregiously, the "properties" segment of the electronic copy of the judgment readily revealed the author as counsel for the claimant.[89] Where the Court of Appeal was willing to overlook this mischief and to accept the minimalist prose of the first instance judge, this would not be palatable under the functional approach. The ten cardinal factors call for a contextual and holistic consideration of all the circumstances which may have a bearing on the suggestion that the judge had indeed copied a partisan submission blindly and whether a fair-minded and informed observer would conclude that the judge had effectively abdicated his or her responsibility as a result of the copying.

In addition to the functional mechanism, this paper proposes that the following paragraph be inserted into the Guiding Principles of the Guide to Judicial Conduct, that forms the wider notion of integrity:

> *Judges are the official bearers of public trust and confidence in the courts. Therefore, the judgments that they write are held to high ethical standards. Judges must undertake intensive finding of fact and conclusion of law before arriving at a decision. A judge must not engage in*

85 *Crinion* (n 5), at [11].

86 See generally, *IG Markets Ltd v Crinion* [2012] EWHC B4 (Mercantile).

87 ibid.

88 *Crinion* (n 5).

89 *Crinion* (n 5), at [11].

> *extensive copying of partisan submissions and must ensure that no important evidence or argument from the other side is overlooked. Where a judge decides to borrow language from sources other than his own, he or she must do it in a way that does not foreclose a party of meaningful appellate review and must ensure that proper attribution is given. A judgment that fails to acknowledge borrowed language is a judgment lacking in integrity and reflects adversely on the ethics of the judiciary.*

The inclusion of this proposed paragraph is not expected to be a silver bullet to every instance of judicial plagiarism, but it will provide a much-needed clarification to judges on the ethical boundaries of "cut-and-paste" judgments. It is not unrealistic to anticipate that a comment addressing plagiarism in the Guide will serve as a salutary deterrent against chameleon writing that adopts the winning litigant's prose, and exhibits no distinctive thought or reasoning from the judge.[90] In doing so, this paragraph could pave the way for broaching the subject of lifted language that is often downplayed or goes unnoticed along the corridors of justice.

Conclusion

Judges are not rubber stamps that assent to the work of another as a substitute for their own. A superficial observation of the judicial process under the pretence of discharging judicial responsibility does not live up to the ethics and virtues envisioned in the Guide to Judicial Conduct. In a cosmos where plagiarism is portrayed as *malum in se,* judges as the guardians of the rule of law are certainly not impervious to the stigma of disregarding this social imperative. Without integrity, impartiality and competence, neither justice nor fairness is possible.[91] Construed narrowly, one side of a dispute which has not been given the closest personal attention by the judge renders the judicial process perfunctory.[92] To paraphrase the lines of an author – "the whole world might play this fraudulent game, but when it is played in an institution dedicated to accountability, integrity, and transparency, the offence is a mortal wound to our legal system."[93]

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90 ibid 14, at 249.

91 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 166.

92 ibid 2, at 211.

93 K. R. St. Onge, *The Melancholy Anatomy of Plagiarism* (University Press of America, 1988) 37.

ANOREXIA NERVOSA IN THE COURT OF PROTECTION: DISCOVERING THE DAMAGING LEGACY OF INCAPACITY AND (IN)ESCAPABLE CATCH-22

Jordan Briggs

Capacity law is an important mediator between the state and the individual. That is because, when some person ('P') is found incapacitous, the state can become empowered to direct what course P's life will take,[1] including by choosing courses that contradict what P would choose for themselves.[2] Capacity law deserves our attention because every person's vulnerability and capacity fluctuates over their lifetime,[3] meaning that nobody can guarantee their lifelong exclusion from its jurisdiction.

Anorexia nervosa ('AN') cases in the Court of Protection show that capacity law can be interpreted, quite avoidably, to permit rather than protect against the state making decisions on Ps' behalf. Clinically defined,[4] AN causes sufferers to restrict calorific intake, intensely fear weight gain,

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1 Whilst capacity law is decision-specific (it determines P's capacity over limited matters (e.g. *viz.* a medical decision) and does not, unless again invoked, disturb P's agency over any other life decision (e.g. what television programmes to watch): *PC & NC v City of York* [2013] EWCA Civ 478), even singular decisions can materially alter the course of someone's life. Examples include decisions about: (i) whether or not a hypersensitive and unpredictable P with kidney failure should receive a transplant notwithstanding its traumatising aftercare regime (*Manchester University NHS Foundation Trust v William Verden and ors* [2022] EWHC 500 (CoP); (ii) whether to restrict contact between P and her loving, lifelong husband because the latter had expressed views tending towards P's death by euthanasia (*SR v A Local Authority* [2018] EWCOP 36); (iii) whether P should have contraception implanted into her, even is do doing required physical force and restraint (*A Local Authority v Mrs. A and Mr. A* [2010] EWHC 1549 (Fam)

2 E.g. *The Mental Health Trust & Ors v DD & Another* [2015] EWCOP 4, authorising the forcible removal from home and therapeutic sterilisation of P against her wishes; *NHS Trust v JP* [2019] EWCOP 23, authorising the deception, sedation and subjection to a caesarean section of P against her wishes.

3 Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, The New Press, 2004); Titti Mattson, 'Autonomy, Capacity and Vulnerability: Making Decisions on Social Services for Persons with Dementia in Sweden', in in Mary Donnelly, Rosie Harding and Ezgi Taşcıoğlu, 'Supporting Legal Capacity in Socio-Legal Context', (Hart, 2022).

4 For Ps' descriptions of how AN affects them, see Tony Hope, Jacinta Tan, Anne Stewart and John McMillan, 'Agency, ambivalence and authenticity; the many ways in which anorexia nervosa can affect autonomy', *International Journal of Law in Contssxt* 9:1, esp. p.23-33.

develop a significantly low body weight and disturbed experiences of the same.[5] This article argues that mental capacity law is being applied undesirably in cases involving AN Ps.

The argument is that, under the existing approach, AN Ps are effectively irrefutably presumed incapacitous in relation to nutrition related therapeutic decisions, despite this offending P's autonomy interests, the Mental Capacity Act 2005 ('MCA 2005'), and the United Nations Convention on the Rights of Persons with Disabilities.

To so argue, the article takes four parts. The first outlines the legal test for determining (in)capacity under the Mental Capacity Act ('MCA') 2005. The second describes how the MCA 2005 is applied to AN Ps. The third criticises that application as perversive of Ps' autonomy, domestic statute and international law. The fourth section, responding to a gap in socio-legal AN literature on this point, disaggregates judicial approaches to AN Ps' capacity and reveals its conviction that AN Ps' reasoning *always* betray 'normative mistakes', then offers an alternative application of capacity law to better respect Ps' autonomy in domestic and international law.

1. Determining (in)capacity under the MCA 2005

Capacity law can engage when it appears that P cannot take a specific decision in furtherance of their best interests.[6] For example, if P refuses medical treatment notwithstanding attendant grave risks, capacity law can engage to inquire whether P properly understood or considered that treatment before rejecting it. If that inquiry is answered negatively, clinicians and courts must treat P in

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5 Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition: <https://www.breathetherapies.co.uk/wp-content/uploads/2019/06/DSM-5-Diagnositic-Criteria-.pdf> (Accessed 31 March 2022)

6 It is understandable but naïve to suppose that capacity law engages only when, in line with MCA 2005 s2(1), P cannot make a decision for themselves 'because of' some 'impairment of, or a disturbance in the functioning of, the mind or brain'. Rather, in clinical practice, incapacity may be determined and attributed to vague descriptors like 'lack of insight' and 'impaired executive/frontal lobe function'. These do not prove any particular disorder or secure causation, as envisaged by s2(1), so 'widen the net of capacity assessments' over those without concrete impairments demonstrably precluding decision-making: Shaun O'Keefe, 'Functional Capacity Assessments by Healthcare Professionals', 'Supporting Legal Capacity in Socio-Legal Context', (*No. 3*), p.88; see also Paula Case, 'Negotiating the domain of mental capacity: Clinical judgment or judicial diagnosis' (2016) 13(3-4) *Medical Law International* 174, especially at 200.

furtherance of their best interests.[7]

The capacity test involves three questions. [8] The first asks: is P *'able to make their own decisions (with support if required)?'*.[9] This tests P's ability to: (i) understand salient 'relevant information' about the treatment,[10] including the reasonably foreseeable consequences of deciding one way or another or failing to decide;[11] (ii) retain that 'relevant information'[12] for a short time;[13] (iii) use or weigh the 'relevant information' as part of a decision-making process,[14] and; (iv) communicate their decision.[15]

'Using and weighing' information, which proves fatal for AN Ps[16] and will be this article's primary concern, tests P's capability to 'employ the relevant information in the decision making process and determine what weight to give it relevant to other information'.[17] Crucially, P cannot be considered

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7 MCA 2005, s1(5); s4.

8 This three-stage formulation appears at 4.21, in the new MCA 2005 [Draft] Code of Practice ('MCA Draft Code') released for consultation on 17 March 2022: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061499/draft-code-of-practice.pdf>. It replaces the two-stage test in the previous MCA 2005 Code of Practice from 2007 ('MCA Old Code'), at 4.10: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf> (Both accessed 31 March 2022).

9 MCA 2005, s2(1)

10 *Ibid*, s3(1)(a)

11 *Ibid*, s3(4)

12 *Ibid*, s3(1)(b)

13 *Ibid*, s3(2)

14 *Ibid*, s3(1)(c)

15 *ibid*, s3(1)(d)

16 Interestingly, India's Mental Healthcare Act 2017 omits that Ps must 'use and weigh' information, requiring instead only that P can 'understand', 'appreciate any reasonably foreseeable consequence of' and 'communicate' a decision (see, generally, Soumitra Pathare and Arjun Kapor, 'Enabling Supported Decision-making in India's Mental Healthcare Act, 2017: Learnings from a Low-Resource Country Setting', in 'Supporting Legal Capacity in a Socio-Legal Context' (*No. 3*)). Accordingly, Indian law might accept the capacity in AN Ps that MCA 2005 denies.

17 *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80, [38].

incapacitous simply because P weighs issues in a manner that, to others, is 'unwise'.[18] Rather, MCA 2005 envisages that, so long as P engages in some weighing and balancing exercise, P is entitled to weigh matters however they wish.

That second capacity question, arising if P fails to demonstrate any ability above but not otherwise, asks: *'is there an impairment or disturbance in the functioning of [P's] mind or brain?'*.[19] If there is, the third question arises and asks: is P's *'inability to make the decision because of the impairment or disturbance?'*.[20] If answered affirmatively, P lacks capacity to take the relevant treatment-related decision and clinicians and courts must treat P in furtherance of their best interests.

2. Case law

The stark fact is that, every time the courts apply MCA 2005 to AN Ps in England and Wales, they decide that P lacks capacity to refuse nutrition-related treatment.[21] The determinative issue is AN Ps' putative inability to 'use and weigh' nutrition-related information. This pattern, and its underlying reasoning, began in *A Local Authority v E* ('*E*').[22]

E was an intelligent, charming and articulate 32-year-old woman.[23] Sadly, she also suffered from severe AN, borderline personality disorder, alcohol misuse and opiate dependency.[24] Before her

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18 MCA 2005, s1(4); MCA Draft Code, 2.14.

19 'Impairments' include some mental illnesses, dementia and losses of consciousness: New Draft Code, 4.46.

20 Emphasis added: New Draft Code, 4.50.

21 Sam Boyle, 'How should the law determine capacity to refuse treatment for anorexia?' (2019), International Journal of Law and Psychiatry, 64, p.7. Indeed, neither the MCA Old Code, nor MCA Draft Code, nor 1995 Law Commission Report on Mental Incapacity (Law com No 231) envisage circumstances in which AN Ps might ever be capacitous: respectively, at 4.22, 4.37 and 3.17.

22 [2012] EWHC 1639

23 *Ibid*, [5]; [101].

24 *Ibid*, [1]; 21]

hearing E had a Body Mass Index ('BMI') of 11.3[25] and was living under palliative care arrangements.[26] The Local Authority, discovering this, applied to the Court of Protection for authorisation to feed E, under physical or chemical restraint for at least one year, to raise her BMI to 17.[27] E resisted. Her capacity to do so was queried.

Adducing evidence on capacity was Dr. Glover. He gave evidence that, for AN Ps, 'the determination to avoid food increases as the sufferer's physical condition worsens'.[28] Accepting that, Peter Jackson J held that E could not 'use and weigh' nutritional information even-handedly because, for her, the 'compulsion to prevent calories entering her system ha[d] become the card that trumps all others'.[29] Accordingly, E was found incapable of 'weighing the advantages and disadvantages of eating in any meaningful way'[30] and was found incapacitous to make nutrition-related decisions.

Peter Jackson J conceded that any P 'with severe [AN] may be in a Catch 22 situation... [because] by deciding not to eat, she *proves* that she lacks capacity to decide'.[31] Put differently, on that analysis, calorific aversion is both the justification for inquiring into P's capacity and - because it discloses a pathological approach to nutrition - its conclusive determinant establishing incapacity. Indeed, Dr. Glover described legal incapacity as a *symptom* of AN by asserting that '*anyone* with severe [AN] would lack capacity to make [nutrition-related] decisions'.[32]

That prophecy was self-fulfilling. *E* was followed by *The NHS Trust v L & Others*.[33] Dr. Glover again appeared and, through evidence that 'the illness *causes a deficit in capacity*', again framed

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25 The lower the BMI number, the more a person is underweight. A BMI under 18.1 indicates P is 'underweight'. Female Ps normally cannot survive a BMI lower than 11: < https://www.ennonline.net/fex/15/limits> (Accessed 4 May 2022.)

26 *No. 25*, [1]; [21].

27 *Ibid*, [44]

28 *Ibid*, [26]

29 *Ibid*, [49]

30 *Ibid*

31 Emphasis added. *Ibid*, [53]

32 Emphasis added. *Ibid*, [52].

33 [2012] EWHC 2741

legal incapacity as a symptom of AN.[34] That evidence 'entirely satisfied'[35] King J that L could not 'use and weigh' treatment information, and so was unable to make nutrition-based decisions. Next came *A NHS Foundation Trust v Ms. X* ('*Ms. X*').[36] Dr. Glover broke new ground by doubting capacity not only in relation to 'using and weighing' information, but also in relation to adequately 'understanding' it.[37] Cobb J accepted that evidence[38] and was 'entirely satisfied that Ms. X lack[ed] capacity'.[39]

This pattern is without exception in reported case law. In *Northamptonshire Healthcare NHS Foundation Trust v AB* ('*AB*'),[40] Roberts J found that AB lacked capacity to make nutrition-related decisions because those decisions were 'so infected... by her fixated need to avoid weight gain... that true logical reasoning in relation to these specific matters is beyond her capacity'.[41] In *A Midlands Trust v RD,*[42] Moor J found nutrition-related incapacity because RD was 'completely overwhelmed' by AN.[43] In *A Mental Health Trust v ER,*[44] remarkably, Lieven J considered capacity 'academic'[45]

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34 Emphasis added. *Ibid*, [54].

35 *Ibid*, [56]

36 [2014] EWCOP 35

37 'Dr Glover... although initially considering that Ms. X had the capacity to understand... when giving oral evidence... retreated... doubting Mx. X's ability to 'understand'... [i]n any event, he was firmly of the view that Ms. X was unable to weigh the relevant information': *Ibid*, [28]

38 Of course, courts may legitimately accept medical evidence, so long as ultimately the courts rather than experts make the final capacity determination (*X and Y v Croatia* (5193/09), 03 March 2012, [90]-[91]). Nevertheless, as Clough recognises, AN cases betray a special 'dominance of medical expertise... which [rarely], if ever, is challenged by the judges' (Beverley Clough (2016) 'Anorexia, Capacity, and Best Interests: Developments in the Court of Protection Since the Mental Capacity Act 2005', *Medical Law Review*, Vol. 24, 3, p.444). Dr. Glover, especially, is something of an architect of the common law approach to AN Ps because his evidence is prominent and dispositive in these early cases. Dr. Glover still features in AN cases today, a whole decade after *E* (see e.g. *A Mental Health NHS Trust v BG* [2022] EWCOP 26).

39 *No. 39*, [29].

40 [2020] EWCOP 40

41 *Ibid*, [64].

42 [2021] EWCOP 35

43 *Ibid*, [33].

44 [2021] EWCOP 32

45 *Ibid*, [31].

before summarily disposing of the issue because, 'although ER can understand and retain the relevant information, she cannot use and weigh it up'.[46]

Judges sometimes omit from their judgments any evidence verifying AN P's inability to 'use and weigh' information, thereby implying the self-evident attendance of incapacity upon the disorder. In *Re W (Medical Treatment: Anorexia)* ('*W*')[47], for example, Peter Jackson J simply 'accept[ed] the evidence of Dr X and Dr Glover that W, by reason of her severe anorexia, lacks the capacity to make decisions'.[48] The substance of that evidence was absent from the judgment. Similarly, in *Cheshire and Wirral Partnership NHS Foundation Trust v Z* ('*Cheshire and Wirral*'),[49] Hayden J reported that a fortnight earlier he had 'made a declaration that Z lacked... the capacity to... make decisions as to whether to undergo treatment for her anorexia nervosa',[50] without recounting any evidence or argument.

The internal coherence of this incapacity-disposed approach in AN cases was reflected in the most recently reported eating disorder case, *Lancashire and South Cumbria NHS Foundation Trust v Q*.[51] Q was a bulimia nervosa sufferer. Hayden J had several AN cases cited to him.[52] He dismissed them all because 'anorexia nervosa and its impact, on decision taking for the individual... [has a] different dynamic'[53] to bulimia. In other words, AN is judicially accepted as having a discrete impact on decision taking. This, in light of the above jurisprudence, can reasonably be understood to include minimal or zero scope for legal capacity, because AN's symptoms are deemed incompatible with weighing nutrition-related information. The effect that, in AN cases but not others, illness and incapacity are inescapably two sides of the same coin.

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46 *Ibid*, [34].

47 [2016] EWCOP 13

48 *Ibid*, [26].

49 [2016] EWCOP 56

50 *Ibid*, [5].

51 [2022] EWCOP 6

52 Namely, *E*; *W*; *Cheshire and Wirral*; *AB*.

53 *No. 55*, [28].

3. Undesirability of the current judicial approach

This approach to AN Ps is undesirable for three reasons. First, it empties Ps' autonomy. Respect for autonomy is an important principle[54] in bioethics.[55] Yet, in AN cases, Ps' wishes carry little or no weight in determining their capacity. The nature of AN Ps' autonomy is of course complex because AN, being a mental illness, itself restricts or otherwise affects P's autonomy.[56] That does not,

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54 E.g. *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, affirming the importance of P's subjectively held wishes and feelings when determining their 'best interests'; *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 affecting that, in light of Ps' autonomy ([108]) and self-determination ([80]) interests, clinicians must inform P not only of risks that the clinician considers important, but risks that (i) a reasonable person in P's position would likely find significant, or; (ii) the clinician is or should be aware P specifically finds significant; *Bell v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 affecting, in light of factors including the 'importance of supporting individual autonomy' ([130]), that clinicians should take a case-by-case approach to deciding whether Ps younger than 16-years-old are capacitous to consent to treatment blocking the onset of puberty. See also Tom Beauchamp & Hames Childress, *Principles of biomedical ethics*, (OUP, 2001); Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law*, (Hart, 2009). Autonomy is especially prioritised in the Swedish bioethical legal framework, especially in its guardianship laws (see, generally, Titti Mattson, 'Autonomy, Capacity and Vulnerability: Making Decisions on Social Services for Persons with Dementia in Sweden', in 'Supporting Legal Capacity in a Socio-Legal Context' (*No. 3*), esp. p.237).

55 Bioethics contains many principles, which may conflict, including: (i) autonomy; (ii) human dignity (e.g. *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, concerning compensating for birth of a disabled client following a negligently performed sterilisation surgery, especially at [90]; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, concerning a challenge to the criminal prohibition on assisting another's suicide, especially at [199]; The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Reg10, affecting that '[s]ervice users must be treated with dignity and respect'); (iii) 'sanctity of life' (e.g. *R (Nicklinson)*, [90], especially at [200]; *R (Newby) v Secretary of State for Justice* [2019] EWHC 3118 (Admin), comprising the most recent challenge to the criminal prohibition on assisting another's suicide [42]; *Briggs v Briggs & Ors* [2016] EWCOP 53, concerning the withdrawal of life-sustaining treatment from a minimally-conscious P, especially at [3] and [8])). AN cases keenly and antagonistically engage 'sanctity of life' and 'autonomy', respectively pointing towards and away from overriding Ps' treatment-refusals to sustain life. The aim of this article is not to resolve that conflict, but rather to show that the common law approach to AN Ps' capacity perverts P's autonomy, and domestic and international law. Nevertheless, as the common law already recognises circumstances in which 'the principle of the sanctity of human life must yield to the principle of self-determination' (*Ms. B v An NHS Hospital Trust* [2002] EWHC 429 (Fam), [23]) even where P has a mental disorder (e.g. *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819, entailing a schizophrenic P's permitted refusal of lifesaving gangrene treatment; *Wye Valley NHS Trust V Mr. B* [2015] EWCOP 60, again entailing a schizophrenic P's permission to refuse lifesaving gangrene treatment). Accordingly, allowing AN Ps to terminally refuse life-sustaining treatment would not be inconsistent with the existing jurisprudential framework.

56 Hope, Tan, Steward and McMillan, *No. 4*, p.33.

however, render AN Ps' feelings, wishes, beliefs and values normatively meaningless. As Ian Kennedy recognises, to entirely discount Ps' wishes and values when determining their treatment is 'effectively to rob the patient of [their] right to [their] own personality'. [57] This is especially harmful for AN Ps because AN treatment is most efficacious when Ps are co-operated with and supported, not summarily overridden.[58] The current approach, therefore, undesirably depersonalises Ps and risks undermining their prognoses.

Second, the current judicial approach to AN Ps' capacity offends domestic law. MCA 2005 provides that AN Ps should be presumed capacitous unless the contrary is proven.[59] Yet, especially in *W* and *Cheshire and Wirral* where incapacity was determined without any recorded supporting evidence, MCA 2005 is not being followed scrupulously or at all. A related risk exists in circumstances that, as Boyle recognises, 'assessments of capacity most often occur *outside* of the courtroom'.[60] A significant risk of judges' current approach is that clinicians may internalise that lawyers always find severe AN Ps legally incapacitous, and so presume or suspect incapacity in *all* AN Ps, without conducting individualised capacity assessments. Judges' hasty disposals of AN Ps' capacity therefore offends the MCA 2005 scheme, and invites similar dismissiveness in the community.

Third, the current approach offends the United Nations Convention on the Rights of Persons With Disabilities ('CRPD').[61] That non-binding Convention, which the UK ratified in 2009, is a 'remarkable and forward looking document'[62] which seeks to ensure the full and equal enjoyment of disabled persons' human rights and fundamental freedoms.[63] It specifically recognises and seeks to

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57 Ian Kennedy, 'Treat Me Right' (Clarendon, 1992) p.56

58 *No 4*, p. 26.

59 MCA 2005, s1(2)

60 *No. 24.*

61 <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html> (Accessed 1 April 2022.)

62 Per Kofi Anan, the then-UN Secretary-General, in a speech to the UN General Assembly on the day of the CRPD's adoption, 13 December 2006: < https://press.un.org/en/2006/sgsm10797.doc.htm>, accessed 4th September 2022.

63 Article 1.

counteract the multiple discrimination that disabled women and girls suffer on account of sexism and ableism.[64] CRPD protects AN Ps because it encompasses 'persons with disabilities' including 'those who have long-term physical, mental,[65] intellectual and sensory impairments',[66] and AN can wholly reasonably be so described.[67] Accordingly, UK judges should be guided by AN Ps' will and preferences,[68] and refrain from any practice[69] which treats AN Ps[70] differently to other disabled Ps.[71] Yet the current approach to AN Ps is guided not by Ps' will and preferences but an objective view of their 'best interests',[72] and is precisely so discriminatory. As regards the latter, for equal treatment to be obtained, symptoms of other impulse control disorders must be similarly treated as determining legal incapacity. That is, if there is to be equality then, in Peter Jackson J's words, for both AN Ps and impulse disorder Ps, acquiescence to impulse must mean that P 'proves that she lacks capacity'.

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64 Article 6

65 For discussion of CRPD's disappointing preference of the pejorative 'mental impairment' over 'psychosocial disability', which is the disabled community's preferred descriptor , see Oliver Lewis, 'The Expressive, Educational and proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities', in Bernadette McSherry and Penelope Weller (eds) 'Rethinking Rights-Based Mental Health Law', (Oxford, Hart Publishing, 2010), especially footnote 3.

66 Article 1.

67 While no judgment or decision has confirmed AN Ps' inclusion under CRPD, they are doubtlessly so. Joanna Whiteman, states that 'severe anorexia alone makes [P] a person with a disability under Article 1': Whiteman, 'Limiting Autonomy? Mental Capacity to Refuse Treatment in the UK', The Equal Rights Review, Vol. 9 (2012), footnote 3. Wayne Martin concurs that Article 1 'would certainly include many individuals who are living with eating disorders' (Martin, 'Human Rights and Human Experience in Eating Disorders', Journal of Psychosocial Studies, 10 (2), p. 119).

68 This is asserted by the Committee on the Rights of Persons with Disabilities, in the authoritative albeit non-binding interpretation of CRPD contained in General Comment No. 1: < https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1> see especially, [29] (Accessed 4th September 2022). See also Amanda Keeling, 'The Problem of Influence' (esp. p.42), and Jill Stavert, 'Adapting or Discarding the Status Quo? Supporting the Exercise of Legal Capacity in Scottish Law and Practice' (esp. p.180), in 'Supporting Legal Capacity in a Socio-Legal Context' (*No. 3*), p.44.

69 Article 4(c)

70 AN sufferers fall under UNCRPD because they have a 'mental... impairment', per Article 1.

71 Article 12(2)

72 For general criticism of MCA 2005's preference for 'best interests' over Ps' will and preferences, contrary to the Committee's interpretation of CRPD, see Rosie Harding, 'Supporting Everyday Legal Capacity: Investigating the Complexities of Putting Rights into a Practice', in 'Supporting Legal Capacity in a Socio-Legal Context', (*No 4*), especially p.302.

One finds no such equality. In *Tower Hamlets v PB*,[73] for example, the disorder was alcohol addiction. Therein, Hayden J considered it 'self-evident' that '*not* every addict in some degree of denial can be regarded as incapacitous'.[74] Yet, by contrast *every* AN P - whether in some degree of denial or not, is invariably regarded as incapacitous. Unlike with alcohol addicts, for AN Ps in the Court of Protection there is no latitude whatever. Given that disparity, and especially in circumstances that to date, all reported cases involving AN Ps have been women,[75] judges' approach to AN Ps' capacity violates CRPD.

4. An alternative application of capacity law to AN Ps

An alternative approach to AN Ps' capacity revises the 'using and weighing' analysis which has, heretofore, always denied Ps' capacity. The crucial change is to accept that when *some* AN Ps refuse treatment, they *have* 'used and weighed' treatment information. To understand how the 'use and weigh' question can be approached anew, consider Natalie Banner's twofold approach to analysing outwardly repugnant decisions.[76]

Imagine persons 'X' and 'Y' standing at a pedestrian crossing. A lorry is hurtling towards the crossing. X warns Y of the lorry's approach. Alarmingly, Y steps straight into the lorry's path. When we ask whether Y 'used and weighed' X's information before stepping out, we can conclude either that:

(1) *Y made a mistake because Y acted in furtherance of death*. Underlying this conclusion are two presuppositions: (i) that Y should have pursued some ultimate end goal we consider valuable (i.e. remaining alive) and; (ii) that Y should have behaved in a manner conducive to achieving that end goal (i.e. remaining still). We consider, when Y fails to so act, that Y made a 'normative mistake'

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73 [2020] EWCOP 34

74 [32]

75 See Article 6.

76 Banner (2012), 'Unreasonable reasons: normative judgments in the assessment of mental capacity?', *Journal of Evaluation in Clinical Practice*, 18:5, p.1040

about how to respond to X's information[77] - that Y 'failed to use or weigh the information... because he did not respond to that information in *the way that he ought to'*.[78]

(2) *Y made no mistake*. This involves no judgements about what end goal or behaviour Y should have adopted. Y might or might not supply their motivations. Either way, there may be no incongruity between Y's motivations and actions, so no 'normative mistake'.

In AN cases, judges always use reasoning style (1). Namely, judges say that P ought to consider remaining alive important or attractive, then identify a 'normative mistake' when P fails to act in furtherance of life.

For example, in *Ms. X*, Cobb J found P incapacitous because, for Ms. X '[t]he *reality and importance* of the associated risks including death [of refusing treatment] are... *not truly appraised*.[79] This betrays the judge's view that Ms. X should have wished to avoid death and that, by not sharing that view, Ms. X made a mistake. Similarly, in *Cheshire and Wirral*, Roberts J found incapacity because '*true logical reasoning* in relation to [nutrition and weight gain] is beyond [P's] capacity'.[80] In other words, the judge felt that logic dictated P's accepting weight gain and, because P reasoned differently, the judge identified a normative error. In short, under the current approach, and despite MCA 2005 expressly prohibiting this,[81] Ps are considered incapacitous because the judge thinks their refusals to accept treatment are unwise.

77 *Ibid*, p.1042.

78 *Ibid*. My emphasis.

79 *No. 39*, [27].

80 *No. 53.*

81 *No. 20*.

5. Building the alternative approach

The alternative approach involves no overriding judgments about how all AN Ps should respond to nutritional decisions. Instead, it accepts that some Ps might legitimately refuse nutritional treatment for a host of reasons, including that they do not want to live anymore. The argument is not that all AN Ps should die or become sicker - indeed, especially when Ps' prognoses are good, care must be taken to support their recoveries.[82] Rather, the argument is that when severely ill Ps do not desire even their best prognosis, the correct response is not, in every case: *"You have made a mistake"*.

Indeed, as Kirsty Keywood recognises, 'particularly [when the] condition is chronic', '[p]atients diagnosed with anorexia nervosa may make treatment refusal decisions that are entirely consistent with their values and beliefs... [namely, finding] physical harm and possibly death as preferable to a further cycle of treatment and detention'.[83] Daniel Wang, too, considers it not unreasonable to choose 'a shorter life with the best possible quality over a slightly longer life with very low quality and a modest possibility of recovery'.[84] If we are to accept that Ps expressing such preferences may not in every instance have erred, two legal changes are required.

First, the information considered 'relevant' to any treatment decision must become broader. Presently, judges ask only whether P has 'used and weighed' *nutritional* information,[85] and do not assess what else motivates P to refuse treatment, such as a wish to die peacefully and soon rather than to painfully endure. Consider, for example, E's evidence to Peter Jackson J: [86]

82 Hope, Tan, Stewart and MacMillan, *No 4*.

83 Keywood, 'Rethinking the Anorexic Body: How English Law and Psychiatry 'Think' (2003), International Journal of Law & Psychiatry, 26(6), p.609

84 Wang, 'Mental Capacity Act, Anorexia Nervosa and the Choice Between Life-Prolonging Treatment and Palliative Care: A NHS Foundation Trust v Ms. X' (2015) 78(5) Modern Law Revue p.871

85 *Ibid*, p.879

86 *No. 25*, [76]

> *'...everything that could have been done to help has been tried... [I have] endured a lot of pain with very little benefit... [I understand] that [I] will die without intervention... [but] want... to live for the remainder of... life as [I] choose... and if necessary to die with dignity'.*

Peter Jackson J could have found that E was 'using and weighing' relevant information because she was evaluating her clinical options (i.e. (i) Treatment = pain and little benefit; (ii) No Treatment = agency and possibly death) and preferring the pathway without treatment. Instead, Peter Jackson J focused only on nutrition-related information and found E incapacitous because, for her, calorific aversion was the 'card that trumps all others'.[87] The alternative approach recognises that P has 'used and weighed' information where they evaluate nutritional and/or related non-nutritional factors[88] when making a decision.

Second, Ps' wishes and feelings evidence must be considered by the judge at the capacity-assessment stage, not merely, as occurs presently when making best interests decisions.[89] Currently, evidence like E's above is excluded from a judge's assessment of whether P has 'used and weighed' treatment-related information. If we believe that E is telling the truth about her decision-making process, then such statements comprise rich, direct evidence of precisely the procedure that judges are charged to analyse. Nothing statutory bars judges from using such evidence to assess whether P has weighed different factors and, especially if that evidence is defeasible rather than conclusive, there is no logical bar either. Accordingly, under the alternative approach, any written or other evidence submitted by P should be permitted to inform assessments of whether Ps' have 'used and weighed' information before making treatment decisions.

Conclusion

The current approach, without any exception whatever, finds that AN Ps lack capacity to refuse

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87 *ibid*, [49].

88 Including a considered desire for a shortened life and aversions to certain feeding forms, such as nasogastric feeding because its penetrative aspect reminds P of historic sexual abuse: *ibid*, [16]; [84].

89 *E*, [76]; *Ms. X*, [51]; *W*, [28-31].

nutrition-related treatment. It harmfully denies AN Ps' autonomy, effectively reverses the statutory presumption of AN Ps' capacity and offends CRPD. An alternative approach does not impute values to AN Ps, can acknowledge that Ps' decisions are more than calorific calculations, and accepts Ps' wishes and feelings evidence as illustrative of their holistic decision-making processes.

That approach retains scope for a judge to find a P incapacitous. Yet, it creates space for some Ps to die where, and because, they so wish. That may sometimes be, on balance, the most ethical course: after a life scarred by and forecasting sorrow,[90] permitting P to integrate death into their life, in the time and manner of their choosing, conceivably restores their capacity for rational agency and entitlement to self-determination.[91]

Sceptics resisting even those deaths must, at minimum, devise a legal approach to AN Ps' capacity that is more faithful to MCA 2005 and CRPD than the current approach then, with women like E held in mind, explain why in every conceivable case, the sceptic's script for P's life should override what is written in P's own hand.

90 *No. 4*.

91 Joseph Raz, 'Death in Our Life' (2012), Oxford Legal Studies Research Paper, 25/2012, p.15-7. Indeed, the German Constitutional Court has held that, where the state obstructs P's 'self-determined death' chosen on the basis of P's subjectively assessed 'quality of life and a meaningful existence', the stated has violated P's human dignity; (26 February 2020) 2 BvR 2347/15.

BALANCING PROTECTION OF REPUTATION WITH FREEDOM OF EXPRESSION: DOES THE DEFAMATION ACT 2013 REVERSE THE 'CHILLING EFFECT' PREVIOUS DEFAMATION LAW HAD ON FREEDOM OF EXPRESSION?

Emma Darlow Stearn

All references correct as at August 2021

Introduction

On the day it received royal assent, a Ministry of Justice press release enthused that the Defamation Act 2013 ("the Act") would 'overhaul the libel laws in England and Wales […] creating a more balanced and fair law'.[1] Lord Lester, who 'greatly informed' the government's draft Defamation Bill,[2] criticised previous defamation law as having a 'severe chilling effect on […] freedom of expression', citing its 'twin vices of uncertainty and overbreadth' and the 'costly and often protracted' litigation it engendered.[3] Employing a section by section analysis of the Act, its context and its application, this paper will posit that, rather than reversing this 'chilling effect', the Act merely places on a statutory footing elements of the common law that were already in reverse gear – a 'free-speech-friendly' evolution had indeed been underway for 'over a decade'.[4] Although for many the Act 'simply does not go far enough',[5] the author submits that in spite of a clear failure to deliver the promised 'overhaul', the Act does meaningfully accelerate the aforementioned evolution, helping defamation law to better 'strik[e] the right balance between protection of freedom of expression […] and protection of reputation', the 'issue' with which it is 'ultimately' concerned.[6]

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1 Ministry of Justice, 'Press release: Defamation Act reforms libel law' (2013) <https://www.gov.uk/government/news/defamation-act-reforms-libel-law> accessed 12th August 2021.

2 The Joint Committee on the Draft Defamation Bill (2011, HL 203, HC 930-I) 16.

3 Anthony Lester, 'These disgraceful libel laws must be torn up' *The Times* (15 March 2011) <https://www.thetimes.co.uk/article/these-disgraceful-libel-laws-must-be-torn-up-698t8zpdk9w> accessed 12th August 2021.

4 David Erdos, 'Data Protection and the Right to Reputation: Filling the "Gaps" After the Defamation Act 2013' (2014) 73 The Cambridge Law Journal 536, 536.

5 Mariette Jones, 'The Defamation Act 2013: a free speech retrospective' (2019) 3 Communications Law 117, 128.

6 Kenneth Clarke, HC Deb 12 June 2012, vol 546, col 204.

Competing rights

'Reputation' has been lauded by academics and judges alike as 'an essential component of our freedom',[7] of 'foundational importance',[8] which 'form[s] the basis of many decisions in a democratic society which are fundamental to its well-being'.[9] Freedom of expression is revered in similar terms, as a universal human right,[10] of 'seminal importance'[11] and 'the lifeblood of democracy'.[12] Defamation law fundamentally antagonises freedom of expression in the process of protecting reputation, by making defamatory words the basis of an actionable tort, whether published in permanent form (libel) or of a temporary nature (slander). Carol Brennan and Vera Bermingham remark that 'the influence of the Human Rights Act 1998 ["HRA"] has been increasingly evident [in Defamation law]'.[13] It has certainly shone a spotlight on this antagonism, or 'ultimate balancing test'.[14] The HRA compels UK courts to take into account decisions of the European Court of Human Rights[15] and stipulates that domestic legislation must be interpreted 'in a way which is compatible with the Convention rights,' [16] one of which is the right to 'freedom of expression'. [17] Reputation is not a stand-alone Convention right, but falls within the remit of the 'right to respect for private and

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7 Solove D J, *The Future of Reputation: Gossip, Rumor, and privacy on the internet* (Yale University Press, 2007) 3.

8 Erdos (n 4) 538.

9 *Reynolds v Times Newspapers Ltd* [1999] UKHL 45, [2001] 2 AC 201.

10 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

11 Erdos (n 4) 540.

12 *R v Secretary of State for the Home Department* [2000] 2 AC 115 (HL) 126 (Steyn LJ).

13 Carol Brennan and Vera Bermingham, *Tort Law Directions* (7th edn, Oxford University Press, 2020) 3.

14 Erdos (n 4) 540.

15 Human Rights Act 1998, s 2(1)(a).

16 ibid s 3(1); referencing the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

17 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Art 10.

family life',[18] and is more often protected by the qualification that Article 10(1) may be restricted if 'necessary in a democratic society, [...] for the protection of the reputation or rights of others'.[19] The proportionality called for by the HRA, and its perceived stronger emphasis on freedom of expression, has certainly bolstered the case for defamation law reform.

Chilling effect

A common criticism among free speech advocates is that defamation law gives 'greater weight to the rights of the claimant at the expense of those of the defendant'.[20] Mariette Jones submits that this 'unequal playing field' is the 'main reason' for defamation law's chilling effect on freedom of expression, citing three of its claimant-friendly, and thus prima facie free-speech adverse principles: the presumption of falsity; the 'irrebuttable presumption of damages', which the libel reform campaign also maintains 'gives libel its unique chilling effect on free speech';[21] and the 'strict liability nature' of libel claims.[22] A spurious threat to silence critics certainly carries more weight if the structure of a defamation claim itself is predisposed to favour the claimant, which these aforementioned elements, combined with the high costs of defending a claim, suggest. Costs have been addressed in places by the Act, as will be discussed, but a more substantial impact has been made elsewhere: Section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[23] was commenced in 2019[24] in relation to publication and privacy proceedings, making success fees

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18 ibid Art 8.

19 ibid Art 10(2).

20 Kay Rimel, "A New Public Interest Defence for the Media? The House of Lords' Decision in *Reynolds v Times Newspapers Ltd*." (2000) 11 Entertainment Law Review 36, 36.

21 English Pen and Index on Censorship, 'Free Speech is not for Sale: The Impact of English Libel Law on Freedom of Expression: A Report' (2009) <http://www.libelreform.org/the-report/> accessed 12th August 2021.

22 Jones (n 5) 119.

23 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 44(4) - 'A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement'.

24 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 13) Order 2018' SI 2018/1287.

under conditional fee agreements irrecoverable from losing parties and thereby solving one of the 'bugbear[s]' of defamation claims.[25] Jones' chilling features, meanwhile, have largely been left untouched by the Act, with the notable exception of section 1, to which this paper will now turn, as it begins its analysis of the Act's substantive provisions.

The Defamation Act 2013

Section 1

The Act has not altered the basic structure of a defamation claim, which seeks to establish that a statement:

(i) is defamatory;

- in meaning: 'what the ordinary man, not avid for scandal, would read into the words complained of';[26]
- in law: words that 'tend to lower the plaintiff in the estimation of right- thinking members of society generally';[27]

(ii) refers to the claimant;[28]

(iii) has been published to at least one third party.[29]

However, the common law test for whether a statement is defamatory is now subject to the threshold requirement of section 1, that 'its publication has caused or is likely to cause serious harm to the reputation of the claimant'[30] or in the case of a 'body that trades for profit [...] [harm] that has caused or is likely to cause the body serious financial loss'.[31] This section is the culmination of a common

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25 Howard Johnson, 'Defamation: the media on the defensive?' (2008) 4 Communications Law 126.

26 *Lewis v Daily Telegraph* [1964] AC 234 (HL) 260.

27 *Sim v Stretch* [1936] 2 All ER 1237 (HL) 1240.

28 Even if unintentional, *Hilton v Jones* (1878) 9 Ch D 620.

29 Excluding one's spouse, *Wennhak v Morgan* (1888) 20 QBD 635 (DC).

30 Defamation Act 2013, s 1(1).

31 ibid s 1(2).

law trend away from libel's irrebuttable presumption of damages and the 'risk of trivial claims'[32] it carried. Credited as the foundations on which section 1 'builds',[33] *Jameel v Dow Jones*[34] and *Thornton v Telegraph Media*[35] introduced, respectively, 'procedural' and 'substantive' 'threshold[s] of seriousness'.[36] The 'Jameel abuse of process jurisdiction'[37] provides that a defamation action requires a 'real' and 'substantial' tort,[38] without which, a proceeding can be stayed on the 'principle of proportionality'.[39] *Thornton* held that a statement 'may be defamatory of [a claimant] because it [*substantially]* affects in an adverse manner the attitude of other people towards him, *or has a tendency so to do*' [judge's emphasis].[40] Tugendhat J thus created 'a qualification or threshold of seriousness, so as to exclude trivial claims,' remarking that 'regard for article 10 and the principle of proportionality both require it'.[41] The influence of the HRA – its call for 'proportionality' – is clearly evident in both judgments' renewed emphasis on accommodating freedom of expression.

Section 1 professedly 'raises the bar for bringing a claim'[42] further still. In practice, however, it initially generated much uncertainty and protracted litigation, as parties 'struggl[ed] to nail the

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32 Beth Grant, 'The Defamation Act 2013: What is it and has it worked?' (*Legal Cheek*, 3rd February 2016) <https://www.legalcheek.com/lc-journal-posts/the-defamation-act-2013-what-is-it-and-has-it- worked/> accessed 12th August 2022.

33 Explanatory Notes to the Defamation Act 2013, para 11.

34 [2005] EWCA Civ 75, [2005] QB 946.

35 [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

36 *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, [2020] AC 612 [8]-[9].

37 Alistair Mullis and Andrew Scott, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77 Modern Law Review 87, 105.

38 *Jameel* (n 34) [50].

39 David Rolph, 'A critique of the Defamation Act 2013: Lessons for and from Australian defamation law reform' (2016) 4 Communications Law 116, 117. 40 *Thornton* (n 35) [96].

41 *Thornton* (n 35) [90].

42 Explanatory Notes (n 33), para 11.

elusive concept of 'serious harm''.[43] *Cooke v MGN Ltd*[44] held that 'serious harm cannot be inferred',[45] except in exceptional cases, whereas *Ames v Spauhaus*[46] suggested that it might be inferred with more frequency. In *Lachaux v Independent Print Ltd,*[47] Warby J held that 'libel is no longer actionable without proof of damage',[48] a decision reversed by the Court of Appeal,[49] who judged the threshold as merely having been raised from 'substantial'[50] to the 'rather more weighty'[51] 'serious' harm, a 'purely semantic' change that critics thought 'frustrated' the Act's aims.[52] Overruling this judgment, the UK Supreme Court confirmed Warby J's analysis: that the claimant 'must demonstrate [...] that the harm [...] was serious',[53] by 'reference to the actual facts about its impact and not just to the meaning of the words'.[54] Inferences of fact could be drawn from considerations such as 'the scale of the publications'.[55]

The Supreme Court's conclusive interpretation of section 1 in *Lachaux* (2019), that libel is no longer actionable *per se,* is undoubtedly the 'boost to free speech' heralded by the defendant's barrister in that case;[56] and although increasing the 'uncertainty' Lord Lester deplored in the short term, the

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43 Romana Canneti, 'Rewriting the Defamation Act' *New Law Journal* (21 June 2019) <https://www.newlawjournal.co.uk/content/rewriting-the-defamation-act> accessed 12th August 2021.

44 [2014] EWHC 2831 (QB), [2015] 1 WLR 895.

45 Ibid [45].

46 [2015] EWHC 127 (QB) [2015] WLR 3409 [92].

47 [2015] EWHC 2242 (QB), [2016] 4 All ER 140.

48 ibid [60].

49 *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594 [44].

50 *Thornton* (n 35) [96].

51 *Lachaux* (n 49) [44].

52 Thomas Bennett, 'An inferential house of cards – serious financial loss under section 1(2) Defamation Act 2013: Burki v Seventy Thirty Ltd & Ors [2018] EWHC 2151 (QB)' (2019) 1 Communications Law 34, 34.

53 *Lachaux* (n 36) [21].

54 ibid [12].

55 ibid [21].

56 Canneti (n 43).

author submits that section 1 is a significant antidote to the law's 'overbreadth',[57] reducing the 'gagging effect'[58] the irrebuttable presumption of damages had indirectly had on freedom of expression.

The additional test under section 1(2) followed a similar trajectory to section 1(1). Following *Lachaux* (2017), Thomas Bennett criticised the 'problematic nature'[59] of its logic, as applied in *Burki v Seventy Thirty*,[60] warning that 'the commercial claimant [may] build their claim on an inferential house of cards'[61] which might 'actually fail, quantitatively, to reach the civil standard of proof'.[62] This clearly stymied parliament's intention, 'to protect ordinary people from being crushed by libel claims brought by big businesses'[63] – the core mischief of the infamous 'McLibel case',[64] where 'the inequality of arms could not have been greater' between an individual defendant and conglomerate claimant.[65]

Lachaux (2019) has since clarified that section 1(2), like section 1(1), 'necessarily calls for an investigation of the actual impact of the statement'.[66] The recent high court ruling of *Gubarev v Orbis* applied this ratio, highlighting the importance of establishing 'proof' and causation.[67] This interpretation of section 1(2) will likely make bringing libel claims more difficult for big companies; there has indeed been a drop in the number of corporate claimants (from 33 to 21) following the

57 Lester (n 3).

58 Canneti (n 43).

59 Bennett (n 52) 34.

60 [2018] EWHC 2151 (QB), [2019] All ER (D) 20 (Feb).

61 Bennett (n 52) 35.

62 Bennett (n 52) 36.

63 Bennett (n 52) 34.

64 *Steel v UK* [2005] EMLR 15.

65 ibid [50].

66 *Lachaux* (n 36) [15].

67 [2020] EWHC 2912 (QB) [42].

Supreme Court judgment.[68] This is a justified recalibration of the law in favour of freedom of expression, protecting 'ordinary individuals' who may be 'easily bullied into silence' by rich companies,[69] by rendering any threat of costly proceedings empty unless there has been, or is likely to be, financial loss suffered.

Section 2

Section 2 codifies the common law defence of 'justification',[70] providing an absolute defence if the defendant can 'show that the imputation conveyed by the statement complained of is substantially true'[71] and in the case of multiple statements, provided that 'the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.'[72] The margin of appreciation afforded by having to prove 'substantial', rather than 'whole' truth is important in not setting the hurdle for defendants too high. Mark Elliott and Robert Thomas's core rationale for this defence is convincing: '[I]t is obviously right, from a freedom of speech perspective, that it should not be unlawful to make true statements just because they are defamatory'.[73] Elliott and Thomas, like Jones, argue that the presumption of falsity has 'a chilling effect on freedom of expression'.[74] Keith J also noted this 'chilling effect', warning that the sometime absence of 'admissible evidence capable of [proving] the facts which would justify a defamatory publication' may 'prevent the publication of

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68 Robert Sharp, 'Judicial Statistics, Defamation Law Claims in 2020: A Libel Thaw?' (*Inforrm,* 8 June 2021) <https:// inforrm.org/2021/06/08/judicial-statistics-defamation-claims-in-2020-a-libel-thaw-robert- sharp/> accessed 12th August 2021.

69 Michael Arnheim, 'The Human Right to Press Freedom?' (2004) 154 The New Law Journal 96.

70 The defence of justification required proof of the 'substantial truth of the "sting of the libel"' - *Chase v News Group Newspapers* [2002] EWCA Civ 1772, [2003] EMLR 218 [38].

71 Defamation Act 2013, s 2(1).

72 ibid s 2(3).

73 Mark Elliott and Robert Thomas, *Public Law,* (4th edn, Oxford University Press, 2020) 837. 6

74 ibid.

matters which it is very desirable to make public'.[75] Much of the chill on freedom of expression seemingly occurs outside the court room, as would-be defendants self-censor, for fear of being unable to prove that a statement is 'substantially true' (or establish any of the other available defences) should proceedings be brought against them.

Reversal of the presumption of falsity – for Geoffrey Robertson QC, 'the only reform that will make a real difference to investigative journalism' –[76] was not included in the Act, the Ministry of Justice reasoning that 'proving a negative is always difficult'.[77] Jones counters that 'surely the argument from truth would be best served if the person who is best placed to know the true facts concerning themselves, that is the claimant, is put to the proof'.[78] Although it may be said to be 'logical and fair' for claimants to bear this burden, 'since they are the party using the process to drag others into court',[79] Mullis and Scott query 'whether freedom of expression really demands that the media defendant be entitled to a presumption that a person deserves a bad reputation unless the contrary is established'.[80] Creating a presumption of truth could have a detrimental effect on journalistic standards, by removing a key motivation for ensuring accuracy. William Bennett QC highlights that it is 'difficult to see the justice' in obliging a claimant in a defamation action accused of a crime or 'other morally reprehensible act' by a newspaper to prove their innocence. He rightly flags that this would have 'serious implications' for a fundamental principle of English law: the presumption of innocence.[81] The author is inclined to agree that the chilling effect of libel law is not great enough to

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75 *Derbyshire County Council v Times Newspapers Limited* [1993] AC 534, [1993] 1 All ER 1011, 548.

76 Geoffrey Robertson, 'Put burden of libel proof on claimants' *The Guardian* (25 February 2013) <https://www.theguardian.com/law/2013/feb/25/libel-laws-speech-uk-expensive?CMP=twt_gu> accessed 12th August 2021.

77 Ministry of Justice, 'Draft Defamation Bill Consultation Paper' (*Ministry of Justice*, March 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/ 228694/8020.pdf> accessed on 12 August 2021.

78 Jones (n 5) 121.

79 Robertson (n 76).

80 Mark Elliott and Robert Thomas, 'Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation' (2009) 6 Communications Law 173, 183.

81 William Bennett, 'The Current State of Defamation Law in England and Wales: Presentation to the European Parliament's Committee on Legal Affairs' (*5RB*, 28 January 2010) <https://www.5rb.com/wp- content/uploads/2010/03/William-Bennett-updated.pdf> accessed 12th August 2021.

justify such a significant, and potentially problematic, shift in favour of freedom of expression.

Section 3

Section 3 replaces the common law defence of 'fair comment' with that of 'honest opinion', providing a complete defence for 'a statement of opinion'[82] which 'indicated' its 'basis'[83] and which 'an honest person could have held'[84] based on 'any fact which existed at the time the statement [...] was published'[85] or 'anything asserted to be a fact in a privileged statement published before the statement complained of'.[86] Even if these conditions are met, the defence 'is defeated if the claimant shows that the defendant did not hold the opinion'.[87]

In departure from the common law, the comment is no longer required to be in the public interest, thereby reducing the burden on defendants, for Mullis and Scott, 'merely the end-point of an existing direction of travel'.[88] This protection afforded exchange of opinion is fundamental to freedom of expression and not incompatible with protection of reputation: defamatory facts 'are either true or not'[89] and, if the latter, are undeserving of protection, whereas 'defamatory opinions [...] can be recognised by readers as viewpoints with which they can choose to agree or disagree'.[90] John Stuart Mill denounced the 'mischief of denying a hearing to opinions',[91] which form the trade of Justice Holmes' 'marketplace of ideas'.[92] However, Andras Koltay is right to note that Justice Holmes'

82 Defamation Act 2013, s 3(2).

83 ibid s 3(3).

84 ibid s 3(4).

85 ibid s 3(4)(a).

86 ibid s 3(4)(b).

87 ibid s 3(5).

88 Mullis and Scott (n 37) 93.

89 Ari Waldman, 'The Marketplace of Fake News' (2018) 20 University of Pennsylvania Journal of Constitutional Law 845, 848.

90 Mullis and Scott (n 37) 91.

91 John Stuart Mills, *On Liberty and Other Essays (*3rd edn, first published 1991, Oxford University Press 2015) 25.

92 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'- *Abrams v United States* 250 US 616 (1919) [58] (Holmes J).

theory 'should not be extended to facts'[93] and the efficacy of this defence hinges on a distinction − between fact and opinion, which 'may be difficult to draw'.[94] The rise in the use of social media, with which courts have grappled, has exacerbated an already difficult task; the Supreme Court in *Stocker v Stocker*, criticised the lower court's use of 'dictionary definitions'[95] and emphasised 'the court's duty to step aside from a lawyerly analysis'[96] and heed the 'impressionistic'[97] nature of the medium.

Section 4

Section 4 provides a complete defence for 'a statement on a matter of public interest',[98] abolishing its pre-cursor, the *Reynolds* defence.[99] The latter had provoked a trend in case law 'towards a more liberal understanding of press freedom',[100] by protecting statements made in the course of 'responsible journalism',[101] for which key criteria were outlined, provided 'the public was entitled to know the particular information'.[102] However, *Reynolds* was 'enforced in a rather haphazard way'[103] by the courts. Misinterpretation of Nicholl J's *Reynolds* criteria (which were applied stringently) persisted after section 4 was introduced, leading to clarification in *Serafin v Malkiewicz* that although

93 Andras Koltay, 'Constitutional protection of lies?' (2020) 3 Communications Law 131, 133.

94 David Lewis, 'Whistleblowing and the Law of Defamation: Does the Law Strike a Fair Balance Between the Rights of Whistleblowers, the Media, and Alleged Wrongdoers?' (2018) 47 Industrial Law Journal 339, 351.

95 [2019] UKSC 17 (HL), [2019] 2 WLR 1033 [25].

96 ibid [38].

97 ibid [42]; affirming the position taken in *Jack Monroe v Katie Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68 [35].

98 Defamation Act 2013, s 4(a).

99 ibid s 4(6); referencing *Reynolds* (n 9).

100 Ian Loveland, 'The Ongoing Evolution of Reynolds Privilege in Domestic Libel Law' (2003) 14 Ent LR 178, 182.

101 *Reynolds* (n 9) 202.

102 *Reynolds* (n 9) 197.

103 Alistair Bonnington, 'Reynolds Rides Again' (2006) 5 Communications Law 147, 147.

'relevant to the interpretation of the statutory defence',[104] any 'reference to a [Reynold's] check list is now inappropriate'.[105] Although obiter, this 2020 judgment is persuasive authority that the Act requires a flexible, case-specific approach. Indeed, a true construction of *Reynolds* would indicate the same.[106]

Removal of the requirement for 'responsible journalism' has denoted a positive shift in protecting the free speech of the non-traditional writer, of particular importance in the digital age. The *Reynolds* defence itself was 'available to anyone',[107] but over- zealous application of criteria, such as 'whether comment was sought from the plaintiff',[108] priced some defendants out of its protection: an individual blogger will lack the fact-checking resources of a national newspaper. Accordingly, Warby J allowed a section 4 defence to succeed in *Economou v de Freitas*,[109] even though the non-journalist defendant's 'conduct [fell] far short of what the *Reynolds* approach requires'.[110]

Protecting publication on matters in the public interest carries a high societal benefit and the renewed emphasis on flexibility of section 4 supports this. However, Jonathan Morgen's assessment that 'Section 4, like *Reynolds* before it, merely restates the intractable conflict' between 'fake news' and 'free speech'[111] is supported by the fact that a successful application of section 4 may leave claimants whose reputations have been *proven* to be defamed facing high costs and an unvindicated reputation.

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104 [2020] UKSC 23, [2020] 4 All ER 711 [68].

105 ibid [75]; [83].

106 'The elasticity of the, common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case'- *Reynolds* (n 9) [204] (Nicholls J).

107 As reiterated in *Jameel v Wall Street Journal Europe* [2005] EWCA Civ 74, [2005] All ER (D) 38 (Feb) [54].

108 *Reynolds* (n 9) 205.

109 2016] EWHC 1853 (QB), [2017] EMLR 4.

110 ibid [160].

111 Jonathan Morgan, 'Pseudo-Codification of the Public-Interest Defence in Defamation' (2020) 79 The Cambridge Law Journal 398, 401.

Providing for this unjust outcome with a declaration of falsity in such cases could have been a helpful addition to the Act.

Sections 5 & 10

There has been much commentary suggesting that defamation law has not caught up with the internet age, academics noting the 'chilling effect on the freedom of expression on the internet' of 'third party comments',[112] and labelling 'secondary publication' a 'major issue with digital media'.[113] Sections 5 and 10 are clearly crafted with this in mind, extending the protection afforded website operators 'significantly', according to Mullis and Scott.[114]

For Andrew Murray, Section 5's aim is to 'ameliorate the chilling effects of the notice and takedown approach used previously'.[115] It introduces a new complete defence to 'operators of websites' who did not post the statement,[116] removing the requirement of the 1996 statutory defence of 'innocent defamation', that a secondary publisher be unaware of the statement's existence.[117] This certainly improves the position of website operators hosting user content.

The defence, however, will fail if the operator 'acted with malice'[118] or if the claimant can show that they were:

- unable to 'identify the person who posted the statement';[119]

112 Andrew Murray, *Information Technology Law: The Law and Society* (4th Edn, Oxford University Press, 2019) 195.

113 Brennan and Bermingham (n 13) 43.

114 Mullis (n 35) 100.

115 Murray (n 110) 190.

116 Defamation Act 2013, s 5(2).

117 Defamation Act 1996, s 1.

118 Defamation Act 2013, s 5(11).

119 ibid s 5(3)(a).

- gave the operator 'a notice of complaint';[120] and

- the website operator 'failed to respond to the notice of complaint in accordance with any provision contained in regulations'.[121]

Keith Mathieson criticises that, 'The resultant Regulations set out a very onerous procedure which the operator is required to follow to maintain its defence';[122] this includes sending 'a copy of the notice of complaint' to the poster of the statement, within '48 hours' of receiving it.[123] This procedure may act as a barrier to use for defendants (section 5 has yet to be used) but perhaps its complexity provides proportionate protection to reputation by deterring careless publication: ultimately, 'it is not unreasonable to require a website operator to take steps to ascertain the truth of an allegation that it is knowingly publishing'.[124]

Section 10(1) provides that:

> A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against [them].[125]

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120 ibid s 5(3)(b).

121 ibid s 5(3)(c).

122 Keith Mathieson, 'Overview of Defamation: Practice Note' (2021) <https:// uk.practicallaw.thomsonreuters.com/ 8-584-3416? comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=cfc6966 b7d334612adac0cc4dcfe3dfa&skipAnonymous=true> accessed 12th August 2021.

123 Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, reg 3, s 4.

124 Mullis (n 37) 101.

125 Defamation Act 2013, s 10(1); Defamation Act 2013, s 10(2): the definitions of 'author, editor and publisher' are to be retained from the Defamation Act 1996.

This provides an additional defence to that of the 1996 Act,[126] whose 'fairly onerous requirements' mean that internet intermediaries may 'prefer to rely on alternative defences'.[127] Section 10 makes it substantially more difficult to bring a defamation action against an internet intermediary. Platforms that host user content deserve this protection: they are intrinsic to how people 'receive and impart information and ideas':[128] the 'marketplace of ideas' of the internet age. However, this does not negate the need to provide redress for defamatory content, as acknowledged by the important caveat housed in section 10(1),[129] which ensures that *someone* may be held accountable.

Sections 6 & 7

Section 6 affords privilege to 'publication of a statement in a scientific or academic journal'[130] on the condition that it relates to 'scientific or academic matter',[131] has been peer-reviewed[132] and is not made with malice.[133] The new defence is the result of 'extended lobbying from the academic and scientific community following the case of *BCA v Singh*',[134] in which a scientist was successfully sued for alleging that the claimant 'promote[d] bogus treatments'.[135] Section 7 extends the qualified privilege defence of the 1996 Act to include reports of scientific and academic conferences: the publication of any report or other statement mentioned in Schedule 1 to the Act, such as reports of a government-appointed public inquiry, is privileged provided that it is 'fair and accurate', made

126 Defamation Act 1996, s 1: responsibility for publication.

127 Mathieson (n 122).

128 Human Rights Act 1998, Art 10.

129 Defamation Act 2013, s 10(1): '*unless* the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher' [my italics].

130 ibid s 6(1).

131 ibid s 6(2).

132 ibid s 6(3).

133 ibid s 6(6).

134 Murray (n 112) 168.

135 *British Chiropractic Association v Singh* [2009] EWHC 1101 (QB), [2009] 5 WLUK 130 [4]; decision subsequently reversed by the Court of Appeal: *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133.

without malice and on a matter of public interest.[136] Common law qualified privilege, as established in *Adam v Ward*, remains active, whereby a communication made by a publisher and received by its audience with a 'reciprocity' of 'interest or a duty, legal, social, or moral' is protected.[137] The rationale for these two statutory provisions and the common law rule is strong: it is worthwhile having robust protection for such kinds of speech, given the public benefit in innovation, inquiry and reportage of the like.

Section 7 has also rendered section 14 of the Defamation Act 1996, absolute privilege for the 'fair and accurate reporting of [legal] proceedings',[138] global in its reach. The importance of justice being accessible, a fundamental tenet of the rule of law,[139] justifies elevating and internationalising this form of freedom of expression.

Section 8

Section 8 provides that 'any cause of action against [a] person for defamation in respect of [a] subsequent publication is to be treated as having accrued on the date of the first publication',[140] provided that the statements are 'substantially the same'[141] and the 'manner' of the publication is not 'materially different'.[142] The statute indicates a non-exhaustive list of factors to consider in comparing two publications, such as the prominence of the statement[143] and the extent of publication.[144]

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136 Defamation Act 1996, ss 15(2) and (3), as amended by the Defamation Act 2013 s 7.

137 *Adam v Ward* [1917] AC 309 (CA) [334].

138 Defamation Act 1996, s 14, as amended by the Defamation Act 2013 s 7.

139 'The law must be accessible and so far as possible intelligible, clear and predictable', Tom Bingham, *The Rule of Law* (first published in 2010, Penguin 2011) 37.

140 Defamation Act 2013, s 8(3).

141 ibid s 8(1)(b).

142 ibid s 8(4).

143 ibid s 8(5)(a).

144 ibid s 8(5)(b).

Murray lauds the provision as reinvigorating the 12-month limitation period of the Limitation Act which had been 'rendered pointless'[145] by the common law rule that 'each individual publication of a libel gives rise to a separate cause of action'.[146] The section removes the 'open-ended liability'[147] and 'costly and time-consuming monitoring of archive content'[148] publishers' freedom of expression was hitherto chilled by. However, it arguably 'elides the harms [to reputation] caused by ongoing publication',[149] particularly potent with online content which is often easily and endlessly accessible. The solution proposed by Mullis and Scott, the 'introduction of a new defence of "non-culpable republication" alongside retention of the multiple publication rule',[150] could have struck a better balance and also removed the potential friction, yet to be considered by the courts and potentially detrimental to would-be claimants, between section 8, which compels expediency, and section 1, for which reaching the 'serious harm' threshold may require more time.

Section 9

Section 9 addresses 'libel tourism', an issue described by different commentators as an 'international embarrassment',[151] 'controversial',[152] 'somewhat exaggerated',[153] or 'enormously exaggerated',[154] which is the practice whereby foreign cases, without a substantial link to England and Wales, are brought within its jurisdiction to take advantage of 'claimant-friendly' provisions such as the

145 Limitation Act 1980, s 4A.

146 *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] QB 783 [57].

147 Mathieson (n 122).

148 Brennan and Bermingham (n 13) 345.

149 Mullis and Scott (n 37) 103.

150 Alistair Mullis and Andrew Scott, 'Lord Lester's Defamation Bill 2010 — a distorted view of the public interest?' (2011) 1 Communications Law 6, 8.

151 English Pen and Index on Censorship (n 22). 152 Mathieson (n 119).

153 Brett Wilson LLP, Defamation Act 2013: A summary and overview six years on' (*Brett Wilson LLP,* 23 January 2020) < https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and- overview-six-years-on/> accessed 12th August 2021.

154 Persephone Bridgman Baker, 'Libel actions – here or the United States?' *The Law Society Gazette,* (5 November 2018) < https://www.lawgazette.co.uk/libel-actions-here-or-the-united-states/ 5068173.article> accessed 12th August 2021.

'presumption of falsehood',[155] eluding the US, for example, where the claimant 'must prove the libellous statement was untrue'.[156]

The libel reform campaign cited the 'multiple publication rule' and 'the global reach of the internet' as contributing to this 'phenomenon of forum shopping',[157] allowing the chilling effect of English libel laws to have a 'negative impact on freedom of expression [worldwide]'.[158] Intending to 'statutorily overrule the *Berezovsky* assumption that wherever harm has occurred those who are victims of that harm may raise an action',[159] section 9 stipulates that the court 'does not have jurisdiction to hear and determine an action [for defamation]' brought against a person domiciled outside of the UK, EU, or the Lugano Convention states, 'unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action'.[160]

Murray notes that prior to the Act, 'the courts had already taken steps to close the window of jurisdictional choice';[161] notably, in *Karpov v Browder*,[162] Simon J found '"a degree of artificiality" about [the claimant] seeking to protect his reputation in this country' and consequently struck out the action.[163] In its first application, Tugendhat J remarked of section 9 that it 'sets a higher threshold for the Claimant to surmount', as they must evidence the 'harm to their global reputations' in order to show that England and Wales is, by comparison, the most suitable place to bring proceedings;

155 Brennan and Bermingham (n 13) 351.

156 Baker (n 154).

157 English Pen and Index on Censorship (n 21).

158 Brennan and Bermingham (n 13) 351.

159 Murray (n 112) 165; referencing *Berezovsky v Forbes Inc* [2000] UKHL 25, [2000] 1 WLR 1004.

160 Defamation Act 2013 ss 9 (1)-(2).

161 Murray (n 112) 166.

162 [2013] EWHC 2071 (QB), [2014] EMLR 8.

163 ibid [139].

he concluded that this makes it 'unduly difficult for some people who are resident or domiciled here to vindicate their reputations'. [164] In allaying concerns about freedom of expression, the provision has seemingly overreached, a side-effect the judgment in *Wright v Ver*[165] may have alleviated somewhat, by compelling courts to consider a broader, non-exhaustive range of factors in determining whether England is 'the most appropriate place', including whether a publication 'is targeted at particular readers in England and Wales'.[166]

Section 11

The common law had already shifted to 'prevent disproportionate libel awards',[167] addressing the problem of over-generous jurors by permitting judges to guide juries regarding damages.[168] By reversing the presumption of jury trials, providing that trial will be 'without a jury unless the court orders otherwise',[169] section 11 almost entirely removes this concern, while also reducing the cost of defamation actions. Time- consuming, expensive jury trials are 'no longer a right'[170] and no jury trial has been ordered since the Act came into force.[171] Additionally, preliminary hearings can now be used to determine meaning,[172] another cost-saver and, according to Wilkin J, a 'great advantage'.[173] Although the loss of the 'constitutional function of the jury'[174] may be felt by some, there is no

164 *Ahuja v Politika Novine I Magazini* [2015] EWHC 3380 (QB), [2016] 1 WLR 1414 [61]; [71].

165 [2020] EWCA Civ 672, [2020] 1 WLR 3913.

166 ibid [64].

167 Kirsty Horsey and Erica Rackley, *Tort Law* (6th edn, Oxford University Press, 2019) 522.

168 *John v MGN* [1995] EWCA Civ 23, [1997] QB 586 (QB) 608.

169 Senior Courts Act 1981, s 69, as amended by the Defamation Act 2013, s 11.

170 *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB), [2015] 1 WLR 971 [47].

171 Brett Wilson (n 153).

172 Civil Procedure Rule 3 1(2)(i) allows parties to apply for a determination of meaning as a preliminary issue.

173 *Morgan v Associated Newspapers Ltd* [2018] EWHC 1850 (QB) [9] (Wilkin J).

174 *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] QB 972 [57].

reason why defamation law should not be brought in line with every other civil action, and benefit from both reduced costs, a victory for all parties, and 'the reasoned judgment' that only trial by judge can bring.[175]

Section 12 & 13

Section 12 and 13, taken together, provide that 'where a court gives judgment for the claimant in an action for defamation the court may order':[176]

- 'the defendant to publish a summary of the judgment';[177]

- 'the operator of a website [...] to remove the statement';[178] or

- 'any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting [it]'.[179]

Only one order has so far been made under section 12, in a case concerning a defamation campaign[180] consisting of 'quite distinctive and very serious' allegations[181] and thus atypical. The general reluctance of courts to apply section 12 was highlighted in *Monir v Wood*,[182] in which Nicklin J counselled that 'exercising [this] power' is an 'interference with the defendant's Article

175 *Yeo* (n 170) [53] (Warby J).

176 Defamation Act 2013, s 12(1); s 13(1).

177 ibid s 12(1).

178 ibid s 13(1)(a).

179 ibid s 13(1)(b).

180 *Shakil-Ur-Rahman v ARY Network Ltd* [2016] EWHC 3110 (QB), [2016] 4 WLR 22.

181 Bloomsbury Professional Limited, 'Level of damages in targeted defamation campaign' (2017) 1 Communications Law 31, 32.

182 [2018] EWHC 3525 (QB), [2019] All ER (D) 31 (Jan).

10 right', and must be 'justified', 'necessary' and 'proportionate'.[183] This narrow application of Section 12 by the courts, keeping in mind the impact on freedom of expression of 'repairing the damage to [...] reputation',[184] strikes an appropriate balance.

In *Summerfield Browne v Waymouth*,[185] a section 13 order was made, 'requiring Trustpilot to remove [a] defamatory review, on the basis that the Defendant's conduct [an individual reviewer] to date [made] it doubtful that he [would] comply with the injunctive relief the Claimant [had] been granted'.[186] The Law Gazette reported that 'Trustpilot said the judgment [...] raised "significant concerns" around freedom of speech'.[187] The author contends, rather, that removal of a defamatory statement is a proportionate, necessary interference with Article 10 HRA, with the legitimate aim of protecting a claimant's reputation, as prescribed by Article 10(2) HRA.[188] Section 13 offers redress against defamatory content, not 'any content', and it is therefore a balanced protector of reputation, crucial in light of the ubiquity of web platforms hosting user content.

Reputation, at present, may continue to be harmed for the duration of libel proceedings. Interim libel injunctions have long been generally unavailable if a defendant intends to raise an affirmative defence,[189] a position indicating 'the importance the court attaches to freedom of speech'.[190] Perhaps mandating the 'appending of notices' to contested statements, as proposed by Mullis and Scott,[191] could better protect reputation, while leaving the free speech of a publisher intact.

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183 ibid [240].

184 ibid [239].

185 [2021] EWHC 85 (QB).

186 ibid [40].

187 Hyde John, 'Trustpilot to fight order to take down libellous solicitor review' *The Law Society Gazette* (11 February 2021) <https://www.lawgazette.co.uk/news/trustpilot-to-fight-order-to-take-down- libellous-solicitor-review/5107374.article> accessed 12th August 2021.

188 Human Rights Act 1998, Art 10(1); Art 10(2).

189 As per the rule in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-94] All ER Rep 965.

190 *Greene* (n 174) [57]- affirming the rule in *Bonnard*.

191 Mullis and Scott (n 37) 107.

Conclusion

In conclusion, the Act achieves a tentative balance between the competing rights to freedom of expression and reputation. It amplifies and extends parts of the common law already angled towards protecting freedom of expression, codifying and strengthening some defences (sections 2-4), and effecting substantial change via section 1. Sections 5-7 and 10 bolster the protection for important forums of debate, while sections 8 and 9 helpfully restrict liability by time and place respectively, although at a price for protection of reputation. Section 11 reduces the length and cost of litigation and sections 12 and 13 provide proportionate remedies where a defamation action is successful. Reversal of the burden of proof, which would have made the most meaningful advancement for free speech, was (justifiably) not effected by the Act, whose lack of revolutionary content certainly carries on defamation law's tradition of 'piecemeal reforms'. A 'Frankenstein's monster' to some,[192] there is a helpful corollary to stitching a body of law together over time: flexibility. Perhaps this incremental approach to reform, with a strong onus on courts to help develop the law, is the best way so fact-sensitive a balancing act between two such integral rights can be navigated.

192 Matthew Collins, 'Reflections on the Defamation Act 2013, one year after A Royal Assent' (*Inforrm*, 25 April 2014)<https://inforrm.org/2014/04/25/reflections-on-the-defamation-act-2013-one-year-after- royal-assent-matthew-collins/> accessed 12th August 2021.

MISSION ABORTED OR MISSION CREEP? IMPLICATIONS OF JUDICIAL REFORMS IN THE JUDICIAL REVIEW AND COURTS ACT 2022

Miranda Sadler

Introduction

The Judicial Review and Courts Act 2022 received royal assent and became law on 28 April 2022. It was the culmination of a sustained effort on the part of the current Conservative government to reform the rules governing judicial review. The government's ambitions for reform were significant when it commissioned the Independent Review of Administrative Law in July 2020. Almost two years later, the resulting legislation in the form of the Judicial Review and Courts Act 2022 was far from the radical overhaul of the court's judicial review powers that was initially envisioned. Section 1 of the Act provides for new types of quashing orders that may be granted by the court at their discretion. Section 2 excludes judicial review of a specific type of decision, namely those made by the Upper Tribunal where it refuses permission to appeal.

However, these provisions arguably lay the groundwork for future curtailments of the court's jurisdiction in judicial review. This essay seeks to show that the reforms created by the Act are more radical than they might at first appear. The first section of the essay sets out the contextual background to the government's reform proposals. The second section examines the constitutional role of judicial review and draws attention to the fundamental tension between the rule of law and parliamentary sovereignty which the court must navigate when exercising its judicial review powers. The third section outlines the government's proposals for reform of judicial review and the consultation process. The fourth and final section discusses the implications of the Judicial Review and Courts Act 2022 for judicial review and the broader constitutional landscape.

Background

The government's interest in reforming judicial review has arisen over the last three years amidst increasing frustration among ministers at what they deem to be interference by the courts in matters

of policy. Such views have also been expounded by some legal and academic commentators, most notably the Judicial Power Project led by Professor Ekins[1] and former Supreme Court judge Lord Sumption.[2] Specifically, the government's ire with judicial review was thought to be provoked by *R (Miller) v The Prime Minister*, in which the Supreme Court held that the Prime Minister's prorogation of parliament for five weeks in September 2019, prior to the UK's withdrawal from the European Union, was an unlawful use of his prerogative power.[3] Following this ruling, the Conservative Party manifesto for the December 2019 General Election promised to examine aspects of the constitution and, in particular, to "ensure that judicial review is available to protect the rights of the individuals against an overbearing state, whilst ensuring that it is not abused to conduct politics by another means or to create needless delays."[4]

Constitutional role of judicial review

Broadly, the function of judicial review is for the court to ensure that decisions made by the executive are made in accordance with laws as created by parliament. A wide range of governmental decisions can be reviewed, including any decision-making power derived from statute or secondary legislation,[5] and most prerogative powers exercised by the government on behalf of the Crown.[6] The court may declare a decision to be unlawful on one of three main grounds: illegality, procedural unfairness or irrationality.[7] The supervisory jurisdiction of the Administrative Court within the

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1 Richard Ekins, 'The Case for Reforming Judicial Review' (Policy Exchange, 27 December 2020)

2 Lord Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 34-35; see also his contributions to the BBC Reith Lectures in 2019.

3 [2019] UKSC 41.

4 'The Conservative and Unionist Party Manifesto 2019' (24 November 2019) 48.

5 Lord Woolf, Sir Jeffrey Jowell QC, Catherine Donnelly, Ivan Hare QC and Joanna Bell QC, *De Smith's Judicial Review* (3rd supp, 8th edn, Sweet & Maxwell 2020) para 3-031.

6 *Council of Civil Service Unions v Minister for the Civil Service* [1984] AC 374. The court will proceed with caution where prerogative powers relate to conduct of foreign affairs: *R v Jones* [2006] UKHL 16; *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

7 *Council of Civil Service Unions* (n 3) 410-411 (Lord Diplock).

Queen's Bench Division, in this respect, stretches back to that exercised by the Court of King's Bench in the seventeenth century and earlier.[8]

Judicial review serves primarily to uphold the constitutional principle of the rule of law. According to Lord Bingham's definition of the rule of law, the core of the principle is that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[9] Judicial review serves to protect this principle by holding public bodies to account if or when they act unlawfully.

Another fundamental constitutional principle upheld by judicial review is parliamentary sovereignty. The courts carry out the will of parliament by ensuring that public bodies exercising powers under statute remain within the limits set by statute, as parliament intended.

However, when the court exercises its judicial review powers, the rule of law and Dicey's orthodox account of parliamentary sovereignty, in which "no person or body is recognised... as having a right to override or set aside the legislation of Parliament", can sometimes come into conflict.[10] In particular, issues have arisen when the court applies the common law principle of legality in statutory interpretation, a powerful presumption that parliament always intends its legislation to conform to the rule of law as a constitutional principle. The presumption may only be rebutted by clear and express legislative words to the contrary.[11] Although the presumption attempts to balance the principles of the rule of law and parliamentary sovereignty, it has resulted in what some commentators, including the government, consider to be strained interpretations of statute by the courts.[12]

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8 Woolf, Jowell, Donnelly, Hare and Bell, *De Smith's Judicial Review* (n 5) para 15-002.

9 Lord Bingham, *The Rule of Law* (Allen Lane 2010) 8.

10 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn, Macmillan and Co 1889) 38.

11 Woolf, Jowell, Donnelly, Hare and Bell, *De Smith's Judicial Review* (n 5) para 1-029.

12 Judicial Review Reform: The Government Response to the Independent Review of Administrative Law (CP 408, March 2021) 27; Richard Ekins, 'The Case for Reforming Judicial Review' (Policy Exchange, 27 December 2020) paras 24, 26. The decisions in *R (Evans) v Attorney General* [2015] UKSC 21 and *R (UNISON) v Lord Chancellor* [2017] UKSC 51 were subject to such criticism.

For example, the courts' reliance on the principle of legality when interpreting ouster clauses, which are provisions that purport to exclude judicial review of executive decisions, has proved particularly contentious. The landmark case *Anisminic v Foreign Compensation Commission* established that an ouster clause will not be upheld by the court unless it contains wording which expressly excludes the court's supervisory jurisdiction.[13] The court has subsequently been criticised for stretching this principle too far on occasions. For example, in *R (Privacy International) v Investigatory Powers Tribunal*[14], the Supreme Court declined to give effect to what some considered to be a clearly worded ouster clause.[15] So far the court has not been confronted by a provision that is, in their view, sufficiently clear in ousting judicial review. In the event that this situation ever arises, it is difficult to predict exactly what would happen given that the UK has no written constitution providing for the boundaries between institutions in such circumstances.[16] The courts might refuse to enforce the offending legislation, as was suggested *obiter* by members of the House of Lords in *R (Jackson) v Attorney General,* which would unequivocally undermine parliamentary sovereignty.[17] Alternatively, it has been suggested that the courts might regard the legislation as lawful but unconstitutional, effectively neutering their own power to uphold the rule of law.[18] It is therefore important for the functioning of the constitution that this fundamental tension between the two principles remains untested, as has been recognised by a number of academics and judges.[19] The onus is instead on

13 [1969] 2 AC 147.

14 [2019] UKSC 22.

15 See for example Mike Gordon, 'Privacy International, Parliamentary Sovereignty and the Synthetic Constitution', *UK Constitutional Law Association Blog* (26 June 2019) <https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/> accessed 30 September 2021.

16 Mark Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds) *The Changing Constitution* (9th edn, OUP 2019).

17 [2005] UKHL 56 [102] (Lord Steyn), [104], [107] (Lord Hope), [159] (Lady Hale).

18 Elliott, 'Parliamentary Sovereignty' (n 16).

19 For example, Sir Jeffrey Jowell QC, 'The Rule of Law' in *The Changing Constitution* (n 17); and Mark Elliott, 'Culture War? Two Visions of the UK Constitution', (Public Law for Everyone, 28 April 2021) <https://publiclawforeveryone.com/ 2021/04/28/judicial-review-reform-iv-culture-war-two-visions-of-the-uk-constitution/> accessed 30 September 2021.

governmental institutions to self-impose their own limits and be respectful of one another's functions.

Proposals for reform

The Independent Review of Administrative Law

The government took its first step towards reform by commissioning the Independent Review of Administrative Law ("IRAL") in July 2020.[20] Made up of an independent panel, chaired by Lord Faulks QC, the IRAL was asked to consider options for reforming judicial review regarding the amenability of public law decisions to judicial review, the grounds of review open to the courts, areas of justiciability, remedies, and judicial review procedure.[21]

The IRAL panel released its findings on 18 March 2021 and ultimately recommended only two reforms. These were: (a) introducing suspended quashing orders as a new remedial tool for courts in judicial review; and (b) abolishing the right to challenge decisions of the Upper Tribunal where it has refused permission to appeal (known as '*Cart*' judicial reviews).

In respect of the second recommendation, although the panel considered that parliament could and should legislate to correct particular court rulings (like *R (Cart) v Upper Tribunal*)[22], it did not recommend broader legislation prescribing areas of non-justiciability.[23] The panel thought that any attempt to do so would be regarded as an ouster of the court's jurisdiction and that, while the use of ouster clauses to deal with specific issues could be justified, it was likely to face a "hostile response from the courts and robust scrutiny by Parliament."[24] Although the panel acknowledged that

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20 Independent Review of Administrative Law (CP 407, March 2021)

21 'Terms of Reference – Independent Review of Administrative Law' (31 July 2020) <https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf> accessed 30 September 2021.

22 [2011] UKSC 28; the Supreme Court held in this case that unappealable decisions of the Upper Tribunal are subject to judicial review in certain circumstances.

23 IRAL (n 20) 55.

24 ibid 56.

parliament was capable of legislating to restrict or exclude judicial review if it wished to do so,[25] they emphasised that "the wisdom of taking such a course and the risk in doing so are different matters" and that taking such an exceptional course would require highly cogent reasons.[26]

In summary, the IRAL took a cautious approach in its recommendations for reforming judicial review. The panel in fact suggested that the best solution to judicial overreach was in the hands of judges themselves by means of exercising judicial restraint.[27] Notably, the panel also took the opportunity to emphasise that not only did the courts need to respect institutional boundaries, but that "politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these [judicial review] powers".[28]

The Government Response to the IRAL

The findings of the IRAL report were evidently not what the government had hoped for. The Government Response to the IRAL ("Response"), which was published on the same day as the IRAL report, accepted the two reforms recommended by the IRAL panel but additionally announced the government's intention to consult on further reforms that had not been recommended.

The Response's apparent disregard for the caution recommended by the IRAL was met with alarm from many in the legal community. Two of the proposals suggested by the government appeared to be particularly restrictive of the courts' exercise of their judicial review powers: firstly, a proposal that ouster clauses *should* be given effect by the courts where there is sufficient justification;[29] and secondly, a proposal to re-introduce the distinction between a public body's lack of power to make a decision and the wrongful use of a power by a public body.[30] The significance of the second proposal

25 ibid 54.

26 ibid.

27 ibid 61.

28 ibid 132.

29 Government Response (n 12) para 89.

30 ibid para 81; this was the doctrine followed by the courts prior to the decision *Anisminic*.

was that it would effectively introduce a category of errors which, even if they rendered a public body's decision unlawful, would not cause the nullification of that decision. This would limit the remedies available to a claimant in judicial review. The Response's proposals, along with a proposal for prospective-only quashing orders, were fiercely criticised by many in the legal community as attempts to "eviscerate" the courts' ability to hold public bodies to account.[31]

Judicial Review and Courts Bill

Following a further consultation exercise, the Judicial Review and Courts Bill was introduced on 21 July 2021.[32] The Bill fell short of the radical reforms promised by the government in their Response, most likely as a result of the consultation feedback and sustained criticism of the government's proposals. The two reforms in the Bill were as follows: firstly, provision for a power that allowed judges to grant quashing orders that are suspended or that have a prospective-only effect;[33] and secondly, the abolition of *Cart* judicial reviews.[34]

The most controversial aspect of the Bill was that it created a presumption that the court "must" make a suspended or prospective-only quashing order where this would offer the claimant adequate redress. Such a presumption had not been recommended by the IRAL and drew strong criticism for attempting to constrain the court's discretion.[35] Furthermore, the power to limit the retrospective effect of quashing orders was not a reform that had been recommended by the IRAL.

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31 See Mark Elliott, 'Nullity, Remedies and Constitutional Gaslighting' (Public Law for Everyone, 6 April 2021) <https:// publiclawforeveryone.com/2021/04/06/judicial-review-reform-i-nullity-remedies-and-constitutional-gaslighting/ > accessed 30 September 2021.

32 Judicial Review and Courts HC Bill (2020-21) [152].

33 ibid cl 1.

34 ibid cl 2.

35 ibid cl 1; Jonathan Morgan 'In Praise of Flexibility: Clause 1 of the Judicial Review and Courts Bill (2021)', *UK Constitutional Law Association Blog* (23 September 2021) <https://ukconstitutionallaw.org/2021/09/23/jonathan-morgan-in- praise-of-flexibility-clause-1-of-the-judicial-review-and-courts-bill-2021/> accessed 30 September 2021.

Judicial Review and Courts Act 2022

The Judicial Review and Courts Act 2022 went into force on 28 April 2022. Before it received royal assent, the House of Commons agreed to remove the controversial statutory presumption requiring the court to make a suspended or prospective-only quashing order.

Discussion

At first glance, the changes to judicial review in the Judicial Review and Court Act 2022 appear restrained, at least in relation to the sweeping reforms which were at one point proposed by the government. The successful removal of the proposed statutory presumption in favour of granting suspended or prospective-only quashing orders notably watered down the reforms, and was praised as a "major win" for the rule of law.[36]

However, other aspects of the Act are no less a cause for concern. The prospective-only remedies created by section 1 of the Act potentially reduce the consequences for government following unlawful action, thereby weakening judicial review as a tool for ensuring governmental accountability. This may, in turn, have a chilling effect on victims of unlawful actions because they may become disincentivised from bringing claims if they feel that they will not receive
adequate redress.

Section 2 of the Act which abolishes *Cart* judicial reviews is, in essence, an ouster clause and is of even greater concern. By including such a provision in the legislation, the government went against the recommendations of legal experts and other stakeholders as provided in the consultation feedback and throughout the legislative process. In their legislative scrutiny report, the Joint Committee on Human Rights raised concerns that removing *Cart* judicial reviews was a "nuclear option" and advised the government to first consider introducing procedural reforms such as tighter time limits

36 The Law Society, 'Big win for rule of law: government retains judges' discretion in judicial review reform' (28 April 2022) < https://www.lawsociety.org.uk/topics/human-rights/big-win-for-rule-of-law-government-restores-judges-discretion-in- judicial-review-reform> accessed 13 June 2022

for bringing challenges to certain types of decision.[37] Despite this, all proposed amendments to the clause were rejected.

In addition to being a direct restriction on the court's supervisory jurisdiction, Section 2 of the Act has the potential to act as a gateway for further incursions on judicial review. The government has ominously suggested that the removal of *Cart* judicial reviews in the Act will serve as a model for more potent ouster clauses in the future.[38] Indeed, attempts to sneak additional ouster clauses into the Bill, including a provision overturning the decision of the Supreme Court in *Privacy International* and provisions excluding judicial review of prorogations and infringements of parliamentary accountability, were made by Conservative MPs during the Bill's passage through parliament.[39] While these attempts were unsuccessful, they betray the current government's persistence in removing checks on executive accountability.

As part of its rationale for legislating to remove *Cart* judicial reviews, the government relied heavily on the claim that the courts have recently become more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.[40] However, this claim appeared to be based on a series of misstatements about the nature of judicial review. For example, the government has expressed concern regarding certain grounds of review available to the court in judicial review, particularly the ground of irrationality. The government viewed this ground as potentially subject to misuse given the "theoretical malleability" of the *Wednesbury* unreasonableness test and its "arguable closeness to value judgments."[41] While it is correct that this ground requires the court to examine the political or moral character of a decision in order to establish whether the decision has any merit at all, the government failed to acknowledge that the

37 Joint Committee on Human Rights, *Legislative Scrutiny: Judicial review and Courts Bill* (2021-22, HL 120, HC 884) 21.

38 *Judicial Review Reform Consultation: The Government Response (CP 477, July 2021) para 55; Robert Buckland QC, 'Keynote Speech: Banishing the Ghosts of Judicial Review Past' (Policy Exchange, 21 July 2021).*

39 'Judicial review and Court Courts Bill 2021-22: Progress of the Bill' (House of Commons Library, 21 January 2022).

40 Government Response (n 12) para 2.

41 Judicial Review Reform Consultation: The Government Response (n 38) paras 18-19; *Associated Provincial Picture House Ltd v Wednesbury Corporation* (1948) 1 KB 223.

Wednesbury unreasonableness test has a very high threshold.[42] This and other misstated observations in the Government Response to the IRAL reveal serious flaws in the government's basis for introducing ouster clauses.

Furthermore, as this essay explains, the use of expressly worded ouster clauses to curtail the court's supervisory jurisdiction could create unresolvable tension between the court's twin functions of protecting the rule of law and upholding parliamentary sovereignty. This would consequently give rise to conflict between parliament and the judiciary, and may weaken either or both institutions. Such conflict could have a devastating impact on the functioning of the constitution and the relationships of mutual respect between governmental institutions. In 2004, when the Labour Government attempted to include a very clear and express ouster clause designed to circumvent *Anisminic* in the Asylum and Immigration (Treatment of Claimants etc) Bill,[43] the provisions were dropped following condemnation from Parliament and the House of Lords.[44] Democratic and parliamentary processes may have to be relied upon once again in the event of any similar re- attempted threat to the constitution.

It is also necessary to view the government's attempts to restrict judicial review within the context of other legislation recently passed or currently being pursued by the government, such as the Dissolution and Calling of Parliament Act 2022, which came into force on 24 March 2022, and that has revived the prerogative power to dissolve parliament. In addition, the Independent Human Rights Act Review published its report at the end of 2021, following which the government launched a consultation on reforming the Human Rights Act 1998 and introduced a Modern Bill of Rights.[45]

Within this context, the Government Response to the IRAL can be seen as one of many

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42 Woolf, Jowell, Donnelly, Hare and Bell, *De Smith's Judicial Review* (n 5) para 11-018.

43 Asylum and Immigration (Treatment of Claimants, etc.) HC Bill (2003-04) [5] cl 11.

44 HC Deb 17 December 2003, vol 415, cols 1641, 1656-1657; HL Deb 15 March 2004, vol 659, cols 72-74, 92-95.

45 Independent Human Rights Act Review (CP 586, December 2021); Human Rights Act Reform: A Modern Bill of Rights – consultation (CP 588, December 2021).

manifestations of an increasingly confident executive seeking to expand its own power. Although it remains to be seen how serious the government is about some of its proposals, the possibility of such interference could foreseeably lead to more calls for a written constitution to provide clarity on the roles of the separate governmental institutions.

Conclusion

The Judicial Review and Courts Act 2022 is a far cry from the radical overhaul of judicial review that had been feared by critics of the government's plans for reforms. Nonetheless, the Act's provisions go beyond what was recommended by the IRAL panel and have potentially detrimental implications for executive accountability and access to justice. In particular, section 2 of the Judicial Review and Courts Act 2022 appears to be a pilot of sorts for the wording of ouster clauses that the government intends to deploy in future legislation. For the sake of constitutional harmony and the rule of law, it must be hoped that this does not come to pass and that all three branches of government continue to afford each other with due respect when carrying out their respective functions.