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EDITOR'S FOREWORD

This edition marks the fifteenth year of the Gray's Inn Student Law Journal. The Journal presents students with an opportunity to engage in high-quality analysis of a legal topic of their choice.

It has been a privilege to be this year's editor, working alongside some of Gray's Inn's most talented students. I would like to extend my deepest thanks to everyone who submitted an essay to the Journal as well as to the team of peer-reviewers who kindly volunteered their time and expertise to critique these submissions.

Reuben Andrews, winner of the Michael Beloff Essay Prize, considers whether the Human Rights Act 1998 needs amending. Max Millington, winner of the Lee Essay Prize, considers the protest and encampment provisions of the Police, Crime, Sentencing and Courts Act 2022 and their impact on the human rights of Gypsies and Travelers as well as the right to protest. Matthew Pugh, winner of the Gide Essay Prize, and Abigail Collier, provide comparative analyses of French and English laws' treatment of extraordinary supervening circumstances on the performance of contracts, while Jakub Mikulski considers contractual frustration and waiver more broadly. Other essays consider mechanisms of constitutional change (Harry Thomas), diplomatic immunity (Udit Mahalingam), the impact of Bitcoin on fiduciary duties (Hazel Bannerman), and the investigative powers of Coroners (Ben Weisz).

I hope that the readers of this edition will find these considered and well-researched essays to be a fascinating and thoroughly enjoyable read.

REBECCA J. BRIMBLE

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 www.legalabbrevs.cardiff.ac.uk.

JUSTICIABLE SOCIO-ECONOMIC RIGHTS: CHANGING THE NARRATIVE ON THE HUMAN RIGHTS ACT[1]

Reuben Andrews
Winner of the Michael Beloff Essay Prize

"Does the Human Rights Act 1998 need amending?"

No question is asked in a vacuum. The debate over whether, and in what way, the Human Rights Act 1998 ('HRA') should be amended exemplifies that. In light of recurrent anti-HRA narratives and the recently proposed Bill of Rights ('the Bill'), this question carries conceptual baggage within which proponents of the Act, and of human rights more broadly, can get mired. Their typical responses follow a narrow path: deny accusations of judicial overreach and reaffirm the status quo of domestic rights protection by challenging attempts to water it down.

In advocating for robust human rights protection, this essay, perhaps inevitably, bears shades of this approach. However, its main focus lies in scrutinising the narrative encapsulated by the Bill: how the political landscape was sculpted to render it palatable, and how we might re-frame this narrative to push the Overton window away from rights-restriction and back towards rights-protection. Through doing so, it will appraise and reject the Bill's amendments before suggesting a different way of amending the HRA to secure democratic oversight, sensitivity to British culture, and – crucially – the protection of the less powerful.

1. The Bill in Context

Plans to reform, or even abolish, the HRA have been 16 years in the making.[2] However, over the past 24 months they have shifted from a recurrent election pledge into what seems now like a political inevitability. The process through which the Bill came into being is essential to any discussion which aims to understand why or how we should amend the HRA and what the future of human rights protection in the UK might look like.

1.1. Human rights for the people

A great deal of political discourse around the HRA follows the populist playbook of positing a fundamental tension between the 'people' and some powerful class unresponsive to their desires[3] – here, a coalition between "lefty lawyers",[4] "unelected, unaccountable judges"[5] and European

[1] This essay was written shortly after the Bill of Rights Bill was proposed. The Bill has since died. Although this essay explores specific provisions of the Bill, it focusses mainly on the political environment which made the Bill possible and on possible ways forward for advocates of human rights. It is hopefully still of interest.
[2] David Cameron, 'Balancing freedom and security - a modern British Bill of Rights' (Speech at the Centre for Policy Studies, 26 June 2006).
[3] Ernest Laclau, *On Populist Reason* (Verso 2005), 83-87.
[4] Michael Cross, 'Johnson opens new front in war on 'lefty lawyers" (*The Law Gazette*, 6 October 2020) < www.lawgazette.co.uk/news/johnson-opens-new-front-in-war-on-lefty-lawyers/5105891.article > accessed 23 August 2022.
[5] Monidipa Fouzder, 'New attorney general criticised 'unelected, unaccountable' judges' (*The Law Gazette*, 13 February 2020) < www.lawgazette.co.uk/news/new-attorney-general-criticised-unelected-unaccountable-

institutions conspiring to subvert democratic processes.

Proponents of restrictively amending the HRA have been careful to position human rights as predominantly benefitting criminals and immigrants,[6] thus creating the impression that they do not benefit the 'people'.[7] For instance, despite attempting to distance himself from the rhetoric, in his first response to an opposition MP during the Bill's initial reading, the then-Deputy Prime Minister invoked the language of a "villains' charter" to refer to the HRA.[8]

Seeing this problem, the Independent Human Rights Act Review "strongly recommended" that any reform package include a commitment to promote civic education about the role of human rights in society and the actual functioning of the judicial system.[9] Through creating an impartial narrative, which highlights rather than obscures the benefits human rights bring, feelings of public ownership over human rights could be enhanced.[10] In turn, this would further one of the founding aims of the HRA: the facilitation of a 'rights culture' in which citizens are empowered to hold the Executive accountable for rights breaches.[11]

However, despite the fact that this proposal, which foregrounded the review, is consonant with the government's purported desire to address public distrust towards the judiciary,[12] it was absent from their consultation on reforming the HRA.[13] The picture remains distorted.

1.2. Moving Targets

For much time, this is where the narrative stood: repealing and replacing the HRA was portrayed as crucial to restoring democratic oversight in our legal system, and to protecting ordinary people. Whatever one thinks of this position, however, it stands in stark contrast to the more extreme position of leaving the European Convention on Human Rights ('ECHR') altogether. Despite this, Conservative politicians have started saying the quiet part loud.

Following Boris Johnson's resignation as Prime Minister, both candidates for leader of the Conservative party made it clear they would leave the ECHR if necessary to send Channel migrants to Rwanda – tellingly, Rishi Sunak adopted this position, replete with stock references to "taking back control" and "lefty lawyers", when it became obvious he was trailing behind Liz Truss in the leadership race.[14] Likewise, in the Bill's first reading, the architect of the Bill himself refused to reject Peter Bone MP's suggestion that "if in practice [the Bill] fails" the government should move to support a private Member's Bill for leaving the ECHR.[15]

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judges/5103089.article> accessed 23 August 2022.

[6] See Boris Johnson's claim that "lefty human rights lawyers" inhibit the incapacitation of "serious sexual and violent offenders": Cross, n 3.

[7] Daily Mail, 'Human rights laws are a charter for criminals, say 75% of Britons' (16 April 2012).

[8] Bill of Rights Deb 22 June 2022, vol 716, col 850.

[9] Ministry of Justice, *The Independent Human Rights Act Review* (CP 586, 2021), 20.

[10] Ministry of Justice, n 8, 21.

[11] Ministry of Justice, n 8, 9.

[12] Bill of Rights Deb 22 June 2022, vol 716, col 847.

[13] Ministry of Justice, *A Modern Bill Of Rights: A consultation to reform the Human Rights Act 1998* (CP 588, 2021).

[14] Express, 'Sunak vows to end power of European court in UK to stop small boats' (6 August 2022) < www.express.co.uk/news/politics/1651294/Rishi-Sunak-illegal-migrants-small-boats-European-Court-of-Human-Rights-update > accessed 23 August 2022.

[15] Bill of Rights Deb 22 June 2022, vol 716, col 849-850.

If the metric for the Bill's success is whether it insulates Executive decision-making from the scrutiny of the European Court of Human Rights ('ECtHR'), then it is doomed to fail as the ECtHR will remain the apex authority on matters of ECHR interpretation.[16] Perhaps this is the point: then-Attorney-General Suella Braverman admitted of the Rwanda policy that it was "clear to anyone [we] had no hope of actually deporting anyone".[17] The more the ECtHR is forced to intervene, the stronger anti-ECHR rhetoric gets.

1.3. The Upshot

The Overton window has shifted; what was once a fringe position is fast moving into the political mainstream. Assurances that the UK will remain a party to the ECHR following the enactment of the Bill should now be viewed with scepticism. Likewise, discussions about the more technical issues with the HRA must be conducted in light of the threat of leaving, as the line between arguments for restrictively amending the HRA and for leaving the ECHR can be blurred in practice. We turn to such arguments now.

2. The Contents of the Bill

Rather than detailing every facet of the Bill, its contents are explored through two broad themes. The following two sub-sections address the theme of democratic oversight. Human rights adjudication is integral to functioning democracies, and the Bill seeks to marginalise this for unfounded reasons. This observation is important, because in the absence of a nuanced understanding of democracy, criticisms of the HRA as undemocratic quickly become Trojan horses for the more extreme position outlined above.

The third sub-section addresses procedural limitations. The Bill markets itself as enhancing rights-protection while at the same time surreptitiously placing barriers on the public's ability to challenge Convention right breaches.

2.1. Democratic Oversight: Domestic Procedure

Many of the Bill's provisions reflect the common critique of the HRA, that it is contrary to democracy for judges to overrule the actions of domestically-elected officials, and to do so in service of a 'foreign court'. Problematically, however, it is difficult to see how this criticism is borne out in the present functioning of the HRA, or how the Bill contributes to – rather than frustrates – the furtherance of democratic oversight.

The Bill seeks to constrain the ability of judges to interpret legislation in conformity with Convention rights (as under Section 3 HRA) and attempts to induce narrower interpretations of those rights through its emphasis on the bare text of such rights (through Clause 3(2)(a)) and its

[16] Mark Elliott, 'The UK's (new) Bill of Rights' (*Public Law for Everyone*, 22 June 2022) < https://publiclawforeveryone.com/2022/06/22/the-uks-new-bill-of-rights/> accessed 23 August 2022.
[17] Suella Braverman, 'As the next Prime Minister, I would truly bring rights home' (*The House*, 12 July 2022) < www.politicshome.com/thehouse/article/suella-braverman-conservative-leadership-prime-minister-leave-echr > accessed 23 August 2022.

side-lining of ECtHR jurisprudence through the removal of Section 2 HRA. Despite this, the central justification for removing Section 3 – that it permits judges to rip up the words of statutes and impose their own meaning – is unsubstantiated.

Much is made of *Ghaidan*, in which the phrase 'husband and wife' was read as applying to same-sex couples,[18] but any argument suggesting this undermines Section 3's democratic importance is undercut by two points. Firstly, counsel for the Home Secretary explicitly made submissions asking the House of Lords to interpret the relevant provision as applying to same-sex couples.[19] Secondly, an empirical assessment of the case-law surrounding Section 3 shows that it is seldom used in practice, and where it is used it regularly plays a key role in addressing "unforeseen drafting issues or factual situations that clearly fell within the overall intention of the legislative scheme".[20]

After all, parliamentarians can't possess foresight into every possible permutation of facts that a given statute could apply to. In this sense, the HRA's interpretative obligation fulfils an important democracy-affirming function in directing judicial expertise towards the task of applying legislation to day-to-day fact patterns, whilst foregrounding the fundamentality of Convention rights. This process is dialogic: Parliament is given the opportunity to respond by legislating further if it finds it necessary. The lack of such response to prior Section 3 interpretations undermines the suggestion that they have been contrary to Parliamentary intention.[21]

However, just as Section 3 affirms democracy, its removal threatens it. Section 3 interpretations are not free-standing and the removal of Section 3 renders precedent for all prior interpretations inapplicable moving forwards;[22] likewise, the transformative nature of the Bill, particularly its changes to the interpretation of Convention rights, creates uncertainty in the future application of prior decisions. Most problematically, Clause 40 appears to let Ministers cherry-pick which pre-commencement Section 3 interpretations they want to retain[23] – something difficult to square with the purported aim of increasing democratic oversight.

2.2. Democratic Oversight: British Rights and British Autonomy

Turning now to the question of British judicial autonomy, it is difficult to accept the proposition that ECtHR jurisprudence has curbed the development of human rights sensitive to British legal culture. It is trite to emphasize the ECHR's British origins, but even as its case-law has developed, it would be incorrect to suggest that UK courts have slavishly imported it into the common law. *Horncastle*[24] is an obvious example of British divergence in the implementation of Convention rights,

[18] *Ghaidan v Godin-Mendoza* [2004] UKHL30, [35-36].
[19] *Ghaidan* [128].
[20] Florence Powell and Stephanie Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?' (*UK Constitutional Law Association*, 24 March 2021) < https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/> accessed 23 August 2022.
[21] Baroness Hale of Richmond, 'Oral evidence: The Government's Independent Human Rights Act Review, HC 1161' (Joint Committee on Human Rights, 3 February 2021), Q26 <https://committees.parliament.uk/oralevidence/1661/html/> accessed 23 August 2022.
[22] Kyle Murray, 'The future of rights-enhanced interpretations under the Bill of Rights' (*UK Constitutional Law Association*, 12 July 2022) <https://ukconstitutionallaw.org/2022/07/12/kyle-murray-the-future-of-rights-enhanced-interpretations-under-the-bill-of-rights/> accessed 23 August 2022.
[23] Elliott, n 15.
[24] *R v Horncastle & Others* [2009] UKSC 14.

but there are others.

For instance, although UK courts have accepted that Article 8 may require a proportionality assessment to be conducted where public-authority landlords wish to evict tenants,[25] subsequent case-law has nevertheless stuck close to a distinctly British notion of property rights as hard-edged 'exclusion rules'. The UK courts put little weight on certain subjective criteria – such as the vulnerability of the tenant, their risk of homelessness, and the lack of specific public need for the property – in proportionality assessments, although they are recognised as important by the ECtHR.[26]

Another possibility is that, rather than referring to permutations of Convention rights which complement common law traditions, the government's notion of 'British rights' instead functions as a fig-leaf for the promotion of a more restrictive set of negative obligations. If this is the case, however, there are convincing reasons why one might think that the Executive does not always hold traditional civil liberties in particularly high regard either – and why, therefore, there is still need for strong fundamental rights protection vis-à-vis the judiciary.

Jalloh, for instance, illustrates the dangers of allowing the Executive to determine the boundaries of fundamental rights in the absence of meaningful judicial oversight. There, the Home Secretary argued that the common law tort of false imprisonment should be constrained to require the same stringent notion of imprisonment as deprivation of liberty under Article 5 – ostensibly to avoid paying £4,000 for unlawfully imposing a curfew.[27] The Supreme Court rightfully argued that this would be a "retrograde step" tantamount to depriving UK citizens over-night of protection to their physical liberty which had existed for centuries.[28]

This points us toward the central issues with framing the ECtHR as a 'foreign court'. It is a *supranational* court[29] whose purpose is to prevent European states from unilaterally adopting authoritarian measures. In this sense restrictions on Executive autonomy are not inherently anti-democratic. As Lady Hale has pointed out, democracy is not value-neutral: it requires commitment to certain underlying ideals, principally the equal treatment and participation of all citizens even if – and perhaps especially if – a majority-backed government tries to act otherwise.[30]

Naturally, there are differences between which actions the ECtHR and the UK government see as corollaries of human rights. Governments have a vested interest in minimising rights obligations, whereas there is no inherent reason for the ECtHR to interpret rights over-expansively. The process of negotiating with the ECtHR is a necessary consequence of supranational supervision and to deny the legitimacy of this role is to deny the legitimacy of the ECHR.

[25] *Manchester City Council v Pinnock* [2010] UKSC 45, [49].
[26] Rachael Walsh, 'Stability and predictability in English property law - the impact of article 8 of the European Convention on Human Rights reassessed' [2015] LQR 585, 605-606.
[27] *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [29].
[28] *Jalloh*, [33].
[29] The Council of Europe includes the UK.
[30] *Ghaidan,* [132].

2.3 Procedural Barriers

One consequence of the Bill is that judges will be less able to ensure Convention-compliant applications of domestic law, and as a result many claimants will be left with the cost and inconvenience of taking their cases to Strasbourg. This is intolerable for basic access to justice reasons, but – as suggested above – it will also embolden those who wish the UK to leave the ECHR by forcing more supranational intervention. Aside from constraining the interpretative capacity of judges, thus substantively altering the content of domestically-enforceable rights, the Bill also introduces procedural barriers to such enforcement.

Namely, Clause 15(1) requires claimants to gain judicial permission to bring proceedings alleging Convention right breaches. Discretion to grant permission is constrained by Clause 15(3)(b), which provides that only those claimants who have suffered, or will suffer, "significant disadvantage" can be allowed to initiate proceedings. Proponents of this Clause have attempted to justify it by way of a central raison d'être, to assist in weeding out "frivolous claims", and a pre-emptive defence: that the ECtHR itself requires claimants to prove significant disadvantage during its admissibility stage, and so this Clause simply reflects existing Strasbourg practices.[31]

Setting aside the lack of substantiation given for the central justification,[32] attempts to treat Clause 15 as equivalent to Article 35§3(b) of the ECHR are misguided. Clause 15(8) seeks to anchor the domestic definition of significant disadvantage to the ECtHR's jurisprudence under Article 35§3(b). Rather than importing this jurisprudence wholesale, however, Clause 15(8) provides that someone only satisfies the domestic test where they would also be regarded as having suffered significant disadvantage by the ECtHR. This is problematic because, in light of the fundamentality of certain rights, the ECtHR has developed case-law for dis-applying the test – for instance, where a breach of Article 2[33] or Article 5[34] is alleged – and this is not reflected in Clause 15(8), which does not contemplate cases where the Strasbourg test does not apply.

Similarly, Clause 15 fails to replicate Article 35§3(b)'s "safeguard clause", which provides that even in the absence of significant disadvantage, the ECtHR should nevertheless hear a case where it is vital to secure respect for human rights – for instance, to clarify the application of a particular obligation, or to resolve structural issues which affect others.[35] Instead, Clause 15(4) provides that the test can be dis-applied "for reasons of wholly exceptional public interest", but this is transparently a higher bar than Strasbourg case-law: what does it mean for reasons of public interest to be "wholly exceptional"?

These disjunctions are more than technical gripes – they belie a fundamental misrepresentation of Strasbourg's admissibility criteria. The ECtHR has long accepted that domestic courts are the most appropriate fora for rights disputes, and the central reason it adopts admissibility criteria is to respect

[31] Bill of Rights Deb 22 June 2022, vol 716, col 846.
[32] No estimates have been produced for the level of government expenditure over 'frivolous claims', and over 700 respondents to the government's consultation did not think the case had been made that such claims occur in significant numbers: Ministry of Justice, 'A Modern Bill of Rights, Consultation Response' (12 July 2022) < www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/outcome/human-rights-act-reform-a-modern-bill-of-rights-consultation-response> accessed 23 August 2022.
[33] *Makuchyan and Minasyan v Azerbaijan and Hungary* App no 17247/13 (ECtHR, 26 May 2020), paras 72-73.
[34] *Zelčs v Latvia* App no 65367/16 (ECtHR, 20 February 2020), para 44.
[35] *Savelyev v Russia* App no 42982/08 (ECtHR, 21 May 2019), para 33.

this principle of subsidiarity. The ECtHR has been clear that the purpose of Article 35§3(b) is to ensure that rights breaches "attain a minimum level of severity to warrant consideration by an international court",[36] reasoning which clearly differs from the Bill's position that only rights breaches of a certain severity can be adjudicated in *domestic* courts.

The ECtHR has been at pains to ensure that their admissibility criteria give way when effective rights protection requires it – a notion alien to the Bill.

3. Reframing the Narrative

The government's narrative picks up on genuine underlying anxieties – principally, popular feelings of democratic deficit. However, its conclusions are difficult to sustain in light of a persistent failure to substantiate its basic claims. This leaves us at a crossroads: do we abandon the drive to re-write our constitution, or do we harness public frustrations? In the close, this essay explores how human rights advocates could pick up the pieces of this narrative and use them to create something new.

3.1. Socio-Economic Rights

The Bill has been overshadowed by the cost of living crisis, which in turn links to other issues, such as the rise in industrial action, skyrocketing rent, and rising rates of homelessness.[37] This has only exacerbated a worsening situation: back in 2019, the UN Special Rapporteur on extreme poverty and human rights admonished the UK for high levels of poverty,[38] noting that "policies of austerity introduced in 2010 continue largely unabated, despite the tragic social consequences."[39]

Despite this, the UK is party to the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), which includes a number of rights that could ease the current situation – an explicit right to strike (Article 8(1)(d)), a right to social security (Article 9), and a right to an adequate standard of living, including adequate food and housing (Article 11). These rights, however, have not been incorporated into domestic law.

The idea of justiciable socio-economic rights ('SER') is not new – Newcastle University published a draft bill proposing their incorporation into the HRA in 2019.[40] However, the present moment is one in which the failures of pre-existing rights frameworks, and of the government, to secure basic subsistence guarantees is more obvious than ever. In light of survey findings which indicate high levels of distrust in the Executive, and desires for stronger safeguards to secure the basic tenets of democracy,[41] the time is right to explore options for justiciable SER.

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[36] *Savelyev v Russia*, n 34, para 26.
[37] Shanti Das, 'Bidding wars, cash up-front and 'auditions' – inside Britain's broken renting market' (*Guardian*, 28 August 2022) < www.theguardian.com/money/2022/aug/28/bidding-wars-cash-up-front-and-auditions-inside-britains-broken-renting-market> accessed 23 August 2022.
[38] 1/5th of the population.
[39] Philip Alston, 'Visit to the United Kingdom of Great Britain and Northern Ireland' (A/HRC/41/39/Add.1, United Nations, 23 April 2019) <https://digitallibrary.un.org/record/3806308?ln=en> accessed 23 August 2022.
[40] Geraldine van Bueren QC *et al*, 'Towards and Economic, Social and Cultural Rights Bill' (12 April 2019) < https://research.ncl.ac.uk/article22/consultation/1%20Consultation%20document.pdf> accessed 23 August 2022.
[41] Alan Renwick *et al*, 'What Kind of Democracy Do People Want?' (*The Constitution Unit*, January 2022) < www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/report_1_final_digital.pdf> accessed 23 August 2022.

3.2. A New Narrative

This essay has already criticised the understanding of 'British rights' invoked by the government, but to reiterate: the Bill aims to restrictively distort the civil and political rights ('CPR') enshrined in the ECHR, under the auspice that only negative obligations reflect our traditional notions of civil liberties. Unravelling the confused ideas underpinning this will help us to see the argument for justiciable SER.

On a philosophical level, CPR often imply SER: it is difficult to explain, for instance, how one could profess to value the right to life without also striving to secure basic subsistence guarantees without which life falters. Any conception of human rights based on what is necessary to secure dignity, autonomy and/or the fulfilment of our capabilities struggles to exclude most SER. While a negative liberty conception of human rights will exclude SER, it relies on the assumption that the state plays no role in the creation of housing, food and water deprivation – an assumption which will be rejected shortly.

On a cultural level, it is incorrect to characterise British history as disclosing a story of rights constrained to the realm of CPR. For instance, E. P. Thompson argues that 18th century food riots were not simply base responses to raising bread prices, but instead disclosed clear popular beliefs about the role of the government: namely, that in times of dearth, the government ought regulate access to food and ensure that no one starved.[42] These beliefs were recognised and even respected by some government agents: Thompson quotes the sheriff of Gloucestershire as saying that riots contained "acts of courage, prudence, justice and a consistency towards that which [peasants] profess to obtain."[43] Nascent within this statement is what might now be described as a right to food – a belief in government intervention in times of food scarcity.

Instead of marginalising historical beliefs of the working class, and the cultures of resistance consequent upon them, we can consider their lineage in an age of skyrocketing food bank usage[44] and understand SER like the right to food as having a distinctly British quality. However, securing minimum levels of subsistence through justiciable SER isn't just a way to create a rights tradition Britain can be proud of, and which does justice to the struggles of our forebears: it also addresses threats to democracy which are not contemplated by the Bill, but which are arguably more pressing. Take, for instance, the political pressure that large economic actors exert on the government as a result of their increased exit options in a globalised economy. Strong trade unions counterbalance this pressure and ensure political equality for the working classes.[45] Trade unions are proven to increase the political participation of workers,[46] and the right to strike mitigates the inherent inequality of bargaining power between labour and capital, allowing workers a say in the environment in which they spend a significant degree of their waking life.

At present, although industrial action falls within the scope of Article 11 ECHR, the ECtHR has not regarded it as fundamental, and has considered wide-ranging prohibitions as consistent with the

[42] E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (Penguin 1991), 229.
[43] Thompson, n 41, 258.
[44] Alston, n 38.
[45] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester, and Virginia Mantouvalou (eds.), *Philosophical Foundations of Labour Law* (Oxford University Press 2018), 256.
[46] O'Neill and White, n 44, 258.

Article – such as the UK's total prohibition on secondary industrial action.[47] Instead, a justiciable right to strike, as enshrined under Article 8(1)(d) ICESCR, is key to protecting democracy, and to staving off threats of further limits on industrial action.[48]

3.3. Possible Rejoinders

The idea of justiciable SER is not uncontentious. While a full discussion of the conceptual questions surrounding SER is not possible, this section will focus on two possible objections in line with the tenor of the Bill.

Firstly, it is sometimes argued that CPR impose negative obligations on the state, and therefore do not require resources to implement, whereas SER impose positive obligations – that is, they require the state to take certain actions – and therefore over-burden the state. Glimmers of this idea can be observed in the Bill, particularly Clause 5's attempt to limit the enforcement of positive obligations developed in relation to Convention rights. This reflects the government's belief that such obligations have been developed in an unpredictable and illegitimate fashion, on top of rights which, properly, disclose purely negative obligations.

In practice, this distinction is untenable, as most rights impose both sorts of obligations at a fundamental level.[49] Take Article 2 for instance: it requires that state agents do not intentionally deprive citizens of life, but in order to ensure this negative obligation a range of positive actions must also be carried out, including the state's proactive creation of systems of training and vetting of state agents to ensure their respect for Article 2.[50]

Likewise, many socio-economic deprivations can be understood as breaches of negative obligations: in *Tanudjaja*, claimants argued that the Canadian government's policy-making had actively limited available housing stock by incentivising property entrepreneurs to buy up property; by doing so, they insisted, Canada had breached its negative obligation to refrain from endangering citizens' life, liberty and security, by eroding access to affordable shelter.[51] As such, defining the right to adequate housing as a straight-forward positive obligation is misconceived – wide-scale governmental policy-making actively, and in many cases knowingly, creates the context in which deprivations of affordable housing, food, and clean drinking-water occur.[52]

A second, related, criticism is that SER are indeterminate, and thus impossible to adjudicate with legal certainty. One way to counter this is to prioritise obligations of conduct, rather than obligations of results: to focus on whether a state's actions are actively pursuing an SER while securing minimum levels of compliance, and that they are refraining from adopting regressive measures.[53]

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[47] *RMT v UK*, App no 31045/10 (ECHR, 8 April 2014).
[48] Ashley Cowburn, 'Liz Truss accused of attempting to erode workers' rights' (*Independent*, 26 July 2022) < www.independent.co.uk/news/uk/politics/liz-truss-trade-unions-tory-leadership-b2130804.html> accessed 23 August 2022.
[49] Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press 1980), 38.
[50] *Nachova and Others v Bulgaria* App nos 43577/98 and 43579/98 (*ECtHR*, 6 July 2005), para 97.
[51] *Tanudjaja v Attorney-General (Canada)* (2014), 326 O.A.C. 257 (CA).
[52] Margot Young, 'Temerity and Timidity: Lessons from Tanudjaja v. Attorney General (Canada)' (2020), 61(2) *Les Cahiers de droit* 469, 483-484.
[53] CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations' (E/1991/23, 14 December 1990), [9-10].

Indeed, while courts sometimes struggle to determine what minimum levels of compliance require,[54] this could be seen as a prime opportunity for democratic input through legislative minima. While this would not completely foreclose developing understandings of the right, it would create a determinate starting point.

Justiciable SER would also address the government's worry that Convention rights are being extended in unpredictable ways. While the government has failed to make the case that the development of positive obligations has actually caused significant operational issues with state agencies, it is nevertheless the case that many attempts to nuance understandings of Convention rights involve socio-economic questions. Breaking off socio-economic disputes into their own rights could add clarity to the adjudication of fundamental rights.

For instance, in *Dove*, the claimant argued that significant operational failures of the Department for Work and Pensions had caused the death of a benefits claimant wrongfully denied Employment and Support Allowance, and that this was *arguably*[55] a breach of Article 2.[56] Although the High Court was quick to reject this argument – perhaps too quick, given similarities to other ECtHR cases[57] – it is far from difficult to see why the argument was made.

The UK's social welfare system has long been criticised as callous and dysfunctional. A dedicated right to social security, complete with minimum operational standards to disincentivise the current strategy of incorrectly rejecting millions of applications in the hope they will not be taken to tribunal,[58] could ensure that the UK's social welfare system achieves the goals that the government claims it pursues and that vulnerable citizens are not forced to attempt to expand ECtHR jurisprudence to find ways to achieve justice.

4. Conclusion

The suggestion made in the final section may strike liberal human rights advocates as radical. On one hand, this is a product of a shifting Overton window, which has slowly eroded our sense of what we believe the government is capable of. On the other hand, this suggestion provides an opportunity to reflect on whether this erosion needs to be permanent. It is no secret that anti-HRA sentiment builds on populist notions of 'taking back control' – though the reality of who is taking control from whom is rarely made explicit. Human rights frameworks should not please governments – they should constrain them. The proposal to amend the HRA to include justiciable SER, therefore, is a necessary move to translate popular discontent and distrust into support for human rights protection.

[54] For instance, the South African Constitutional Court's self-proclaimed lack of competence to pick between multiple expert estimates of the minimum level of water needed to survive: *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28.
[55] This is the threshold for the procedural obligation under Article 2 to arise.
[56] *Dove v Assistant Coroner for Teesside* [2021] EWHC 2511 (Admin).
[57] *Mammadov v Azerbaijan* App No 4762/05 (*ECtHR*, 17 December 2009), paras 99-100.
[58] May Bulman, 'DWP admits it has wrongly refused disabled people benefits at record rate' (*Independent*, 21 February 2022) < www.independent.co.uk/news/uk/home-news/dwp-pip-disabled-benefit-uk-b2009256.html> accessed 23 August 2022.

ARE THE PROTEST AND ENCAMPMENT PROVISIONS OF THE POLICE, CRIME, SENTENCING AND COURTS ACT 2022 CONSISTENT WITH: (1) THE HUMAN RIGHTS OF GYPSIES AND TRAVELLERS; AND (2) THE RIGHT TO PROTEST?

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1. Introduction

This essay will first assess the consistency of the provisions of Part 4 of the Police, Crime, Sentencing and Courts Act 2022 ("PCSCA 2022") with the human rights of Gypsies and Travellers. It will then assess the consistency of Part 3 PCSCA 2022 with the right to protest. The content and scope of these rights is identified through reference to the relevant Articles of the European Convention on Human Rights ("ECHR" or "Convention"). The Human Rights Act 1998 ("HRA 1998") incorporates the ECHR into domestic law by giving further effect to those "Convention rights" set out in Section 1 and Schedule 1 of the Act. It is unlawful for public authorities to act in a manner which is incompatible with Convention rights unless obliged to do so by primary legislation (s6). The law must be interpreted and given effect in a way which is compatible with Convention rights as far as this is possible (s3). Domestic courts must "take into account" the case law of the European Court of Human Rights ("ECtHR" or "the Strasbourg Court") in their interpretation of Convention rights (s2) and precedent requires them to "follow any clear and constant jurisprudence of the Strasbourg Court."[59] The ECtHR has made clear that the Convention is intended to guarantee rights that are "practical and effective", not "theoretical and illusory".[60] The essay concludes that the provisions of Part 3 and Part 4 PCSCA 2022 are inconsistent with ensuring the "practical and effective" protection of (1) the human rights of Gypsies and Travellers and (2) the right to protest.

2. The Human Rights of "Gypsies and Travellers"

The term "Gypsies and Travellers" refers to a wide and diverse range of communities living in England and Wales, including Romany Gypsies, Irish Travellers, Scottish Gypsy Travellers, Welsh Gypsy Travellers (or Kale) and New Travellers. The courts have recognised that Romany Gypsies and Irish Travellers form distinct ethnic minority groups (racial groups) for the purposes of equality legislation, affording them protection from discrimination on the basis of this protected characteristic.[61] The different peoples who fall under the umbrella term of "Gypsies and Travellers" (with the exception of New Travellers) each possess their own unique customs and cultural and linguistic heritages. What they share is an adherence to a way of life characterised principally by two related but distinct traditions – nomadism and the occupation of caravans.

The rights of Gypsies and Travellers to sustain a nomadic way of life and to live in caravans receive significant protection under ECHR. Article 1 of the First Protocol ("A1 P1") of the Convention provides that everyone is entitled to the peaceful enjoyment of their possessions (which would include caravans). Article 8 provides a right to respect for private and family life and for home.

[59] *R (Ullah) v Special Adjudicator* [2004] 2 AC §20; affirmed in *R (AB) v Secretary of State for Justice* [2021] 3 WLR 494, §54.
[60] *Airey v Ireland* (Application No 6289/73), 9 October 1979, §24.
[61] *Moore & Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin), at §9.

Article 14 requires states to guarantee all Convention rights without discrimination on the grounds of race or "other status". Article 7 protects against punishment through uncertain, arbitrary, or retrospective laws. It embodies the principle that where the law is unclear, it should not be construed so as to criminalise or penalise the accused.[62]

Actions taken by public authorities to evict Gypsies and Travellers will be likely to engage their Article 8 rights.[63] These rights are "qualified" under the Convention and public authorities may justify any interference which is "prescribed by law" (the law must be accessible, clear and precise), in pursuit of a legitimate aim (including "public safety", "the prevention of disorder or crime" and "the protection of the rights and freedoms of others"), and is "necessary in a democratic society" (interpreted as meaning the interference must meet a "pressing social need" and be "proportionate" to achieving the legitimate aim).[64]

The case law of the ECtHR has established that an assessment of the proportionality of any such interference should include special consideration of the specific needs and different lifestyle choices of Gypsy and Traveller communities, taking into account the comparative vulnerabilities and social disadvantages experienced by these groups.[65] The ECtHR has stressed that the loss of home is the most extreme form of interference with the right to respect for home,[66] and has ruled that in the event of public authorities forcibly evicting Gypsies and Travellers, alternative housing should be provided except in cases of *force majeure*.[67] It has repeatedly held that the effect of reading Article 8 together with Article 14 imposes on states a positive obligation to facilitate the Gypsy and Traveller way of life by ensuring access to suitable, culturally appropriate accommodation.[68]

Despite the protections afforded by domestic equalities and human rights legislation, decades of legal and policy developments in England and Wales have made it increasingly difficult for Gypsies and Travellers to live in accordance with their traditions and cultural preferences. The primary challenges faced are a lack of authorised sites for temporary and permanent caravan pitches on local authority land and barriers to obtaining planning permission for new pitches on private land.[69]

The Criminal Justice and Public Order Act 1994 ("CJPOA 1994") repealed the statutory duty imposed on local authorities by the Caravan Sites Act 1968 to provide pitches for Gypsies and Travellers in their area, meaning there is now little impetus to ensure the supply of deliverable sites. Research undertaken by Friends, Families and Travellers in January 2020 found only eight out of 68 local planning authorities in the South East were meeting the pitch requirements for the five year period identified in their Local Plans.[70] In 2015, the planning definition of "Gypsies and Travellers"

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[62] *Kokkinakis v Greece* (1994) 17 EHRR 397, §52.

[63] *Winterstein v France* (Application No. 27013/07), §142.

[64] Assessing proportionality involves the application of a four-part test confirmed by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

[65] *Chapman v UK* (2001) ECHR, 33 EHRR 18, §96; *Connors v United Kingdom* (2005) 40 EHRR 9, §84; *Yordanova and Tohsev v Bulgaria* (Application No. 25446/06) §§129, 133.

[66] *Buckland v United Kingdom* (2012) 56 EHRR 16.

[67] *Winterstein v France* (Application No. 27013/07), §159.

[68] *Chapman v UK* (2001) ECHR, 33 EHRR 18, at §96; *Connors v United Kingdom* (2005) 40 EHRR 9, at §84.

[69] Friends, Families and Travellers, *Briefing: Accommodation issues facing Gypsies and Travellers in England* (March 2022).

[70] No Place to Stop: Only 8 of 68 Local Authorities in South East England Have Identified Enough Land for Travellers to Live < www.gypsy-traveller.org/planning/no-place-to-stop-only-8-of-68-local-authorities-in-south-east-england-have-identified-enough-land-for-travellers-to-live/> accessed 8 September 2022.

in the Government's *Planning Policy for Traveller Sites* was changed to exclude those who for whatever reason (ill health, disability, caring responsibilities, old age) no longer maintain a "nomadic habit of life", irrespective of their cultural preference for living in caravans.[71] Research undertaken by the Equality and Human Rights Commission ("EHRC") in 2019 noted a significant corresponding fall in planning authorities' assessment of pitch needs in their areas.[72]

A consequence of the chronic lack of suitable authorised sites is that a significant minority of Gypsies and Travellers continue to occupy land unlawfully. There are two primary forms of unlawful occupation: "unlawful developments", when a Gypsy or Traveller owns or has express permission to be on the land but does not have planning permission for residential occupation; and "unlawful encampments", which occur when a Gypsy or Traveller is occupying land without consent (is trespassing). The Government Traveller Caravan Count (January 2022) found 12% of the total number of Traveller caravans in England were on land unlawfully: 2,377 were on unauthorised developments and 515 on unauthorised encampments.[73]

Gypsy and Traveller communities are among the most vulnerable, marginalised and disadvantaged in society. A 2018 survey by the EHRC found that 44% of the British public expressed negative feelings towards these groups.[74] In 2019, the House of Commons Women and Equalities Committee reported: "Gypsy, Roma and Traveller people have the worst outcomes of any ethnic group across a huge range of areas, including education, health, employment, criminal justice and hate crime."[75] The reasons for this comparative social disadvantage are complex and multi-faceted, however, one contributory factor is the recurrent tension between efforts to maintain a traditional way of life and falling foul of the law in the absence of sufficient suitable authorised accommodation sites. The difficulty of the situation has been concisely described by Sarah Spencer in *Gypsies and Travellers: Britain's Forgotten Minority*:

> "Lacking sites on which to live, some pitch on land belonging to others; or on their own land but lacking permission for caravan use. There follows a cycle of confrontation and eviction, reluctant travel to a new area, new encampment, confrontation and eviction. Children cannot settle in school. Employment and health care are disrupted."[76]

The Conservative Party's 2019 General Election manifesto promised to "tackle unauthorised traveller camps" by giving the police "new powers to arrest and seize the property of trespassers… in order to protect our communities".[77] The Queen's Speech in 2021 referred to unauthorised encampments causing "nuisance and misery for local people".[78] Following the conclusion of a

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[71] Department for Communities and Local Government ("DCLG"), *Planning policy for traveller sites* (August 2015), Annex 1: Glossary, p.9.

[72] EHRC, Research report 128: *Gypsy and Traveller sites: the revised planning definition's impact on assessing accommodation needs* (September 2019), pp.16-17.

[73] Count of Traveller Caravans, January 2022: England < www.gov.uk/government/statistics/traveller-caravan-count-january-2022/count-of-traveller-caravans-january-2022-england > accessed 26 August 2022.

[74] EHRC, Research report 119: *Developing a national barometer of prejudice and discrimination in Britain* (October 2018), p.31.

[75]Women and Equalities Committee, *Tackling inequalities faced by Gypsy, Roma and Traveller communities,* Seventh Report of Session 2017-19 (April 2019), p.3.

[76] [2005] EHRLR 335, p.337.

[77] Conservative Party Manifesto 2019 < www.conservatives.com/our-plan/conservative-party-manifesto-2019 > accessed 8 September 2022, p.19.

[78] Queen's Speech 2021 < www.gov.uk/government/speeches/queens-speech-2021 > accessed 8 September 2022.

consultation which ran from November 2019 to March 2020,[79] the Government announced the provisions contained within Part 4 of the PCSC Bill. These measures were scrutinised by the Parliamentary Joint Committee on Human Rights ("JCHR") who concluded that "Part 4 of the Bill gives rise to several human rights concerns" and noted that the "proposals self-evidently discriminate against Gypsy, Roma and Traveller people."[80] Police and local authority representatives informed the JCHR that the suite of existing powers available to address unauthorised encampments was sufficient and no additional legislation was required.[81]

Part 4 PCSCA 2022 operates by amendments to Part 5 CJPOA 1994. The new ss60C-E CJPOA 1994 creates a criminal offence of residing on land without consent, in or with a vehicle, and provides police with associated powers of arrest and seizure. A person (aged over 18) will commit the offence if they have caused, or are likely to cause, significant damage, disruption, or distress; if a request has been made for them to leave or remove their property by the occupier, a representative of the occupier, or a constable; and they have failed to comply with the request as soon as reasonably practical; or have returned to the land within 12 months of the request. In accordance with the drafting and accompanying statutory guidance, the offence can be prospective in reach, capturing a person "not yet physically on the land" (but with that intention) if they are "likely to cause significant damage, disruption or distress."[82]

In addition to the new offence, the existing powers provided by ss61, 62A CJPOA 1994 to direct trespassers to leave unauthorised encampments and remove any property or vehicles they have with them are extended. S61 is amended so that directions to leave may be issued if trespassers cause or are likely to cause "damage, disruption, or distress" (this need not be "significant"). Directions can now also apply to land that forms part of a highway. The period of prohibited return under both the s61 and s62A powers is extended from three to 12 months. Failure to comply with a direction issued under s61 or s62A constitutes a criminal offence and enables police to seize and remove relevant property. A person will not commit any of the offences outlined if they have a "reasonable excuse" for failing to comply with a direction to leave.

The conditions for establishing the s60C offence and the extended ss61, 62A powers capture a wide set of circumstances and are open to subjective interpretation. "Damage" and "disruption" are defined non-exhaustively in s60C(8) and s61(10). "Damage" includes that "to the environment" including excessive "noise" and "smells". "Disruption" includes interference with a person's lawful use of the land (which is very broad in scope). "Distress" is (confusingly) not defined in relation to the s60C offence but is within s61(10) and appears to mean the same as "offensive conduct" contained within s60C(8). It is that which is "caused by – (a) the use of threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) the display of any writing, sign, or other visible representation that is threatening, abusive or insulting". "Significant" is not defined in the legislation. Instead, the statutory guidance issued to police suggests that whether damage, disruption or distress are significant will turn on the facts of each case and that "this will be for the police and

[79] Home Office, Government Consultation (5 November 2019 – 5 March 2020): *Strengthening police powers to tackle unauthorised encampments*.

[80] JCHR, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments*, Fourth Report of Session 2021-22, HC 478, HL Paper 37 (July 2021), p.3.

[81] *Ibid.,* p.13.

[82] Home Office, *Statutory Guidance for Police on Unauthorised Encampments: a summary of available powers* (June 2022), p.3.

courts to assess." The guidance then provides a non-exhaustive list of factors the police "could" consider to inform their assessment.[83]

The provisions of Part 4 PCSCA 2022 lower the threshold for enforcement action against unauthorised encampments. This will increase the likelihood of police forces disproportionately interfering with the rights of Gypsies and Travellers to the peaceful enjoyment of their possessions (A1 P1) and to respect for their private and family life, and home (Article 8). The lack of clarity and certainty concerning the requisite conditions for committing a criminal offence – the meaning of "significant distress"; what actions or conduct would justify a prospective charge based on assessment of "intention" and "likely to cause" – raise the prospect of criminal charges falling foul of Article 7 ECHR.

Part 4 PCSCA 2022 is (at the very least indirectly) discriminatory due to the disproportionate impact it will have on Gypsy and Traveller communities in comparison with other groups. This appears to be tacitly acknowledged in the statutory guidance which refers to "the Gypsy, Roma, Traveller community" but to no other ethnic or societal group. 72% of respondents to the Government's consultation thought that the proposed amendments to ss61, 62A CJPOA 1994 would have a negative impact on the health or educational outcomes of Gypsy and Traveller communities.[84] Although the guidance requires the police ensure "proper welfare enquiries are carried out", "in accordance with their wider equalities and human rights obligations", it goes on to state: "the police, alongside other public bodies, should not gold-plate human rights and equalities legislation".[85] This unnecessarily obfuscates the police's statutory obligations and discourages robust and Convention compatible proportionality assessments.

Under s60C, a Gypsy or Traveller will commit an offence if disobeying a request to leave made by a private individual (the legal occupier) if the other requisite conditions are met. Unlike the police, members of the public are under no legal compulsion to weigh the proportionality of requests to leave encampments or consider the implications for the potentially vulnerable residents.

The overall effect of Part 4 PCSCA 2022 is to further exacerbate the difficulties faced by Gypsies and Travellers seeking to maintain a traditional way of life. Those forming unauthorised encampments due to the lack of suitable authorised sites now face a heightened risk of arrest, criminalisation and the loss of their caravans (their homes) following seizure by the police, or forfeiture ordered by the courts. In all probability, Gypsies and Travellers will comply with requests to leave encampments rather than risk these catastrophic consequences. In the absence of measures to increase the availability of suitable accommodation sites, the enactment of these provisions places the Government in contravention of its obligations under the Convention (and therefore domestic human rights law) to facilitate the Gypsy and Traveller way of life.

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[83] *Ibid*., pp.5-6.

[84] Government Response to the Consultation 'Strengthening police powers to tackle unauthorised encampments' < www.gov.uk/government/consultations/strengthening-police-powers-to-tackle-unauthorised-encampments/outcome/government-response-to-the-consultation-strengthening-police-powers-to-tackle-unauthorised-encampments-accessible-version > accessed 8 September 2022.

[85] Home Office, *Statutory Guidance for Police on Unauthorised Encampments*, p.13.

3. The Right to Protest

There is no express "right to protest" protected by Parliamentary statute. Instead, the right is derived from an amalgam of Article 10 (freedom of expression) and Article 11 (freedom of peaceful assembly and association) ECHR. Through giving further effect to these rights in domestic law, HRA 1998 represented what Sedley LJ memorably described as a "constitutional shift".[86] This observation was echoed by Lord Bingham who pointed to the "hesitant and negative" approach of the English common law to freedom of expression and assembly prior to its enactment: "permitting that which was not prohibited".[87] David Mead has characterised this "shift" as involving the introduction of a positive and substantive right in place of a negative freedom to protest in the silence of the law.[88]

The content of (and limits to) this positive and substantive right are elucidated by the case law of the ECtHR. The exercise of Article 10 and Article 11 rights during protests are often closely associated, when the function of an assembly or protest action is to express views and inform public debate.[89] Article 10 protects the expression of views which may "offend, shock, or disturb the State or any sector of the population", [90] and also the choice of form in which they are conveyed, including symbolic protest activities.[91] Article 11 will only protect peaceful (non-violent) assembly, [92] however, an individual will not lose the protection of the Convention right if he remains peaceful in his intentions and behaviour even though others become violent,[93] or the assembly itself is deemed unlawful by the State.[94]

Articles 10 and 11 are qualified – the right to protest is not absolute. Public authorities may justify restrictions on protest for one of the legitimate aims provided in 10(2) or 11(2) which include "public safety", "the prevention of disorder or crime" and "the protection of the rights and freedom of others". Any interference must also be "prescribed by law" and "necessary in a democratic society", i.e. proportionate. Although recognised as qualified, the ECtHR has repeatedly stressed the fundamental importance of freedom of expression and of peaceful assembly as foundations of a democratic society.[95] The Convention imposes not only a negative obligation on States to refrain from unjustified restrictions on free expression and assembly, but also a positive obligation to facilitate peaceful protest.[96] The OSCE/ODIHR and Venice Commission's *Guidelines on Freedom of Peaceful Assembly* stipulates that this includes the duty to facilitate assemblies at the organisers'

[86] *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, p.795.
[87] *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105, §34.
[88] D. Mead, *The New Law on Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (2010), Oxford: Hart Publishing, p.26.
[89] Ezelin v France (1991) 14 EHRR 362, at §§37, 51.
[90] *Handyside v United Kingdom* (1979-80) 1 EHRR 737, at §49.
[91] *Women on Waves v Portugal* (Application No. 31276/05, 3 February 2009, at §39.
[92] *Kudrevicius v Lithuania* (2015) 62 EHRR 34, §92.
[93] *Ezelin*; *Ziliberberg v Moldova* (Application No 61821/00) 4 May 2004; *Primov v Russia* (Application No 17391/06) 12 June 2014, §155.
[94] *Cisse v France,* (Application No 51346/99) 9 April 2002, §50; *Samut Karabulat v Turkey* (Application No 16999/04) 27 January 2009, §§35-38.
[95] *Steel v United Kingdom* (1999) 28 EHRR 603, §101; *Ziliberberg*, §2.
[96] *Platform Ärtze für das Leben v Austria* (1988) 13 EHRR 204, §§31-32.

preferred location and within "sight and sound" of their intended audience.[97]

Strasbourg case law has made clear that deliberately disruptive and obstructive conduct is capable of falling within the protection of Articles 10 and 11 if carried out in the course of an otherwise peaceful protest.[98] However, action intended to "seriously disrupt the activities carried out by others is not at the core of that freedom".[99] The ECtHR has held that protests in public places invariably "cause some disruption to ordinary life, including disruption of traffic", and "it is important for public authorities to show a certain degree of tolerance" if Article 11 is not to be deprived of substance.[100] This substantive interpretation of the right to protest has also been asserted in domestic courts. Laws LJ noted in *Tabernacle v The Secretary of State for Defence* that "Rights worth having are unruly things... [d]emonstrations and protests are liable to be a nuisance… or at least perceived as such by others who are out of sympathy with them."[101] The Supreme Court has recently asserted that "intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11."[102]

The extent of the "constitutional shift" has been called into questioned.[103] Peter Thornton QC has argued that "the introduction of articles 10 and 11 into English law has been more subtle than dramatic", pointing to the "plethora of legislative measures restricting and, in some instances criminalizing otherwise peaceful protest."[104] Mead suggests that "with the exception of [HRA 1998]… any gains made by protesters in their ability to protest… have not come from Parliament. Legislative intervention has been singly one-way."[105] Following a mission to the United Kingdom in 2013, the Special Rapporteur to the UN reported that "the focus of the legal framework on freedom of peaceful assembly is overall more on ensuring public order, rather than on a human rights-based approach to facilitating peaceful assemblies."[106]

The measures contained in Part 3 PCSCA 2022 were proposed in the context of widely publicised protest action by environmental activists, Insulate Britain, which included the obstruction of motorways and the disruption of transport infrastructure. They followed disruptive protests organised by the Extinction Rebellion group in April and October 2019. In her keynote speech to the Conservative Party Conference in October 2021, the Home Secretary vowed to use her position to close (unspecified) "loopholes" in the law and to "give the police and courts new powers" to deal with these "offenders" and "criminals".[107] The Explanatory Notes accompanying the PCSC Bill

[97] OCSE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, Study No.769/2014 (3rd Edition, 15 July 2020), p.9.

[98] *Steel*, §142 (obstructing a grouse shoot); *Hashman v United Kingdom* (1999) 30 EHRR 241, §§27-28 (intentional disruption of a fox hunt); *Kudrevicius*, §97 (obstruction of major roads).

[99] *Kudrevicius*, §97.

[100] *Primov*, §145.

[101] *Tabernacle v The Secretary of State for Defence* [2009] EWCA Civ 23, §43.

[102] *DPP v Ziegler* [2021] 3 WLR 179, §70.

[103] Mead, p. 393; H. Fenwick (Chapter 9 updated for 5th edn by M. Hamilton), *Civil Liberties and Human Rights* (2017, 5th edn), Oxford: Routledge, p. 682.

[104] P. Thornton QC et al., *The Law of Public Order and Protest* (2010), Oxford: Oxford University Press, p.400.

[105] Mead, p. 405.

[106] M. Kiai, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland* (17 June 20123), A/HRC/23/39/Add.1; §17.

[107] Priti Patel MP, Keynote Speech to the Conservative Party Conference, delivered 5 October 2021, < www.conservatives.com/news/2021/taking-the-tough-decisions-to-cut-crime > accessed 8 September 2022.

made clear that the provisions in Part 3 were aimed at addressing "non-violent" but disruptive and obstructive forms of protest:

> "Recent changes in the tactics employed by certain protesters, for example, gluing themselves to buildings or vehicles, blocking bridges or otherwise obstructing access to buildings such as the Palace of Westminster and newspaper printing works, have highlighted some gaps in current legislation."[108]

Additionally, the Explanatory Notes set out the intentions of the Bill to replace the common law offence of public nuisance with a statutory offence,[109] and to further protect access to Parliament.[110] Reviewing the proposed measures, the JCHR raised "concerns" that these "would increase those restrictions on non-violent protest in a way that we believe is inconsistent with our rights."[111]

Part II of the Public Order Act 1986 ("POA 1986") empowers senior police officers to impose conditions on public processions (s12) and static assemblies (s14) provided certain "triggers" are fulfilled. Part 3 PCSCA 2022 amends these provisions to introduce new "triggers" based on noise. Conditions can be imposed when protesters generate noise which *may* result in serious disruption to the activities of an organisation which are carried on in the vicinity; or which *may* have a relevant impact on persons in the vicinity (which *may* be significant) (ss12(1)(aa),(ab) and 14(1)(aa),(ab)). The level of noise required is not defined in relation to an objective measure such as decibel count or what amplifying equipment is used and instead, officers must use their discretion. Limited guidance is provided within the legislation to suggest that this noise may be such as to "result in persons connected with the organisation not being reasonably able, for a prolonged period of time to carry on in that vicinity the activities or any one of them"; or such as may cause "persons of reasonable firmness with the characteristics of persons likely to be in the vicinity… to suffer alarm or distress" (ss12(2C,D), and 14(2C,D)). Officers must consider the likely number of persons affected and the likely duration and intensity of that impact (ss12(2E), 14(2E)).

S74(2)(c) PCSCA 2022 removes the statutory limitations on conditions which can be applied by the police to static assemblies, therefore further enhancing the opportunity for restrictions. S79 inserts the new provision of s14ZA into POA 1986, creating powers for police to impose conditions (for the first time) on "one-person protests". In what appears to be an attempt to further target obstructive forms of protest, PCSCA 2022 inserts new provisions into ss12 and 14 POA 1986 to provide detail on the meaning of the term "serious disruption to the life of the community" – an existing "trigger". This will include actions which "result in a significant delay to the delivery of a time-sensitive product to consumers"; and which "may result in a prolonged disruption of access to any essential goods or essential service." Moreover, the Secretary of State is empowered to make regulations to amend these provisions to provide further examples of conduct which should be treated as resulting in "serious disruption… to the activities of an organisation" or "to the life of the community" (ss12(13)(b)(ii) and 14(12)(b)(ii)) POA 1986). This provision would appear to

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[108] Explanatory Notes to the Police, Crime, Sentencing and Courts Bill [Bill 5 (2021-22) – EN], §§66, 67.
[109] *Ibid*., §70.
[110] *Ibid*., §68.
[111] JCHR, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order*), Second Report of Session 2021-22, HC 331, HL Paper 23 (June 2021), p.3.

enable the Government to determine what is or is not a seriously disruptive (and therefore permissible or impermissible) form of protest at any one time.

By way of s75 PCSCA 2022, the offences under ss12 and 14 POA 1986 are amended so as to be capable of being committed where a person "knows or ought to know" that they have breached a condition imposed on a procession, assembly, or one-person protest. This reduces the burden on the prosecution in comparison with the former offences (when the requirement was actual knowledge), enhancing the prospect of the conviction of protesters. The Act increases the maximum custodial sentence for the offences (from three months to 51 weeks) and the fine (from a level 3 to a level 4, i.e. £2,500).

A new statutory offence of "intentionally or recklessly causing a public nuisance" is created by s78 PCSCA in place of the previous common law offence. It may be committed on the basis of causing serious "distress", "annoyance", "inconvenience" or "loss of amenity". These elements are not defined further in the legislation (they are notably broad and subjective concepts). A person found guilty of the offence may be convicted on indictment to a sentence of up to 10 years imprisonment. S80 PCSCA 2022 amends s137 of the Highways Act 1980 to increase the maximum penalty for the offence of wilful obstruction of the highway (from a fine to up to 51 weeks imprisonment). S76 extends the "controlled area" around Parliament established by the Police Reform and Social Responsibility Act 2011 in which police can impose restrictions on protest activities and adds a new offence of obstructing the passage of a vehicle into or exiting from this area.

Taken together, the provisions of Part 3 PCSCA 2022 significantly extend existing powers available to the police to restrict peaceful forms of protest and introduce a greater level of discretion in their exercise. They also expand the already extensive range of criminal offences which may be brought against protesters,[112] and provide for harsher sentencing powers. The Supreme Court has affirmed that "restrictions" for the purposes of Articles 10(2) and 11(2) would include measures taken before, during and after a protest including any "arrest, prosecution, conviction and sentencing".[113] The effect of the provisions will be to increase the likelihood of public authorities (including the police and courts) engaging (and infringing) the Article 10 and 11 rights of protesters. The prospect of incurring criminal sanction may have a chilling effect on the exercise of protest rights. Allowing for the imposition of conditions on protests due to noise (including on "one-person protests") represents a disproportionate infringement on freedom of expression and peaceful assembly. Generating noise is integral to effective, non-violent forms of protest – the purpose of which is to publicly express views and ensure these are *heard*. A right to protest removed from the "sight and sound" of the intended audience would be emasculated and would not be consistent with that positive and substantive right provided by the Convention.

[112] Offences During Protests, Demonstrations, or Campaigns < www.cps.gov.uk/legal-guidance/offences-during-protests-demonstrations-or-campaigns > accessed 8 September 2022.
[113] *Ziegler*, §57.

4. Conclusion

The protest and encampment provisions of PCSCA 2022 are inconsistent with the human rights of Gypsies and Travellers and the right to protest. Cumulative legal and policy developments prior to the Act's enactment had served to weaken their "practical and effective" protection. The effect of PCSCA 2022 is to further exacerbate this trend and raises the prospect of the constitutional guarantee of Convention rights which are merely "theoretical and illusory" when considered in the context of the overall legal order.

RE-EXAMING HAZELL: WHY A ONE 'RING' TO RULE THEM ALL APPROACH IS OBSTRUCTIVE FOR EXAMINING OUR CONSTITUTION AND CHANGES TO IT

Harry Thomas

'[U]nlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way…'.[114] So noted the Supreme Court in *Miller* [2017]. It is because of this lack of codification of the UK's constitution that Hazell's argument is ultimately unconvincing when he states that 'Legislation is not the only mechanism of constitutional change, but in quantitative terms it is the most important single source of constitutional law in the United Kingdom'.[115] Ascertaining a superlative constitutional source – one 'ring' to rule them all – is attractive in its simplicity, but in so doing, Hazell mischaracterises both the nature of our constitutional sources, and misunderstands *how* constitutional change occurs. Deliberate reference to legislation enacted from 2018 onwards is made in order to support this re-examination of Hazell and demonstrates that ultimately other factors aside from constitutional sources themselves are the greatest mechanisms for constitutional change: brief examination of the UK's exit from the EU demonstrates perhaps the most powerful recent example of this.

Any appraisal of Hazell must wrestle with a '*mechanism* of constitutional *change*' on the one hand, and a '*source* of constitutional *law'* on the other (emphasis added). The pragmatism in the UK's constitution as noted by the Supreme Court, means that conflation of these two phrases in a compound sentence is unhelpful; in the same way some sources of the constitution are non-legal, so too, it is contended, are mechanisms for constitutional change, challenging Hazell's argument for the seminal importance of legislation for either. The lack of constitutional codification means that sources of the constitution are axiomatically interdependent, so isolating any one source as most important is counterproductive; for every individual example one can draw on, championing the importance of a given source, one can find a compelling qualification, because of this interdependency. A *written* constitution is by its very nature an unsurpassable *source* of law; if the UK had this, then any answer here could well be a simple one.[116] This essay evaluates sources of constitutional law and considers mechanisms for constitutional change chiefly via a comparison between two specific constitutional sources, statute, and case law. However precisely due to the interdependent nature of the constitution, other sources will also be considered. In assessing importance, a quantitative approach advocated by Hazell does not survive scrutiny; rather a qualitative methodology focused on the interdependency of constitutional sources and mechanisms for constitutional change is more appropriate.

Whilst much of the debate around the UK constitution is unreconciled, legal scholars are typically in agreement on its chief sources.[117] These sources are a combination of written and unwritten, legal

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[114] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [40].
[115] Robert Hazell, 'Time for a new convention: parliamentary scrutiny of constitutional bills 1997-2005' [2006] PL 247.
[116] Unsurpassable as a *source* of law in the sense that it prevails over all other legislation.
[117] For relevant introductory discussions on constitutional sources see: John Stanton and Craig Prescott, *Public Law* (3rd edn, OUP 2022); Anne Dennett, *Public Law Directions* (2nd edn, OUP 2021); Colin Faragher, *Concentrate Public Law* (7th edn, OUP 2021); James Holland and Julian Webb, *Learning Legal Rules* (11th edn, OUP 2022). These sources are typically categorised as: (1) constitutional statutes; (2) case law; (3) constitutional conventions; (4) the royal prerogative; (5) Parliament's laws and customs; and (6) authoritative academic works.

and non-legal, which as Anne Dennett puts it, 'gives the constitution its sense of hidden, mysterious rules that are difficult to pin down'.[118] When considering what constitutes 'constitutional change', this 'mysterious' sense deepens, because debate typically focuses on more informal elements: '…while the US constitution is a matter of law, the British constitution is a matter of opinion…', to which commentators like Lord Sumption have said that '…this is too glib, but there is some truth in it'.[119] This 'truth' is that debate often relies on examination of *principles*, rather than *sources*, the most well-known of which are conceptions of: the rule of law, parliamentary supremacy and the separation of powers. Although reference to such concepts appear in all six of the constitutional sources listed, they have evaded consensus in substantive terms; the Constitutional Reform Act 2005 famously specifies the importance of 'the constitutional principle of the rule of law' for example, but does not then define it.[120] Yet conclusions around the extent of constitutional change often relate to these normative principles, the 'political' constitution rather than the sources of the 'legal' constitution (supporting this 'truth' as Sumption remarked, quoted above), about how state power should be exercised and constrained. The corollary is that Hazell's assertion of the seminal importance of 'legislation' seemingly both as a source of constitutional law *and* as a mechanism for constitutional change, is unpersuasive.[121]

This argument is furthered first through evaluation of statute as a constitutional source. Hazell uses the term 'legislation', but it is 'statute', specifically *constitutional* statutes as a distinct category of Acts of Parliament that are a source of the constitution; legislation is not analogous here, it is a generic term to include all types of law passed by Parliament. This affects any quantitative justification of statute's importance: correctly understood, we are not talking about all of Parliament's laws when we consider them as sources of the constitution. Prima facie however, Hazell's assertion may still be seen as persuasive, leaning on Dicey's conception that:

> …Parliament…has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law… as having a right to override or set aside the legislation of Parliament.[122]

Thus, as Hazell puts it, '…at its simplest, changing the constitution is a simple matter of changing the law'.[123] If Parliament has the superior right to do this through legislation, then assessment of the importance of such a constitutional source must be hard to beat? This case is strengthened if one considers that statute is recognised as legally superior to other constitutional sources: statute may override constitutional conventions;[124] and it may curtail aspects of the royal prerogative for example.[125]

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118 Dennett (n4) 51.
119 Both quotations from: Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2020) 98.
120 Constitutional Reform Act 2005, s 1.
121 For an interesting recent quantitative study around such constitutional principles, harnessing machine learning computational methods to analyse a large corpus of parliamentary debate, see: Alex Schwartz, 'The Changing Concepts of the Constitution' (2022) 42 Oxf. J. Leg. Stud. 758.
122 Albert Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1992) 3.
123 Hazell (n2) 247.
124 *Madzimbamuto v Lardner- Burke* [1969] 1 AC 645. An established constitutional convention that Parliament would not legislate for Southern Rhodesia without the consent of the Rhodesian Government was unsuccessful, the convention overridden by the relevant statute (Southern Rhodesia Act 1965).
125 *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 WLR 464. The Government used prerogative powers to compensate victims via a non-statutory scheme which the House of Lords held the Government was unable to do as although the statutory scheme was yet to be implemented,

Yet, such an argument does not account for the relationship between different sources of the constitution. Dicey in his famous exhortation is seeking to define a constitutional *principle* not a constitutional *source*, that of 'parliamentary sovereignty.' Authority for this principle comes from the Bill of Rights (1689), statute, but its protection and development, since inception, lies in judicial decisions, case law, a separate constitutional source. Parliamentary sovereignty is recognised as common law doctrine; such protection and development are seen in examples dating from the *Case of Proclamations* (1610), which predates the Bill of Rights;[126] through the development of the 'Enrolled Act' rule;[127] and statute's ability to override international law.[128] Further, as indicated, we must refine Hazell's use of the term 'legislation.' The recognition of a specific category of constitutional statutes was established by case law: "We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes".[129] One could use such special status in support of Hazell, using it to point to the therefore unparalleled importance of such a source.

To do this would again underplay the interdependency noted, and the reliance any source of the constitution, including legislation, has on others. Assigning relative importance to one over the other is like suggesting the frame of a bicycle is more important than its wheels: both, and much more, are essential to a bicycle's function. The test for a constitutional statute appeared only in 2002 and is not universally accepted;[130] the government has admitted that it is 'impossible to provide a watertight definition of significant constitutional legislation'.[131] This also further limits the persuasiveness of any quantitative analysis as Hazell concedes when he remarks that 'There is no clear classification of what is a constitutional Bill and what is not, and with our unwritten constitution it is impossible to devise one'.[132] Principles only partly inform the process, and members of the Executive (not a constitutional source), act as 'business managers in the House of Commons' playing a crucial role in deciding which Bills are afforded constitutional status by the legislative process assigned.[133] Thus the interdependency between legislation and other sources, the wheels and the frame of the constitution to continue the bicycle metaphor, cannot be divorced. Legislation is but one important source of the constitution and mechanism for constitutional change, change which in itself is '…a product of both history and morality'.[134] To assign superlative importance to a singular constitutional source appears overly simplistic.

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it had been approved by Parliament, and thus must be followed, preventing the use of the prerogative to introduce a different, less generous scheme.

[126] *Case of Proclamations* [1610] EWHC KB J22. The court protected Parliamentary supremacy directly by holding that prerogative powers could not be used to alter the law of the land. In short, the royal prerogative as a source of constitutional law can be understood as what remains of the absolute powers of the Monarchy that have not been removed by, or transferred to, Parliament. Dicey's classic definition is still relevant to this precis, see: Dicey (n9) 20.

[127] Developed through the cases of: *Edinburgh & Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710; and *Pickin v British Railways Board* [1974] AC 765.

[128] *Cheney v Conn* [1968] 1 All ER 779. The court held that the statute that imposed the tax objected to in the case, prevailed over the Geneva Convention as an international treaty to which the UK was and is a party.

[129] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 15 [62] (Laws LJ). Note Lord Justice Laws' comments were obiter dictum but have been accepted and endorsed subsequently by the Supreme Court, for example in: *R (Miller)* (n1) [67].

[130] David Feldman for instance disagrees with Lord Just Laws' definition in how it links constitutional statues to fundamental rights, see: David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343.

[131] Deputy Prime Minister, *The Process of Constitutional Change* (Cm 8181, 2011) [20].

[132] Hazell (n2) 272.

[133] Ibid, ibid.

[134] Trevor Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2015) 17

Rather, in considering constitutional change, constitutional *sources* writ large are typically not the most important 'mechanisms.' Briefly examining the European Union (Withdrawal) Act 2018 (EUWA 2018) demonstrates this.[135] As a constitutional statute, s5 EUWA 2018 is the most significant provision because it ends the supremacy of EU law over the English and Welsh legal system: 'The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after [IP completion day]'.[136] Again, on the one hand, this points to the importance of legislation in restoring UK sovereignty, and thus also enacting constitutional change. However, this legislation was in response to the decision taken by the electorate in June 2016 to leave the EU. The day after the vote, the government announced it would now prepare to withdraw from the EU, which in turn dictated the legislative agenda of Parliament. The democratic instrument of the referendum with influence then from the Executive in Parliament, was the *mechanism* of constitutional change here rather than a constitutional source. The ability to hold a referendum was reliant on statute,[137] but it was the political imperative that drove the constitutional change ultimately enacted.[138] One should also remember that Parliament legislated for this referendum without any constitutional safeguards in relation to possible outcomes following it, because it was designed to be advisory, not binding:

This Bill requires a referendum to be held on the question of the UK's continued membership of the European Union (EU) before the end of 2017. *It does not contain any requirement for the UK Government to implement the results of the referendum*, nor set a time limit by which a vote to leave the EU should be implemented. Instead, *this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions.*[139] (emphasis added).

The fact that the real politic of the outcome proved to be binding furthers the point that political imperatives are the true mechanism of constitutional change, not constitutional sources.

This idea of political imperatives is furthered by considering how the de jure importance of EUWA 2018's designation as a constitutional statute, has not translated into de facto constitutional importance. Whilst the ability for the UK to 'take back control' of laws once superiorly governed by the EU is perhaps the 'legal essence of Brexit', the creation of retained EU law, necessary to avoid legal blackholes created by the UK's exit, means that this regained sovereignty will necessarily be graduated.[140] As Stanton and Prescott point out, 'The extent to which UK law will mirror or diverge from EU law depends on the nature of the UK's future relationship with the EU'.[141] This will be predominantly determined politically, not legally, but the outcome will again manifest itself as constitutional change. The Supreme Court confirmed that even a constitutional convention such as

135 Including as amended by the European Union (Withdrawal Agreement) Act 2020.
136 EUWA 2018 s 5(1), with words substituted by European Union (Withdrawal Agreement) Act 2020 c1 Pt 4 s 25(4)(a) (December 31, 2020: shall come into force on IP completion day as specified in 2020 c 1 s 39(1) and sch.5(1) as specified in SI 2020/1622 reg 5(d)).
137 The referendum on the EU was provided for under the terms of the European Union Referendum Act 2015.
138 Vernon Bogdanor argues in favour of referendum also as a mechanism against changes, including constitutional changes, that the public do *not* want, citing examples such as Tony Blair's desire for the UK to adopt the Euro. See for instance: Jonathan Sumption and Vernon Bogdanor, *The Social Context of the Law: Britain's Unwritten Constitution (*4 Nov 2019) < www.youtube.com/watch?v=YIlkY90Cck8 > accessed 8 Jan 2023.
139 Elise Uberoi, 'European Union Referendum Bill 2015-16' (Briefing Paper No 07212, House of Commons Library 3 June 2015).
140 Stanton and Prescott (n4) 192.
141 Ibid, ibid.

the Sewel Convention, which has been included within statute, does not turn it into a legal rule.[142] But this is not where a convention's importance as a constitutional source lies, rather it is through the political imperative it drives.[143] The fact that Westminster *can* legislate on devolved matters without approval of the relevant legislature, overriding convention, does not mean that it *will*, precisely because of the political impact and concomitant calls for constitutional change it may have. [144] It is a similar logic that applies following the recent '#Indyref2' decision by the Supreme Court: the Scottish National Party will seek other, political mechanisms to effect the desired constitutional change of independence, which if forceful enough will manifest themselves in constitutional law rather than the importance of legislation in driving any such change.[145]

Prerogative powers should be seen in a similar vein, and my qualitative evaluation furthered, if we consider judicial decisions (case law) concerning the constitution. One specific example is the advice given by the Prime Minster to the Queen to use the royal prerogative to prorogue Parliament in September 2019, found by the Supreme Court to be unlawful.[146] '*A fundamental change was due to take place in the Constitution* […] on 31st October 2019' (emphasis added) and Parliament's right 'as the democratically elected representatives of the people' to 'have a voice in how that change comes about is indisputable'.[147] Here is significant impending constitutional change and a source of constitutional law other than legislation, affecting how that change 'comes about.' In determining by what *standard* the lawfulness of the advice was to be judged, this case also made it clear that '…the boundaries of a prerogative power relating to the operation of Parliament are…determined, *by the fundamental principles of our constitutional law*' (emphasis added).[148] Thus here is also one source of constitutional law, royal prerogative, determined with refence to constitutional *principles* rather than sources, expressed through another constitutional source, case law. Legislation's position as 'the most important single source' is not supported in such an evaluation.

The nature of the UK's constitution may well mean that comparatively, constitutional changes are a far more regular event,[149] but this essay has challenged the view that legislation, itself an inaccurate term in this context, is the most important constitutional source *or* mechanism for constitutional change. Qualitative evaluation and understanding the UK constitution as a political as well as a legal entity, reveals that it is the interdependency of constitutional sources that should be asserted. In consideration of constitutional change itself, precisely because the constitution 'has not been codified, it has developed pragmatically', mechanisms for such change are not confined most

142 *R (Miller*) (n1) [136-151].
143 By the 'Sewel Convention', a constitutional convention (and so also a constitutional source), the UK Parliament will normally only legislate on a matter devolved to the Scottish Parliament, Northern Ireland Assembly or Senedd Cymru if that relevant legislature has given its consent. This is recognised under statute with the Scotland Act 2016 adding s28 into the Scotland Act 1998; and the Wales Act 2017 adding an equivalent provision into s107 of the Government of Wales Act 2006.
144 It also does not mean that constitutional conventions have no legal significance, see for instance: *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The Court of Appeal recognised that under constitutional convention, the minister involved was accountable to Parliament for the decision taken establishing the legal principle that actions of government departmental officials are synonymous with the actions of the minister in charge of the department.
145 *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.
146 *R (Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41
147 Ibid [57]
148 ibid [38]
149 See for instance arguments made in comparison with other countries' constitutions in: Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (CUP 2009).

importantly to legislation either.[150] Therefore in the final analysis, any argument that champions a 'most important single source' of the constitution is an untenable oversimplification.

[150] Quotation taken from: *R (Miller)* (n31) [32].

IS ENGLISH LAW OR FRENCH LAW BETTER ADAPTED TO DEALING WITH THE EFFECTS OF EXTRAORDINARY SUPERVENING CIRCUMSTANCES ON PERFORMANCE OF THE CONTRACT?

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1. Introduction

The six years that have passed since the overhaul of French contract law in 2016 have been a reminder to lawyers around Europe of the need for the law to provide a way of resolving contractual disputes occasioned by circumstances not provided for in the text of the contract. Needless to say, the English and French approaches to extraordinary supervening circumstances differ vastly in form, as is to be expected given their respective Common and Civil law origins. To assist the chalk and cheese comparison to which these differing traditions give rise, this essay will be structured around the three relevant sections of the French Civil Code, referring to English cases which establish similar rules – all fitting under the broad term 'frustration' – along the way. Thus it will be established that the two jurisdictions are quite alike in the types of situations which they consider necessitating some sort of deviation from the contract. This will clear the ground for an evaluation of which system better deals with such situations, with particular emphasis on the way such situations are resolved – both process and outcome – and its consequent commercial attractiveness.

2. *Imprévision*

Imprévision is a new doctrine introduced in 2016 and set out in Article 1195 of the *Code civile* (Cc). The article provides that a contracting party whose obligations have been rendered 'excessively onerous' may request a renegotiation and, if none is forthcoming, ask the court to revise or terminate the contract. There is broad agreement that it represents a volte-face from the old French position, outlined in the *Canal de Craponne* decision, that mere commercial disadvantage would not be enough to warrant any relief from contractual obligations. The reason it has been chosen as the starting point of this comparison of French and English law is the breadth of 1195 Cc and the likelihood that it will be invoked in many circumstances which in England would beget pleas of frustration.[151]

Though it has long been a common boast of English contract law that it will not use frustration to relieve a party whose presumed but not sole feasible method of performance becomes impossible (*Blackburn Bobbin*),[152] there is good reason to believe that some degree of flexibility and pragmatism exists. As Kovac correctly points out, the case often seen as establishing the doctrine of frustration, *Taylor v Caldwell*,[153] contains the implicit admission that the theoretical possibility of rebuilding a burnt down building will not prevent frustration, made explicit by the words of Earl Loreburn in the Great War case of *Horlock v Beal*,[154] that 'impossible' means 'impracticable in a commercial sense'.[155] That said, the *Blackburn Bobbin* hurdle still looms large, with the rise of expressly named '*force majeure*

[151] Cass. Civ., 6 mars 1876.
[152] *Blackburn Bobbin Co Ltd v T.W. Allen & Sons Ltd* [1918] 2 KB 467.
[153] (1863) 3 B & S 826.
[154] [1916] 1 AC 486, 499.
[155] M. Kovac, 'Frustration of purpose and the French Contract Law reform', 2018 25 MJ 288, 304, 307.

clauses' surely evidence enough of the courts' reluctance to use frustration to assist a party facing merely unhoped for disadvantage.

One aspect of *imprévision* which can be easily contrasted with frustration is the codified right to request a renegotiation and, as a fallback, the court's jurisdiction to adjust the terms of the contract. Views differ as to whether this is conducive to a balanced and commercially efficient relationship between parties: Kovac believes it is a licence for the stronger party to threaten the weaker by demanding a renegotiation, an angle not explored by Pédamon in her hypothesis that in an environment of rising commodity prices a buyer will likely accede to a supplier's request to renegotiate because the delay caused by allowing the case to go to trial will exacerbate the eventual adjustment.[156] An essential frame to the question is the fact that 1195 Cc (like 1218 Cc on *force majeure*) is non-mandatory and can be excluded subject to 1171 Cc on unfair terms, and, according to Pédamon, likely will be excluded in large commercial contracts.[157] Supposing though that a given contract has not excluded 1195 Cc, the invitation to renegotiate by itself is not likely to be of much consequence. Requesting a renegotiation is the normal response to straitened circumstances – to which the English case law on performance of existing contractual obligations as consideration is ample testament – and the more unforeseeable the more likely the other party is to agree to some level of relief. Consequently, the main remaining difference between the French and English regimes is the ability of the French courts to alter a contract. English judges must decide whether to rule a contract frustrated or not – a binary choice. Though a party which has been able to perform some of its obligations before frustration occurred is protected and able to enforce *quantum meruit* payment thanks to the Law Reform (Frustrated Contracts) Act 1943, the court is powerless to help one which, in the absence of frustrating circumstances, it has declared still bound by its obligations. This means that French judges have a powerful tool for keeping contracts alive not shared by their English counterparts.

3. *Force majeure*

Force majeure, defined in 1218 Cc, is the French form of relief from obligations which most readily presents itself for comparison with English frustration. In large part this is likely because until 2016 it was the only one provided for in the *Code civile* and therefore the most written about. Given the introduction of *imprévision* in 2016, it now seems that *force majeure* will be limited to the most extreme circumstances – it requires obligations to be 'prevented', not just made more difficult to fulfil. The most intriguing aspect of the revised doctrine of *force majeure* is the now codified distinction between permanent and temporary suspensions of obligations. This is because the English law on frustration does not make such a clear-cut distinction, rather courts seem to have to consider on a case-by-case basis whether a delay is enough to count as frustration. In *Bank Line v Arthur Capel,*[158] the wartime requisitioning of a ship, which delayed the commencement of a year-long charter from April to September 1915 was held to have frustrated the contract. To rule otherwise would have left the ship owner bound to perform the impossible and so blamelessly liable for late performance. Modern French judges faced with similar facts would now have the option of recognising temporary *force*

[156] Kovac 301; C. Pédamon, 'The paradoxes of the theory of *imprévision* in the new French law of contract,' 2017 112 *Amicus Curiae* 10, 15.
[157] B. Fauvarque-Cosson, 'Review on the Ground of *Imprévision*', in J. Cartwright & S. Whittaker (eds.) *The Code Napoléon Rewritten* (Hart, 2017), 199; Pédamon 13.
[158] [1919] AC 435.

majeure, meaning no punishment for the delay and with the added benefit to the ship owner of keeping the contract alive, so preventing a loss of revenue.

4. *Caducité*

Like *imprévision*, *caducité* is a concept newly introduced to French contract law by the reforms of 2016. It is to be found in 1186 and 1187 Cc, which stipulate that when the 'essential elements' of a contract disappear, the contract automatically becomes void – '*caduc*'. For this reason Laithier justifiably believes it is closely comparable to the English doctrine of frustration of common purpose introduced in *Krell v Henry*[159] but deemed not to apply in the similar coronation case of *Herne Bay Steam Boat Co v Hutton*.[160] While it is difficult to find much more than this written about *caducité* in either the French or English scholarship, it is worth considering at some greater length given that one of the most important frustration cases of the past few years – *Canary Wharf v European Medicines Agency*[161] – concerns frustration of common purpose, not simple impossibility.

In the briefest possible terms, Marcus Smith J reached his decision in *Canary Wharf* that frustration did not apply because the lease of office space – which was all the contract was in the eyes of the lessor – was uninhibited by the UK's withdrawal from the EU. Thus the common purpose of the contract remained intact. Rather than speculating whether a judge drawing not on the century of English case law since *Krell* but on the new 1186 Cc's 'essential elements' formulation would have reached the same decision, comparison will instead be made to a recent French case[162] similar on its facts to *Krell* and *Canary Wharf* but which curiously was treated by the court of cassation as concerning *force majeure* and decided without mention of *caducité*.

The case in question concerned a couple who had paid up front for a stay in an hotel. The husband was hospitalised approximately 150km away and the wife cut short her stay in order to be with him. The hotel refused to reimburse them for the remainder of their intended stay. The couple pleaded the case as one of *force majeure*. This was rejected on the ground that their obligation – payment – was not prevented by the husband's hospitalisation. Mathias Latina contrasts this in a case note with a case from 1998[163] in which a student who had fallen ill during a hairdressing course stopped paying her accommodation fee, and whose plea of *force majeure* succeeded. Latina focuses on the apparently inconsistent application of *force majeure*, reconciling the two decisions by stating that *force majeure* is thus shown not to be permitted to benefit the 'creditor' – the party owed accommodation but unable to take it up.[164] For what it is worth, this is plausible but ignores what an English lawyer might call the estoppel angle: claiming a refund of money paid and perhaps relied on is somewhat more ambitious than trying to escape future payments.

For our purposes, though, the real intrigue lies elsewhere: why was the 2020 case not argued as one of *caducité*? Not taking up a booked hotel room is after all almost identical in subject matter to *Krell*, which can plausibly be seen as the ultimate inspiration and progenitor of 1186 Cc. There is one

[159] [1903] 2 KB 740.
[160] [1903] 2 KB 683; Y-M. Laithier, 'Quand peut-on invoquer la caducité du contrat?' 2021/1 *Revue des Contrats* 161, 166.
[161] [2019] EWHC 335 (Ch).
[162] Cass. 1re Civ., 25 novembre 2020, no. 19-21.060.
[163] Cass. 1re Civ., 10 février 1998, no. 93-16.316.
[164] M. Latina 'Le créancier, qui n'a pas pu profiter de la contrepartie à laquelle il avait droit, ne peut invoquer la force majeure', 2021/1 *Revue des Contrats* 17, 18.

obvious difference between *Krell* and the facts of the French hotel case in the origin of the supervening event, though both by chance were illnesses. In *Krell* a third party – His Majesty's – illness vitiated the common purpose of the contract because it was judged to change sufficiently the quality of the service which was to be provided. In the French case, the fact the guests were respectively unwilling or unable to make use of the service they had purchased did not mean that identical service was not being provided. While in neither case was hotelier or guest at fault for the circumstances, in the French case it is undeniable that those circumstances will have appeared to the court much more bound up with the guest, which is probably sufficient to explain both the difference in outcome and the failure of the judgement even to mention *caducité*. If, as proposed, we believe that the French concept of *caducité* is modelled on the English frustration of common purpose, then comparison with the facts of *Canary Wharf* makes it even less surprising that *caducité* was not even entertained. In that case the change which occurred – the UK's withdrawal from the EU – was entirely unrelated to the actions of either party and still no frustration of common purpose was found.

Finally, this French case also seems to answer the question posed by Fauvarque-Cosson: whether 1195 Cc's 'excessively onerous' refers purely to the cost to the debtor or also encompasses greater profits for the creditor.[165] Here, the hotel would have seen an increased profit because it would not have had to provide any services to the couple during the unused portion of their booking. Since *imprévision* was not mentioned in this case either, it appears that 'excessively onerous' is being read narrowly and not as relating to the parties' relative positions.

5. Conclusion

An interesting picture of the French and English law on supervening events is therefore beginning to emerge. *Force majeure*, long thought of as the French equivalent of frustration, is surely constrained by the invention of *imprévision* and *caducité* and will now only work in the most extreme cases of supervening events. Furthermore, instead of seeing *imprévision* as a lesser form of *force majeure*, as might be tempting at first glance, *imprévision* should really be treated as an entirely new genus of plea because of the different procedure it triggers – renegotiation followed if necessary by a settlement imposed by the court. At the same time, *caducité* should be seen as the other side of the coin from *force majeure*, given that both terminate an obligation automatically – much like English frustration. The difference between them lies in type of events they deal with. *Force majeure*, as the name implies, requires some sort of force, whereas *caducité* applies when the contract could still be fulfilled but at least one party no longer wants it to be.

The question which remains unanswered is how this new, tripartite French regime compares to the English umbrella doctrine of frustration. The applicable metric must surely be commercial attractiveness; while there are other valid ways of judging a system of contract law, the fact that English jurists have long boasted of the commercial attractiveness of theirs and that the French reforms were expressly aimed at emulating this commercial success makes it a reasonable yardstick now. On the one hand, the likelihood that many French cases will be dealt with under *imprévision* means that some level of uncertainty will invariably about the eventual outcome of any contract can only be avoided by excluding 1195 Cc – though if doing so is attractive to both parties this should not be cause for criticism. On the other, the codified nature of French law, and in particular the clear

[165] Fauvarque-Cosson 198.

and accessible division of what in England is one broad doctrine means that even parties without ready access to counsel stand a chance of knowing how they can escape obligations which they have good reason no longer to feel bound to fulfil.

A final angle which must be considered before reaching a decision is the relationship between the different ways of backing out of a contract and the remedies courts will likely impose if those escape routes fail and obligations still enforceable go unperformed. It is well established that French courts are more willing to mandate performance, which in England remains the exception to the norm of awarding damages.[166] Since the former is undoubtedly more onerous on the losing party, it makes sense that the French system has now adopted in *imprévision* a way of letting contracts be adapted so that at least performance occurs on less ruinous terms than would have been required if the contract were simply enforced as originally agreed. While it should be noted that in England it remains possible for parties to renegotiate of their own accord, and the quantification of damages gives English judges some flexibility in shaping the eventual outcome, the fact that once a judge is involved it seems inevitable that an English contract will not be performed cannot be good for commercial activity. Notwithstanding that an economist might spin this as good for competition because it would mean the unperformed contract is awarded to some new party which is able to fulfil it, from a *pacta sunt servanda* standpoint the French system seems superior because it keeps the contract closest in form to the original: the parties stay the same, only the obligations are adjusted as necessary to keep the contract alive.

[166] J.M. Smits, *Contract law: a comparative introduction*, 3rd ed. (Elgar, 2021) 194, 200.

RESPONDING TO SUPERVENING CIRCUMSTANCES IN THE PERFORMANCE OF CONSTRUCTION CONTRACTS: AN ENGLISH AND FRENCH PERSPECTIVE

Abigail Collier

1. Introduction

This essay undertakes a comparative assessment of French and English law in the context of the effects of supervening circumstances, particularly COVID-19 as a supervening circumstance affecting contracts in the construction industry. The structure recognises the principle of *pacta sunt servanda* as underpinning French and English legislative preservation of contracts, and comments on the merits of the codification of provisions within French law, compared to the more fluid nature of its English counterparts. The essay explores the advantage of the French legal system through examination variation: how the concepts of renegotiation (2.1) and impévision (2.3.) deal with delays in supply and project completion, in conjunction with the doctrine of severance (2.2.) and contractual hardship clauses (2.4). This essay also considers the similarities in French and English force majeure clauses (3). Whilst the two legal systems have similar provisions regarding the operation of force majeure clauses, the differences are embedded within the respective thresholds and judicial trends, in finding which circumstances amount to the same. Finally, this essay considers the operation frustration in English law (4), and ultimately asserts that French legislation is somewhat better equipped to deal with supervening circumstances.

2. Variation

2.1. Variation – English Law (Renegotiation)

In English law, renegotiation is the method of varying requirements within an existing contract and is often associated with carrying the least legal risk. A variation is best illustrated as a new contract created within an existing contract, which can take the form of parties agreeing new terms or waiving existing contractual requirements. It would therefore be possible for parties to agree to vary prior stipulations of delivery dates for materials, in response to delays caused by shortages.

2.2 Variation – English Law (Severance)

On the other hand, the doctrine of severance enables parties to effectively take a 'blue pencil' to the offending clauses, which has the effect of removing what would otherwise jeopardise a contract from withstanding the effects of the delays. The advantage of this is the flexibility and ease for parties to make amendments, however the unrestricted ability to alter essential terms of contracts can have far reaching consequences. A fundamental argument is that altering any of the standard form contracts ("SFCs"), undermines the very essence of them, particularly as they have been drafted to deal with supervening circumstances. In *Balford Beatty v Docklands Light* Railway[167], parties altered an SFC by omitting a dispute resolution clause. When a dispute arose regarding the decision of the certifier of payments, the omission of the clause meant that not only could the arbitrator not review

[167] *Balfour Beatty v Docklands Light Railway* [1996] 78 BLR 42

the decision, but because it appeared to be the intention of the contracting parties, the court was restricted to finding a breach of contract instead of resolving the issue between the parties. This demonstrates how the intentional variation caused a complete breakdown in the interaction between vital clauses. Although this example is of a contract unaffected by supervening circumstances, it illustrates the risk that a seemingly simple amendment can carry.

2.3 Variation – French Law (Imprévision)

French law codifies an equivalent approach under the concept of imprévision in Article 1195 of the French Civil Code.[168] The provision functions by instigating negotiation between parties where 'a change in circumstances which was unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party which had not accepted to bear that risk'.

In practice, this gives contracts an additional lifeline before releasing parties from their obligations, and demonstrates the proactivity of the French legal system, recognising the need to protect complex contracts supporting large scale projects. Under the provisions, the courts are empowered to review and correct defective amendments, and any unfairness resulting from its application, which mitigates the risk of amendments causing the complete contractual breakdown exemplified in the *Balfour*[169] case.[170] The Grand Paris Express project involves plans to add 68 stations to the Parisian metro and extend existing lines by 200km to improve transport links. The lockdown in March 2020 halted a significant portion of the project, and even once the restrictions had been lifted, coupled with delays incurred by the production and supply of materials, the rate of work dropped between 30-50%.[171] The consequence of this is that project completion date had to been varied from 2024 to between 2025-2030. The ability to amend the contract demonstrates how the provisions are employed to protect projects comprised of complex bodies of contracts, which is arguably better protected under the codified provisions of French law.

2.4 Variation – French Law (Contractual Hardship Clauses)

Contractual hardship clauses are commonplace in French contracts, to replace or work alongside the doctrine of imprévision. The clauses have the same effect as the doctrine, but with an added mechanism of acting as an agreement within the contract that covers events which may fall outside of the traditional scope of imprévision. In a French contract for the sale of oil, a contractual hardship clause outlined a scale for calculating changes in oil price which would automatically adjust the contract without the need for termination[172] The consequences of the Kippur War rendered the clause inoperable as the increase in oil price fell outside of the scope of the agreed scale. However, the case illustrates how similar clauses could be used to deal with the impact of the pandemic, as

[168] Ordonnance n°2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime general et de la prevue des obligations des livres III (Des sources d'obligations)
[169] Ibid.
[170] Luigi Montefusco, 'Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgium Courts' (2020) 13(2) Journal of Civil Law Studies
< https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1264&context=jcls >
[171] Catherine Barbe 'Société du Grand Paris: COVID-19 Impact on the Paris Region Transportation and Urbanism' (CBIPS, 16 June 2020) <
https://cbips.engineering.columbia.edu/sites/default/files/content/CBIPS_6.16_Catherine_Barbe.pdf >
[172] Conseil d'État, Société Propetrol, 5 November 1982

clauses could be drafted to build consideration into contracts where the effects of the COVID-19 significantly alter an economic or technical limb of the agreement. An example of this would be by anticipating price increases of materials due to shortages in production. If attempts to renegotiate terms between parties fail, a contract can be terminated.

3. Force Majeure

3.1. Force Majeure – English Law

Alternatively, a party could invoke force majeure which has the effect of releasing both parties from all future obligations. The relationship between the pandemic and the contract will be heavily scrutinised before a finding of force majeure will be made. If the impediment to performance is temporary, obligations will be suspended, until they can be resumed. However, if the impediment is indefinite, or the delays from temporary measures justify it, the contract may be terminated. Despite the gravity of this, there is an obvious reluctance to define the term in English law. The dossier of SFCs seem to provide responses to force majeure events as opposed to giving a coherent definition. For example. the Joint Contracts Tribunal ("JCT") permits an extension of time where circumstances are included under the Relevant Event clause,[173] and similarly, under the New Engineering Contract ("NEC"), compensation events are defined as ones that stop the contractor from completing works, or prevent completion by the agreed date, and permit parties to seek extensions of time and renumeration.[174] The suite of contracts created by the International Federation of Consulting Engineers, known as FIDIC contracts, provide criteria for exceptional events:[175]

1. Firstly, the circumstances must be beyond the control of the parties, and therefore cannot be ascribed to a particular party.

2. Secondly, it must not be capable of being provided for at the time of entering into the contract, and at the time of arising it must have been, or continue to be, unavoidable; if satisfied, a party can seek an extension of time or renumeration.

Generally, to rely upon force majeure clauses in English law, the circumstances must have caused a significant degree of interference upon a party's ability to perform its obligations. The standard of interference is fact-specific, and contingent on the individual wording of the clause. This depends on whether it is formulated to prevent breach occurring should the set of circumstances arise, or whether it is intended to operate as an exemption from liability were a breach to arise.[176] The English courts are known to make findings of force majeure in narrow circumstances, as stated in *Lebeaupin v Crispin*,[177] that clauses:

[173] Lexis Nexis, 'Practice Note: JCT- interpreting the lists of Relevant Events and Relevant Matters' (2022) < www.lexisnexis.co.uk/legal/guidance/jct-interpreting-the-lists-of-relevant-events-relevant-matters >

[174] CMS Law-Now 'NEC3 – Force Majeure by any other name' (CMS Law-Now, 2012) < www.cms-lawnow.com/ealerts/2012/03/nec3-force-majeure-by-any-other-name?sc_lang=en >

[175] Herbert Smith, 'Force majeure clauses: FIDIC, ENAA and drafting bespoke clauses' (Construction Dispute Avoidance Newsletter, March 2012) < www.fidic.org/sites/default/files/force_majeure_hs_2012.pdf >

[176] Hugh Beale, *Chitty on Contracts* (Vol 1, 34th edn, Sweet & Maxwell 2022) 231

[177] Lebeaupin v Richard Crispin & Co [1920] 2 K.B 714 (1920)

'Should be construed in each case with close attention to the words which precede it and follow it, and with a due regard to the nature and general terms of the contract'.

In terms of how this would apply to construction contacts, the wording of the clause must cater for the pandemic either directly or synonymously. Moreover, the parties are under an obligation to mitigate the effects of the force majeure event, and in relation to COVID-19, this is likely to require parties to co-operate as far as possible before giving either party grounds to terminate.

In *Thames Valley Power Ltd v Total Gas & Power Ltd,*[178] English courts considered whether the dramatic increase in the market price of gas amounted to sufficient grounds for force majeure. Whilst this case can be distinguished because it is not related to the pandemic, the courts did not find force majeure to cover the commercial consequences of diminished profitability. The rigidity of the English approach does protect the contract, but to the detriment of the party bearing the burden of lesser profitability. Practically, this could ultimately result in a party becoming insolvent, which seems counterproductive if preservative measures are placed above all other commercial factors.

3.2. Force Majeure – French Law

The French system offers clarity on the legal operation, by giving a codified definition in Article 1218(1).[179] The event is defined as one that is beyond the control of the parties and could not have been reasonably foreseen at the time of the conclusion of the contract, and which has the effect of preventing the debtor from performing its obligations. The definition is assisted by Article 1351(1)[180] which qualifies the impossibility of performance as force majeure. In *Total Direct Energie V Électricité de France,*[181] the Court examined whether the pandemic constituted a force majeure event under a contract created in line with French regulation of the electricity market. The pandemic caused an energy crisis due to the impact on the demand, which led to a significant price drop, and resulted in TDE having to 'sell' the electricity at half of the agreed price. EDF argued that to apportion the financial risk wholly to itself would be unjust, however the Court found that COVID-19 qualified as a force majeure event and therefore suspended future obligations between the parties. This was an interesting decision as the contract was technically still performable, and force majeure cannot usually be used to remedy financial difficulty.

[178] Thames Valley Power Ltd v TOTAL Gas & Power Ltd [2005] EWHC 2208 (Comm)
[179] Ordonnance n°2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime general et de la prevue des obligations des livres III (Des sources d'obligations)
[180] Ibid
[181] Total Direct Énergie SA v Electricité de France SA Case no 20/06689, Cour d'Appel de Paris, 28 July 2020

4. Frustration

4.1. Frustration – English Law

Frustration can provide an alternative in the absence of an adequate force majeure clause when dealing with supervening circumstances in English law; the Law Reform (Frustrated Contracts) Act 1943 permits parties to be discharged from further performance of the contract where it has become 'impossible' or 'otherwise frustrated'.[182] A similarity between the doctrine and force majeure exists in the fundamentals, namely that neither can be invoked light. In *Davis Contractors Ltd v Fareham Urban District Council*,[183] a contact was affected by the shortages of staff and materials as a result of World War II, yet was not found to have been frustrated just because it had become more expensive and more difficult to perform. Whether frustration would be available for parties to rely upon can be distinguished by whether the pandemic has had the effect of causing insuperable difficulties, or whether it has caused inconvenience by making obligations more onerous to perform. In *Canary Wharf Group v European Medical Agency,*[184] a pre-Brexit lease was subject to a law which stipulated that the agency, at the time based in London, had to be based in an EU member state. It was found that Brexit was not an unforeseen event at the time of entering into the contract, and there had been no supervening illegality because the introduction of the law did not prevent the agency from continuing its obligations under the lease. The judgment underscored the status quo of frustration and confirmed that whilst it may function by releasing parties from obligations where force majeure falls short, it does not offer parties a free pass to suspend future performance. This sets a useful precedent for understanding the effect of illegality on contracts impeded by the pandemic, particularly in consideration of the illegality of movement. It seems that English courts would be reluctant to find that illegality of movement in one country would render a contract frustrated where the performance remained legal in another country, which is important for the existence of cross-border contracts.

5. Conclusion

The pandemic has certainly created the perfect tempest of the international threat posed to health and economies, and the legal landscape will see an influx of case law testing and protesting the abilities to deal with the effect of supervening circumstances on the performance of contracts. It is fair to say that both bodies of law seek to uphold the sanctity of contracts however, it is contended that the way of achieving this is markedly different. Whilst both systems offer contracts an additional salvation by permitting amendments through renegotiation, the English legal system appears to 'protect' the contract by providing limited circumstances under which it can be terminated. For example, where renegotiation fails, parties may first seek to rely upon the doctrine of severance to delete the offending terms and enable performance to continue. The French legal system codifies the English approach and mandates negotiation, which sets the bar of expectation for parties to continue performance alongside dealing with the effects of supervening circumstances. On balance, the systems stand on an equal footing, with a similar importance placed upon efforts to renegotiate. However, it is suggested that the concept of Force majeure is where the systems differ. Specifically, in French law, the codification of a definition provides legal certainty, and the courts overtake its contemporaries in the willingness to adapt the definition in

[182] Law Reform (Frustrated Contracts) Act 1943, s 1(1)
[183] David Contractors v Fareham Urban DC [1956] UKHL 3
[184] Canary Wharf Limited v European Medicine Agency [2019] EWCH 335 (Ch)

line with commercial practicality, such as where parties suffer severe financial difficulties. Heightened commercial awareness is necessary to protect technical and expensive contracts, and for this reason, it is posited that French law is better adapted to deal with the effects of supervening circumstances.

KEEP CALM AND CARRY ON: WAIVING FRUSTRATION

Jakub Mikulski

1. Introduction

At time of writing, it has been over a year since the Russian invasion of Ukraine began. In addition to the coronavirus pandemic, this event has generated a substantial amount of force majeure litigation, where the necessary clauses were pre-emptively inserted into contracts. Where those clauses were not inserted, parties must depend on the doctrine of frustration to discharge them from obligations, when some occurrence renders performance as originally envisioned impossible.

When this doctrine applies, it is trite law that parties do not need to take any steps for their contract to be frustrated. However, this article will argue that it is in the interests of justice for parties to be able to waive the applicability of frustration to their contract in certain circumstances. The effect of this would be that parties can continue with their original contract, despite potentially frustrating events such as pandemics or wars.

2. Opportunism and Unfair Outcomes

The split Court of Appeal in *Nicholl & Knight v Ashton, Edridge & Co. (The Orlando)* has been cited as exemplifying the issue presented by the automatic operation of the doctrine of frustration.[185] While the approach of the majority has been preserved in the accepted approach, this article will elevate the dissent for its correct recognition of the specific and unnecessary injustice enabled by the current law.

The Orlando was a steamship which was contractually designated to carry cottonseed from Alexandria in January 1900.[186] However, a month before she was due to collect the cargo, the ship ran aground in the Baltic Sea. By coincidence, the market price of cottonseed also rose during this time. Seizing this opportunity, the seller relied on frustration to discharge the contract. As such, when the majority of the Court of Appeal ruled in his favour, the seller received a windfall through his release from (what turned out to be) a bad deal.

The unfairness stems from the fact that the buyer was prejudiced when the goods could not be delivered as stipulated and yet it was the seller who profited. An additional factor in this case was that the parties altered the contract, from shipment by "ship or ships" to "per steamship Orlando".[187] The dissent by Vaughan Williams LJ began with the construction of this provision as only intended for the benefit of the buyer, ensuring prompt delivery by nominating a ship with a specified departure date. This was specifically based on an understanding of the shipping industry, that "time of loading is a condition introduced into the contract for the benefit of the buyers".[188] If it was the buyer's clause, it should be down to the buyer whether the stipulation is enforced. Consequently, it would be down to the buyer whether the contract is frustrated, preventing profit to the seller arising from

[185] Edwin Peel, Frustration and Force Majeure (4th ed.) 4-093.
[186] *Nicholl & Knight v Ashton, Edridge & Co. (The Orlando)* [1901] 2 K.B. 126.
[187] *The Orlando*, ibid., 131.
[188] *The Orlando*, ibid., 137.

prejudice to the buyer.

The examination of frustration case law to reach this conclusion focuses on the common understanding between the parties that "some particular specified thing continued to exist" for the fulfilment of their obligations.[189] While in *Taylor v Caldwell,* the hall was essential to the contract, *The Orlando* was specified but not so integral. Thus, only clauses which were "of the essence of the contract" could cause its frustration with their impossibility. Sympathy for this position is found in the Suez cases, for instance Lord Simonds' response to the impossibility of a certain shipping route allegedly frustrating a contract: "it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated."[190]

The fundamental idea in that approach is that the clause which becomes frustrated is related to the contractual right of a party to enforce it. Though previous authorities do not explicitly disavow this, some do get close. In *BP v Hunt*, then Mr Justice Goff was unequivocal that "frustration is not a legal right; it is a legal doctrine."[191] On a critical reading, this could rule out the application of waiver to frustration entirely; the language of election and choice is certainly appropriate to legal rights and not so much to legal doctrines. However, this dictum would also be read as specifically referring to the nature of frustration: when it operates, it is not up the parties how it operates. Frustration as a legal doctrine must operate consistently. Fortunately, that principle is not threatened by the possibility of waiver. It must be integral to its existence as a legal doctrine for frustration to function as fairly as possible.

3. The Overlapping Principles of Frustration and Waiver

Where significant prejudice results from the operation of an automatic rule of law, a simple solution is to introduce a consensual element.

3.1. Frustration Seeks to Reduce Unfair Outcomes

It is in the true nature of frustration to manage the risk of injustice by inspecting the intentions of the parties. To an extent, the doctrine already accounts for the intentions of the parties in its multifactorial approach. In *The Sea Angel,* the Court of Appeal listed the relevant factors to consider when determining if a contract is frustrated, including its terms, contemplations of the parties as to risk, the nature of the supervening event, and the parties' reasonable calculations as to the possibilities of future performance in the new circumstances.[192] Thus, it cannot immediately be determined that any given event is always frustrating: it already depends on how the parties and the contract between them view such an event.

By closer analogy to the injustice in *The Orlando*, there is also a rule against automatic benefit from self-induced frustration. In *Taylor v Caldwell*, Blackburn J insisted that frustration applies where performance becomes impossible "without default of the contractor" and that only where the thing

[189] *The Orlando*, ibid., 135. See also *Taylor v Caldwell* (1863) 3 B. & S. 826, 833.
[190] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93 at 112.
[191] *BP Exploration v Hunt* [1975] 1 W.L.R. 783, 809.
[192] [2007] EWCA Civ 547, [111].

contracted for ceases to exist "without the fault of either party, both parties are excused".[193] Lord Sumner reformulated this in his statement that "reliance cannot be placed on self-induced frustration".[194] The idea of fault similarly appears in s7 Sale of Goods Act 1979.

The underpinning of this principle is that a party should not automatically benefit from their own misconduct. In essence, the application of waiver to frustration would be based on the adjacent idea, that a party should not automatically benefit from their own inability to perform any contractual stipulation. Admittedly, if all frustrating events led to the party's election, there would be minimal utility in the doctrine for defaulting promisors. A balance must be struck to allow terms which are non-essential or inserted for the promisee's benefit to be waived. In cases of self-induced frustration, the termination of the contract is effectively at the option of the prejudiced party. Since the inducing party cannot rely on frustration, it falls to the innocent party to invoke it, if they wish. This is exactly the scenario the waiver approach replicates.

At the same time, frustration is still generally said to occur automatically. In the frequently cited *Hirji Mulji v Cheong Yue SS Co*, the Court confirmed that regardless of the knowledge of the parties, once the requirements for frustration are met the contract is discharged "forthwith, without more and automatically."[195] The intention is that parties need take no steps for the doctrine to operate. This is a legal fiction likely intended to protect a party that does not know about the change in circumstances.

However, it need not be preserved to any greater extent than that. For instance, Michael Bridge concluded that the "automatic frustration of the contract serves no practical purpose", betraying an atypical overreaction to terminate the contract as a whole, rather than address the specific obligation affected by a frustrating event.[196] Therefore, there is no obstacle to reinterpreting the automatic nature of frustration as a feature of the doctrine, which once established operates as if it had been automatic. The new function of this element would therefore be to limit unfairness brought about by significant changes in market prices as the frustrating event unfolds.

3.2. Waiver: the shield of the prejudiced

The major concern with a non-automatic election process would be that parties are left in a limbo as to whether their contract is frustrated. Fortunately, this is a familiar issue and well-mitigated in the law of waiver. For that reason, frustration should not stop at directly adopting the principles of self-induced frustration but can benefit from integrating ideas from the established jurisprudence of election and waiver.

For clarity, the two terms of election and waiver can be used interchangeably in this context. As defined by Lord Diplock in *Kammins v Zenith*, the terms can both describe the process by which the statement or conduct of a party debars them from asserting a substantive right or defence which they once possessed.[197] Election simply differs in that it implies a choice between two or more rights or defences. This makes it appropriate to say a party would elect frustration under this proposal, as

[193] *Taylor v Caldwell* (1863) 3 B. & S. 826, 840.
[194] *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 452.
[195] [1926] A.C. 497, 505. See also *J Lauritzen v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 9.
[196] Michael Bridge, Frustration and excused non-performance, L.Q.R. 2021, 137(Oct), 580, 603.
[197] [1971] A.C. 850, 883.

they would forgo their substantive contractual rights in affirmation, and vice versa. While a waiver provision can exist in a contract, parties are also put to election in response to breaches of contract, which indicates that the mechanism can be applied as part of a legal doctrine.

Foremost, an electing party is not empowered to indefinitely lord a right to choose over the other. In *The Kanchenjunga*, Lord Goff synthesised the relevant principles:

> "[the electing party] has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it […] In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent course of action then open to him […] he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstance specified in s35 of [Sale of Goods Act 1979]."[198]

Three aspects stand out.

1. The election period is not indefinite and the law will take a just decision in place of the electing party if they are not prompt enough, as a matter of practicality rather than obligation. This directly addresses the concern of being left in limbo and leaves discretion for the Court to flexibly determine appropriate election periods, taking into consideration all the circumstances of the case.

2. The election can be made by conduct consistent with only one of the rights, eliminating the other by implication. The application of this to frustration would be to insist on performance despite the impossibility of one provision in the contract. In the context of *The Orlando*, this would be inviting delivery in any other ship. Such an identification of the integral obligations in the contract to be fulfilled is directly in opposition to the acquiescence to frustration.

3. A direct reference is made in this dictum on waiver to the nonconformity provision in the 1979 Act; just as that addresses flaws in goods which a buyer is willing to accept, the waiver approach to frustration addresses flaws in other contractual obligations which a buyer is willing to accept. Inherently, this characterises waiver as a shield against the sword of unfair frustration. If the buyer is willing to waive one of their own terms, only the opportunism of a defaulting party would ever suffer. This is not a class the doctrine of frustration aims to protect currently, so it is entirely consistent to extend the approach further in that direction. Overall, this means that no issue arises regarding parties excessively left waiting to find out if their contract is frustrated and that there is an aligned of underlying principles between waiver and frustration.

Additionally, there is some provision in the law of waiver for the waiver of a right to terminate, exemplified by the recent case of *DD Classics v Chen*.[199] If a Court was to completely ignore *BP Exploration* and regard frustration as a right to terminate, this could be directly relevant to the

[198] Motor Oil Hellas (Corinth) Refineries v Shipping Corporation of India [1990] 1 Lloyd's Rep. 391, 398.
[199] [2022] EWHC 1404 (Comm). See also Beale (ed), Chitty on Contracts (34th ed.), 25-067.

doctrine. Even if not, the judgment in that case reaffirms that integral terms must be clearly expressed as such, and that unreasonable delay can remove the right of election from the hands of an innocent party. Further, the example of election given in the case is the late acceptance of a non-conforming payment. Translated to the frustration context, behaviour from the promisee which facilitates the fulfilment of obligations for the promisor could amount to a waiver of the right to claim the contract is discharged. This is because it demonstrates the importance of another part of the contract to the promisee: referring to the previous example, it was not the steamship Orlando which the buyer wanted, but rather the prompt shipment of cottonseed it represented.

The underlying purpose of both waiver and this approach to frustration is to allow the prejudiced party to decide of their own accord how to manage their interest in the contract. This is the only way to guarantee that the law does not enable unjust outcomes.

4. Implementation

The implementation of the waiver approach to certain instances of frustration would validate the dicta of Vaughan Williams LJ in *The Orlando*. It is certain that, given the chance, the buyer in that case would have waived the right to have their cottonseed delivered in that specific vessel and consequently would have captured the rise in market value of that good themselves.

It is important to remember that the buyer would have captured this profit if the contract had been executed as intended, with no accidents impeding the seller. There can be no complaint of radically different performance, to use the language of Lord Radcliffe's theory of frustration in *Davis Contractors v Fareham UDC.*[200] Similarly, one can apply a particularised version of the implied term theory; only if integral obligations are breached, would the parties agree to discharge the contract in its entirety. There is no reason why the implied term could not allow for election in response to the impossibility of performing non-essential contractual stipulations. The examination of each of these theories demonstrates how neatly this approach fits into the broader jurisprudence of frustration.

The need for this change is underscored by the highly unsatisfactory current state of affairs. Considering the majority ruling in *The Orlando*, parties in time-sensitive commercial situations are left without recourse. The only option for parties with more time is to begin a new contract on the same terms. This is unlikely to succeed, as the dynamic of negotiations would be substantially altered by an unwanted frustration. A defaulting party, aware of their newfound position of strength, may not agree to be bound without greater incentive. Alternatively, the promisee may have requested a specialised product for which there is low demand, so the seller may be forced to accept a lower price. Both cases are undesirable and unnecessary interruptions to a contractual relationship between parties.

It is technically possible for parties to contract back into their previous obligations through offer and acceptance by conduct, by carrying on performance despite frustration.[201] The legal analysis would differ, but this could, to the layperson, appear like waiving frustration. Again, this solution is unsatisfactory as it is limited to situations where intent to form a contract is repeatedly demonstrated by the parties which presumably are not in dispute that such a contract is already in existence.

[200] [1956] A.C. 696 at 729.
[201] *Brogden v Metropolitan Railway Co* (1877) 2 App. Cas. 666.

As a further alternative, Bridge proffered the law of unjust enrichment to address benefits captured by defaulting parties which ought rightfully to belong to the promisee. Specifically, restitution could be available in respect of benefits "retained under a contract in indefinite suspense".[202] However, this requires regarding losses allocated under the doctrine of frustration as unjust. Therefore, though Bridge presents the best actionable answer, a solution which maintains the integrity of frustration by extending its existing principles would be preferable. For exactly that reason, it is submitted that waiver of frustration is the most appropriate approach from a conceptual perspective.

5. Conclusion

Frustration as a doctrine is most effective when it can discharge parties from impossible performance. The grey area around impossibility will always generate issues in this area of law. However, where the 'impossibility' to perform in fact turns on a non-essential clause inserted for the benefit of the promisee, there must exist a right to waive that term and thereby disapply frustration, effectively waiving that too.

From the origins of this concept, the end goal has been to achieve justice through frustration. Whichever way the law chooses to address unwanted frustration, the prevention of prejudice to the interests of innocent parties must be an incontestable guiding principle. If no more elegant solution can be devised, it is submitted they should be left to choose and secure their interests for themselves.

[202] Michael Bridge, Frustration and excused non-performance, L.Q.R. 2021, 137(Oct), 580, 603.

DISMANTLING THE DIPLOMATIC IMMUNITY DEFENCE TO MODERN SLAVERY: CASE COMMENT ON *Basfar v Wong* [2022] UKSC 20

Udit Mahalingam

1. Introduction

The decision of the Supreme Court in *Basfar v Wong* is the most recent addition to jurisprudence on the question of whether the alleged exploitation of domestic workers in circumstances of modern slavery falls within the 'commercial activity' exception to diplomatic immunity in Article 31(1)(c) of the Vienna Convention on Diplomatic Relations 1961 ('VCDR').[203] The judgment in this case provides important clarification about the distinction between the ordinary employment of domestic staff and the exploitation of workers in conditions of modern slavery, but leaves open the question of whether an action grounded in human trafficking alone would fall within the 'commercial activity' exception to immunity. The limits of *Basfar* are thus likely to be tested in subsequent litigation. Although a significant chapter in the pursuit of accountability for the exploitation of domestic workers by diplomatic agents, it is by no means the end of this tale.

2. Facts

The appellant was a migrant domestic worker who had been employed since November 2015 in the household of the respondent, a diplomat representing the Kingdom of Saudi Arabia in the United Kingdom. She was provided with an employment contract stipulating that she would work a maximum of eight hours per day, with one day off each week and one month off each year, and that she would be provided with sleeping accommodation and paid the National Minimum Wage.

However, following years of maltreatment from her employer, the appellant escaped from the respondent on May 24, 2018, and brought a claim against him in the Employment Tribunal for unlawful deduction of wages and breaches of her employment rights, making several allegations that were assumed to be true for the purposes of the appeal. First, the appellant claimed she was confined in the respondent's house except to take out the rubbish and was only allowed to communicate with her family twice a year using the respondent's telephone. In addition, the appellant alleged that she was forced to work over sixteen hours every day with no holiday or rest breaks and was required to standby by always wearing a doorbell. The appellant also claimed that she was shouted at and called offensive names, and that she could only cook for herself when the respondent and his family were out; otherwise, she ate their leftovers. After arriving in the United Kingdom, she received no pay until July 2017, when she received a lump sum of approximately £1,800 for six months of work – a fraction of her contractual entitlement. Following this, the appellant was not paid again.

The respondent applied to have her claim struck out on the ground that he had diplomatic immunity from civil litigation. The tribunal declined to strike out the appellant's claims. The Employment Appeal Tribunal allowed the respondent's appeal but issued a certificate that the case was suitable for a 'leapfrog' appeal directly to the Supreme Court, permission for which was later granted.

[203] *Basfar v Wong* [2022] UKSC 20

3. Legal Context

It is a longstanding principle of customary international law that certain foreign government officials are recognized as having legal immunity from the jurisdiction of another country. This custom has been recognised as "one of the most important tenets of civilised and peaceable relations between nation states".[204] As the International Court of Justice pointed out in *Democratic Republic of the Congo v Belgium (Arrest Warrant of 11April 2000),* diplomatic immunity is not an immunity from liability, but rather a procedural immunity from the jurisdiction of courts in a receiving state.[205] This procedural immunity exists "not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States", and can be disapplied in certain circumstances.[206]

Article 31(1) VCDR, as enacted in the United Kingdom under s.2(1) of the Diplomatic Privileges Act 1964, provides for three exceptions to the general immunity of diplomatic agents from the civil and administrative jurisdiction of a receiving state. Diplomats do not enjoy immunity in relation to:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.[207]

'Professional or commercial activity' under Article 31(1)(c) has generally been construed as referring to trade or business activities in light of Article 42 VCDR, which prohibits diplomatic agents from practicing "for personal profit any professional or commercial activity" in a receiving state.[208] Indeed, it is widely accepted that the 'commercial activity' criteria cannot be construed to include activities "incidental to the ordinary conduct of [a diplomat's] daily life", given that such an interpretation would impair the efficient performance of the functions of diplomatic missions in a receiving state.[209] As Eileen Denza notes, "it was made clear during the drafting of Article 31(1)(c) that the exclusion did not apply to a single act of commerce but to a continuous activity".[210]

To that extent, the boundary between occasional activities incidental to a diplomatic function and outside activities deemed commercial was tested most prominently in *Tabion v Mufti*; the first case to determine whether employment claims brought against a diplomat fell within the ambit of Article 31(1)(c). In this case, various claims brought by a domestic worker against a diplomatic agent under the Fair Labour Standards Act 1929 were not deemed to give effect to an Article 31(1)(c) exception

[204] *A Local Authority v AG* [2020] EWFC 18 [38].
[205] *Democratic Republic of the Congo v Belgium (Arrest Warrant of 11 April 2000)* [2002] ICJ [59-61]
[206] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95, recital 4.
[207] Ibid, art. 31 (1)
[208] Ibid, art. 42. See also: *Propend Finance Pty Ltd v Sing* [1997] 111 ILR 611 [635-636]
[209] *Basfar v Wong* [2022] UKSC 20 [34]
[210] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed, Oxford University Press, 2016), 251.

to immunity. Considering the relevant *travaux préparatoires,* the United States Court of Appeals for the Fourth Circuit held that the term 'commercial activity' did not have so broad a meaning to encompass ordinary service contracts, such as those governing the employment relationship between a domestic worker and diplomat, but rather only related to trade or business activity engaged in for personal profit.[211] In endorsing a narrow interpretation of the meaning of 'commercial activity',[212] the Court of Appeals also stressed that the "outcome reflects policy choices already made": the apparent inequity against the claimant was outweighed by concerns about potential reciprocal action being taken against American diplomats abroad.[213]

How, then, can the issue of diplomatic immunity be reconciled with universal commitments to fight against human trafficking, and modern slavery more generally?[214] This was the question that confronted the Supreme Court of the United Kingdom in *Reyes v Al-Malki and another*. In *Reyes,* the Court did not give a binding decision on whether the employment of a domestic worker in alleged conditions of human trafficking amounted to the exercise of a 'commercial activity' within the meaning of Article 31(1)(c) but indicated that it saw substance in the argument.

First, as observed by Lord Sumption, a diplomatic agent's "functions as a member of the mission" in Article 39(2) VCDR, on which *Reyes* was decided, are the same as his "official functions" in Article 31(1)(c): functions, whether official or incidental, performed for or on behalf of a sending state.[215] Moreover, in *obiter* remarks endorsed by Lord Clarke and Lady Hale, Lord Wilson expressed concern over Lord Sumption's minority view that the employment of a domestic servant on exploitative terms was not a 'commercial activity' under Article 31(1)(c). Thus, Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 ('Treaties Convention'), requiring the interpretation of treaty provisions to account for any relevant rules of international law applicable in the relations between parties, could give rise to the inclusion of modern slavery under the 'commercial activity' exception to diplomatic immunity. Although noting that diversion from *Tabion* and subsequent jurisprudence required a strong rationale, Lord Wilson warned that a "legally respectable solution" by the Court could "favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude here in our capital city".[216]

[211] *Tabion v Mufti* 73 F 3d 535 (4th Cir, 1996) [8]
[212] The decision in *Tabion v Mufti* has consistently been followed in the United States by courts in other circuits on materially similar facts. For a comprehensive list of post-*Tabion* jurisprudence, see: *Reyes v Al-Malki and another* [2017] UKSC 61 [24].
[213] *Tabion v Mufti* 73 F 3d 535 (4th Cir, 1996) [15-16]
[214] See, for example: *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 171 ('Palermo Protocol'); *Council of Europe Convention on Action against Trafficking in Human Beings*, ETS 197; *Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development,* U.N. Doc A/RES/71/313, Target 8.7.
[215] *Reyes v Al-Malki and another* [2017] UKSC 61 [20]
[216] Ibid, [68]

4. Arguments

The appellant in *Basfar* submitted that 'trafficking in persons', as defined under international law, constituted a commercial activity. Since her claim related to her trafficking by the respondent, rather than her ordinary employment, it consequently fell within the ambit of the Article 31(1)(c) exception. The appellant's recruitment in Saudi Arabia and subsequent exploitation at the respondent's residence in the United Kingdom by means of coercion and abuse of power, or of her position of vulnerability, amounted to "harbouring" her within the meaning of the Palermo Protocol definition of trafficking until her escape.[217] Moreover, even if the alleged facts did not come within the definition of human trafficking, her claim could properly be characterised as relating to forced labour and/or domestic servitude.

Adopting the reasoning of Lord Sumption in *Reyes,* the respondent submitted that the employment of a domestic servant at a diplomat's private residence did not constitute the exercise of a commercial activity under Article 31(1)(c), whether the domestic servant was a victim of human trafficking. *Tabion* and subsequent jurisprudence in the United States were persuasive to the extent that the courts rejected cases raising the Article 31(1)(c) exception on similar facts to those alleged by the appellant. The relevant *travaux préparatoires* indicated that the phrase 'professional and commercial activity' in Article 31(1)(c) and Article 42 had the same meaning. Thus, it was argued, employment relationships were precluded from giving rise to an exception to immunity since they neither provided personal profit to a diplomatic agent, nor fell outside the scope of a diplomat's official functions. The appellant's claims were also, in any case, not actions relating to human trafficking, and therefore did not give effect to Article 31(1)(c).

5. The Supreme Court Judgement

The Supreme Court allowed the appeal and reinstated the judgement of the Employment Tribunal, refusing to strike-out the claim. It held that the employment of a domestic worker by a serving diplomat in circumstances which constitute modern slavery was a 'commercial activity' and therefore within the ambit of Article 31(1)(c).

All members of the Supreme Court agreed that the ordinary employment of a domestic worker by a diplomat did not amount to the exercise of a commercial activity under Article 31(1) (c). However, the majority held that there was a "material and qualitative difference" between the exploitation of a domestic worker in conditions of modern slavery and an ordinary employment relationship incidental to the daily life of a diplomat.[218] The respondent exerted a high degree of control over the appellant and her labour: placing her in social and physical isolation; subjecting her to psychological abuse; withholding her payments; and restricting her access to the outside world. Moreover, the respondent exploited his high degree of control over the appellant for personal profit, enjoying her services for close to two years at a fraction of her contractual entitlement initially and subsequently for no pay at all. This amounted to a "deliberate and continuing course of conduct by which that benefit was gained", and in the majority's view, "was properly characterised as the exercise of a commercial activity".[219]

[217] *Basfar v Wong* [2022] UKSC 20 [85] and [89]
[218] Ibid, [43]
[219] Ibid, [52]

Consequently, the majority rejected the respondent's submission that there was no normative distinction between the ordinary employment of a domestic worker by a diplomat and the exploitation of a worker in conditions of modern slavery. Such conduct was an "abuse" of a diplomat's presence and fell outside the scope of ordinary contractual relationships incidental to the daily life of diplomats and their families, which immunity seeks to protect from suit.[220]

The majority observed that their conclusion did not depend upon which manifestation of modern slavery (e.g., slavery, forced labour, domestic servitude) may best have described the appellant's treatment. Although the Court observed that the assumed facts of the case were a "paradigm example of domestic servitude",[221] the majority did not resolve the issue of whether the appellant's treatment amounted to human trafficking, as defined under international law. The case that the exploitation of the appellant's labour amounted to a commercial activity, observed the majority, would have been just as cogent if she had already been resident in the United Kingdom and became an employee of the respondent freely prior to her maltreatment. Conversely, if the respondent had trafficked the appellant into the United Kingdom using deception or coercion for the purpose of exploitation but subsequently employed her on a voluntary basis, a claim of breach of employment contract would seemingly not give rise to an Article 31(1)(c) exception.

In their dissenting judgement, the minority noted that it sympathised with the plight of trafficked domestic workers. However, it disagreed with the contention that the conditions in which a person is employed or how they came to be employed could convert employment into an activity that falls within the 'commercial activity' exception to diplomatic immunity.

The minority advanced that international instruments on human trafficking and modern slavery did not expand the meaning of 'commercial activity' and therefore the scope of Article 31(1)(c). Such an expansion would risk seriously undermining the scope of diplomatic immunity and risk exposing diplomats from the United Kingdom based abroad to retaliatory measures. Thus, although the treatment of the appellant was of an "appalling nature", it did not amount to a commercial activity within the meaning of Article 31(1)(c).[222]

6. Comment

The Supreme Court have provided much needed clarification as to the extent to which diplomats enjoy immunity from civil jurisdiction in employment disputes. In recognising the "material and qualitative difference" between ordinary employment relationships and the employment of individuals in conditions of modern slavery, the majority have largely resolved the question left open in *Reyes* and distinguished its decision in *Basfar* from the *Tabion* line of jurisprudence. To that extent, the Court have struck an important balance between ensuring the coherence of diplomatic immunity as a cardinal principle of customary international law and securing the legal accountability of perpetrators of modern slavery. This is in line with the objectives set out in recital 4 of the VCDR, the principles of treaty interpretation in Article 31(3)(c) of the Treaties Convention, as well as with emerging

[220] Ibid, [57]
[221] Ibid, [100]
[222] Ibid, [153]

recognition from international courts of the inherent commerciality of trafficking in persons.[223]

Whilst the decision in *Basfar* appears to depart from orthodox approaches to the applicability of employment claims to the Article 31(1)(c) exception, neither *Tabion* nor subsequent cases squarely raised the question of whether the conditions of a domestic worker's employment converted an ordinary employment relationship into the exercise of a commercial activity. The concluding emphasis on Lord Wilson's remarks in *Reyes* surrounding the proliferation of serious cases of domestic servitude in the United Kingdom, particularly in the homes of diplomats, further suggests that a strong policy rationale underlies the decision in *Basfar*. On this point, legal scholar Dr Jason Haynes criticises the decision for not going "nearly far enough to protect and liberate these invisible workers, who may be paid for their work, but whose circumstances are abusive, though not of a sufficient degree to be considered 'modern slavery.'"[224] Haynes' criticisms rest on his contention that "several other victims of exploitation" are theoretically barred from satisfying the "narrow criteria" set by the majority regarding the involuntariness and profitability conditions.[225] Indeed, the Supreme Court notably left open the question of whether an action grounded in human trafficking alone would engage the Article 31(1)(c) exception and declined to resolve the issue of whether the appellant's treatment amounted to such activity. Such an omission appears to corroborate the suggestion that *Basfar* is, for all its liberating potential, "not a panacea".[226]

Nonetheless, the absence of any binding domestic precedent on the interface of the 'commercial activity' exception to immunity and the issue of modern slavery suggests that this gap – as well as the narrow parameters of the decision – accords with a more pragmatic approach to the incrementalistic development of the common law. The Supreme Court have previously gestured towards the need to secure effective remedies for victims of modern slavery in *Taiwo v Olaigbe and another*, calling upon Parliament directly to consider amending the Modern Slavery Act 2015 to include an enforceable civil remedy as "recompense for the ill-treatment meted out to workers such as these".[227] It is therefore perhaps premature to characterise *Basfar* as being severely limited, given that the scope of the decision is still likely to be tested in subsequent litigation.

Regarding the legal position on exceptions to diplomatic immunity post-*Basfar*, it remains to be seen whether and to what extent the decision will be relied on as precedent in other jurisdictions. Whilst it is a commonplace to note that reciprocity forms "a constant and effective sanction for the observance of nearly all the rules of the [VCDR]", the majority in the Supreme Court saw no evidence to support the existence of a risk of reciprocal action being taken against diplomatic agents representing the United Kingdom because of its decision.[228] Indeed, the majority observed that if the UK Government had considered that such a risk existed, it would have intervened in the present case and addressed this issue. However, concerns about reciprocity may nonetheless facilitate a degree of judicial hesitancy amongst courts in different jurisdictions grappling with the same issues raised in *Basfar*. As observed by Lord Sumption in *Reyes:*

[223] See, for example, the European Court of Human Rights' analysis in *Ranstev v Cyprus and Russia* App no. 25965/04 (ECtHR, 10 May 2010) [280].
[224] Jason Haynes, 'Revisiting the relationship between human trafficking and diplomatic immunity' [2023] *LQR* 139, 209.
[225] Ibid, 208
[226] Ibid, 208
[227] *Taiwo v Olaigbe and another* [2016] UKSC 31 [34]
[228] Denza, 2

It is true that the Appeals Court's conclusion [in *Tabion*] on the principal point was influenced by the State Department's statement of interest and that the constitutional division of powers in the United States requires the courts to show "substantial deference" to the executive's views on such matters.[229]

This reluctance to disrupt such a long-established principle of customary international law is perhaps one of the many reasons why Joseph Dyke and James McGlaughlin suggest that the majority decision in *Basfar* represents "a dilution of diplomatic immunity" and sits at odds with English courts' previous approach.[230] Indeed, a series of recent High Court decisions suggests that *Basfar* may not assuage the conservative approach taken by lower courts towards efforts to curb reliance on diplomatic immunity for private acts in different contexts. In *London Borough of Barnet v AG and others*, the High Court declined to make a declaration of incompatibility between s.2 of the Diplomatic Privileges Act 1964 and Article 3 of the European Convention of Human Rights ('ECHR'), determining that the ECHR did not give rise to any exception to rules of diplomatic immunity in relation to child protection.[231] Similarly, in *Fernando v Sathananthan*, the Court held that threats by a diplomat to protestors were performed in the exercise of his functions in the capacity of a diplomat entitled to residual immunity.[232] In *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs,* the High Court dismissed a challenge to the FCO's determination that a diplomat enjoyed immunity from criminal jurisdiction following their involvement in a fatal road traffic collision.[233] Whilst concerns about the maltreatment of migrant domestic workers in diplomatic households may have informed the Supreme Court's approach in *Basfar*, there is little explanation as to why the lower courts struggled to find a policy rationale for creating an exception to immunity in the previous instances. It will therefore fall to the Court of Appeal or Supreme Court to rectify this, whether that be by reconsidering the legal position adopted in previous cases, or – as in the case of *Taiwo* – by inviting Parliament to exercise its legislative competences.[234]

[229] *Reyes v Al-Malki and another* [2017] UKSC 61 [25]
[230] Joseph Dyke and James McGlaughlin, 'Diluting Diplomatic Immunity' [2023] *NLJ* 8016, 11-12.
[231] *London Borough of Barnet v AG and others* [2021] EWHC 1253 (Fam) [122]
[232] *Fernando v Sathananthan* [2021] EWHC 652 (Admin) [39]
[233] *R (Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3185 (Admin) [147]
[234] Recommendations that overseas domestic workers in diplomatic households should be employed by the foreign state, under the reasonable understanding that they do not enjoy civil immunity, rather than by individual diplomats have yet to be implemented by the UK Government. See: Home Office and UK Visas and Immigration, *Independent Review of the Overseas Domestic Workers Visa* (Final Report, 6.11.15), para 165.1; Reyes *v Al-Malki and another* [2017] UKSC 61 [59]

'THE INTERNET IS NOT A PLACE WHERE THE LAW DOES NOT APPLY'[235]: EXTENDING FIDUCIARY DUTIES TO BITCOIN NETWORKS?

Tulip Trading Ltd v Vander Laan & Ors: A Case Analysis

Hazel Bannerman

1. Introduction

In February 2023, the Court of Appeal granted an appeal against a High Court decision to set aside service of proceedings outside of jurisdiction.[2362] The High Court had ruled that Tulip Trading Ltd (a cryptoasset-owning company) had not raised a serious issue to be tried in its assertions that the developers of crypto-networks owe fiduciary and tortious duties to the users of those networks.[237]

In granting the appeal, the Court acknowledged that it could be possible for software developers of cryptoasset networks to owe fiduciary duties to their users. What those fiduciary duties will entail will not be confirmed until the case goes to trial, however Birss LJ noted that they may include a duty to introduce code to return cryptoassets to their owners in 'certain circumstances'.[238] This development comes at a time when the nature and regulation of cryptoassets is being explored in both statute and at common law.[239]

This commentary provides an outline of the case at first and second instance, and then concludes with some analysis of its implications. Like the Justices in the case at hand, this essay will use 'cryptoasset' and 'bitcoin' interchangeably.[240]

2. 'Crypto' Explained

To understand the *ratio* and the implications that fiduciary duties might have for cryptoasset networks, it is imperative to understand cryptoassets and the way networks operate. Birss LJ has provided a clear outline of the core cryptoasset structures in paragraphs 16 to 29 of the judgment, which is summarised below.[241] Bitcoin is a version of electronic cash requiring no third-party financial institutions, transactions are instead recorded in a public database; 'blockchain'.[242] The assets are held at digital addresses, with the amount public but the identity of the owner hidden. Each address has a public key (identifying the address) and a private key (allowing the owner to 'cryptographically sign a record of the transaction moving bitcoin'); bitcoin therefore cannot be moved from an address without the corresponding private

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[235] Tulip Trading Ltd v Van der Laan & others [2023] EWCA Civ 83, [83] ("Tulip 2")
[236] Tulip 2
[237] Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch) ("Tulip 1")
[238] Tulip 2, [86]
[239] See, for instance; Law Commission, Digital Assets: Consultation Paper (Law Com No 256, 2022); HM Tresury, Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence (2023); AA V Persons Unknown [2019] EWHC 3556 Comm; Ion Science Ltd & Duncan John v Persons Unknown, Binance Holdings Ltd, Payment Ventures Ltd (unreported, 21st December 2020)
[240] Tulip 2, [20]
[241] Ibid., [16] – [29]
[242] Ibid., [19] – [21]

key.[243]

The blockchain is held across networks: the first being BSV (a defendant in this case) and the subsequent networks being copies of the previous' blockchain but with different software applied after the copy.[244] Software supports these networks and the code for the software is public, like the transactions.[245] This means that any user (or 'miner') can propose changes to it, however it can only be 'implemented by someone with the relevant electronic password', i.e. a developer.[246] The way changes are accepted and implemented is disputed between Tulip and the Defendants. The dispute centres around whether software development follows a 'decentralised model', whereby the 'Developers' of the networks play just a small part of a fluctuating body of users suggesting and contributing to updates.[247] If decentralised, fiduciary duties would be difficult to impose on any discernible group. This dispute is explored in both judgments as this work will make clear.

3. Factual Background

Dr Craig Wright is the CEO of Tulip Trading Ltd [henceforth, Tulip], a Seychelles registered company.[248] Following an alleged hack of computers in Dr Wright's home, encrypted files containing Tulip's private keys to (what they claim are) their cryptoassets were stolen. Tulip are unaware of the identity of the hackers and are unable to access or move their cryptoassets without the private keys. Dr Wright argued that the assets will not have been moved, since, although the hackers have the encrypted files, they will be unable to break the encryption and access the keys inside.[249]

The cryptoassets in question are held across four networks (the Defendants/Respondents), none of which are in this jurisdiction. The networks are: (i) The Bitcoin Satoshi Vision network [BSV] (the First Defendant); (ii) The Bitcoin Core network [BTC Network] (the Second to Thirteenth Defendants); (iii) The Bitcoin Cash network [BCH] (the Fourteenth Defendant); and (iv) The Bitcoin Cash ABC network [BCH ABC] (the Fifteenth and Sixteenth Defendants).[25016] At first instance, Dr Wright and Tulip alleged that the network developers could and should have created a patch for the computer code, which would transfer the assets to a new address, or which could create a replacement private key for the existing addresses, allowing Tulip to transfer their cryptoassets.[251] Tulip contended that the developers of the relevant networks owe them a positive fiduciary duty to do so.

In May 2021, Tulip obtained an order from Deputy Master Nurse to serve claims on all sixteen defendants. The First Defendant did not challenge service; the Thirteenth Defendant did not respond; however, all remaining defendants submitted applications to challenge service. The Fourteenth Defendant, served later than the others, challenged the order in November 2022 and this judgment is awaiting appeal by Tulip. The Second to Twelfth and Fifteenth to Sixteenth Defendants however, challenged service in March 2022 in front of Falk J. It is this judgment that was appealed in February of this year.

[243] Ibid., [22]
[244] Ibid.,[26]
[245] Ibid.,[28]
[246] Ibid.,[29]
[247] Tulip 1, [34]
[248] Ibid., [2]
[249] Tulip 2, [37]
[250] Tulip 1, [4]
[251] Tulip 2, [38]

4. High Court Judgment

The High Court was concerned principally with procedural arguments. It was required to consider: a merits test on Tulip's claim; whether the claim fell within the gateways for service out of jurisdiction; and whether England and Wales was the appropriate forum for the case.[252] Falk J ruled in Tulip's favour on the latter two matters.

However, on the merits test, Falk J concluded that Tulip had 'not established a serious issue to be tried'.[253] The Justice's reasoning was that even if Tulip was able to establish the facts on which it relied, they had no tangible likelihood of establishing the fiduciary duty they claimed the Defendant developers owed them. It was asserted that: an imbalance of power arising from Tulip's entrusting its digital property to the Defendant developers was not 'a sufficient condition for the existence' of a duty; the developers could introduce software to serve their own purposes rather than another parties; and the positive duties Tulip alleged went far beyond those recognised in prior cases.[254] Just because the developers had the ability to make the changes Tulip requested, it did not mean the developers had a wider obligation to make such changes again in the future – the duty was very fact specific.

There was contention on the 'defining characteristic of a fiduciary relationship', which was set out in *Bristol and West Building Society v Mothew [1998] Ch 1* at 18A-C (paragraphs cited in both Tulip 1 and 2) as 'single-minded loyalty' owed to the principal by the fiduciary.[255] It was accepted, both by Tulip and by Falk J that any fiduciary duty owed to Tulip would be owed to other users of the networks.[256] Falk J was concerned that the remedy Tulip sought would be inconsistent with this duty to other users and, when considering the efficacy of remedies, accepted the Defendants' view of a decentralised system for updating software, raising fears that users might refuse to install the relevant software update leading to a potential fork in the network.[257]

Two further issues were raised in this judgment: a proposed amendment to Tulip's case; and policy considerations. The amendment was rejected due to a failure to submit an amended particulars of claim (a decision endorsed by Birss LJ) but later included in The Court of Appeal trial.[258] On policy, Falk J stated that the case raised important issues, however this in itself was not enough to warrant its going to trial. The court referenced the ongoing work of the Law Commission in reforming this area of law and considered that development of the law in this area 'could be considered by the Law Commission and, if appropriate, by Parliament'.[259]

[252] Ibid., [4]
[253] Tulip 1, [171]
[254] Tulip 2, [51] – [54]
[255] Ibid., [55]
[256] Tulip 1, [78]
[257] Ibid., [78]
[258] Tulip 2, [65]
[259] Tulip 1, [135]; see also: Law Commission, *Digital Assets: Consultation Paper* (Law Com No 256, 2022)

5. Grounds for Appeal:

Tulip appealed this judgment on six grounds:

- '**Ground 1:** this is a developing, complex and uncertain area of law and therefore the point ought to go to trial;
- **Ground 2:** the conclusions are in error because they are based on findings impermissibly assumed against Tulip […];
- **Ground 3:** Taking into account the Law Commission project was an error;
- **Ground 4:** The judge was wrong to hold that Tulip has no real prospect of establishing that the claimed fiduciary duties exist';[260]
- **Ground 5:** considered the tortious duties the Defendants might owe, this was not assessed in Birss LJ's judgment, since it would follow from any success in proving the existence of fiduciary duties;
- **Ground 6:** the Amended Particulars of Claim should be included and considered within the analysis of the other grounds.

The Amended Particulars of Claim put forward that the Defendants were not yet in breach of their duties; it was an anticipated breach pending a court declaration that Tulip was the rightful owner of the bitcoin (so it could not be disputed by other users).[261] The Defendants had made clear that they would not patch the software as Tulip wanted regardless, so would come to be in breach. This amendment was accepted and applied by the Court of Appeal.[262]

The Defendant Respondents advanced two grounds: (i) that if the judgment did assume facts against Tulip, even without these facts Tulip would fail; and (ii) that regardless of Tulip's amended case, no serious issue was raised.[263]

6. Court of Appeal Judgment and Implications

The Court of Appeal found that Tulip had raised a serious issue to be tried and there was a prospect of Tulip establishing the fiduciary duties claimed. The significance of this was acknowledged in Lord Justice Birss' analysis.[264] Tulip's case is far removed from previous cases on fiduciary duties and, as Birss LJ noted, although the categories of fiduciary duties are not closed, it is only under exceptional circumstances that they are extended.[265] However, while the common law must evolve 'incrementally', it does not mean that nothing can be done when a novel case surfaces.[266] This case therefore explored a developing area of law, while also encouraging the common law to keep pace with the modern world and to not retreat for fear of overextending 'incremental development'.[267]

[260] Tulip 2, [67]
[261] Ibid., [61]
[262] Ibid., [65]
[263] Ibid., [69]
[264] Ibid., [86]
[265] Ibid., [71]
[266] Ibid., [71]
[267] Ibid., [71]

In determining the potential for existence of any fiduciary duty that the Defendants might owe Tulip, Birss LJ cited the test laid out by Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1.[268] *Mothew* defines the characteristics of a fiduciary relationship as one 'of trust and confidence' and 'single-minded loyalty'.[269] Applying this, the Court examined: the level of control and authority the Developers exercised on behalf of another; the concept of undivided loyalty; and the ways in which a duty might manifest.

Of particular significance was the issue of control. Tulip advised that the Defendant Developers have significant control over their [Tulip's] assets, far greater control than say if the assets were money in a bank, where the Board and developers are subject to regulations.[270] The Defendants, however, argued this was not reflective of the way Bitcoin networks function, particularly due to the users' ability to identify software problems and then accept or reject software updates.[271] This question of decentralisation of control, on which the Defendants' view was accepted as fact in the first instance, cannot be resolved upon appeal – it would require disputed facts to be assumed in one party's favour and so must await substantive consideration at trial. However, Birss LJ indicated that Tulip's case on the lack of decentralisation in Bitcoin networks is arguable, thus rendering fiduciary duties imposable on a recognisable group – the developers.[272]

The court found evidence of an issue to be tried in the example used of a software bug. While any third party may identify a problem in software, it is the developers who decide whether it should be fixed, and the method of doing so.[273] They also prevent any other party from introducing a fix.[274] This exercise of authority and 'discretionary decision-making' is common to fiduciary duties.[275]

Decisions taken by the developers may not satisfy all their users all the time, thus we come to the question of competing interests and undivided loyalty. Birss LJ drew analogy with trustees, who may make decisions which benefit some beneficiaries but are unpalatable to others.[276] In so doing, the trustees do not undermine their roles as fiduciaries.[277] The developers are deciding and the users, whether they like the decision or not, must trust that they act in good faith when doing so.[278]

Analysis then turned to how fiduciary duties might be exercised. Birss LJ opined that there might be both a negative duty for developers not to act in their own self-interest, and a positive duty to fix bugs as and when they arise.[279] Tulip seeks to extend the latter to transferring cryptoassets without the relevant private key once a court has established true ownership. Here, Birss LJ rejected the earlier decision that this renders Tulip's case unarguable by undermining a 'fundamental feature of the networks' due to the entrustment of decision-making to developers by the users as a class.[280] This case therefore may not only lead to a development within the law as it stands, but also have practical ramifications in the way cryptoassets can be transferred if the trial judge is convinced by such an argument.

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[268] Ibid., [42]
[269] Bristol and West Building Society v Mothew [1998] Ch 1, [18A-C]
[270] Ibid., [72]
[271] Ibid., [72]
[272] Ibid., [91]
[273] Ibid., [73]
[274] Ibid., [78]
[275] Ibid., [74]
[276] Ibid., [80]
[277] Ibid., [80]
[278] Ibid., [80]
[279] Ibid., [78]
[280] Ibid., [84]

The legal implications of this case are sizeable. As the law stands, there are certain relationships that are 'well-settled as fiduciary relationships' (for instance trustee-beneficiary; director-company; solicitor-client).[281] Cases falling beyond these fixed categories rely on Millet LJ's test from *Mothew*[282] and the subsequent case law to expand upon it.[283] In determining Tulip raise a serious issue to be tried, Lord Justices Lewison, Popplewell, and Birss have opened the door to a possible extension of the settled categories of fiduciaries to include crypto-network software developers. Although the road may not be 'simple or easy' there is evidently an arguable case against Bitcoin networks being decentralised and for their developers being fiduciaries.[284] Furthermore, this case coincides with the Law Commission's ongoing report on digital assets and HM Treasury's future financial services regulatory regime for cryptoassets, which finished its consultation period on 30th April 2023.[285] There is potential for statute and common law to change in tandem with respect to cryptoassets in the near future.

What such fiduciary duties will entail in practice is not yet certain. Finding software developers owe fiduciary duties to the users of their networks will leave room for users to pursue claims against developers and potentially recover lost assets. However, Tulip Trading Ltd make for a special case. They had roughly $4 billion held across the Defendants' networks and it has taken two years (since Tulip were first granted permission to serve the defendants outside the jurisdiction) just to reach this stage. The trial can also only go ahead due to Dr Craig Wright's residency in this jurisdiction; the property being located here; and there being 'no other jurisdiction with which the dispute had a closer link'.[286] This may not always be the case.

Furthermore, claimants will have to prove that they are the true owners of the relevant cryptoassets, or else developers cannot be certain of to whom they owe fiduciary duties. In light of the specific jurisdictional requirements and the funding required, it may be that while the option is there, pursuing claims against developers is only available to a limited number of individuals and companies.

Practical implications will not be limited to users. Developers will need to adjust to a potential classification as a fiduciary. Although speculation, one likely consequence may be a rise in indemnity insurance, however such duties may also mean that developers re-evaluate the way networks are run to minimise their liability. This could manifest as a shift towards greater decentralisation, with changes to networks being made anonymously.

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281 *Snell's Equity* (Sweet & Maxwell, 34th Ed. 2002), 7-004
282 See p. 5 of this text.
283 For a summary of some of this case law see Tulip 2 [41] – [49]
284 Tulip 2, [86]
285 Law Commission, *Digital Assets: Consultation Paper* (Law Com No 256, 2022); HM Treasury, *Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence* (2023)
286 Tulip 2, [7]

7. Conclusion

This text has summarised the factual matrix of Tulip Trading Ltd v Van der Laan & others and explored the High Court's and the Court of Appeal's answers to whether Tulip raised a serious issue to be tried. It has then considered the legal and practical ramifications.

In permitting the case to proceed to trial, the Court of Appeal has acknowledged that Tulip's case has the potential to extend fiduciary duties and explore decentralisation of cryptoasset networks. The outcome of the eventual trial, alongside the Law Commission's upcoming report[287], should be closely monitored by anyone with an interest in this field. However, it should be noted that, thanks to jurisdictional issues in bringing claims against crypto-network developers (which would warrant a far longer piece), these developments may not lead to an influx in cases being brought.

[287] The Law Commission's report and recommendations on Digital Assets is currently pending, following the conclusion of the consultation period on 30th April 2023 < www.gov.uk/government/consultations/future-financial-services-regulatory-regime-for-cryptoassets >

HOW THE SHOREHAM AIRSHOW INQUEST PUT RECENT DEVELOPMENTS IN CORONIAL LAW INTO PRACTICE

Case Comment on the Inquests into the Shoreham Airshow Disaster, West Sussex Coroner's Court, November–December 2022.

Ben Weisz

1. Introduction

Seven years after a plane crash killed eleven men at the Shoreham Airshow, West Sussex's Senior Coroner concluded they had been unlawfully killed. However, the pilot had previously been acquitted of gross negligence manslaughter. This was possible because the Supreme Court recently ruled that the standard of proof for inquest conclusions is always the civil standard – even for unlawful killing. Yet while that Supreme Court ruling loomed large at the inquest, it was another recent development in coronial law that proved more complex in practice. Two High Court decisions enforced a rule that Coroners should not normally 'reinvestigate' matters considered by accident investigators. This limited the evidence and lines of inquiry available at *Shoreham*. This review will examine those challenges, explaining how the Coroner decided it was still safe and fair to reach the conclusion she did. It will also consider how the distinction between 'reinvestigation' and novel inquiry can prove tricky to navigate in practice.

2. Facts

On 22 August 2015, a vintage Hawker Hunter jet crashed onto a busy dual carriageway while performing a looping manoeuvre at the Shoreham Airshow. Eleven men were killed. There were thirteen injured survivors, including the pilot, Andrew Hill. Even prior to the Covid-19 pandemic, the inquest was subject to various delays. The families first faced several other legal and investigatory processes.

2.1. AAIB Investigation

First, the Air Accident Investigation Branch (AAIB) investigated the crash.[288] In 2017, it concluded that the crash occurred because the pilot began the loop with insufficient speed and applied insufficient engine thrust, causing the jet to fail to reach sufficient height to complete the manoeuvre safely. It also concluded the pilot missed an opportunity to perform an escape manoeuvre at the apex of the loop.[289] Several contributory factors were also identified, including a lack of training on escape manoeuvres. The AAIB found no evidence of any cognitive impairment that might have caused the pilot to fly as he did. [290]

[288] As it was required to under The Civil Aviation (Investigation of Air Accidents and Incidents) Regulations SI 2018/321; Regulation (EU) 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC Text with EEA relevance [2011] OJ L 264.
[289] Air Accident Investigations Branch, *Report on the accident to Hawker Hunter T7, G-BXFI near Shoreham Airport 22 August 2015*, Air Accident Report 1/2017, (AAIB 2017) p203.
[290] Ibid. p203 section (c)

2.2. Criminal Trial

In 2019, Mr Hill was acquitted of eleven counts of gross negligence manslaughter. In his defence, counsel for Mr Hill argued that he might have experienced cognitive impairment in the cockpit.[291] In the aftermath of Mr Hill's acquittal, the AAIB reviewed that possibility, concluding it was improbable.[292] By the time the inquests began in 2022, two key developments in coronial law had changed the legal landscape, as detailed below.

3. *Maughan* and the Civil Standard

Coroners must investigate deaths where the cause is unknown; deaths which occurred in state custody; or where the deceased died a violent or unnatural death, as in the present case.[293] Coroners must establish how, where, and when the deceased came by their death.[294] Inquests do not apportion blame or determine criminal or civil liability.[295] In answering these questions using the prescribed form,[296] the coroner may record one of nine 'short form' conclusions. Additionally, or instead, the coroner may record a narrative conclusion. Prior to 2020, it had been thought that the standard of proof for these conclusions was the civil standard for all but two: suicide and unlawful killing, for which the higher criminal standard applied. The Coroners' regulations said as much,[297] as did the Chief Coroner's advice.[298] However, the Supreme Court has recently overruled those regulations.

In *R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire,*[299] the Supreme Court held that the civil standard would apply to all conclusions, short or narrative, including suicide and unlawful killing. Lady Arden suggested that a civil standard could enhance the recording of suicides,[300] and better reflected modern attitudes.[301] She suggested that this was more appropriate to the role of inquests, which are about investigating deaths, not administering criminal justice.[302] She held that to continue to require the criminal standard of proof for unlawful killing might leave families with the impression that "the system has conspired to prevent the truth from being available to them".[303] However, Lord Kerr, dissenting, felt that short form conclusions of suicide or unlawful killing were still solemn pronouncements with "clear resonances beyond those of other short form conclusions."[304]

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[291] 'Shoreham Airshow crash pilot acquitted over deaths', *BBC News*, 8 March 2019 < www.bbc.co.uk/news/uk-england-47495885 > accessed 10 Feb 2023.
[292] AAIB Supplement: review of G-forces in Shoreham accident, (AAIB 2019) < https://assets.publishing.service.gov.uk/media/5df89b7ded915d0931d74770/Hawker_Hunter_T7_G-BXFI_Supplement_02-20.pdf > accessed 10 Feb 2023.
[293] Coroners and Justice Act 2009 (CJA) s1(2).
[294] Ibid s 5(1), s10(1).
[295] Ibid S10(2).
[296] 'Form 2' as prescribed by the Coroners (Inquests) Rules 2013 (SI 2013/1616) made under the CJA 2009.
[297] Ibid Schedule, explanatory note (iii).
[298] Chief Coroner's Law Sheet No. 1, as revised 18 Jan 2016 < www.judiciary.uk/wp-content/uploads/2020/08/law-sheets-no-1-unlawful-killing-1.pdf > accessed 9 Feb 2023.
[299] [2020] UKSC 46
[300] Ibid at 68.
[301] Ibid at 70.
[302] Ibid at 81.
[303] Ibid at 93.
[304] Ibid at 115.

3.1. Implications for Shoreham

A conclusion of unlawful killing would be returned if the Coroner concluded it was more likely than not that the *Shoreham* victims had died as a result of gross negligence manslaughter. It did not matter that a jury had already acquitted the pilot. While coronial rulings may not contradict the outcome of criminal proceedings in respect of the same death,[305] there is no contradicting an acquittal. This is because an acquittal does not depend on the proof of any affirmative proposition.[306] It is perfectly consistent to hold a proposition is more likely than not to be true, but also hold that one cannot be sure about it beyond reasonable doubt. The coroner could conclude the victims had been unlawfully killed without contradicting the jury.[307] The judgment in *Maughan* certainly livened the parties to that possibility.

4. *Norfolk* and 'Going Behind' the AAIB

An additional, perhaps trickier, legal problem has been posed by another recent development in coronial law: since 2016, Coroners have been significantly restricted from covering the same ground as accident investigators.

In *R (on the application of the Secretary of State) v Her Majesty's Senior Coroner for Norfolk,*[308] a Coroner had fined the Chief Inspector of the AAIB for not disclosing cockpit footage from a crashed helicopter. The High Court found the Coroner was wrong to do so, since such footage is normally only disclosed by permission of the Court.[309]

However, Singh J went further than overturning the fine, holding that:

> "There is no public interest in having unnecessary duplication of investigations or inquiries. The AAIB fulfils an important function in that it is an independent body investigating matters which are within its expertise. I can see no good reason why Parliament should have intended to enact a legislative scheme which would have the effect of requiring or permitting the Coroner to go over the same ground again when she is not an expert in the field."[310]

Lord Thomas CJ then described what is now dubbed the '*Norfolk* test': Coroners may not reinvestigate matters covered by accident investigators "in the absence of credible evidence that the investigation into an accident is incomplete, flawed or deficient."[311]

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[305] CJA 2009, Schedule 1 p8(5)
[306] *Skelton v Senior Coroner for West Sussex* [2020] EWHC 2813 at 116.
[307] *Hunter v CC West Midlands* [1981] AC 529 at 543B.
[308] [2016] EWHC 2279 (Admin).
[309] At the time of *Norfolk,* due to s18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996, SI 1996/2798. It has since been superseded by s25 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018, SI 2018/321, which performs much the same function.
[310] *Norfolk* at [49].
[311] Ibid. at [56].

5. *Sussex* and the Lack of Access to Protected Material

The *Norfolk* test was implemented in *HM Senior Coroner for West Sussex v Chief Constable of Sussex.*[312] The Coroner applied to the High Court for access to protected material for use at the *Shoreham* inquest. In this case: cockpit footage from the pilot's GoPro camera; expert reports produced at the criminal trial; and transcripts of evidence.[313] She wanted to consider a paper, written by a friend of the pilot, that suggested he might have suffered cognitive impairment in the cockpit by a mechanism not previously considered by the AAIB. The protected material would help her assess whether that paper revealed a flaw in the AAIB investigation. The court held that the paper did not amount to credible evidence that the AAIB investigation had been flawed. Its author was not an expert in the field, and his reasons for writing the paper were not clear. The *Norfolk* test was not met, and the Coroner was denied access to the footage and transcripts.

Yet the implications for the inquest were broader still. Since the *Norfolk* test was not met, the Coroner was not permitted to reinvestigate any of the AAIB's findings. Neither the Coroner nor any interested party could challenge those findings, call additional evidence on matters the AAIB had considered, or examine the AAIB's source material. Consequently, several planned areas of inquiry were removed – including the competency and actions of the pilot; the safety of the aircraft; and the extent to which the pilot suffered cognitive impairment.

The ruling in *Sussex* also meant that the pilot was not called to give evidence, since he could not tell the coroner anything which he had not already told the AAIB. These restrictions created several challenges for the long-awaited inquest.

6. Making a Safe and Fair Conclusion

To return a conclusion of unlawful killing, the Coroner would need to decide that, on the balance of probabilities, the victims' deaths resulted from gross negligence manslaughter.[314] This requires five elements:[315]

i. The pilot owed the victims a legal duty of care;
ii. The pilot breached that duty;
iii. There was a serious and obvious risk of death to any breach;
iv. The breach did in fact cause the victims' deaths;
v. The breach was gross - so "truly exceptionally bad" as to amount to a criminal act.[316]

(ii) and (v) proved the most controversial, raising three legal issues:

1. When assessing breach (ii) – would the restriction on going beyond the AAIB report allow for enough evidence to safely conclude the pilot breached his duty – particularly on the issue of cognitive impairment?

312 [2022] EWHC 215 (QB)
313 Ibid. at 11.
314 Manslaughter, murder, and infanticide are the only possible forms of unlawful killing since the decision of the High Court in *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin), at 70.
315 *R v Adomako* [1995] 1 AC 171.
316 *R v Misra; R v Srivastava* [2004] EWCA Crim 2375.

2. When assessing grossness (v) – from where could the Coroner adduce the standard of care, given the AAIB did not discuss that issue?
3. Give the restrictions imposed on the inquests, could such a conclusion be procedurally fair to the pilot?

Each legal issue is considered below:

1. Assessing the Breach & Evidence

In a submission to the pre-inquest review, counsel for Mr Hill asked the Coroner to rule out a conclusion of unlawful killing, on the grounds that the AAIB report could not provide sufficient evidence to safely reach that conclusion. He suggested there were 'known unknowns' – relevant material he was prevented from relying upon, relating to the AAIB's conclusions on cognitive impairment. The coroner rejected this application, ruling that it would be inappropriate to make any decisions on conclusions before hearing the evidence.

However, the underlying question would still need to be addressed: given the *Sussex* ruling prevented the Coroner from interrogating the AAIB report, or calling additional evidence on matters it had considered, how could there be sufficient evidence available to her to safely reach a conclusion of unlawful killing?

Coroners must not unduly exclude evidence relevant to the questions they must answer. Very recently, in *Leeson v HM Area Coroner for Manchester South,*[317] a judicial review succeeded because the coroner had unduly narrowed the scope of evidence to be considered. A woman had drowned in a swimming pool. Her husband had been acquitted of her murder. He had, however, taken out a large life insurance policy on his widow before she drowned, evidence which the coroner in that case had incorrectly ruled out of scope.

Shoreham can be distinguished from *Leeson,* however. In *Shoreham*, the Coroner did not decide to exclude evidence she might otherwise have considered. Instead, the High Court had placed certain evidence beyond her reach. Furthermore, although the Coroner was not able to interrogate that evidence herself, that did not mean the inquest had no access to it. Rather, the AAIB had interrogated the evidence on cognitive impairment, and the High Court bound the Coroner to accept the AAIB's conclusions.

After *Norfolk*, Coroners must generally accept the AAIB's conclusions on matters of fact.

2. Assessing Grossness

However, the AAIB's findings could not necessarily answer all the questions the Coroner needed to ask. In particular, the AAIB was silent on questions of law. To find that the pilot breached his duty, or grossly breached his duty, the Coroner would need to know what the standard of the reasonable fast jet pilot was. The AAIB report did not discuss that standard. Nor could the AAIB's representatives

[317] [2023] EWHC 62 (Admin).

assist in court.[318] As such, the standard of care would need to be adduced from elsewhere.

Counsel for Canfield Hunter, the aircraft's owners, submitted that since the AAIB was silent on duty, let alone breach, then such matters were simply unavailable to the Coroner because of the ruling in *Norfolk*. The Coroner rejected this position since it led to absurdity. It would mean that a coroner could never return a verdict of unlawful killing after any fatal accident involving an aircraft, even one flown by a (hypothetically) intoxicated pilot without a license. In fact, given that the AAIB had not considered duty, breach, or grossness at all, the victims' families and the CAA submitted that those issues were open to the Coroner to explore. The *Norfolk* prohibition was only a ban on reinvestigation. It was not a ban on investigating new matters which the AAIB had not considered.

It should be noted from the outset that this is not always a straightforward distinction and may need further clarification. For example, the Coroner closed down a line of questioning based on whether, as a flying instructor on the Hawker Hunter, Mr Hill ought to have known how to perform an escape manoeuvre. Should that questioning be permitted, as it explored something the AAIB had not considered (the fact that Mr Hill was an instructor)? Or was it, as the Coroner concluded, an attempt to bring new evidence to a matter the AAIB had already investigated (his lack of knowledge of escape manoeuvres)? This distinction – between re-investigating using fresh evidence; and investigating the previously un-investigated – will not always be easy to maintain.

Assuming the search for a standard of care fell on the right side of that distinction, where else might it be found? One submission was that, given the obvious danger posed by fast-jet flying, any serious error would be a gross breach of duty. However, this begged the question as to how the Coroner should distinguish "serious" errors from regular ones.[319] The Civil Aviation Authority submitted that existing legislation gave some guidance here. A gross breach is one that is so truly exceptionally bad as to be criminal.[320] The Air Navigation Order provides some guidance as it illustrates that Parliament had chosen to criminalise pilots of civil aircraft who recklessly or negligently endangered the safety of any person or property.[321]

3. Fairness

Counsel for Mr Hill did not only submit that the Coroner lacked sufficient evidence to safely reach a conclusion of unlawful killing. They further submitted that to do so under the circumstances would violate principles of natural justice, including the "basic principle" that somebody affected by a court decision was entitled to test the material upon which it is based. Ordinarily, it would be noted at this point that inquests are about finding facts, not apportioning blame; no conclusion of unlawful killing could name any party that may have acted unlawfully. Yet in this particular case, counsel for Mr Hill submitted that such a conclusion would be "personally and reputationally devastating." The case would attract plenty of media interest, and it would be obvious who "the pilot" referred to.

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[318] S21 of the *Memorandum of Understanding between AIBs and Chief Coroner,* (Department for Transport 2017) < www.gov.uk/government/publications/memorandum-of-understanding-between-the-aibs-and-the-chief-coroner/memorandum-of-understanding-between-aibs-and-chief-coroner#:~:text=The%20MoU%20recognises%20that%20coroners,in%20fulfilling%20these%20duties%20should > accessed 9 Feb 2023.

[319] *Inquest into the deaths in the Shoreham Aircrash,* West Sussex Coroner's Court, Legal Submissions, 15 December 2022

[320] *Adomako,* 187D

[321] Specifically, Article 241, SI 2016/765 made under S61 of the Civil Aviation Act 1982.

Legal scholar Gerard Kelly argued that the *Maughan* ruling could lead to inquests becoming more adversarial.[322] With the reputational risk posed by more easily accessible rulings of unlawful killing, lawyers for interested persons may "accentuate the adversarial element of coronial proceedings", scoring points rather than assisting the Coroner.

In other words, interested persons may take a more adversarial stance to defend their reputation in a coronial system that is not designed for that purpose.

Counsel for Mr Hill submitted that there was a "real risk" that members of the public would not understand the "nuanced" difference between his criminal acquittal, and a finding that the victims had been unlawfully killed. They added that this could have a material impact on his hopes to regain his flying license.

7. The Coroner's Finding: Unlawful Killing

Ultimately, the Coroner concluded that all eleven men had been unlawfully killed.[323] She held anything more "anodyne" would fail to uphold her legal duties.[324] She was satisfied that the AAIB's findings to enabled her to safely reach that conclusion. On the grossness of any breach, the Coroner effectively concluded that the breaches had been so numerous and so significant that she did not need to be an expert on the standards of a fast jet pilot to know that the pilot had fallen so far below them as to amount to gross negligence.[325]

Firstly, due to *Sussex,* she was bound to accept the AAIB finding that the plane crashed "as a result of the manner in which it was flown" – not cognitive impairment or mechanical failure.[326] Secondly, the report itself set out multiple errors, each of which was serious. As such, echoing the direction in *Misra*, the coroner described the pilot's flying as "exceptionally bad." Directly addressing the questions of procedural fairness, the Coroner rejected the idea that such a conclusion was unsafe because unfair to Mr Hill. First, it was a "reasonable inference" that Mr Hill could have presented the material he described as "known unknowns" to the AAIB should he have wished.[327]

More importantly, she said she was not persuaded that the risk to Mr Hill's reputation was a good reason not to return such a verdict.[328] She cited Lady Arden's judgment in *Maughan*:

"It seems to me that the public are likely to understand that there is difference between a finding at an inquest and one at a criminal trial where the accused has well-established rights to participate actively in the process." [329]

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322 Gerard Kelly, 'Unlawful Killing at Inquests: Clarity or Confusion?' (2022) 90 Medico-Legal Journal 230.
323 *Inquests into the deaths in the Shoreham Aircrash: Findings of fact and conclusions including the ruling on law,* (West Sussex Coroners Court, 2022) < www.westsussex.gov.uk/media/18404/shoreham_facts_conclusions.pdf > accessed 31 May 2022.
324 Ibid. at R5. Coroners cannot discharge their legal duties by resiling from difficult conclusions without a good explanation. See *R (Makki) v South Manchester Senior Coroner and Molnar* [2013] EWHC 80 (Admin).
325 Ibid. at R35-40
326 Ibid. at R26.
327 Ibid. at R31
328 Ibid. at R43.
329 *Maughan* at 93.

The Coroner agreed. It is noteworthy that Lady Arden clearly envisaged situations where a suspect was acquitted of a crime, only to face reputational harm at an inquest. She acknowledged that at an inquest, that suspect might not be able to participate as "actively" as they did at trial. This was not an unforeseen consequence of *Maughan*. Having considered it, the Supreme Court clearly felt that procedural fairness could nevertheless be achieved.

8. Conclusion

In early 2023, Mr Hill applied for judicial review, though the High Court refused permission and he chose not to challenge this decision.[330]

Three cases loomed large over the Shoreham inquests. Of them, *Maughan* may have been the most eye-catching to non-lawyers – enabling the striking juxtaposition of a verdict of unlawful killing after a criminal acquittal. Yet in legal terms, the impact of *Norfolk* and *Sussex* proved even more substantial: the requirement not to needlessly reinvestigate saves time, resources, and misunderstanding – yet poses its own evidential and ethical challenges. *Shoreham* gives instructive examples of how these challenges might be overcome in practice.

[330] 'Shoreham air crash: Pilot drops challenge on inquest verdict', *BBC News*, 1 June 2023 < www.bbc.co.uk/news/uk-england-sussex-65779379 > accessed 2 June 2023.